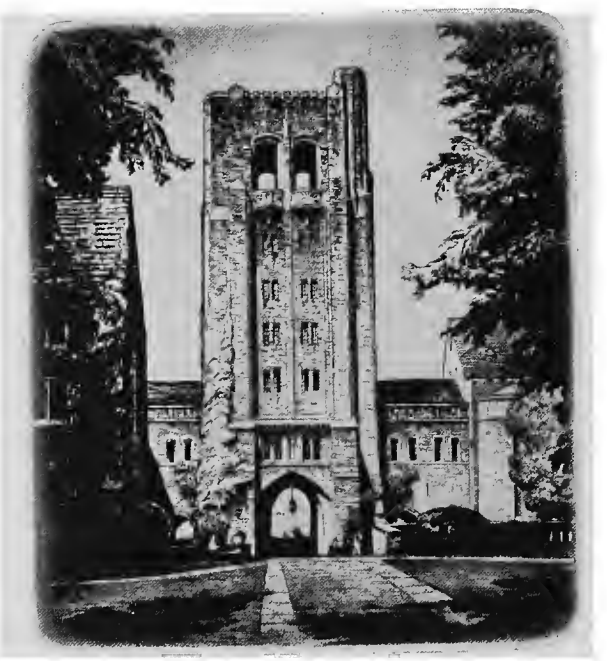

THE LAW AND PRACTICE

IN THE

SURROGATES' COURTS

IN THE

STATE OF NEW YORK

THIRD EDITION

BEING A COMMENTARY

ON

CHAPTER XVIII OF THE CODE OF CIVIL PROCEDURE

BY

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IN GRATEFUL APPRECIATION
OF THE KINDNESS
OF THE LATE
HON. ELLIOTT F. SHEPARD, LL.D.
TO WHOM I OWE MY START IN
NEW YORK CITY
AND IN MEMORY OF THE KINDLY
COUNSEL AND ENCOURAGEMENT
OF THE LATE
NOAH DAVIS WITH
WHOM I STUDIED AND
PRACTISED LAW
THIS WORK IS INSCRIBED

PREFACE TO THIRD EDITION

Although resolved in December, 1902, to abjure further bookmaking, the desire to improve the book in the light of the experience and study of the ten years since the first edition was published, and to increase its usefulness overcame my reluctance, and I have given considerable time and labor to the threefold task of bringing it up to date, condensing it into one volume form and perfecting the analytical index. A great part of the work has been rewritten, such as the chapter on disposition of decedent's realty to pay debts and those on the transfer tax and on distribution. Parts have been consolidated from various chapters, as the discussion of claims against decedents' estates.

I have personally examined the hundreds of decisions made since the Edition of 1902 went to press and some 1,200 new citations have been made; and have also revised the citation of the Consolidated statutes as reported to the legislature of 1908 by the Board of Statutory Consolidation.

I have also adopted a system of continuous section numbering throughout the work, and have inserted an analytical table of contents summarizing such sections; while the analytical index at the end is believed to be complete, noting every proposition in the text, under such numerous catch-headings as to make the work available to every practitioner.

The change back to one volume I believe will add to the working helpfulness of the contents by bringing index and text within the two covers.

I beg to acknowledge not only the many testimonies to the practical helpfulness of the former editions, but also kindly criticisms and suggestions as to points in which it might be made more helpful.

HENRY W. JESSUP.

June 1, 1909,
31 Nassau Street, New York City.

PREFACE TO SECOND EDITION

The work of revising the first edition of this book has been in continuous progress since May, 1899, when the original manuscript went to press. Originally undertaken merely in order to keep the author's copy up to date, the numerous decisions and the many important changes in the Code by our Legislature and the demand upon the publishers for the work have necessitated the preparation and publication of a second edition. The work has been so thoroughly revised as to require its being entirely repaged and printed from new plates. The greatest change is in the chapter upon the Transfer Tax Law in which branch of the law the Legislature has displayed its greatest industry. In the preparation of this chapter I have had the benefit of the experience and services of Mr. Samuel T. Carter, Jr., who has had peculiar opportunities of familiarizing himself with the law and its development and changes as well as in constant practice in cases involving questions under the act. I have no apology to make for presenting in this edition the changes made by him in my original work, which I have adopted almost without alteration.

I also desire to express my indebtedness to Mr. Joseph T. Brown, Jr., for assistance upon the index and for his careful and remarkably clear summary of the law relating to the construction of wills, which will be found at the close of chapter 8 of Part III, which summary I have also adopted as it stands.

With the exception of this assistance, I have personally examined every case decided since the issuance of the first edition and have endeavored to give to the profession in the very language of the decisions, the law as declared by the courts applicable to proceedings in the Surrogates' Courts in the State of New York. The plan of the work has been unchanged; the Code sections are still differentiated in type so that the work can still be kept up to date by the code amendment pasters.

The index has been, it might be observed, a labor of love, and the author has diligently endeavored to prepare that which shall make available, without too much effort, the contents of the book. It is an analytical index and contains every possible heading under which the particular subjects have been thought likely to be looked for by the practitioner. The author begs to suggest that the usefulness of the book may be increased to those who have it by a careful use of the table of Code sections. In this table the pages upon which the section is actually quoted are printed in italics as distinguished from the pages upon which it is merely referred to or discussed. So far as has been possible, the cases under any par-

ticular section are grouped in that part of the book in which it is actually quoted.

At the request of many of those using the work, a table of cases has been prepared.

If it were appropriate, I should have liked to set forth here some reasons why, in my judgment, the jurisdiction of the Surrogate should be enlarged. It seems strange that he should be deemed equal to construing a bequest, and not a devise, though the latter be given in the same will and the same language. The Supreme Court by its appellate divisions would safeguard the interests affected by such additional power, if conferred upon men, who by daily study and experience, grow peculiarly capable of dealing with all problems of testamentary law.

I am sensible of the fact that a work of this character is not an addition to literature, but if the work shall make easier the task of the practitioner under our Code in ascertaining what the courts have held to be the intent of the Legislature in framing and reframing the Code, the eight years during which I have been occupied in it will not have been wasted.

HENRY W. JESSUP.

December 1, 1902,
30 Broad Street, New York City.

PREFATORY NOTE

TO

THE LAW AND PRACTICE IN SURROGATES' COURTS IN THE

STATE OF NEW YORK

I have read with great care the proofs of the work entitled "Law and Practice of Surrogates' Courts in the State of New York," by my former partner, Henry Wynans Jessup, of the New York Bar, with much pleasure and instruction.

He has succeeded in collating and compiling the statutes and decisions of the courts relating to the subject-matter of his work with marked clearness and fullness. The work has been done in such a way as to be extremely helpful to practitioners in those courts as well as to the courts themselves, and the mode of doing so, and particularly of citing authorities and of arranging them with such clearness that they speak for themselves, renders the book peculiarly valuable.

I have no hesitation in recommending the work not only to all the members of the legal profession who practice in Surrogates' Courts, but by reason of its clearness of statement to executors, administrators, trustees and guardians and others who are interested in the administration and distribution of estates. I am sure this book will be greatly serviceable to them all because of such simplicity and clearness of its arrangement of the authorities and of the law on all subjects involved.

I hope the work will have the wide circulation it deserves.

NOAH DAVIS.

March, 1899,

46 West 56th Street, New York City.

AUTHOR'S PREFACE TO FIRST EDITION

This work was begun four years ago, at the request of Mr. David Banks. It is practically a commentary on Chapter XVIII of the Code of Civil Procedure, which defines the practice in the Surrogates' Courts in the State of New York.

So far as practicable the text has been worded in the language of the decisions. Earnest effort has been made to make discriminating citations to the various propositions in the text, both of the leading, and of the most recent adjudications. The wholesale citing of a large number of cases to a point clearly decided in one authoritative case has, in the author's professional experience, proved a hindrance rather than a help, and has, therefore, been avoided here.

The text is differentiated by appropriate type from the Code sections commentated. The table of Code sections will indicate where any given section is quoted. Should amendments be enacted by the Legislature to any sections in Chapter XVIII, the new section can be put in, in the form of adhesive slips, and the work thus kept constantly up to date.

The forms, inserted as precedents throughout the text, have been carefully prepared or adapted from those in use in the various Surrogates' offices in the State. They are inserted in the text, as in that way the discussion of the procedure is illustrated and made clearer. Nearly every Surrogate has official forms in his office, which as a general rule it is advisable to use, in order to expedition of business. Precedents in a text-book should never be blindly followed. They can only be useful as skeletons, or guides in framing the successive proceedings.

The precedents given in this work are somewhat fully annotated.

Here and there the discussion had been compacted into the form of analytical tables, which, it is hoped, will prove of service. Such, *e. g.*, are the tables under the Transfer Tax Law.

No apology is thought necessary for the size of this commentary, which was necessarily caused by the plan of the work as well as the distressing lack of harmony between the decisions on many detail points by different Surrogates, as well as by the various Appellate Courts.

I am indebted for valuable aid and suggestions to Hon. Theodore H. Silkman, Surrogate of Westchester County; to Mr. Emmett R. Olcott, of the New York bar, for assistance in preparing the transfer tax precedents; to Mr. Edward W. Bonynge, Deputy Chief Clerk of the New York Surrogates' office, for valuable suggestions as to the practice on accountings; to Mr. Jacob Washburn, Probate Clerk in the same office, for hints as to the

practice on probate proceedings; to Mr. Arthur D. Wing, for assistance in classifying the cases examined; to Mr. T. F. C. Demarest for expert aid in the preparation of the index; also to the Surrogates in the various counties and to the Public Administrator's Counsel in New York City, by whose courtesy I was furnished with full sets of their official forms.

I am also indebted to Hon. Noah Davis, with whom I was associated when I undertook this work, for kindly encouragement and suggestion in regard thereto

HENRY WYNANS JESSUP.

April 19, 1899.
30 Broad Street, New York City.

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The *Analytical Index* is at pp. 1203 *et seq.* and the references are to page numbers.

The Index to Code Sections is at pp. xxxvii *et seq.* and shows, by reference to pages, where a given section is cited, or *by italics*, where it is quoted, in full or in part.

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[References are to pages.]

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Williamson v. Williamson, 6 Paige, 298; 940, 943.
Williamson v. Williamson, 2 Redf. 449; 319, 337, 347, 348.
Willing, Est. of, 7 Civ. Proc. Rep. 92; 1148.
Willis v. Mott, 36 N. Y. 486; 327, 337, 338, 343.
Willis v. Sharp, 115 N. Y. 396; 855.
Willis v. Sharp, 113 N. Y. 586; 1144.
Willoughby v. McCluer, 2 Wend. 608; 786.
Willson v. Willson, 2 Dem. 462; 1111, 1127.
Wilmot v. Robinson, 42 Misc. 244; 930, 932.
Wilson v. Baptist Ed. Society, 10 Barb. 308; 839.
Wilson v. Hetterick, 2 Bradf. 427; 333, 342.
Wilson, Matter of, 103 N. Y. 374; 121.
Wilson, Matter of, 76 Hun, 1; 327.
Wilson, Matter of, 92 Hun, 318; 479, 551, 552, 555.
Wilson v. Moran, 3 Bradf. 172; 383, 385.
Wing, In re, 41 Hun, 452; 755, 758.
Winne, Matter of, 50 Misc. 113; 354.
Winne v. Winne, 166 N. Y. 263; 270, 743.
Winnington, Est. of, 1 Civ. Proc. Rep. 267; 586.
Winter, Matter of, 21 Misc. 552; 890.
Wintermeyer v. Sherwood, 77 Hun, 193; 817, 1187.
Wischmann, Matter of, 80 App. Div. 520; 700.
Wise, Est. of, 2 Civ. Proc. Rep. 230*n.*; 594.
Withers, Est. of, 2 Civ. Proc. Rep. 162; 231, 233.
Wohlgemuth, Matter of, 110 App. Div. 645; 176, 302.
Wolf's Appeal, Matter of, 22 W. N. C. (Pa.) 93; 746.
Wolfe's Est., 15 N. Y. Supp. 539; 864.
Wolfe, Catharine, Est. of, 6 Dem. 268; 865.
Wolfe, In re, 137 N. Y. 205; 443, 900.
Wolfe v. Lynch, 2 Dem. 610; 995.
Wolfe, Matter of, 89 App. Div. 349 (aff'd 179 N. Y. 599); 862, 869.
Wolstenholme v. Wolstenholme File Mfg. Co., 64 N. Y. 272; 220.
Wood v. Brown, 34 N. Y. 337; 45, 494, 495, 660, 1011, 1100.
Wood v. Byington, 2 Barb, Ch. 387; 964, 981.
Wood, Est. of, 29 St. Rep. 298; 182.
Wood, Est. of, 70 Hun, 230; 670.
Wood, Est. of, 7 N. Y. St. Rep. 721; 101, 1093.
Wood v. Ford, 4 Redf. 34; 1032.
Wood v. Keyes, 8 Paige, 365; 1175.
Wood, In re, 3 Redf. 9*n.*; 827, 963.
Wood v. Knapp, 100 N. Y. 109; 80.
Wood v. Mather, 44 N. Y. 256; 1067.
Wood, Matter of, 38 Misc. 64; 935.
Wood, Matter of, 40 Misc. 155; 893, 956.
Wood, Matter of, 5 Dem. 345; 105, 1017, 1093, 1098.
Wood, Matter of, 70 App. Div. 321; 148, 985.
Wood, Matter of, 2 Connoly, 144; 261.
Wood, Matter of, 17 N. Y. Supp. 354; 506, 508.
Wood, Matter of, 8 N. Y. Supp. 884; 675.
Wood, Matter of, 34 Misc. 209; 1087.
Wood v. Rusco, 4 Redf. 380; 806, 1131.
Wood v. Tunicliff, 74 N. Y. 38; 830.
Wood v. Vanderburgh, 6 Paige, 285; 951.
Wood v. Wood, 4 Paige, 299; 678.
Woodbury, Matter of, 13 Misc. 474; 840, 841.
Woodbury, Matter of, 40 Misc. 143; 827, 930.
Wooden v. W. N. Y. & P. R. R., 126 N. Y. 10; 545.
Woodhouse v. Woodhouse, 5 Redf. 131; 163.
Woodruff's Est., 1 Tuck. 58; 1107.
Woodruff v. Woodruff, 3 Dem. 505; 99, 664.

[References are to pages.]

Woods, Matter of, 55 Misc. 181; 1146, 1154.
Woodsworth, Matter of, 2 Barb. Ch. 351; 1011.
Woodward v. James, 44 Hun, 95; 949.
Woodward v. James 115 N. Y. 346; 1030, 1034.
Woodward, Matter of, 69 App. Div. 286; 112, 1110.
Woodward, Matter of, 28 Misc. 602; 248.
Woodward, Matter of, 167 N. Y. 28; 355, 380, 453.
Woodward, Matter of, 52 App. Div. 494; 375.
Woodward, Matter of, 117 N. Y. 522; 449.
Woodward, Matter of, 13 N. Y. St. Rep. 161; 243, 981, 1102.
Woodworth, Matter of, 5 Dem. 156; 96.
Woolley, Matter of, 38 Misc. 353; 958.
Woolley v. Woolley, 95 N. Y. 231; 319, 345.
Woolsey, Matter of, 17 Misc. 547; 332, 342, 360.
Worden v. Van Gieson, 6 Dem. 237; 326.
Wormser v. Croce, 120 App. Div. 287; 252.
Wormser, Matter of, 51 App. Div. 441; 896, 906, 911.
Wormser, Matter of, 36 Misc. 434; 894.
Wormuth v. Hale, 17 Week. Dig. 180; 546.
Worrall v. Driggs, 1 Redf, 499; 1100.
Wotton, Matter of, 59 App. Div. 584; 1023.
Wright's Accounting, 4 Redf. 345; 806.
Wright v. Austin, 56 Barb. 17; 957.
Wright, In re, 20 N. Y. Supp. 86; 1059.
Wright, Matter of, 22 N. Y. St. Rep. 83; 1065.
Wright, Matter of, 121 App. Div. 581; 231.
Wright v. Nostrand, 58 How. Pr. 184; 57.
Wright v. Trustees of M. E. Church, Hoff. Ch. 202; 102, 147.
Wright v. Wright, 3 Redf. 325; 219.
Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580; 1068, 1069, 1070.
Wyckoff v. Van Sicklen, 3 Dem. 75; 1153.
Wylie v. Lockwood, 86 N. Y. 291; 449.
Wyman v. Wyman, 26 N. Y. 253; 1077.
Wyman v. Wyman, 118 App. Div. 109; 344.
Wyse v. Wyse, 155 N. Y. 367; 358.

Yale v. Baker, 2 Hun, 468; 180, 183.
Yarwood v. The Trusts, etc., Co., 94 App. Div. 47; 269.
Yates v. Houston, 3 Tex. 433; 542.
Yates v. Root, 4 App. Div. 439; 812.
Yates v. Thomas, 35 Misc. 552; 724.
Yeandle v. Yeandle, 5 N. Y. Supp. 535; 370.
Yeddo v. Whitney, 17 Weekly Dig. 120; 806.
Yetter, Matter of, 44 App. Div. 404; 117.
York, Matter of, 1 How. Pr. N. S. 16; 1135.
Young v. Brush, 28 N. Y. 667; 1155.
Young v. Hicks, 92 N. Y. 235; 8.
Young, Matter of, 17 Misc. 680; 437, 444, 1146.
Young Men's Christian Association, Matter of, 22 App. Div. 325; 854, 936.
Young v. Purdy, 4 Dem. 455; 1098.
Young v. Young, 5 Weekly Dig. 109 (aff'g 80 N. Y. 422); 787.
Young v. Young, 2 Misc. 381; 843, 861.
Younger v. Duffie, 94 N. Y. 534; 315, 318, 457.
Youngs v. Youngs, 45 N. Y. 254; 447.
Yung, Matter of, N. Y. Law Jour., July 11, 1908; 263, 266.

Zapf v. Carter, 90 App. Div. 407; 223.
Zeigler, Matter of, 19 N. Y. Supp. 947; 366.
Zeph, Matter of, 50 Hun, 523; 539.
Zerega, Matter of, 58 Hun, 505; 9, 36, 37, 39.
Zerwinski or Siriski, Matter of, 51 Misc. 661; 659.
Zeuschner, Est. of, 15 N. Y. St. Rep. 744; 1117.
Ziemer v. Crucible Steel Co., 99 App. Div. 169; 151, 490.
Zwickert, Matter of, 26 N. Y. Supp. 773; 1038.

SURROGATES' COURTS

IN THE

STATE OF NEW YORK

PART I

INTRODUCTORY DEFINITIONS

The statutory definitions should be carefully read before beginning the study of chapter 18 of the Code of Civil Procedure.

These definitions are contained in

§ **2514.** *Definition of expressions used in this chapter.*

In construing the provisions of this chapter, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

1. The word, "intestate," signifies a person who died without leaving a valid will; but where it is used with respect to particular property, it signifies a person who died without effectually disposing of that property by will, whether he left a will or not.

2. The word, "assets," signifies personal property applicable to the payment of the debts of a decedent.

3. The word, "debts," includes every claim and demand, upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action; and the word "creditor" includes every person having such a claim or demand, any person having a claim for expense of administration, or any person having a claim for funeral expenses.

4. The word, "will," signifies a last will and testament, and includes all the codicils to a will.

5. The expression, "letters of administration," includes letters of temporary administration.

6. The expression, "testamentary trustee," includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or adminstrator.

7 The word, "surrogate," where it is used in the text, or in a bond or under-

taking, given pursuant to any provision of this chapter, includes every officer or court vested by law with the functions of surrogate.

8. The expression, "judicial settlement," where it is applied to an account, signifies a decree of a surrogate's court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes specified in the statute; and an account thus made conclusive is said to be "judicially settled."

9. The expression, "intermediate account," denotes an account filed in the surrogate's office, for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands, and not made the subject of a judicial settlement.

10. The expression, "upon the return of a citation," where it is used in a provision requiring an act to be done in the surrogate's court, relates to the time and place at which the citation is returnable, or to which the hearing is adjourned; includes a supplemental citation, issued to bring in a party who ought to be, but has not been cited; and implies that, before doing the act specified, due proof must be made, that all persons required to be cited have been duly cited.

11. The expression, "person interested," where it is used in connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee, or otherwise, except as a creditor. Where a provision of this chapter prescribes that a person interested may object to an appointment, or may apply for an inventory, an account, or increased security, an allegation of his interest, duly verified, suffices, although his interest is disputed; unless he has been excluded by a judgment, decree, or other final determination, and no appeal therefrom is pending.

12. The term, "next of kin," includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed residue of the assets of a decedent after payment of debts and expenses, other than a surviving husband or wife.

13. The expression, "real property," includes every estate, interest, and right, legal or equitable, in lands, tenements, or hereditaments, except those which are determined or extinguished by the death of a person seized or possessed thereof, or in any manner entitled thereto, and except those which are declared by law to be assets. The word, "inheritance," signifies real property, as defined in this subdivision, descended as prescribed by law. The expression, "personal property," signifies every kind of property, which survives a decedent, other than real property as defined in this subdivision, and includes a right of action conferred by special statutory provision upon an executor or administrator.

CHAPTER I

SURROGATES AND THEIR COURTS

§ 1. **Definition.**—Surrogates' Courts in the State of New York are courts of record, possessing a special and limited jurisdiction, which extends generally over the probate of wills, the administration and distribution of decedents' estates, and the protection of the interests of infants. *Matter of Thompson*, 184 N. Y. 36, 41.

Jurisdiction over this latter subject is not exclusive, and its limited character must be emphasized (see § 4 below), e. g., while they have the "like power and authority to appoint a general guardian . . . . of an infant which the chancellor had" (§ 2821, Code Civ. Proc.) they have the power to "direct and control" his conduct only in cases specially prescribed by law. *Matter of Bolton*, 159 N. Y. 129, 135.

Surrogates have also been given jurisdiction over the transfer tax procedure, to determine what is taxable, the amount of the tax, and its collection. In spite of this very substantial addition to the business of the Court, the State has made no provision for any additional compensation to the Surrogate, even in the counties whence the bulk of this tax is collected.

The Surrogate is the judge or judicial officer presiding over such a court.

§ 2. **Surrogates' Courts in the State of New York** date back to the act of March 16, 1778 (Laws of N. Y. [Jones & Varick's ed.] 23). "Before the Revolution, the power of granting letters testamentary and letters of administration resided, in New York, in the Colonial Governor, as judge of the Prerogative Court, or Court of Probates of the colony. It was afterward vested in the Court of Probates, consisting of a single judge, and so continued until 1787, when Surrogates were authorized to grant letters testamentary, and letters of administration of the estates of persons dying within their respective counties. If the person died out of the State, or within the State not being an inhabitant thereof, the granting of administration was still reserved to the Court of Probates (L. N. Y. sess. 1, chap. 12, and sess. 10, chap. 38; *Goodrich* v. *Pendleton*, 4 Johns. Ch. 552). This practice continued until the act of March 21, 1823, when the Court of Probates was abolished, and all the original powers of that court were transferred to the Surrogates." (2 Kent's Commentaries, 410.) The act of March 16, 1778, established a tribunal known as the "Court of Probates" vested with the powers, authority and jurisdiction in testamentary matters which the governor of the colony of New York, while it was subject to the Crown of Great Britain, had and exercised as judge of the Prerogative

Court, or the Court of Probates of the colony, except, however, the power of appointing Surrogates.

§ 3. **They are courts of record** expressly enumerated as such by the Code. Code Civ. Proc. § 2, subd. 14.

Prior to 1877 they were not deemed courts of record (*People* v. *Carr*, 100 N. Y. 236, 241), although they exercised powers only incident to and characteristic of such tribunals (see table below; *Matter of Latson*, 1 Duer, 696), such, for example, as the power to punish by fine and imprisonment, which power, says Blackstone (III, 24), cannot be exercised by any other court than a Court of Record, adding: "The very creation of a new jurisdiction with the power of fine and imprisonment makes it instantly a court of record." But in 1877, by amendment to the Code, "a Surrogate's Court in each County" was added to the statutory list of courts of record.

Like all courts of record a Surrogate's Court has a seal, of which the Surrogate has charge (Code Civ. Proc. § 2507); it can fine and imprison for contempt (Code Civ. Proc. § 2481, subd. 7); its acts and judicial proceedings are "enrolled for a perpetual memorial and testimony" in books of record; and it has even been held that, as a Court of Record, it falls within the language of the Federal statute, and has common-law jurisdiction to grant naturalization. *Matter of Harstrom*, 7 Abb. N. C. 391.

§ 4. **Their jurisdiction is special and limited.**—It has always been held that the Surrogates' Court are tribunals of limited jurisdiction. Those claiming under a decree of the Surrogate must show affirmatively his authority to make it. *Farmers' L. & T. Co.* v. *Hill*, 4 Dem 41; *Matter of Hawley*, 104 N. Y. 250, 262; *Matter of Randall*, 152 N. Y. 508, 516, and cases cited; *Matter of Bolton*, 159 N. Y. 129, 136.

The subjoined table exhibits this in detail. And the facts necessary to confer jurisdiction must always be alleged in the initial papers. *Potter* v. *Ogden*, 136 N. Y. 384, 396.

It is well settled that, where a court has only a special limited jurisdiction, which jurisdiction depends upon certain specific facts, a total defect of evidence as to any one of these essential facts will make its action void. *Id.* See also *Hewitt* v. *Newberger*, 141 N. Y. 538, at page 543, citing *Curry* v. *Pringle*, 11 Johns. 444; *Bigelow* v. *Sterns*, 19 Johns. 39; *Murphy* v. *Kron*, 20 Abb. N. C. 259.

This case was a criminal case and related to the jurisdiction of the recorder, but the principle is applicable to the Surrogate's Court. The higher courts at first jealously restricted the jurisdiction of this inferior court (*Harris* v. *Meyer*, 3 Redf. 450; *Sipperly* v. *Baucus*, 24 N. Y. 46) to its statutory powers. As time went on certain implied powers were claimed and exercised; but in 1830, the Revised Statutes (2 R. S. 220. sec. 1) denied them this reasonable extension of their powers. After specifically enumerating the powers of Surrogates' Courts (see table) the statute provided that these powers should be exercised in the manner prescribed in the statutes, "and in no other;" and no "Surrogate shall, under pre-

text of incidental power, or constructive authority, exercise any jurisdiction whatever not expressly given by the statutes of this State."

This part of the law was short-lived, as might have been expected. It soon became necessary to repeal it (Laws of 1837, chap. 460, sec. 71; *Sipperly* v. *Baucus*, 24 N. Y. 46; *Campbell* v. *Thatcher*, 54 Barb. 382), because the courts found that the exercise of certain incidental powers "was absolutely essential to a due administration of justice." *Pew* v. *Hastings*, 1 Barb. Ch. R. 452. The following table sets forth in comparative form the growth of the powers of the Surrogates' Courts up to the present time. See also *post*, chap. II, Jurisdiction.

Before Revised Statutes	Under Revised Statutes of 1828-1830	Under Code of Civil Procedure, § 2472
To take proof of the execution of last wills and testaments, and to admit them to probate. 2 Laws of N. Y. (1787) Jones & Varick's ed. 71.	To take the proof of wills of real and personal estate in the cases prescribed by law; and also to take the proof of any will relating to real estate situated within the county of such surrogate, when the testator in such will shall have died out of this state; not being an inhabitant thereof and not leaving any assets therein.	To take the proof of wills; to admit wills to probate; to revoke the probate thereof; and to take and revoke probate of heirship.
To grant letters testamentary and of administration. *Ibid.*	To grant letters testamentary and of administration.	To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.
To swear executors or administrators to the truth of the inventories and accounts exhibited by them. *Ibid.*	To direct and control the conduct, and settle the accounts of executors and administrators.	To direct and control the conduct, and settle the accounts, of executors, administrators and testamentary trustees; to remove testamentary trustees and to appoint a successor in place of a testamentary trustee so removed. They may now also administer oaths. Laws of 1884, chap. 309.
To call administrators to account; to decree the just and equal order of distribution after the payment of debts and expenses; to compel administrators to observe and pay the same; and to enforce it by execution against the person. *Ibid.* 1 Webster's Laws, 317, 325; *Seymour* v. *Seymour*, 4 Johns. Ch. 409; *Foster* v. *Wilbur*, 1 Paige, 537; *Dakin* v. *Hudson*, 6 Cow. 221.	To enforce the payment of debts and legacies, and the distribution of the estates of intestates.	To enforce the payment of debts and legacies; the distribution of estates of decedents; and the payment or delivery by executors, administrators and testamentary trustees, of money or other property, in their possession belonging to the estate.
To order the sale of real estate for the payment of debts when the personal estate was insufficient, and, when the real estate proved insufficient, to divide the proceeds after the payment of expenses proportionally among the creditors; to confirm all such sales and direct conveyances to be made by executors or administrators, and to order the mortgaging or leasing of the real estate of any testator or intestate for the same purpose when infants are interested. Laws of N. Y. (1799) Andrew's ed. 724.	To order the sale and disposition of the real estate of deceased persons.	To direct the disposition of real property, and interests in real property, of decedents, for the payment of their debts and funeral expenses, and the disposition of the proceeds thereof.
Covered by "incidental powers." See *Brick's Estate*, 15 Abb. Pr. 12, 33.	To administer justice in all matters relating to the affairs of deceased persons, according to the provisions of the statutes of this state.	To administer justice in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto.

Before Revised Statutes	Under Revised Statutes of 1828-1830	Under Code of Civil Procedure, § 2472
To appoint guardians for infants as fully as the chancellor might do. 3 Webster (1802), 158.	To appoint guardians for minors, to remove them, to direct and control their conduct, and to settle their accounts as prescribed by law.	To appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; and in the cases specially prescribed by law, to direct and control their conduct and settle their accounts.
To order the admeasurement of dower upon the application of the widow, of any heir, or of the guardian of a minor. 3 Webster (1806), 315.	To cause the admeasurement of dower to widows. 2 R. S. 220, § 1, tit. 1, c. II, part III.	Under the Code of Civil Procedure provision is made for an "action for dower" §§ 1596–1625, which is a civil action, local and triable by jury (§ 968) and Surrogates' Courts have no longer jurisdiction of it. See 3 Rumsey's Practice, p. 89. And by ch. 407, L. 1903, there was added subd. 8: "To settle the accounts of a father, mother, or other relative having the rights, powers and duties of a guardian in socage, and to compel the payment and delivery of money or other property belonging to the ward.
To hear and determine any cause touching a legacy or bequest in any last will and testament; to decree the payment of it, and to enforce it by execution against the person. 2 Laws of N. Y. (*supra*) 71. To record all wills proved before them with the proof thereof, letters testamentary and of administration granted by them with all things concerning the same, all orders or decrees made by them for the sals of real estate, and all instruments, writings or documents of a like nature left unrecorded by their predecessors, and to complete the unfinished business of their predecessors. Laws of 1813, 139; Laws of 1828, 130. To institute inquiry respecting the personal estate of intestates not delivered to the public administrator or accounted for lawfully by persons into whose hands it was supposed to have fallen. This was in 1821.	Every Surrogate had power to issue subpœoas, to compel attendance of witnesses, or production of any paper material to any inquiry pending in the court, and to punish for disobedience just as a court of record could. To issue citations and compel appearance of parties; to enforce all lawful orders, process and decrees of his court by attachment against the persons of those neglecting or refusing to comply with them. To exemplify under seal all transcripts of records, papers or proceedings. To preserve order by punishing for contempt. But all the powers above enumerated were to be exercised (1830–1837) in no manner other than that prescribed by the statute, and incidental powers were denied. After 1837 they held the same incidental powers conceded them before the adoption of the Revised Statutes.	Corresponding to this enumeration of powers is § 2481 of the Code which provides that a Surrogate in court or out of court as the case requires, has power. 1. To issue citations to parties, in any matter within the jurisdiction of his court; and in a case prescribed by law, to compel the attendance of a party. 2. To adjourn, from time to time, a hearing or other proceeding in his court; and where all persons who are necessary parties have not been cited or notified, and citation or notice has not been waived by appearance or otherwise, it is his duty, before proceeding further, so to adjourn the same, and to issue a supplemental citation or require the petitioner to give an additional notice, as may be necessary. 3. To issue, under the seal of the court, a subpœna, requiring the attendance of a witness, residing or being in any part of the State; or a subpœna *duces tecum*, requiring such attendance, and the production of a book or paper material to an inquiry pending in the court. 4. To enjoin, by order, an executor, administrator, testamentary trustee, or guardian, to whom a citation or other process has been duly issued from his court from acting as such, until the further order of the court. 5. To require by order, an executor, administrator, testamentary trustee, or guardian, subject to the jurisdiction of his court, to perform any duty imposed upon him by statute, or by the Surrogate's Court, under authority of a statute. 6. To open, vacate, modify, or set aside or to enter as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, cler-
They had authority to compel the attendance of witnesses, the production of wills, documents or writings and for disobedience in such cases to commit the party offending for contempt; and, lastly, in all matters submitted to their cognizance, they were authorized to proceed according to the course of the court having, by the common law, jurisdiction of such matters, except so far as they were restricted by statute, and they had such incidental powers as were necessary to carry those which were granted into effect. Laws of 1813, 139; *Brick's Estate*, 15 Abb. Pr. 12, 33.		

Under Code of Civil Procedure,	Under Code of Civil Procedure,	Under Code of Civil Procedure,
ical error or other sufficient cause. (The powers conferred by this subdivision, must be exercised only in a like case, and in the same manner, as a court of record and of general jurisdiction exercises the same powers). Upon an appeal from a determination of the Surrogate, made upon an application pursuant to this subdivision, the appellate division of the Supreme Court has the same power as the Surrogate; and his determination must be reviewed, as if an original application was made to that term. 7. To punish any person for a contempt of his Court, civil or criminal, in any case where it is expressly prescribed by law that a court of record may punish a person for a similar contempt, and in like manner.	8. Subject to the provisions of law, relating to the disqualification of a judge in certain cases, to complete any unfinished business, pending before his predecessor in the office, including proofs, accountings, and examinations. 9. To complete, and certify and sign in his own name, adding to his signature the date of so doing, all records of papers, left uncompleted or unsigned by any of his predecessors. 10. To exemplify and certify transcripts of all records of his court, or other papers remaining therein. 11. With respect to any matter not expressly provided for in the foregoing subdivision of this section, to proceed, in all matters subject to the	cognizance of his court, according to the course and practice of a court having, by the common law, jurisdiction of such matters, except as otherwise prescribed by statute; *and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred.* See *Matter of Underhill*, 117 N. Y. 471, 473, citing *Riggs* v. *Cragg*, 89 N. Y. 480, "A Surrogate can exercise only such jurisdiction as has been specially conferred by statute, together with those incidental powers which may be requisite to effectually carry out the jurisdiction actually granted." See also *Sipperly* v. *Baucus*, 24 N. Y. 46; *Stillwell* v. *Carpenter*, 52 N. Y. 414; *Bevan* v. *Cooper*, 72 N. Y. 317; *Matter of Camp*, 126 N. Y. 377, 390.

By Laws 1909, ch. 65, a new subdivision is added: 12. A Surrogate or a clerk of the Surrogates' Court has power to administer oaths, to take affidavits and the proof and acknowledgment of deeds and all other instruments in writing, and certify the same with the same force and effect as if taken and certified by a County Judge.

As illustrative of the table the following summary statement is interesting (but see, *post*, separate topics):

The courts have sustained the power and jurisdiction of Surrogates' Courts in the following cases:

To revoke probate upon discovery of a later will. *Campbell* v. *Logan*, 2 Bradf. 90, 93.

To inquire into legitimacy of children, by virtue of its power to determine and direct the distribution of an estate. *Matter of Laramie*, 6 N. Y. Supp. 175. *Matter of Schmidt*, 42 Misc. 463. And, similarly, to pass on the validity of a marriage, or of a divorce. *Matter of Hall*, 61. App. Div. 266; *Matter of McGarren*, 112 App. Div. 503. *Matter of Garner*, 59 Misc. 116.

To determine whether one is an "adopted child," in compliance with statute; or is entitled to a child's share, under agreement with decedent. See, *post*, Adoption.

To set aside an irregular or unauthorized order. *Vredenburgh* v. *Calf*, 9 Paige, 128; *Skidmore* v. *Davies*, 10 Paige, 316, also *Proctor* v. *Wanamaker*, 1 Barb. Ch. R. 302, holding that independently of the statute of 1837, the Surrogate had power to revoke letters of administration which had been improperly obtained upon false suggestion of matters of fact, citing *Cornish* v. *Cornish*, 1 Lee's Ecc. Rep. 14; *Burgis* v. *Burgis*, *Id.* 121; *Ogilvie* v. *Hamilton*, *Id.* 418; *Lord Trimbleston* v. *Lady T.*, 3 Hagg. Ecc. Rep. 243.

To prove a foreign will (*Isham* v. *Gibbons*, 1 Bradf. 69, 79, and act of 1837, § 77), and hereunder a will of a foreigner executed in this State according to its forms (*Catherine Robert's Will*, 8 Paige, 519), and a will of a

foreigner, dying in the county, leaving no assets, but where assets come into the county afterwards. *Kohler* v. *Knapp*, 1 Bradf. 241, 246.

To open default on an accounting and allow a contest. *Pew* v. *Hastings*, 1 Barb. Ch. R. 452.

To approve, or disapprove, upon an accounting, a settlement made by the one accounting with his decedent's partners. *Matter of Meyer*, 95 App. Div. 443.

To enter an order *nunc pro tunc*. *Butler* v. *Emmett*, 8 Paige, 12, 21 (*dictum*). See now § 2481, C. C. P. subd. 6.

To relieve parties, in a proper case, from a stipulation. *Matter of Richardson*, 118 App. Div. 164.

To entertain proceedings for probate of an unattested will although it is not produced and offered, when a foreign court declines to surrender the document. *Matter of Delaplaine*, 5 Dem. 398, and see *Russell* v. *Hartt*, 87 N. Y. 18. This is not such a case as is contemplated by section 1861 of the Code providing for an action to establish a will.

To issue a commission to take testimony in foreign countries. *Russell* v. *Hartt*, 87 N. Y. 18.

It seems it may grant naturalization. *Matter of Harstrom*, 7 Abb. N. C. 391.

To direct executors to pay counsel for services. *Gilman* v. *Gilman*, 63 N. Y. 41 (but see *Devin* v. *Patchen*, 26 N. Y. 441); *Reed* v. *Reed*, 52 N. Y. 651; *In re Bailey*, 14 N. Y. S. R. 325; *Clock* v. *Chadeagne*, 10 Hun, 97. See under section 2730, *Matter of O'Brien*, 145 N. Y. 379, 384.

To compel a purchaser of real estate to take, or relieve him from taking. *Matter of Lynch*, 33 Hun, 309. To approve or disapprove investments by executors or testamentary trustees. *Jones* v. *Hooper*, 2 Dem. 14.

To pass on the validity of an antenuptial agreement (*In re Jones's Est.*, 3 Misc. 586), and enforce it (*Young* v. *Hicks*, 92 N. Y. 235) of course where it is necessary to determine the rights of the parties. *Matter of Davenport*, 37 Misc. 169; *Matter of Bostwick*, 49 Misc. 186.

Where the contract was that A should have his wife's personalty if he survived her, it was held that his right was subject to due administration. *Foehner* v. *Huber*, 42 App. Div. 439.

To take an accounting by an executor of proceeds of real estate sold under a testamentary power. *Baldwin* v. *Smith*, 3 App. Div. 350. But not if power be void. *Matter of Meyer*, Ketcham, Surr., N. Y. Law J., June 10, 1909.

To try the question of a decedent's inhabitancy. *People* v. *Waldren*, 52 How. Pr. 221; *Bolton* v. *Schriever*, 26 Abb. N. C. 230.

To dismiss or discontinue suits. *Heermans* v. *Hill*, 2 Hun, 409; *Matter of Friedell*, 20 App. Div. 382, 384.

To hear and determine upon a final accounting a disputed claim of an executor against the estate although the claim be equitable in its nature. *Boughton* v. *Flint*, 74 N. Y. 476. But see CLAIMS AGAINST ESTATE.

To judicially construe a will of real and personal estate in some cases,

but of course the Surrogate's action only affects the personal estate. (See *post.*) *Matter of Marcial,* 37 St. Rep, 569; *Matter of French,* 52 Hun, 303; *Purdy* v. *Hayt,* 92 N. Y. 445, 450.

To determine whether an applicant for a revocation of probate is a "person interested" in the estate. *Matter of Peaslee,* 73 Hun, 113.

To grant a purchaser on partition sale leave to pay into court money to pay creditors when there has already been a Surrogate's decree directing sale of real property to pay decedent's debts. *Matter of Stumpf,* 4 App. Div. 282.

To determine if a woman is "lawful widow" of testator. *Matter of Hamilton,* 76 Hun, 200; *Matter of McGarren,* 112 App. Div. 503. And to that end he may examine the judgment roll in a Supreme Court annulment action. *Ibid.*

To ascertain whether a person is an heir or belongs to any class designated in the will—such as next of kin, devisee, etc. *Matter of Verplanck,* 91 N. Y. 439, 450; *Purdy* v. *Hayt,* 92 N. Y. 445; *Riggs* v. *Cragg,* 89 N. Y. 480; *Crouse* v. *Wilson,* 73 Hun, 353, 356. For example: to determine whether a certain grandchild is capable of taking a given legacy, and incidentally of passing on question of residence of such grandchild. *Garlock* v. *Vandevort,* 128 N. Y. 374, 377.

To determine whether a savings bank account belongs as assets to a decedents' estate, and, incidentally, to decide whether decedent, in life, made a gift thereof. See *post,* ASSETS.

But Surrogates cannot acquire jurisdiction where not conferred by statute, although the parties all appear, assent and submit the questions at issue. *Dakin* v. *Demming,* 6 Paige, 95; *Tucker* v. *Tucker,* 4 Keyes, 136; *Matter of Smith,* 41 N. Y. St. Rep. 337; *Matter of Walker,* 136 N. Y. 20, 29, citing *Chemung Canal Bank* v. *Judson,* 8 N. Y. 254; *Beardslee* v. *Dolge,* 143 N. Y. 160, 165; *Matter of Zerega,* 58 Hun, 505; *Matter of Redfield,* 71 Hun, 344, 348; *Bevan* v. *Cooper,* 72 N. Y. 317; 329; *Matter of Underhill,* 117 N. Y. 471, 479. Nor can jurisdiction be acquired by consent of attorneys. *Duryea* v. *Mackey,* 151 N. Y. 204. It seems the rule is different as to jurisdiction of the person. *Matter of Bingham,* 127 N. Y. 296.

They have no power to deal with certain insurance proceeds in excess of that purchased with $500 a year of premiums. Domestic Relations Law § 22. See ASCERTAINING THE ESTATE.

They cannot set aside for fraud a release given by a party interested in an estate to the executors. *Saunders* v. *Soutter,* 126 N. Y. 193; *Matter of Randall,* 152 N. Y. 508; which reviews the whole subject. *Matter of Irvin,* 24 Misc. 353. Nor have they power to compel an administrator to bring an action in another court. *Matter of McCabe,* 18 N. Y. Supp. 715. Nor to entertain a motion for a new trial of issues after jurisdiction has been divested by an appeal to the Supreme Court and specified issues have been sent to a jury for trial in that court. *Matter of Patterson,* 63 Hun, 529, 531. Nor to pass on questions of title raised between a claimant

and a representative of testator's estate. *Matter of* Walker, 136 N. Y. 20, 29. He cannot pass on validity of assignment to representative of mortgages of testatrix. But he can, on accounting, require the executor to account for such mortgages as an asset. *Matter of Ammarell*, 38 Misc. 399. But he cannot direct an executor or administrator to deliver up to a claimant property in the representative's hands which claimant asserts is his. *Case* v. *Spencer* 86 App. Div. 454, and cases reviewed. Nor to decide whether a decedents' transfer of property was made in fraud of creditors. *Matter of Bunting*, 98 App. Div. 122. Nor to decree the payment of a claim rejected by the executor. *Matter of Perry*, 5 Misc. 149; *Lambert* v. *Craft*, 98 N. Y. 342; *McNulty* v. *Hurd*, 72 N. Y. 518; *Glasius* v. *Fogel*, 88 N. Y. 434; *Fiester* v. *Shepard*, 92 N. Y. 251; *Matter of Callahan*, 152 N. Y. 320; *Matter of Stevens*, 20 Misc. 157. (See *post.*) Nor to direct a satisfaction of record of a mortgage belonging to an infant, although its estate is within its jurisdiction. *Cromwell* v. *Kirk*, 1 Dem. 599. Nor have they any jurisdiction over realty left by a decedent or its avails, unless brought within their jurisdiction by a will or by a statute for the purpose of being dealt with for some special purpose (like the payment of debts in case the personalty is inadequate for the purpose). *Sweeney* v. *Warren*, 127 N. Y. 426, 435.

When confronted by an act or instrument he is powerless to pass upon he must take it at its face or remit the parties to the proper forum. For example. A petitions that B account. B produces a full release by A, the validity or effect of which A disputes. The Surrogate will treat it as a bar. *Matter of Wagner*, 119 N. Y. 28. See also *Sanders* v. *Soutter*, 126 N. Y. 193; *Matter of U. S. Trust Co.*, 175 N. Y. 304. See cases in dissenting opinion of Vann, J., p. 312.

The foregoing is merely illustrative. The rule in specific cases can be found under the chapters dealing with these cases (*q. v.*).

§ 5. **They are constitutional courts,** under the new constitution of 1894, which provides (art. VI, § 15): "The existing Surrogates' Courts are continued, and the Surrogates now in office shall hold their office until the expiration of their terms. . . . Surrogates and Surrogates' Courts shall have the jurisdiction and powers which the Surrogates and existing Surrogates' Courts now possess, until otherwise provided by the legislature." See *Matter of Bolton*, 159 N. Y. 129, 134.

Thus the legislature has, as before, the power to deal as it will with the jurisdiction and powers of these courts, but it may not abolish the courts. See *People* v. *Carr*, 86 N. Y. 512, 514.

§ 6. **The terms of office of all Surrogates** are regulated also by the constitution.

First. Those in office January 1, 1895, are to hold their unexpired terms.

Second. Those hereafter elected to serve for six years in all counties save the county of New York. In that county the term is fixed at fourteen years.

Third. But no Surrogate is to serve longer than until and including the last day of December next after he shall be seventy years of age.

This last provision is not to be taken as abridging the term of any Surrogate elected prior to the time when the new constitution went into effect who may become seventy years of age before his six or fourteen years expire. *People ex rel. Davis* v. *Gardner,* 45 N. Y. 812. This case is directly in point. This provision as to the Surrogates is new. For it has been expressly held that the provision in the old constitution fixing an age limit did not apply to Surrogates. *People ex rel. Lent* v. *Carr,* 100 N. Y. 236. So in *People* v. *Gardner,* the provision was new as to county judges, and a county judge chosen prior to the time when the new article of the constitution was to go into effect (that is, at the November election preceding January 1, 1870), and who had taken the oath of office, was held to be "in office at the adoption of this article" and entitled to hold his office for the full term of four years although he became seventy years of age on February 9, 1870.

It is true that the new constitution does not lengthen the term of office as was the case before, and, therefore, possibly the reasoning of Folger, J., might not be applicable that the insertion of an age limit was clearly called for by the new and longer term, and could not be made to apply to the old and shorter term which was in express words "continued." However, the express provision "shall hold their offices until the expiration of their terms" is unambiguous. What follows refers to other officers, to wit: their "successors" who are to be elected. As to these an age limit is fixed. It is thought that *People* v. *Gardner* would still be an authority in the case of any Surrogate in office January 1, 1895, who may be near seventy. His term would not be abridged thereby.

§ 7. **Enumeration of courts.**—The "existing Surrogates' Courts" and the "Surrogates in office" when the new constitution became operative were as follows: In thirty-one of the sixty counties of the State the county judge was also Surrogate for his county, under § 15, art. VI of former constitution. [This article was an amendment to the constitution of 1846, prepared by delegates, elected pursuant to chapter 194, Laws of 1867, who met in convention in Albany, June 4, 1867. This article was submitted to the people in November, 1869, and adopted by a very narrow majority of less than 7,000. The article provided (§ 15): "The county judge shall also be Surrogate of his county; but in counties having a population exceeding 40,000 the legislature may provide for the election of a separate officer to be Surrogate, whose term of office shall be the same as that of the county judge."] In one of the remaining thirty, Sullivan County, there was also a special Surrogate [see County Law, Laws of 1892, chap. 686; 5 R. S. (8th ed.) 3957], the regular Surrogate being also county judge.

In twenty-eight of the remaining counties, to wit: In Albany, Cattaraugus, Cayuga, Chatauqua, Clinton, Columbia, Dutchess, Erie, Jefferson, Kings, Monroe, Montgomery, Niagara, Oneida, Onondaga, Ontario,

Orange, Oswego, Otsego, Queens, Rensselaer, Saratoga, St. Lawrence, Steuben, Suffolk, Ulster, Washington and Westchester, there were separate Surrogates, who had been elected by virtue of the provisions of the constitutional amendment above referred to.

In the county of New York there were two separate Surrogates elected under the provisions of chapter 642, Laws of 1892, either of whom is entitled to exercise all the powers conferred by law upon the Surrogate of the city and county of New York. Laws of 1843, chap. 9, Code Civ. Proc. § 2504.

In eight of the twenty-eight counties where separate Surrogates had been elected, to wit: Cayuga, Chautauqua, Jefferson, Oneida, Orange, Oswego, St. Lawrence and Washington, there were also special Surrogates as well.

So we find on January 1, 1896, thirty Surrogates (two in New York), thirty-one county judges acting as Surrogates and nine special Surrogates.

This leads us to note the distinction between Surrogates proper and other Surrogates.

§ 8. **The law provides for five kinds of Surrogates.**

I. Surrogates proper.
II. County judges sitting as Surrogates.
III. Special Surrogates.
IV. Acting Surrogates.
V. Temporary Surrogates.

§ 9. **Surrogates proper** are those Surrogates who are elected in counties of over 40,000 population to sit in the Surrogates' Courts of those counties. Each of the Surrogates of New York is a Surrogate proper.

> Where the county judge is also surrogate, he may be designated, in any paper or proceeding relating to the office of surrogate, as the surrogate of the county, without any addition referring to his office as county judge. A local officer elected, as prescribed in the constitution, to discharge the duties of surrogate, or of county judge and surrogate, is designated in this act, and, when acting as surrogate, may be designated, as the special "surrogate" of his county. Where an officer, other than the surrogate, acts as surrogate in a case prescribed by law, he must be designated by his official title, with the addition of the words, "and acting surrogate." **§ 2483, Code Civil Proc.**

§ 10. **County judges** when sitting as Surrogates are entitled to the designation of "the Surrogate of the county, without any addition referring to his office as county judge." Code Civ. Proc. § 2483. The distinction between Surrogates proper and county judges sitting as Surrogates was formerly further emphasized by the fact that under the old constitution a Surrogate was not a judge, but merely a judicial officer (see *People ex rel. Lent* v. *Carr*, 100 N. Y. 236); but the distinction cannot longer be made now that the court is a court of record and a constitutional court as well. Code Civ. Proc. § 3343, subd. 3, says the word "judge" includes a Surrogate. Still, this was only for purposes of construction in interpreting

the provisions of the Code itself. To preside, by right, over a Court of Record constitutes the one so presiding a judge.

§ 11. **Special Surrogates** are local officers whose election may be ordered on application of the board of supervisors "to discharge the duties of county judge and of Surrogates in cases of their inability, or of a vacancy, *and in such other cases as may be provided by law*, and to exercise such other powers as *are or* may be provided by law." Const. art. VI, § 16 (new matter being indicated by italics). The Code distinctly designates these officers as "Special Surrogates." Code Civ. Proc. § 2483. The Code is not to be taken as repealing the prior provisions of the law giving Special Surrogates their powers. Laws of 1849, chap. 306, and Laws of 1851, chap. 108; *Aldinger* v. *Pugh*, 132 N. Y. 403; *Ross* v. *Wigg*, 101 N. Y. 640.

§ 12. **Acting Surrogates** are officers *other than the Surrogate* who act as Surrogate in the cases prescribed by law. They must be designated by their regular official title, with the addition of the words "and Acting Surrogate." Code Civ. Proc. § 2483. The Code provides:

> Where, in any county, except New York, the office of surrogate is vacant; or the surrogate is disabled by reason of sickness, absence or lunacy, and special provision is not made by law for the discharge of the duties of his office in that contingency; the duties of his office must be discharged untill the vacancy is filled or the disability ceases, as follows:
>
> 1. By the special surrogate.
>
> 2. If there is no special surrogate, or he is in like manner disabled, or is precluded or disqualified, by the special county judge.
>
> 3. If there is no special county judge, or he is in like manner disabled, or is precluded or disqualified, by the county judge.
>
> 4. If there is no county judge, or he is in like manner disabled, or precluded or disqualified, by the district attorney.
>
> But before an officer is entitled to act, as prescribed in this section, proof of his authority to act as prescribed in section twenty-four hundred and eighty-seven of this act must be made. In any proceeding in the surrogate's court of the county of Kings, before either of the officers authorized in this section to discharge the duties of the office of surrogate of such county for the time being, if an issue is joined or a contest arises either on the facts or the law, such officer, in his discretion, may, by order transfer such cause to the supreme court to be heard and decided at a special term thereof, held in such county, which order shall be recorded in the surrogate's office. A certified copy of such order, together with the appropriate certificate or certificates of the authority of the officer to act as surrogate, shall be sufficient and conclusive evidence of the jurisdiction and authority of the supreme court in such matter or cause. After a final order or decree is made in the matter or cause so transferred to the supreme court, the court shall direct the papers to be returned and filed, and transcripts of all orders and decrees made therein to be recorded in the surrogate's office of such county; and when so filed and recorded, they shall have the same effect as if they were filed and recorded in a case pending in the surrogate's court of such county. **§ 2484, Code Civil Proc.**

In the county of Kings, however, a special provision of law (chap. 490,

Laws of 1884) is made for a certificate by the Surrogate that he is disabled; in which case first the county judge, and then the district attorney are named as the proper officers to discharge the duties of the disabled Surrogate. If neither of them can act, then the Surrogate must file the certificate required by section 2485 of the Code designating the Surrogate of an adjoining county, other than New York.

That section provides as follows:

> Where the surrogate of any county, except New York, is precluded or disqualified from acting with respect to any particular matter, his jurisdiction and powers with respect to that matter vest in the several officers designated in the last section, in the order therein provided for. If there is no such officer qualified to act therein, the surrogate may file in his office a certificate, stating the fact; specifying the reason why he is disqualified or precluded; and designating the surrogate of an adjoining county, other than New York, to act in his case in the particular matter. The surrogate so designated has, with respect to that matter, all the jurisdiction and powers of the surrogate making the designation, and may exercise the same in either county. **§ 2485, Code Civil Proc.**
>
> In the county of New York the supreme court, at a special term thereof, on the presentation of proof of its authority, as prescribed in the next section, must exercise all the powers and jurisdiction of the surrogate's court, as follows:
>
> 1. Where the surrogate is precluded or disqualified from acting, with respect to a particular matter, it must exercise all the powers and jurisdiction of that court with respect to that matter.
>
> 2. Where the office of surrogate of the county is vacant, or the surrogate is disabled by reason of sickness, absence or lunacy it must exercise all the powers and jurisdiction of that court, until the vacancy is filled or the disability ceases, as the case may be. **§ 2486, Code Civil Proc.**

Prior to the adoption of the new constitution the Code provided that if the Surrogate were precluded or disqualified from acting, or where the office of Surrogate was vacant, or the Surrogate disabled by reason of sickness, absence or lunacy, the Court of Common Pleas should exercise all the powers and jurisdiction of the Surrogates' Courts with respect to the matter regarding which the Surrogate is precluded or disqualified, or until the vacancy is filled or the disability ceases.

But as by the new constitution, the Court of Common Pleas is abolished, the Code has been amended (chap. 946 of Laws of 1895, taking effect January 1, 1896), by substituting the words "Supreme Court" for the Court of Common Pleas, which, together with the Superior Court of the city of New York is now merged in the Supreme Court.

> The surrogate's court, in a county where the county judge is also surrogate, may be held at the time and place at which the county court is held; and, in that case, the order of business of the county court, the court of sessions, and the surrogate's court, is under the direction of the county judge. **§ 2506, Code Civil Proc.**

§ 13. **Proof of authority.**—Before any one may act as Surrogate, or another court assume jurisdiction in lieu of the Surrogate's Court proof of authority is required to be made. And the practitioner should be careful to see that the statutory requirement is complied with.

> Where the surrogate is disqualified or precluded from acting in a particular matter, that fact may be proved by the surrogate's certificate thereof, or, except as otherwise prescribed in section 2485, by affidavit or oral testimony.

That is to say, except in case there be no officer capable of acting as designated in § 2484, i. e., Special Surrogate, special county judge, county judge, or district attorney; for in such case the certificate of the Surrogate is requisite together with a designation by him of the Surrogate of an adjoining county.

> The fact that the surrogate is so disqualified or precluded, or that he is disabled, or that the office is vacant; and also the authority of the officer of the court, as the case may be, to act in his place, may be proved, and are deemed conclusively established by an order of a justice of a supreme court of the judicial district embracing the county. After such an order is made, the surrogate shall not make the certificate specified in section 2485 of this act, and if such a certificate has been theretofore filed, the powers and jurisdiction of the surrogate therein designated as specified in that section, thenceforth cease. **§ 2487, Code Civil Proc.**

This proof of authority is an indispensable prerequisite to assuming jurisdiction. The Acting Surrogate himself is likewise interested in having such proof of authority duly filed, as his right to compensation depends upon it. Code Civ. Proc. § 2493; *Matter of Tyler*, 60 Hun, 566. The Code prescribes with great detail how the proof by order of a Supreme Court justice is to be made. Code Civ. Proc. § 2488.

> An order may be made, as prescribed in subdivision second of the last section, upon or without notice, as a justice of the supreme court of the judicial district embracing the county thinks proper. It must recite the cause of the making thereof, it must designate the officer or court, empowered to discharge the duties of the office of surrogate; and, if it relates to a particular matter only, it must designate that matter. It may, in the discretion of the justice, require an officer to give security for the due discharge of his duties therein. Where the office of surrogate is vacant, or the surrogate is disabled by reason of lunacy, the attorney general if directed by the governor, must, or the district attorney, upon his own motion, may, apply for the order, and a justice of the supreme court of the judicial district embracing the county must grant it upon his application. A justice of the supreme court of the judicial district embracing the county may also grant the order upon the application of a party, or a person about to become a party to any special proceeding in the surrogate's court. Where the surrogate is sick or absent, the granting of the order rests in the direction of the justice, and its effect may be qualified as the justice thinks proper. **§ 2488, Code Civil Proc.**

The order of the Supreme Court justice may be made upon or without notice. If the Surrogate is merely sick or absent the justice has full discretion to refuse to grant the order. He may qualify its effect as he deems right. He may require security to be given by the officer designated. The order must recite the cause of the making thereof; it must designate the officer or court empowered to discharge the duties of Surrogate. If made in relation to a particular matter only, that fact must appear in the order, which should designate the matter.

Where the office of Surrogate is vacant, or should he be disabled by lunacy the attorney general, if directed by the governor, *must* apply for the order. Or the district attorney *may* do so, upon his own motion. Upon either application the justice to whom the application is made, that is, a Supreme Court justice of the judicial district embracing the county, must grant it.

It is proper for a party to any special proceeding in the court of a Surrogate disabled by lunacy or whose office is vacant, or for a person about to become a party, to make application for the order. If the application is thus made the granting of the order is discretionary. The justice *may* grant it on such application.

Where there is no special Surrogate in a county, but there is a special county judge, it is proper to designate the latter where the Surrogate is temporarily absent and unable to act. See § 2483, Code Civ. Proc.; *Matter of Frye*, 48 N. Y. St. Rep. 572.

The following precedents are suggested:

Certificate under section 2485.

In Surrogate's Court,

County of
Title. }

I Surrogate of the County of hereby certify, that I am precluded, (*or* disqualified) from acting with respect to the above entitled matter by reason of (*here state the reason why he is disqualified or precluded*).

And I further certify that there is no officer designated in section 2484 of the Code of Civil Procedure, within this county, qualified to act therein, and I do accordingly pursuant to the provisions of section 2485 of the Code of Civil Procedure designate the Hon. the Surrogate of the adjoining County of (*note*) to act in my place and stead, in the above entitled proceeding.

Note. The Surrogate of New York County cannot be designated.

(Dated.) (Signature.)

Supreme Court,
County of,

Proof of authority under section 2487 of the Code of Civil Procedure.

In the matter of the application of for an order establishing the authority of (*here insert name of officer or court to be designated*) to act in the place and stead of Hon. Surrogate of the County of in (*give title of proceeding*).

To the Supreme Court of the State of New York:

The petition of of respectfully shows to this court:

I. That late of and County of in the State of New York departed this life on the day of 190 leaving his last will and testament.

II. That your petitioner is named as executor in said last will and testament, and has accordingly begun a proceeding for the probate of said will (*note*), in the Surrogate's Court in the said County of and has filed a petition praying that the necessary parties be cited; that said will be proved; and that letters testamentary be granted thereon.

Note. Or describe particular matter.

III. Your petitioner is informed and verily believes that the Hon. Surrogate of the County of is precluded or disqualified from acting with respect to the probate of the said will (*here state cause of disqualification, whether general or special under section* 2496, *and, in a proper case, add,* as further appears from the certificate of said Surrogate hereto annexed) (*or* is disabled by reason of) (*or* that the office of Surrogate in said County is vacant).

IV. And your petitioner further shows (*here state, in the order required by section* 2484, *what officer in the County is qualified to be designated or to act in the place of the Surrogate except in New York County; see section* 2486). Wherefore your petitioner prays an order of this court, establishing the fact that the said Surrogate of the County of is disqualified (*or* precluded, *or* that he is disabled, *or* that the office is vacant) and further establishing the authority of the Hon. (*Specifying the proper officer under section* 2484, *or in the County of New York specify merely* "the Supreme Court") to exercise the jurisdiction and powers of the said Surrogate (*or where the Surrogate is disabled, or his office is vacant,* to discharge the duties of the said Surrogate's office) with respect to the said proceedings for the probate of said will (*or* until the vacancy is filled, *or* until the disability of the said Surrogate ceases). (*In cases of the Supreme Court* "to exercise all the powers and jurisdiction of said Surrogate's Court" until the vacancy is filled or the disability ceases, *note.*)

Note. Since there are two Surrogates in New York County it is not probable that the contingen-

(*Where the application is for the designation of a special officer to act as Surrogate, add,* and that said order fix the se-

cies provided against in section 2486 are likely to occur

curity to be given by said for the due discharge of his duties in said matter,) *or* for the exercise of the powers and jurisdiction of said Surrogate.)

(Dated.) (Signature.)

Note. Where the Justice of the Supreme Court requires notice of the application to be given this may be done by notice of motion or by order to show cause. The petition may be used as an affidavit upon which the order to show cause may be obtained, in which case, however, an additional affidavit should be presented stating the reason why an order to show cause is asked for.

State of New York } ss.:
County of }

being duly sworn says: that he is the petitioner above named; that he has read the foregoing petition, by him subscribed; and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

Sworn to before me this }
day of 190 }

(Signature.)

At a Special Term of the Supreme Court, held in and for the County of at the County Court House in on the day of 190 .

Present:

Hon.

Justice.

Order under section 2487.

Title. }

On reading and filling the annexed petition of duly verified the day of 190 , (*and where the certificate is annexed to the petition add,* together with the certificate of Hon. Surrogate of the County of the day of 190) by which it appears to the satisfaction of this Court that a proceeding has been instituted in the Surrogate's Court of the County of for (*here state nature of proceeding*) and it further appears that the Hon. the Surrogate of said County is disabled by reason of (*or* that the office of said Surrogate is vacant; *or* that the said Surrogate is disqualified or precluded from acting in the said proceeding, by reason of) (*here state general or special reason of disqualification*)

Now, on motion of attorney for the petitioner, it is hereby

Ordered, that (*here designate the special officer indicated by the petition under section* 2484 *or in the County of New York the Supreme Court*) be and he (*or* it) is hereby designated and empowered to discharge the duties of the office of said Surrogate in the matter of (*here specify extent of the officer's authority*) (*or where the office is vacant, or the Surrogate is disabled say* "designated and empowered to exercise the powers and jurisdiction of the said Surrogate's Court until " (here specify the filling of the vacancy, or the ceasing of the disability, see section 2486).

Where an officer is designated add a further clause.

And it is Further Ordered that the said (*designating the officer*) before exercising any of the powers or performing any of the duties of said Surrogate execute and file a bond (*here describe the character and amount of bond*)

(Signature of Judge).

§ 14. **Termination of authority of Acting Surrogate.**—Where the Acting Surrogate was appointed for any reason, except a vacancy in the office of Surrogate, his authority to act may be revoked by a justice of the Supreme Court of the judicial district embracing the county; such an order may be made on proof either that the cause for designating or appointing the Acting Surrogate no longer is operative or that the order or appointment was improvidently made in the first instance. When the cause of the making of the order or appointment was that the office of Surrogate was vacant, the filling of the vacancy supersedes the appointment and terminates the authority of the Acting Surrogate without any formal order of revocation.

But however terminated it is without prejudice to the proceedings theretofore taken by virtue of the original designation; and when terminated the unfinished proceeding must be transferred to, and may be completed by the Surrogate in the same manner, and with like effect as when a new Surrogate completes the unfinished business of his predecessor.

The language of the Code is as follows:

> Where an order is made by a justice of the supreme court of the judicial district embracing the county as prescribed in the last two sections or an appointment is made by the board of supervisors, as prescribed in section 2492 of this act, for any cause except a vacancy in the office of surrogate, it may be revoked, without prejudice to any proceedings theretofore taken by virtue thereof, by a justice of the supreme court of the judicial district, embracing the surrogate's county, upon proof that it was improvidently made, or that the cause of making it has become inoperative. Such an order or appointment, made upon the ground that the surrogate's office is vacant, is superseded without any formal revocation, by the filling of the vacancy. After the order

or appointment is revoked, or the vacancy is filled, as the case may be, the unfinished business in any proceedings taken by virtue of the order or appointment, must be transferred to, and may be completed by the surrogate in the same manner and with like effect as where a new surrogate completes the unfinished business of his predecessor. **§ 2489, Code Civil Proc.**

§ 15. **Transfer from Supreme Court.**—Similarly, if the Supreme Court has been entertaining proceedings, cognizable before a Surrogate, it may, in its discretion, and at any time, transfer the proceeding by its order back to the Surrogate's Court. This will usually be done if the Supreme Court is satisfied that the reason for the exercise of its powers and jurisdiction has ceased to operate.

See Code Civ. Proc. § 2491, which is as follows:

The court may, at any time, in its discretion, upon being satisfied that the reason for the exercise of its powers and jurisdiction has ceased to operate, make an order to transfer to the surrogate's court, any matter then pending before it. Such an order operates to transfer the same accordingly. Immediately after such a transfer, or after the revocation of the order of the general term, as prescribed in the last section but one, the surrogate must cause entries to be made in the proper book in his office, referring to all the papers filed, and orders entered, or other proceedings taken, in the supreme court; and he may cause copies of any of the orders or papers to be made, and recorded or filed in his office, at the expense of the county.

Order remitting proceedings to Surrogate's Court under section 2491.

Supreme Court
Caption.

Present:

Hon.

Title. } Justice.

This proceeding having been transferred to me (*or*, to this court) from the Surrogate's Court of the County of by order of the Supreme Court dated the day of 19 for the reason that (*state reason recited in order*), and it appearing to my satisfaction that the reason for the exercise of the powers and jurisdiction of said Surrogate's Court by this court has ceased to operate, now, pursuant to section 2491 of the Code of Civil Procedure, it is

Ordered that the above entitled proceeding be and the same is hereby transferred back to the said Surrogate's Court of the County of

(Signature.)

Note. "Such an order operates to transfer" the proceeding — § 2491 — and all subsequent proceedings must be entitled in and acted on by the Surrogate's Court.

So long as the proceedings remain out of the Surrogate's Court provision is made, as to New York and Kings counties, that they be entitled, sealed and signed as if originally cognizable in the court to which they are transferred. They are filed in the office of the clerk of that court, who performs the duties in relation thereto that the Surrogate or his clerk

would, had they remained in his court. And the issues raised in the proceedings are tried according to the rules prevailing in the court to which it has been transferred. The issuing of a citation may be directed, and any order intermediate the citation and the decree may be made, by a judge of that court.

This is by virtue of the following provision of the Code:

> In a special proceeding cognizable before a surrogate, taken in the supreme court as prescribed in this article, the seal of the court in which it is taken, must be used, where a seal is necessary. The special proceeding must be entitled in that court; and the papers therein must be filed or recorded, as the case may be, and issues therein must be tried, as in an action brought in that court. The clerk of that court must sign each record, which is required to be signed by the surrogate or the clerk of the surrogate's court. The issuing of a citation may be directed, and any order intermediate the citation and the decree may be made by a judge of the court. **§ 2490, Code Civil Proc.**

§ 16. **Temporary Surrogates** are special officers, appointed under special circumstances, to perform the duties of a Surrogate for a limited time. If the Surrogate is disabled by reason of sickness and there is no Special Surrogate, or special county judge (*Matter of Frye*, 48 N. Y. St. Rep. 572) of the county, the board of supervisors (this applies to any county except New York) may, in its discretion, appoint *a suitable person* to act as Surrogate *until* the Surrogate's disability ceases; or until a Special Surrogate or a special county judge is elected or appointed. The Supreme Court also possesses the power to appoint such temporary officer, by virtue of its succeeding to all the powers of the chancellor *Matter of Hathaway*, 71 N. Y. 238, 245.

The chancellor had this power under chap. 320 of the Laws of 1830, § 20. Held, *In re Hathaway, supra*, that this power was not divested by the constitution of 1846 which prohibited the justices of the Supreme Court from making appointments to public office. This case reviews the rule as to Temporary Surrogates under the old practice.

As to New York County, its Surrogate's Court was established prior to the constitution of 1846 (see art. 14) and was merely continued thereby (§ 12). The term of office was left under the control of the legislature. (It is now fourteen years.) When Surrogate Van Schaick died in 1876 leaving five years of his term of six years unexpired, Delano C. Calvin was appointed Temporary Surrogate until the general election next ensuing. At such election he was elected "in place of Delano C. Calvin, appointed in place of S. D. Van Schaick, deceased." Held (*People* v. *Carr*, 25 Hun, 325, and 86 N. Y. 512) that his election was for the unexpired term, i. e., to 1881, and not for a full term to 1882. See opinions of Davis, P. J., and of Rapallo, J.

This seems to be the proper rule as to terms of Surrogates elected to succeed a Surrogate upon the occurrence of a vacancy. As to New York County we have already noted under section 2486 that there would be no

Temporary Surrogate, as the Supreme Court is directed to act until the vacancy is filled. (This is unlikely now to occur as there are two Surrogates.) Moreover, these decisions would probably govern in view of the manifest intention of the new constitution as to uniformity of terms in county offices.

Acting and Temporary Surrogates must not be confounded. The one is usually an existing officer—the other need not be. The Acting Surrogate unless directed so to do by the Supreme Court need not give additional security for the performance of his duties. Code Civ. Proc. § 2488. The Temporary Surrogate cannot enter upon his duties until he has given an official bond, such as is prescribed by law with respect to a person elected to the office of Surrogate (Code Civ. Proc. § 2492), and must file an oath of office. The Code expressly differentiates between them—for in providing for their compensation it mentions "an officer" (meaning Special Surrogate, special county judge, county judge or district attorney) "or a person" (meaning the suitable person mentioned in section 2492) "appointed by the board of supervisors, who acts as Surrogate of any county during a vacancy in the office, or in consequence of disability." Code Civ. Proc. § 2493.

> In any county, except New York, if the surrogate is disabled, by reason of sickness, and there is no special surrogate, or special county judge of the county, the board of supervisors may, in its discretion, appoint a suitable person to act as surrogate, until the surrogate's disability ceases; or until a special surrogate or a special county judge is elected or appointed. A person so appointed must, before entering on the execution of the duties of his office, take and file an oath of office, and give an official bond as prescribed by law, with respect to a person elected to the office of surrogate. **§ 2492, Code Civil Proc.**

§ 17. **The compensation of Acting and Temporary Surrogates** equals, *pro rata*, the salary of the Surrogate (or of the county judge in counties where that officer is also Surrogate), and the amount must be audited and paid in like manner as that of the regular incumbent. Code Civ. Proc. § 2493, is as follows:

> An officer, or a person appointed by the board of supervisors, who acts as surrogate of any county during a vacancy in the office, or in consequence of disability, as prescribed in the last nine sections, must be paid, for the time during which he so acts, a compensation equal, *pro rata*, to the salary of the surrogate; or, in a county where the county judge is also surrogate, to the salary of the county judge. The amount of his compensation must be audited and paid, in like manner as the salary of the surrogate, or of the county judge as the case may be. Where an officer of the county performs the duties of the surrogate, with respect to a particular matter, wherein the surrogate is disqualified or precluded from acting, the supervisors of the county must allow him a just compensation for his services therein, to be audited and collected in the same manner.
>
> This section applied to Kings County, L. 1884, chap. 390.

But this refers only to work *actually done* and time *actually occupied* in discharging the duties of a Surrogate (*Matter of Tyler*, 60 Hun, 566), and not to the time elapsing from the day he first begins his duties until he is relieved therefrom. For time when he is not engaged as Surrogate he may not receive compensation. Where there is a Special Surrogate, under section 1 of chapter 306 of the Laws of 1849 (covering eight counties) his election contemplates his discharging the duties of Surrogate in his county in case of vacancy or of the disability of the Surrogate proper. Consequently his salary is in anticipation of his being called upon so to act—and when he is so called upon he has no right to additional compensation under section 2493. *His* compensation is fixed by the board of supervisors, and does not necessarily correspond to that of the Surrogate. See *People* v. *Sup. Oneida Co.*, 82 Hun, 105.

The Code further provides:

> Where an act is done, or a proceeding is taken by, before, or by authority, of an officer, or a person appointed by the board of supervisors, temporarily acting as surrogate of any county, as prescribed in this article, the same must be recorded, or the proper minutes thereof must be entered, in the books of the surrogate's court, in like manner as if the same was done or taken by, before, or by authority of the surrogate of the county; and the officer or person so acting, or the clerk of the surrogate's court, must sign the certificate of probate and any letters so issued, and must certify the record thereof in the book. **§ 2494, Code Civil Proc.**
>
> This section applied to Kings County by L. 1884, chap. 490.

This means he must sign the same with his proper official designation. If he omit it, however, the record may subsequently be amended. *Monro's Estate*, 15 Abb. Pr. 363.

§ 19. **What constitutes disqualification.**—The Code defines what causes will operate so to disqualify a Surrogate as to necessitate the appointment or designation of an Acting or Temporary Surrogate.

In the first place he is subject to the general disqualifications of a judicial officer. Thus he shall not try as Surrogate any proceedings in which he is a party, or interested; but where, by stipulation of the attorneys, moneys were paid in to the Surrogate to await the result of a litigation and the Surrogate took possession accordingly, held this was not an interest to disqualify him (*Matter of Hancock*, 91 N. Y. 284, reversing 27 Hun, 78; *Matter of Newcombe*, 63 Hun, 633, see 18 N. Y. Supp. 549); nor may he try proceedings in which he has been attorney or counsel (*Darling* v. *Pierce*, 15 Hun, 542) (*see below*); or where he is related by consanguinity or affinity to any party to the controversy within the sixth degree. Code Civ. Proc. § 46. Marriage to a legatee not a party to the proceeding held not to disqualify. *Hopkins* v. *Lane*, 6 Dem. 12.

In *Underhill* v. *Dennis*, 9 Paige, 202, it was held a Surrogate might appoint a relative guardian *ad litem*. So in *Matter of Van Wagonen*, 69 Hun, 365 it was held, following the case in 9 Paige, that, whatever might be

said of the ethical proprieties of such appointment, the fact that such guardian was the Surrogate's brother would not disqualify him from acting. See also *Matter of Hopper* (a lunatic), 5 Paige, 489.

In addition to these general disqualifications:

> A surrogate is disqualified from acting upon an application for probate, or for letters testamentary, or letters of administration, in each of the following cases:
>
> 1. Where he is or claims to be, an heir or one of the next of kin to the decedent, or a devisee or legatee of any part of the estate.
>
> 2. Where he is a subscribing witness, or is necessarily examined or to be examined as a witness to any written or nuncupative will.
>
> 3. Where he is named as executor, trustee or guardian, in any will, or deed of appointment, involved in the matter. **§ 2496, Code Civil Proc.**

But this was held not to disqualify a Surrogate who was warden in a church to which a legacy was given by a will, from entertaining proceedings for its probate. *Hopkins* v. *Lane*, 6 Dem. 12, aff'd 17 N. Y. St. Rep. 677.

Aside from the statutory causes for disqualification, a Surrogate must use his discretion in declining to act in a given case. *Matter of Newcombe*, 18 N. Y. Supp. 549. See, as to personal interest, *Matter of Bingham*, 127 N. Y. 296.

An adult party can waive objection to the power of a Surrogate to act unless one of these three disqualifications exists. The objection may be urged at any time before issue is joined by that party; "or, where an issue in writing is not framed, at or before the submission of the matter in question to the Surrogate." See Code Civ. Proc. § 2497, which is as follows:

> An objection to the power of a surrogate to act, based upon a disqualification, established by special provision of law, other than one of those enumerated in the last section, is waived by an adult party to a special proceeding before him, unless it is taken at or before the joinder of issue by that party; or, where an issue in writing is not framed, at or before the submission of the matter or question to the surrogate. **§ 2497, Code Civil Proc.**

As for infants, their rights are not prejudiced. The acts of a disqualified Surrogate in proceedings in which their rights are involved are void as to them. The failure of a special guardian to interpose objection cannot be taken as a waiver, nor does it bind the infant. See *Wigand* v. *De Jonge*, 8 Abb. N. C. 260.

§ 20. **Terms of court—Attendance by Surrogate.**—The following provisions of the Code relate to the terms of the court and the Surrogate's duty to attend:

> The surrogate's court is always open for the transaction of any business, within its powers and jurisdiction. The surrogates of the city and county of New York, from time to time must appoint, and may alter the times of hold-

ing terms of that court for the trial of probate proceedings and for the hearing of motions and other chamber business. They must prescribe the duration of such terms, and assign the surrogate to preside and attend at the terms so appointed. In case of the inability of a surrogate of that county to preside or attend, the other surrogate may preside or attend in his place. Two or more terms of the surrogate's court may be appointed to be held at the same time. The term of that court held at the chambers shall dispose of all business except contested probate proceedings; all contested probate proceedings shall be disposed of at the trial term. An appointment must be published in two newspapers published in the city of New York during or before the first week in January in each year; except that the surrogates of that county may, by notice to be published in two newspapers in the city of New York for at least five days, appoint the time for holding chambers and trial terms during the year eighteen hundred and ninety-three. All the powers conferred by law upon the surrogate of the city and county of New York may be exercised by either of the surrogates of said city and county. **§ 2504, Code Civil Proc.** (See below.)

The surrogate must, unless prevented by sickness or other unavoidable casualty, attend at his office on Monday of each week, except during the month of August, or where Monday is a public holiday, on the following Tuesday, to execute the powers conferred and the duties imposed upon him. But the surrogate of any county, may, by an instrument in writing, under his hand, filed in the office of the clerk of the county at least twenty days before the first day of January in any year, designate a day of the week, other than Monday, on which he will attend at his office, or a month other than August, during which he will be absent therefrom, or both during that year; and where the county judge is also surrogate, he is not required to attend at his office on any day when the county court or the court of sessions is sitting. The surrogate must also execute the duties of his office, at such other times and places, within his county, as the public convenience requires. The surrogate may sign decrees, letters testamentary, of administration and guardianship, and orders during the month of August or such other month as he shall designate for his vacation wherever he shall be passing such vacation within the state. **§ 2505, Code Civil Proc.**

Abuses were discovered by the committee of the assembly which investigated the Surrogate's Court and office in the county of New York in 1889, which indicated the value of putting some check upon the appointments made by Surrogates in that county, and the amendment was enacted by chapter 605 of the Laws of 1899 to § 2504, at the end thereof, which reads as follows:

"And there shall be published in the official law paper published in said county, upon Monday of every week, under the name of the Surrogate making the several appointments, a full and true list of the names of all appraisers, transfer tax appraisers, special guardians, referees and temporary administrators, which either Surrogate shall have designated or appointed during the preceding week, together with the names of the proceedings in which they were appointed and the dates of said appointments."

§ 21. **When Surrogate not to practice.**—The constitution of 1894, art. 6, § 20, prohibits any Surrogate *thereafter elected*, in a county having

a population exceeding 120,000, from practicing as an attorney or counsellor in any court of record in this State, and from acting as a referee.

The Surrogate of Westchester, taking office January 1, 1901, acted as referee, and a motion was made on the ground he was without power to act.

The Appellate Division refused to pass on the question because the order appealed from was made on consent in order to the appeal. But it was queried whether the state census of 1892 or the Federal census of 1900 would govern; it being claimed that under the state census there could be a deduction made for the population annexed to New York County in 1895. *Brown* v. *Brown*, 64 App. Div. 544. See also *Matter of Silkman*, 88 App. Div. 102, where a second application was made to disbar the then Surrogate from practice during his term. Three opinions were written. The motion was denied on the ground that if he had offended the constitution he had offended as Surrogate and not as a lawyer; and on the further ground that in the court's opinion of what the word "population" meant it did not appear the county had a population exceeding 120,000. See opinion of Woodward, J., pp. 106–123.

Further prohibitive provisions are contained in the Code itself:

> A surrogate shall not be counsel, solicitor or attorney in a civil action or special proceeding for or against any executor, administrator, temporary administrator, testamentary trustee, guardian or infant, over whom, or whose estate or accounts, he could have any jurisdiction by law. The surrogate of the county of Monroe shall not act as referee or practice as attorney or counsellor in any court of record in the state. **§ 2495, Code Civil Proc.**

If a Surrogate has been acting as counsel or attorney before his election and undertakes to pass on proceedings initiated by him as counsel or attorney, as for example in making an order of sale based on a judgment recovered by him, or in passing an executor's accounts, prepared under his personal advice, his acts are void. *Darling* v. *Pierce*, 15 Hun, 542; *Wigand* v. *De Jonge*, 8 Abb. N. C. 260.

CHAPTER II

JURDISDICTION OF SURROGATES' COURTS—ITS NATURE AND EXTENT

§ 22. The Code is somewhat explicit as to the general jurisdiction of Surrogates, and has defined carefully their incidental powers in sections 2472 and 2481. (See also table under § 4, *ante.*)

§ **2472.** *General jurisdiction of surrogate's court.*

Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

1. To take the proof of wills; to admit wills to probate; to revoke the probate thereof; and to take and revoke probate of heirship.

2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.

3. To direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee so removed.

4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate.

5. To direct the disposition of real property, and interests in real property, of decedents, for the payment of their debts and funeral expenses, and the disposition of the proceeds thereof.

6. To administer justice, in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto.

Note. This does not, however, give such powers as to apply surplus income of a trust to payment of the beneficiary's creditors. *Matter of Widmayer*, 28 Misc. 362.

This can only be done by a court of equity. *Wetmore* v. *Wetmore*, 149 N. Y. 520, 527; *Tolles* v. *Wood*, 99 N. Y. 616.

7. To appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; and in the cases specially prescribed by law, to direct and control their conduct, and settle their accounts.

8. (Added 1903.) To settle the accounts of a father, mother, or other relative having the rights, powers and duties of a guardian in socage, and to compel the payment and delivery of money or other property belonging to the ward.

This jurisdiction must be exercised in the cases, and in the manner prescribed by statue.

§ 2481 is given in this connection (as well as in the table in chap. I) as necessary to a full view of the Surrogate's jurisdiction.

§ 2481. *Incidental powers of the surrogate.*

A surrogate, in court or out of court, as the case requires, has power:

1. To issue citations to parties, in any matter within the jurisdiction of his court; and, in a case prescribed by law, to compel the attendance of a party.

2. To adjourn, from time to time, a hearing or other proceeding in his court; and where all persons who are necessary parties have not been cited or notified, and citation or notice has not been waived by appearance or otherwise, it is his duty, before proceeding further, so to adjourn the same, and to issue a supplemental citation, or require the petitioner to give an additional notice, as may be necessary.

3. To issue, under the seal of the court, a subpœna, requiring the attendance of a witness, residing or being in any part of the state; or a subpœna duces tecum, requiring such attendance, and the production of a book or paper material to an inquiry pending in the court.

4. To enjoin, by order, an executor, administrator, testamentary trustee, or guardian, to whom a citation or other process has been duly issued from his court, from acting as such, until the further order of the court.

5. To require, by order, an executor, administrator, testamentary trustee, or guardian, subject to the jurisdiction of his court, to perform any duty imposed upon him, by statute, or by the surrogate's court, under authority of a statute.

6. To open, vacate, modify, or set aside, or to enter, as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The powers, conferred by this subdivision, must be exercised only in a like case and in the same manner, as a court of record and of general jurisdiction exercises the same powers. Upon an appeal from a determination of the surrogate, made upon an application pursuant to this subdivision, the appellate division of the supreme court has the same power as the surrogate; and his determination must be reviewed, as if an original application was made to that division.

7. To punish any person for a contempt of his court, civil or criminal, in any case, where it is expressly prescribed by law that a court of record may punish a person for a similar contempt, and in like manner.

8. Subject to the provisions of law, relating to the disqualification of a judge in certain cases, to complete any unfinished business, pending before his predecessor in the office, including proofs, accountings, and examinations. See *Matter of Johnson*, 27 Misc. 167, Varnum, S.

9. To complete, and certify and sign in his own name, adding to his signature the date of so doing, all records or papers, left uncompleted or unsigned by any of his predecessors.

10. To exemplify and certify transcripts of all records of his court, or other papers remaining therein.

11. With respect to any matter not expressly provided for in the foregoing subdivisions of this section, to proceed, in all matters subject to the cognizance of his court, according to the course and practice of a court, having, by the common law, jurisdiction of such matters, except as otherwise prescribed by statute; and to exercise such incidental powers, as are necessary to carry into effect the powers expressly conferred.

12. A surrogate or a clerk of the surrogate's court has power to administer oaths, to take affidavits and the proof and acknowledgment of deeds and all

other instruments in writing, and certify the same with the same force and effect as if taken and certified by a county judge.

Added L. 1909, ch. 65.

§ 23. The provisions of the new constitution are as follows:

Art. VI, § 15. **Surrogates' Courts; Surrogates, their power and jurisdiction; vacancies.**

The existing surrogates' courts are continued, and the surrogates now in office shall hold their offices until the expiration of their terms. Their successors shall be chosen by the electors of their respective counties, and their terms of office shall be six years, except in the county of New York, where they shall continue to be fourteen years. Surrogates and surrogates' courts shall have the jurisdiction and powers which the surrogates and existing surrogates' courts now possess, until otherwise provided by the legislature. The county judge shall be surrogate of his county, except where a separate surrogate has been or shall be elected. In counties having a population exceeding forty thousand, wherein there is no separate surrogate, the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be six years. When the surrogate shall be elected as a separate officer, his salary shall be established by law, payable out of the county treasury. No county judge or surrogate shall hold office longer than until and including the last day of December next after he shall be seventy years of age. Vacancies occurring in the office of county judge or surrogate shall be filled in the same manner as like vacancies occurring in the supreme court. The compensation of any county judge or surrogate shall not be increased or diminished during his term of office. For the relief of surrogates' courts the legislature may confer upon the supreme court in any county having a population exceeding four hundred thousand, the powers and jurisdiction of surrogates, with authority to try issues of fact by jury in probate cases. *Id.* § 15.

§ 24. **Powers specially conferred by statute.**—Among the powers specially conferred by statute referred to in section 2472, was the power to administer oaths and take acknowledgments. This was given by Laws, 1900, ch. 510, § 1. It is now embodied as subd. 12, *supra* in § 2481.

He may also direct an executor or administrator, having letters from his court to become a "consenting creditor," in proceedings to discharge an insolvent from his debts. Code Civ. Proc. § 2153. See *Matter of P. Sherryd*, 2 Paige, 602 where the chancellor held, prior to the statute, he had no power to permit a trustee to petition for such discharge.

He has also concurrent jurisdiction with the county courts in adoption proceedings, under the Domestic Relations Law. Laws, 1896, chap. 272, §§ 60–68. These proceedings are simple, and fall under two general heads: "Voluntary adoption" and "Adoption from charitable institutions." Both proceedings are cognizable before a Surrogate. See *post*, part V, chap. I.

Jurisdiction is also given, by the Tax Law, chap. 24 of the General Laws (Laws, 1896, chap. 908) article X, over taxable transfers. See part VI, chap. V, *post*.

A Surrogate has also power to give leave to issue execution against an executor or administrator in his representative capacity, upon a judgment for a sum of money. In fact no such execution can issue without such permission by order of the Surrogate from whose court the letters issued specifying the sum to be collected, and indorsed with a direction to collect that sum. Code Civ. Proc. §§ 1825 *et seq.* See *post.*

He may also authorize an executor or administrator to prefer certain debts (see Code Civ. Proc. § 2719 and *post*, part VI, chap. III), and to compromise or compound claims, on application, for good and sufficient cause. *Id.*

He may decree payment by an executor or administrator personally of an amount equal to the value of exempt property negligently omitted to be set apart by him for a surviving husband, wife or child as prescribed by law, or equal to the amount of injury thereto in proper case. See Code Civ. Proc. § 2724, and *post*, part VIII.

He has power in certain cases (see discussion under §§ 2798 *et seq.* and § 2537, and § 2793, *post*), to receive surplus moneys and distribute the same. See *Matter of Gedney*, 30 Misc. 18.

He may, under § 1380 of the Code, *q. v.*, make a decree granting leave to issue an execution against the property of a deceased judgment debtor on whose estate he may have granted letters. See § 1381 as to procedure in securing such decree. With this general survey of the extent of a Surrogate's jurisdiction, and the illustrations under § 4, *ante*, we pass to the examination of the nature of that jurisdiction.

§ 25. **Nature of jurisdiction—The jurisdiction of a Surrogate's Court** may be

I. Exclusive of all other courts.

II. Exclusive of other Surrogates' Courts.

III. Concurrent with other courts.

§ 26. **Exclusive jurisdiction** is vested in Surrogates' Courts in the State of New York, over the probate of wills and the issuance of letters testamentary or letters of administration. See *Delabarre* v. *McAlpin*, 71 App. Div. 591. Note hereafter "action to establish a will," and 2 R. S. 126, § 46; *Burger* v. *Hill*, 1 Bradford, 360, 371. See 1 R. S. of 1813, 365, § 7, as to probate prior to Revised Statutes; *Brick's Estate*, 15 Abb. Pr. 12, for historical sketch of jurisdiction of Surrogates and their courts.

Those provisions of the Code, §§ 1861–1867, under which an action may be brought to establish a will, constitute an exception to the general rule that wills are proved by and letters issued pursuant to a decree of a Surrogate's Court only.

The exception is, however, rather apparent than real. For in those cases where an action to establish a will is allowed by the Code [see also Revised Statutes (2d ed.), 2 R. S. §§ 67–68], the judgment of the court in which the action is brought must be supplemented by the action of the Surrogate. He must record in his office an exemplified copy of the judgment; after which recording letters testamentary, or letters of administration

with the will annexed, are issued from the Surrogate's Court, as if the judgment of the other court were the very decree of the Surrogate. The letters issue in the same manner, and with like effect, as upon a will duly proved in the Surrogate's Court. Code Civ. Proc. § 1863. The Surrogate *must* (Code Civ. Proc. § 1864) record the will, and issue letters thereupon, but the court under whose judgment he has to act *cannot* do so.

Subject to this apparent exception the Surrogate's jurisdiction over probates is exclusive. But as all his jurisdiction is a limited one, so this exclusive jurisdiction is limited. It may depend upon and be conditioned by: 1. Mode of execution; 2. Place of execution; 3. Residence of testator; 4. Locus (or situs) of property willed.

§ 27. **Mode of execution.**—Surrogates may grant probate of wills,

(*a*) When executed as prescribed by the laws of the State, whether they be wills of real or personal property.

(*b*) Also wills of personal property, executed in other States, or in Canada, or in Great Britain or Ireland, as prescribed by their respective laws.

(*c*) Also wills of personal property of non-residents, executed according to the law of testator's residence.

This appears (*a*) from the Decedents' Estates Law, §§ 23–25, formerly § 2611 of the Code.

> § 23. A will of real or personal property, executed as prescribed by the laws of the state, or a will of personal property executed without the state, and within the United States, the dominion of Canada, or the kingdom of Great Britain and Ireland, as prescribed by the laws of the state or country where it is or was executed, or a will of personal property executed by a person not a resident of the state, according to the laws of the testator's residence, may be *admitted to probate in this state.*

[This is a material amendment. It used to read "may be proved as prescribed in this article."]

> § 24. The right to have a will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will.
>
> § 25. The last two sections apply only to a will executed by a person dying after April eleven, eighteen hundred and seventy-six, and they do not invalidate a will executed before that date, which would have been valid but for the enactment of sections one and two of chapter one hundred and eighteen of the laws of eighteen hundred and seventy-six, except where such a will is revoked or altered by a will which those sections rendered valid, or capable of being proved as prescribed in article first of title third of chapter eighteenth of the Code of Civil Procedure.

See *Matter of Rubens*, 128 App. Div. 626 (1st Dep. 2 dissents) [will of one residing in France executed not according to French law but ours, property in this State.]

It appears (*b*) from § 2705 of the Code formerly chap. 731, Laws 1894, which is as follows:

Admission of will of non-residents to probate, etc.

The last will and testament of any person being a citizen of the United States, or, if female, whose father or husband previously shall have declared his intention to become such citizen, who shall have died, or hereafter shall die, while domiciled or resident within the United Kingdom of Great Britain and Ireland, or any of its dependencies, which shall affect property within this State and which shall have been duly proven within such foreign jurisdiction, and there admitted to probate, shall be admitted to probate in any county of this State wherein shall be any property affected thereby, upon filing in the office of the surrogate of such county, and there recording, a copy of such last will and testament, certified under the hand and seal of a consul-general of the United States resident within such foreign jurisdiction, together with the proofs of the said last will and testament, made and accepted within such foreign jurisdiction, certified in like manner; and letters testamentary of such last will and testament shall be issued to the persons named therein to be the executors and trustees, or either, thereof, or to those of them who, prior to the issuance of such letters, by formal renunciation, duly acknowledged or proven in the manner prescribed by law, shall not have renounced the trust therein devolved upon them; provided, that before any such will shall be admitted to probate in any county in this State, the same proceedings shall be had in the surrogate's court of the proper county as are required by law upon the proof of the last will and testament of a resident of this State who shall have died therein; except that there need be cited upon such probate proceedings only the beneficiaries named in such will. L. 1894, chap. 731.

§ 28. **Same.**—Under the first subdivision in the last section (*a*), *any* will is entitled to probate, wheresoever and by whomsoever executed, whatever the nature of the property whose disposition it seeks to effect, and wherever such property may be situated, *provided* it be shown to have been executed in conformity with the laws of this State. *Matter of M'Mulkin*, 5 Dem. 295, 297. Thus, where testatrix died in Glasgow, Scotland, where she resided at the time of making her last will and testament, which will was executed in conformity with the laws of this State, though fatally defective under Scotch law, it was (in the case just cited) admitted to probate. See also *Matter of Rubens*, *supra*. (See dissent by Ingraham.)

The second subdivision (*b*), adds to the list of provable wills wills not of realty, executed in any other State in the Union, or in the Dominion of Canada, or in the Kingdom of Great Britain and Ireland, *provided* they be shown to have been executed in conformity with the laws of the place of execution.

The provision is explicit—"laws of the State or country where it is or was executed" regardless of testator's residence, or the place of his death. Formerly this was not so; but if, after executing a will valid under the laws of the place in which it was made, the testator changed his domicile it might result in intestacy. Thus in 1856 a will was offered in New York County for probate, made by a man who at the date of execution of the will was a citizen of South Carolina. The will was executed according to

the requirement of the laws of that State. Subsequently the testator removed to this State, where he became domiciled and died. It was held that he died intestate in New York. *Moultrie* v. *Hunt*, 23 N. Y. 394. This decision was followed until the amendment of 1893 to § 2611 Code Civ. Proc. above quoted. This section was a consolidation of old sections 2611–2613, and is again divided up in the Decedents' Estates Law.

The third subdivision (*c*), covers wills (also not of realty) executed by any non-resident of the State according to the laws of testator's residence. This means residence at time of execution, and is not affected by change of residence subsequently.

Under this subdivision it has been held that a New York Surrogate has jurisdiction and may proceed with the probate of a non-resident's will of personal property executed according to the laws of such testator's residence, without awaiting action by the corresponding tribunals of the other State or country. *Booth* v. *Timoney*, 3 Dem. 416; *Matter of Delaplaine*, 45 Hun, 225. So, a holographic will of one dying in France with no witnesses, valid under the Civil Code of France, section 970, was admitted to probate in New York County as a will of personal property. *Matter of Cruger*, 36 Misc. 477. But this section gives no jurisdiction to a Surrogate over the probate of wills of real property unless executed according to the New York laws. *Matter of Gaines*, 84 Hun, 520. Note that no will executed under either (*b*) or (*c*) of *real* property is provable here. A will of realty to be effectual to pass lands here must have been executed in conformity with the New York statute; prior to the amendment of 1893 to § 2611 the validity of execution of a will made by a non-resident without the State depended on his residence at the time of his death. Thus in *Moultrie* v. *Hunt*, 23 N. Y. 394, 403 (see extract from Story on pp. 404, 405), the court said: "It would be plainly absurd to fix upon any prior domicile in another country. The one which attaches to him at the instant when the devolution of property takes place, is manifestly the only one which can have anything to do with the question." The amended section applies "only to a will executed by a person dying after April 11, 1876, and it does not invalidate a will executed before that date, which would have been valid but for the enactment of sections one and two of chapter 118 of the Laws of 1876, except where such a will is revoked or altered by a will which those sections rendered valid or capable of being proved as prescribed in this article." Code Civ. Proc. § 2611, amended 1893.

§ 29. **The place of execution** may also determine the question of jurisdiction—this appears partly from the foregoing sections. If the will presented to the Surrogate was executed in this State it must have been executed in conformity with the laws of this State. If executed without the State by a resident of the State it must have been executed in conformity with the laws of this State if it devises real property; if it deals only with personal property it is covered by the provisions of the preceding section.

If executed without the State by a non-resident then it must have been

executed in conformity with the laws of the place of testator's residence when he executed it.

§ 30. **Residence of testator.**—Conceding the will to have been executed so as to be provable in this State under either of the foregoing sections the Surrogate's jurisdiction is further conditioned by the residence of testator. If he was, at the time of his decease, a non-resident of the State the rule is that laid down above (and see section 31, *infra*, as to effect of locus of property willed). If he was, however, a resident of the State then the jurisdiction of the Surrogate's Court depends on the county of which he was a resident. Code Civ. Proc. § 2476. See *James* v. *Adams*, 22 How. Practice, 409, to effect that it is not the process under which parties come before the Surrogate that gives him jurisdiction; but the residence of the decedent.

§ 31. **Locus of property willed** is a most important element in determining jurisdiction, but it is more properly to be treated under the next subtopic.

It may be here remarked, however, that a properly executed will of a non-resident can be proved in this State only in one of three cases:

(1) Where the decedent died within a county of the State, leaving personal property in the State either at his death, or which after his death comes into the State and remains unadministered.

Or, (2) where the decedent died without the State, but leaving personal property in a county of the State, or which after his death comes into the State, and remains unadministered.

Or, (3) where decedent leaves real property to which the will relates, or which is subject to disposition for the payment of his debts, and which is situated within a county of the State, provided no petition has been presented under either of the two just mentioned cases in any other Surrogate's Court. Code Civ. Proc. § 2476, subd. 4.

§ 31a. **Other questions exclusively within Surrogate's jurisdiction.**—It may be added that the Surrogate's Court has further exclusive jurisdiction to determine all questions of fraud, imposition, undue influence, mistake and other circumstances relating to the factum of the instrument as well as to avoid the will or set aside its probate on the ground of fraud, mistake or forgery. *Case of Broderick's Will*, 21 Wallace, 503. See opinion *Clark* v. *Fisher*, 1 Paige, 176, and cases cited; *Colton* v. *Ross*, 2 *Id.* 398; *Muir* v. *L. & W. Orphan Home*, 3 Barb. Ch. 477. So also mistakes and variances between the will as prepared and the instructions given for preparing it can only be reformed in this court. Story's Equity, § 179; *Burger* v. *Hill*, 1 Bradf. 360, 372.

§ 32. **Jurisdiction exclusive of other Surrogates' Courts.**—Section 2476 of the Code provides that:

> The surrogate's court of each county has jurisdiction, exclusive of every other surrogate's court, to take the proof of a will, and to grant letters testa-

mentary thereupon, or to grant letters of administration, as the case requires, in either of the following cases:

1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere.

2. Where the decedent, not being a resident of the state, died within that county, leaving personal property within the state, or leaving personal property which has, since his death, come into the state, and remains unadministered.

Note. Thus, the surrogate first issuing letters ancillary, on a non-resident's estate, acquires exclusive jurisdiction to appoint transfer tax appraisers. *Matter of Hathaway,* 27 Misc. 474.

3. Where the decedent, not being a resident of the state, died without the state, leaving personal property within that county and no other; or leaving personal property which has, since his death, come into that county, and no other, and remains unadministered.

Note. This gives jurisdiction not only to issue letters; but, even if none be issued, the surrogate may assume jurisdiction to assess the transfer tax, if the property, so within the county, be taxable. *Matter of Fitch,* 160 N. Y. 87, 93.

4. Where the decedent was not, at the time of his death, a resident of the state, and a petition for probate of his will, or for a grant of administration, under subdivision second or third of this section, has not been filed in any surrogate's court; but real property of the decedent, to which the will relates, or which is subject to disposition under title fifth of this chapter (Code Civ. Proc. §§ 2749–2801, *relating to disposition of decedent's real property for the payment of debts and funeral expenses*), is situated within that county and no other. See *Matter of Buckley,* 41 Hun, 106; *Matter of Taylor,* 13 N. Y. St. Rep. 176. **§ 2476, Code Civil Proc.**

Consequently in any case covered by the four subdivisions of this section, the petition must be presented to the Surrogate of the county having this exclusive jurisdiction.

Subdivisions 3 and 4, however, suggest the possibility of a case where personal property comes or real property is found to be situated in another county or counties. In such case, while the Surrogates of such counties have concurrent jurisdiction, exclusive of all others than themselves, the one first assuming jurisdiction of the probate proceedings has a jurisdiction exclusive of every other Surrogate. This is by virtue of section 2477.

Where personal property of the decedent is within, or comes into, two or more counties, under the circumstances specified in subdivision third of the last section; or real property of the decedent is situated in two or more counties, under the circumstances specified in subdivision fourth of the last section; the surrogates' courts of those counties have concurrent jurisdiction, exclusive of every other surrogate's court, to take the proof of the will and grant letters testamentary thereupon, or to grant letters of administration, as the case requires. But where a petition for probate of a will, or for letters of administration, has been duly filed in either of the courts so possessing concurrent jurisdiction, the jurisdiction of that court excludes that of the other. **§ 2477, Code Civil Proc.**

§ 33. **Jurisdiction of Surrogates over wills of residents.**—The primary distinction indicated by section 2476 is between resident and non-resident decedents. Jurisdiction to take proof of the will of a decedent, who was a resident of the county at the time of his death, is wholly independent of assets. *Matter of Taylor*, 13 N. Y. St. Rep. 176. But it may be necessary for the Surrogate to determine the fact of residence, which he has power and which it is in fact his duty, to do. *Bolton* v. *Schriever*, 135 N. Y. 65. Where decedent was a lunatic, and her committee removed her from Putnam County, her former place of residence, to his own residence in Westchester County, where she lived till she died, Surrogate Coffin held that her residence at death was in the latter county. *Hill* v. *Horton*, 4 Dem. 88, 92. While the domicile of the father is that of the child (*Von Hoffman* v. *Ward*, 4 Redf. 244, 259; *Kennedy* v. *Ryall*, 69 N. Y. 379, 386), it is not changed by a mere separation of the father and mother, there being no legal dissolution of the relation of husband and wife, yet the domicile of the husband is not necessarily that of the wife, if they have separated. *Matter of Florence*, 54 Hun, 328. The original domicile will be presumed to continue until a new one is acquired (*Von Hoffman* v. *Ward, supra; Depuy* v. *Wurtz*, 53 N. Y. 556), and a new one can be acquired only by actual residence coupled with the intent there to abide. *Graham* v. *Public Administrator*, 4 Bradf. 127; *Matter of Thompson*, 1 Wend. 43. Their intention to change is not sufficient. *Von Hoffman* v. *Ward, supra; Graham* v. *Public Administrator, supra; Matter of Clarke*, 40 N. Y. St. Rep. 12. Where there is doubt as to the decedent's residence the will may be resorted to, for the words of description may be significant in disputed cases as fixing whether at the time of its execution his domicile of origin had changed. *Matter of Stover*, 4 Redf. 82, 87.

Where the petition contains distinct allegations as to testator's residence, and the allegations are practically substantiated by proof, the decree admitting the will to probate is conclusive, and cannot be collaterally attacked. *Bumstead* v. *Read*, 31 Barb. 661.

So if a petition is filed containing a distinct allegation of residence in that county, the Surrogate of such county acquires exclusive jurisdiction under section 2475 to try the question of residence. And if a petition is filed in another county alleging residence there, the Surrogate of that county acquires no jurisdiction unless the Surrogate first acquiring jurisdiction determines the residence of decedent not to have been in his own county. *Matter of Buckley*, 41 Hun, 106.

§ 34. **County residence not state residence the test of jurisdiction.**—Section 2476 expressly hinges the Surrogate's jurisdiction in case of residents upon the residence of the decedent at the time of his death within the county of the Surrogate.

Consequently a mere allegation in the petition that the testator at the time of his death was a resident of the State of New York is not sufficient to give jurisdiction. *Oviedo* v. *Duffie*, 5 Redf. 137. Not even where all the parties to the proceeding consent. *Matter of Zerega*, 58 Hun, 505. Where

testator's home was in Westchester County where he voted and paid taxes, but spent the winter months in New York City at his daughter's house, paying board to her, it was held by the General Term, reversing the Surrogate of New York, that he was a resident of Westchester County, and that the New York Surrogate had no jurisdiction. *Matter of Zerega, supra.* See *Matter of Walker*, 54 Misc. 177, as to separate residence of wife for probate purposes, citing *Matter of Florence Will*, 7 N. Y. Supp. 578.

§ 35. **Same.**—The decedent must have been a resident of the county in which the Surrogate had his court, even though insane when removed thereto from his former domicile in another county. *Hill* v. *Horton*, 4 Dem. 88. Thus when a petition showed that testator was United States consul at Cadiz, Spain, where he died, leaving a will, executed there; that he was a citizen of the United States, an inhabitant of the State of New York, temporarily resident at Cadiz, it was held that probate could not be granted as it did not appear when the petition was filed, on the papers, that the testator resided in New York County. *Oviedo* v. *Duffie*, 5 Redf. 137, 139. And this is because the court being one of special and limited jurisdiction its right must be shown and not be presumed. The facts giving jurisdiction not only to the court as a Surrogate's Court, but also to the court as the Surrogate's Court of a particular county must be averred in the petition; *Matter of Hawley*, 104 N. Y. 250, 262, and cases cited; *Riggs* v. *Cragg*, 89 N. Y. 480, 489, and cases cited; and a petition for probate, omitting such averments is defective. *Estate of Duffie*, 3 Law Bull. 49. As this question of inhabitancy is a jurisdictional one by statute, the Surrogate must determine it when the application for probate is made. Such determination is conclusive when made, unless reversed on appeal. It, certainly, is not to be attacked collaterally. *Bolton* v. *Schriever*, 58 Super. Ct. 520, aff'd in 135 N. Y. 65. The Court of Appeals in the case just cited says (p. 73): "The actual death of an individual who, at the time of his death, was an inhabitant of the State is the jurisdictional fact. . . . Whether one or the other of the Surrogates' Courts in the various counties shall administer upon the estate . . . . is a question which the legislature has provided for, and it depends, among other things, upon the fact of inhabitancy. This fact the Surrogate to whom it is presented must decide, and if he decides that it exists, and upon evidence which legally tends to support his decision, under such circumstances we think it ought to stand until reversed. . . . The decision of the Surrogate of one county, after a hearing of the parties upon the question whether the case calling for the exercise of the jurisdiction of his court, or the Surrogate's Court of some other county, exists or not, should be conclusive in all collateral proceedings." And see *Harrison* v. *Clark*, 87 N. Y. 572; *Power* v. *Speckman*, 126 N. Y. 354; *Bumstead* v. *Read*, 31 Barb. 661, citing many cases; *Matter of Hathaway*, 27 Misc. 474.

The Code itself provides (§ 2473) after declaring the general jurisdiction of the Surrogate's Court, that where its decree is drawn in question collaterally, and the necessary parties were duly cited or appeared, the jurisdic-

tion is presumptively, and, in absence of fraud or collusion, conclusively established by the allegation of jurisdictional facts in the petition. This relates only to such matters as are jurisdictional. As to these alone is the Surrogate's decision conclusive. Thus where a Surrogate appointed a minor as administrator, the question of age not having been brought to his notice, and the statute forbidding such an appointment, held, in a collateral matter, absolutely void (eligibility not being a jurisdictional fact). *Knox* v. *Nobel*, 77 Hun, 230, 232. It is the residence at death, not the location of decedent's assets that conditions jurisdiction in cases of residents of this State dying testate or intestate. *Matter of Taylor*, 13 N. Y. St. Rep. 176.

§ 36. **As to what constitutes residence** sufficient to give the Surrogate of a particular county jurisdiction it is a matter of fact which the Surrogate must determine according to the usual rules in such connection. *Matter of Cruger*, 36 Misc. 477, 479. "Residence" must be equivalent to domicile, and must include both actual residence and intention. *Ibid.*, citing *Dupuy* v. *Wurtz*, 53 N. Y. 556.

But they are not identical terms—"A person may have two places of residence, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence, as an inhabitant in a given place—while domicile requires bodily presence in that place, and also an intention to make it one's domicile." Opinion of Vann, J., in *Matter of Newcomb*, 192 N. Y. 238, 250. See whole opinion. "Residence, unless combined with intention, cannot effect a change of domicile." *Ibid.* Where evidence was contradictory and left Surrogate in doubt it was held that testator's declaration or recital in a will written by himself was conclusive. *Matter of Stover*, 4 Redf. 82. In *Matter of Golden*, 40 Misc. 544, there were two wills, and two contradictory recitals. The one was holographic, and recited Saratoga, where there was proof he intended to reside the rest of his life. The other, drawn by his attorney, recited Troy as his residence, where he had in fact resided for 40 years. The domicile of the child is that of the parent—as where the father had left England and settled in New York City, and after seven months sent for his wife and child. The child being killed by negligence on its arrival in New York, letters of administration on its estate were granted in New York County and suit brought for damages. Held that the father's domicile was the child's and the suit properly brought. *Ryall* v. *Kennedy*, 67 N. Y. 379, 387. See also *Isham* v. *Gibbons*, 1 Bradf. 62; *Graham* v. *The Public Administrator*, 4 Bradf. 127; *Seiter* v. *Straub*, 1 Dem. 264, case of an orphan infant whose general guardian resided in New Jersey; *Von Hoffman* v. *Ward*, 4 Redf. 244. An infant, not being *sui juris*, cannot change its domicile, *Matter of Dawson*, 3 Bradf. 130, but her testamentary guardian, acting in good faith, can effect such change. *Matter of Kiernan*, 38 Misc. 394. Where one parent dies, the child's domicile is that of the surviving parent. *Ruall* v. *Kennedy*, *supra*. See as to effect on domicile of

intent shown in parent's will. *White* v. *Howard*, 52 Barb. 294. So where parents separate, not under decree of a court, the child's domicile is still that of the father, although actually removed by and in custody of the mother elsewhere. *Von Hoffman* v. *Ward*, *supra*. So also as to rule that original domicile continues until a new one is acquired. Same. Also *Matter of Stover*, 4 Redf. 82; *Matter of Clark*, 15 N. Y. Supp. 370; *Matter of Zerega*, 58 Hun, 505. See *Dupuy* v. *Wurtz*, 53 N. Y. 556; *Hart* v. *Kip*, 148 N. Y. 306; *Matter of Brant*, 30 Misc. 14. If husband and wife separate, the wife securing a divorce in another State, where she becomes domiciled, she retains such separate domicile. Divorce for *his* wrong makes it possible for her to acquire a new and separate domicile. *Matter of Colebrook*, 26 Misc. 139. In *Matter of Walker*, 54 Misc. 177, it was held that, for probate purposes, husband and wife could have separate domiciles, in that inhabitancy at death was the Surrogate's test, citing *Matter of Florence Will*, 7 N. Y. Supp. 578; *Bolton* v. *Schriever*, 135 N. Y. 65.

§ 37. **Indians on reservation.**—In *Dole* v. *Irish*, 2 Barb. 639, it was held, construing the "Indian Law," that the estates of Indians could not be administered in Surrogates' Courts. It there appeared that there was a custom of distribution having the force of tribal law. In *Matter of Jack*, 52 Misc. 424, Hickey, Surr., was asked to probate the will of a Tuscarora residing on the reservation in Niagara County. He examined the Indian law, as amended by chap. 679, L. 1892, and followed *Dole* v. *Irish*. But in *Matter of Printup*, 121 App. Div. 322, the court held that letters of administration could issue *in the absence of proof* that the particular tribe had ample governmental regulations amounting to the custom of distribution proved, in the Dole case, to exist among the Senecas. (See dissent by McLennan, P. J.) See also *Peters* v. *Tall Chief*, 121 App. Div. 309, rev'g 52 Misc. 617.

§ 38. **Non-residence.**—As to non-residents the provisions of the Code above cited fall under two heads: I. Decedent, non-resident, dies in the Surrogate's county. II. Decedent, non-resident, dies outside the State. The first is again subdivisible under three heads.

I

Decedent, non-resident, dies in Surrogate's county; (*a*) leaving personal property within the State;

(*b*) Or leaving personal property which has, since his death, come into the State; and remains unadministered;

(*c*) Or where no petition for probate or for letters has been filed under subdivision 2 or 3 of § 2476 [i. e. (*a*) or (*b*), *supra*] but real property of decedent to which the will relates, or which is subject to disposition for the payment of decedent's debts is situated solely within the Surrogate's county.

Note. See *Matter of Fitch*, 160 N. Y. 87, 92–95; *Matter of Bronson*, 150 N. Y. 1.

The second is also subdivisible under three heads.

II

Decedent, non-resident, dies without the State; (this makes the location of the assets within the State the prerequisite of jurisdiction. See *Matter of Taylor*, 6 Dem. 158) (*a*) leaving personal property within the Surrogate's county and no other, even though the will be in the actual possession of the court of another county and cannot be produced before him. *Russell* v. *Hartt*, 87 N. Y. 18; *Booth* v. *Timoney*, 3 Dem. 416; *Matter of Seabra*, 18 Wky. Dig. 428. If the property be stock of domestic corporations having different "principal places of business," the stock is deemed to be, under § 2476, subd. 3, in the county of such "principal place" and the Surrogate first acting in either county has jurisdiction. *Matter of Arnold*, 114 App. Div. 244.

(*b*) Or leaving personal property which has since his death come into the Surrogate's county and no other, and which remains unadministered. See *Estate of Duffy*, 1 Dem. 202; *Matter of Hopper*, 5 Dem. 242. Note the words "and remains unadministered." Thus where a foreign executor remits funds to be paid under the will to a legatee in one of the counties of this State that is not, it would appear, property of decedent coming into State after his death within the meaning of the Code. See *Sedgwick* v. *Ashburner*, 1 Bradf. 105.

(*c*) Same as I (*c*) above.

§ 39. **Same subject.**—The jurisdiction over wills of non-residents depends, therefore, under section 2476, upon property being in or being brought into the county of the Surrogate. Subdivision 4 relating to real property is very explicit. But the two prior subdivisions relate to personal property. Many of the decisions use the word "assets," but erroneously. The word "assets" is usually understood to relate only to personal property applicable to the payment of debts. *White* v. *Nelson*, 2 Dem. 265. But the words used in section 2476 cover every article of personalty. Consequently, jurisdiction, in a proper case, may be predicated on the existence of a Japanese folding chair (*White* v. *Nelson*), or a family Bible, or a pair of earrings, or an insurance policy (*Johnson* v. *Smith*, 25 Hun, 171), or a promissory note actually in the county. *Matter of Hopper*, 5 Dem. 242; Code Civ. Proc. § 2478; *Beers* v. *Shannon*, 73 N. Y. 292. The location of the property in the Surrogate's county is what gives him jurisdiction (*Taylor* v. *Public Administrator*, 6 Dem. 158), and it has been held that the fact that it was improperly brought in the county since decedent's death does not divest such jurisdiction. *Matter of Hughes*, 95 N. Y. 55; *Parsons* v. *Lyman*, 20 N. Y. 103. But, in *Hoes* v. *N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 435, 482, it was held "property brought into the State, for collusive purposes or temporarily, after owner's death, does not confer jurisdiction to grant administration." See also *Matter of McCabe*, 84 App. Div. 145. But the mere transmission by a foreign executor of funds into the State in pursuance of a decree for distribution by the court which appointed him does not warrant a Surrogate in basing on such funds a claim of jurisdiction here. Such funds cannot be subjected to a second administration. *Sedg-*

wick v. *Ashburner*, 1 Bradf. 105. To acquire jurisdiction under subdivision 4, i. e., on the basis of "real property of the decedent to which the will relates in the Surrogate's county," it is sufficient that the will purports to devise such real property. For purposes of jurisdiction the Surrogate need not try the issues of the testator's title as a preliminary to the proof of the will. *Vreeland* v. *McClelland*, 1 Bradf. 393, 415. If the devise is general, and has no sufficient description on its face to show that the property devised is within the particular county, it would be competent for the Surrogate to hear testimony and satisfy himself on that point. *Ibid.* Finally it is important to note that the property on which the Surrogate bases his jurisdiction must be *unadministered.* So where an executrix under a Rhode Island will qualified in that State, and coming to New York City reduced to her possession as executrix, all the assets of her testator's estate that were in that county, and took them into actual manual custody, collecting in all moneys there held on deposit for his account, it was held there was no property within the county unadministered to sustain jurisdiction of a proceeding begun by a petition filed after the executrix had reduced the property to her possession. *Townsend* v. *Pell*, 3 Dem. 367, citing *Evans* v. *Schoonmaker*, 2 Dem. 249, aff'd 31 Hun, 638.

§ 40. **Jurisdictional facts averred.**—When, therefore, a Surrogate's court has presented to it a petition setting forth averments of these jurisdictional facts, it may assume jurisdiction. It need not await the institution of probate proceedings in the place of testator's residence; but may act forthwith. *Booth* v. *Timoney*, 3 Dem. 416. Nor is any considerable amount of property requisite as a basis for an exercise of jurisdiction. In New York County a "Japanese folding chair" was held sufficient as such a basis, it being brought into the county after decedent's death. *White* v. *Nelson*, 2 Dem. 265. In this case the singular objection was made that, under 2 R. S. 83, § 9, six chairs must be excluded in reckoning a decedent's assets—and, further, that under the New Jersey law, in which State decedent was domiciled, the chair was also exempted. The Surrogate overruled this objection and exercised his jurisdiction. See also *Matter of Hopper*, 5 Dem. 242. See also *Van Giessen* v. *Bridgford*, 83 N. Y. 348, 355, where the court seems to think that a family Bible and a pair of earrings would be sufficient personal property on which to assume jurisdiction. And so also where, in 1863, A took out a policy of insurance in favor of, among others, B and his personal representatives, and in 1866, B died, and thereafter, in 1868, A moved into this State and died in Broome County, it was held: that the interest of B's representatives in the policy was personal property brought into the county after B's death and warranted the Surrogate of Broome County in assuming jurisdiction. *Johnston* v. *Smith*, 25 Hun, 171, 176. In 1850, Surrogate Bradford refused an application for probate (*Kohler* v. *Knapp*, 1 Bradf. 241, 245), where the decedent, an inhabitant of Ohio, becoming insane while on a visit to New York City, died there. At that time the case of a non-resident, dying in the county, leaving no assets, but assets coming into the county after his death, was not, in terms, pro-

vided for in the statutes. After reviewing the old practice and holding that even though the Surrogate must exercise his powers in the manner prescribed by statute, yet in a case upon which the statutes were silent he should not decline jurisdiction when it is apparent that a proper occasion to invoke his authority has arisen, the Surrogate, deeming it such a *casus omissus*, nevertheless declined to exercise jurisdiction because the only assets claimed to have come into the county after decedent's death were (1) an old cloak lent to decedent by a friend by whom it was brought into the State, but subsequently after his death returned to Ohio; and (2) certain debts due the decedent from an estate in Connecticut, the administrator of which estate was in New York City. It was held, first, that the mere temporary presence of the cloak on bailment here was not sufficient to warrant jurisdiction, especially as it had since, and before filing the petition, been removed from the county; and second: that the debt mentioned constituted an asset not in New York but in Connecticut.

Under the Code, as it now stands, the cloak, though on bailment, would probably be held to constitute sufficient property to act upon, provided, of course, it were still in the county at the time of making application.

An application for probate on the will of a non-resident in the State of New York should be denied when it appears that an executor or administrator appointed in a foreign jurisdiction has reduced decedent's assets in the county to actual possession before the petition was filed. *Townsend* v. *Pell*, 3 Dem. 367, 369; *Evans* v. *Schoonmaker*, 2 Dem. 249, 250 (aff'd in 31 Hun, 638). But, on the other hand, once a New York Surrogate's Court has rightly assumed jurisdiction, no action of foreign courts can disturb it, or divest it of the control it has acquired over the executors or administrators it may have appointed, or prevent it from compelling them to account for the assets they are administering. *Duffy* v. *Smith*, 1 Dem. 202, 208. Nor, even, will this jurisdiction once assumed be disturbed by proof of the fact that the personal property, which came into the county after decedent's death, on the strength of which jurisdiction was exercised, was brought in irregularly and without authority of law. *Matter of Accounting of Hughes*, 95 N. Y. 55, and cases cited. The Surrogate of Kings County had assumed jurisdiction by virtue of subd. 4, § 23, art. 2, tit. 2, chap. IV, part 2 of the Revised Statutes. This was about 1883. In the case just cited the Court of Appeals held, in the first place, that where there were two administrators of a single estate, one in the place of decedent's domicile, and the other in a foreign jurisdiction, "whether the courts of the latter will decree distribution of the assets collected under the ancillary administration, or remit them to the jurisdiction of the domicile, is not a question of jurdisdiction, but of judicial discretion depending upon the circumstances of the particular case." Pages 59, 60, citing *Harvey* v. *Richards*, 1 Mason, 380; *Parsons* v. *Lyman*, 20 N. Y. 103; *Despard* v. *Churchill*, 53 N. Y. 192. In the second place, "conceding the illegality of the removal of the assets from Pennsylvania . . . . the assets being in fact here, the Surrogate of Kings County acquired jurisdiction to grant admin-

istration. He was not deprived of jurisdiction because the assets were irregularly brought here, nor does that fact deprive him of jurisdiction to decree distribution."

§ 41. **Location of debts as affecting jurisdiction.**—We have observed above cases where the assets on which jurisdiction by a Surrogate in this State was sought to be based consisted of debts. There is now provision made in the Code in this connection which is important and which reads as follows:

> For the purpose of conferring jurisdiction upon a surrogate's court, a debt, owing to a decedent by a resident of the state, is regarded as personal property situated *within the county where the debtor*, or either of two or more joint debtors, resides; and a debt owing to him by a domestic corporation, is regarded as personal property, situated within the county where the principal office of the corporation is situated. But the foregoing provision *does not apply to a debt evidenced by a bond, promissory note*, or other instrument for the payment of money only, in terms negotiable, or payable to the bearer or holder. Such a debt *whether the debtor is a resident or a non-resident* of the state, or a foreign or a domestic government, state, county, public officer, association or corporation, is, for the purpose of so conferring jurisdiction, regarded as personal property, at the place where the bond, note, or other instrument is, either within or without the state. **§ 2478, Code Civil Proc.**

While this section is new yet the principle contained in the latter part is not.

Thus the Court of Appeals in 1878, in *Beers* v. *Shannon*, 73 N. Y. 292, held that a debt upon a bond has its situs where the bond is, and not where the obligor resides (citing Laws of 1830, chap. 320, § 16), for purpose of Surrogate's jurisdiction. See also *Matter of Hopper*, 5 Dem. 242.

§ 42. **Jurisdiction concurrent with other courts.**—This topic can be most readily discussed as follows: Jurisdiction may be exercised in certain cases concurrently with a Surrogate's Court by

1. Federal courts.
2. Other state courts.
3. Other Surrogates' Courts.

§ 43. (1) **With Federal courts.**—The only jurisdiction a Surrogate's Court can exercise concurrently with the Federal courts is that over naturalization, which, however, it rarely if ever has used. See *Matter of Harstrom*, 7 Abb. N. C. 391; chap. 1, § 4. On the other hand, the Federal courts have asserted a right to jurisdiction in certain cases arising between citizens of different States involving the validity and construction of wills. They do not, and cannot, claim a probate jurisdiction, that is to say, an application to prove a will would not be removable to a Federal court. It is not a suit at common law or in equity. It is a proceeding, and, moreover, a proceeding *in rem*, which does not necessarily involve any controversy between parties. In its initiation all persons are cited to appear who are interested, regardless of the State of which they may be citizens. So the United States

Supreme Court has said in this connection: "From its nature, and from the want of parties, ... the proceeding is not within the designation of cases at law or in equity between parties of different States of which the Federal courts have concurrent jurisdiction with the state courts under the Judiciary Act." *Gaines* v. *Fuentes et al.*, 2 Otto (92 U. S.), 10, 21. And the court continues: "But whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties." *Ibid.*, p. 22. It may be noted that Waite, Ch. J., and Bradley and Swayne, JJ., dissented, on the ground that to assume jurisdiction to revoke a probate was to all intents and purposes to assume probate jurisdiction which the Federal courts never had. See *Broderick's Will*, 21 Wallace, 503; *Tracer* v. *Jennison*, 106 U. S. 191, 195; *Gaines* v. *New Orleans*, 6 Wallace, 642. "The probate of a will duly received to probate by a state court of competent jurisdiction, is conclusive of the contents and validity of the will in this court." See *Fouvergne* v. *City of New Orleans*, 18 How. 470, 473. Mr. Rice in his work on "American Probate Law," p. 21, says: "Jurisdiction as to wills, and their probate as such, is neither included (in) nor excepted out of the grant of judicial power to the Federal courts. So far as it is *ex parte* and merely administrative, it is not conferred, and cannot be exercised at all, until, in a case at law or in equity, its exercise becomes necessary to settle a controversy as to which of those courts have jurisdiction by reason of citizenship."

But an original bill cannot be sustained in the Federal courts upon an allegation that the probate of a will was contrary to law (*Tarver* v. *Tarver*, 9 Pet. 174), because the courts "must receive the sentences of the state courts to which the jurisdiction over testamentary matters is committed as conclusive of the validity and contents of a will." *Fouvergne* v. *New Orleans*, just cited.

§ 44. (2) **With other state courts.**—We have already discussed "an action to establish a will" as the nearest approach to probate jurisdiction which courts, other than Surrogates' Courts, enjoy in this State.

LOST WILLS

The Supreme Court used to have jurisdiction (*the power to take proof of a lost or destroyed will at first resided solely in the Court of Chancery.* 2 R. S. chap. VI, tit. 1, §§ 42, 63, 67; *Bowen* v. *Idley*, 11 Wend. 227; 6 Paige, 46; *Collyer* v. *Collyer*, 4 Dem. 53, 55; *Buckley* v. *Redmond*, 2 Bradf. 281, 286; *Timon* v. *Claffy*, 45 Barb. 438; *Voorhis* v. *Voorhis*, 50 Barb. 119, aff'd 39 N. Y. 463) which the Surrogates' Courts did not have to prove a lost or destroyed will. Since 1870 (L. 1870, chap. 359, § 8; also 2 R. S. 58, § 67*b*) a lost or destroyed will can be admitted to probate in a Surrogate's Court (Code Civ. Proc. § 2621); but only in a case where a judgment establishing

the will could be rendered by the Supreme Court, as prescribed in section 1865 of the Code, which reads: "But the plaintiff is not entitled to a judgment, establishing a lost or destroyed will, as prescribed in this article, unless the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime; and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness." (See part III, chap. IX.)

ADMINISTRATION

Mr. Pomeroy in his treatise on "Equity Jurisdiction" divides the different States into three classes as regards the question of equitable jurisdiction over administration. The third, in which he includes New York, he says is where the "equitable jurisdiction is not concurrent, but is simply auxiliary or ancillary and corrective. The Probate Court takes cognizance originally of all administrations, and has powers sufficient for all ordinary purposes. Equity interposes only in special or extraordinary cases, which have either been wholly omitted from the statutory grant of probate jurisdiction, or for which its methods and reliefs are imperfect and inadequate, or where its proceedings have miscarried and require correction." Pomeroy's Eq. Jur. (2d ed.) § 1154, and read note to same on p. 1749. It has been held that the Supreme Court will decline to act where an administrator, being sole next of kin, is claimed to have made a gift *causa mortis* to another of the entire estate. The estate must first be administered in the Surrogate's Court. *Dickinson* v. *Col. Trust Co.*, 33 Misc. 668.

ACCOUNTINGS

See Part VIII, *post*

Any court of equity has jurisdiction concurrent with that of Surrogates' Courts to compel executors, administrators and testamentary trustees to account and to direct and control their actions in relation thereto. *Wood* v. *Brown*, 34 N. Y. 337, 345, citing *Rogers* v. *King*, 8 Paige, 210. Thus, where an executor or trustee denies the existence of a trust, a court of equity, which has power to construe a will whenever necessary to control or guide the action of a trustee, can exercise its jurisdiction and call upon him to account. For, so far as the property is effectually disposed of by the will, the executor holds it in trust for the legatees or beneficiaries, and, according to the law of this country, if there is any part of such property or any interest therein not effectually disposed of by the will, he holds it in trust for those who are entitled to it under the statute of distributions. *Wager* v. *Wager*, 89 N. Y. 162, 166, citing *Bowers* v. *Smith*, 10 Paige, 193; Williams on Executors, 294; 2 Story's Eq. Juris. § 1208; *Hays* v. *Jackson*, 6 Mass. 153.

The seal of the Court of Probate is conclusive evidence of the factum of a will, but any court of equity has jurisdiction to construe the will for

the purpose of enforcing a proper performance of any trusts arising thereunder. However, "where complete relief can be obtained in the Surrogate's Court, a court of equity may, in its discretion, decline, on that ground, to entertain an action for an accounting or other relief against executors." *Wager* v. *Wager, supra,* p. 168; *Ludwig* v. *Bungart,* 48 App. Div. 613, rev'g 33 Misc. 177; *Chipman* v. *Montgomery,* 63 N. Y. 221.

ESTABLISHING VALIDITY, CONSTRUCTION OR EFFECT OF WILL

This cannot, strictly speaking, be said to be a subject of concurrent jurisdiction of Surrogates' Courts and other courts, although it has been so treated. Under section 2624 of the Code the Surrogate is directed to try an issue, raised as to the validity, construction or effect of any disposition of *personal* property contained in the will of a resident of this State executed in this State. Under section 1866 of the Code an action may be brought to determine the validity, construction or effect of a testamentary disposition of *real* property within the State, or of an interest therein which would descend to the heir of an intestate. These sections seem wholly distinct but they are interrelated by reason of a provision that the section "does not apply to a case, where the question in controversy is determined by the decree of a Surrogate's Court, duly rendered upon allegations for that purpose, as prescribed in article first of title third of chapter eighteenth of this act, where the plaintiff was duly cited in the special proceeding in the Surrogate's Court, before the commencement of the action." Code Civ. Pro. § 1866.

Now, it will be seen that both these sections refer to the validity not of the will itself but of the testamentary disposition made in the will. The Court of Appeals has expressly denied jurisdiction over the former, except in actions to establish the will as provided in the Code. *Anderson* v. *Anderson,* 112 N. Y. 104, 113. The policy of the court has been to deny jurisdiction in equity in matters regarding wills separated from trusts.

In *Delabarre* v. *McAlpin,* 71 App. Div. 591, it is held (see headnote) that the Supreme Court will not entertain an action, brought by persons claiming to be entitled to personal property as beneficiaries under an unprobated will, against a person claiming title to such personal property under a subsequent unprobated will of the decedent and also under a transfer executed by the decedent, to obtain an adjudication that the subsequent will and transfer were obtained by fraud and undue influence, and to require the defendant to account to the plaintiff for such personal property, where it does not appear that the testatrix had any real property or that there are any circumstances which would prevent the Surrogate's Court from passing upon the question as to the validity of the two wills.

The general policy of this State is and has been to commit to the Surrogates' Courts the decision of questions upon the due execution of an alleged will. *Anderson* v. *Anderson,* 112 N. Y. 113; *Higgins* v. *Union Trust Co.,* 32 N. Y. St. Rep. 197, aff'd 127 N. Y. 635.

See as to cases when real property is involved, *Norris* v. *Norris*, 32 Hun, 175; *Wallace* v. *Payne*, 14 App. Div. 597.

It has been held that section 2624 gives no jurisdiction to Surrogates to determine the *validity*, construction or effect of a testamentary disposition of *real* property. *Prive* v. *Foucher*, 3 Dem. 339, 340; *Matter of Fuller*, 22 N. Y. St. Rep. 352. Yet the jurisdiction of the court was asserted to give judicial construction to a will of real property under certain circumstances. *Matter of Marcial*, 37 N. Y. St. Rep. 569. In conclusion it would seem that the *concurrent* jurisdiction is limited to bequests of personality or such interests in real property as are personal in their nature, the jurisdiction of chancery being asserted by Chancellor Walworth in 1843. *Bowers* v. *Smith*, 10 Paige, 193. See *Wager* v. *Wager*, 89 N. Y. 162, 167, 168; *Read* v. *Williams*, 125 N. Y. 560, 566. (See part III, ch. VIII.) See also *Ludwig* v. *Bungart*, 48 App. Div. 613, where it was held the Supreme Court would not refuse jurisdiction merely because the Surrogate's Court had concurrent jurisdiction; but only in case it had already assumed to act in the premises (rev'g 33 Misc. 177).

PREVENTING PROBATE

We have said that the Surrogates' Courts have exclusive jurisdiction over probate of wills. Nevertheless, where testatrix had made an irrevocable will of certain property to one who had given it to her in her lifetime in consideration of such will, a complaint was sustained which asked for a judgment restraining an executor named in a later will from proving it, and directing that the former will be adjudged irrevocable and entitled to probate. *Cobb* v. *Hanford*, 88 Hun, 21.

APPOINTING GUARDIANS

There can hardly be said to be concurrent jurisdiction in this regard, although every court of inferior or general jurisdiction has power to appoint guardians *ad litem* of minors. *Brick's Estate*, 15 Abb. 12. Sections 468 to 477 of the Code, relating to infant parties, it is held are not applicable to Surrogates' Courts (*Matter of Watson*, 2 Dem. 642), as are sections 2530 and 2531. See *Matter of Bolton*, 159 N. Y. 129, 134, where the court discusses carefully the limits on the Surrogate's power over infants' interests. See § 1, *ante*.

§ 45. (3) **Concurrent jurisdiction of Surrogates.**

JURISDICTION ONCE ASSUMED IS EXCLUSIVE

Jurisdiction once duly exercised over any matter by a surrogate's court, excludes the subsequent exercise of jurisdiction by another surrogate's court, over the same matter, and all its incidents, except as otherwise specially prescribed by law. Where a guardian has been duly appointed by, or letters testamentary or of administration have been duly issued from, or any other special proceeding has been duly commenced in, a surrogate's court having

jurisdiction, all further proceedings, to be taken in a surrogate's court, with respect to the same estate or matter, must be taken in the same court. **§ 2475, Code Civil Proc.**

See also § 2477 quoted, *ante*, in § 35.

§ 46. **Effect of change in county lines.**—Where the boundaries of a county are changed or a new county constituted, the Code provides against the apparent confusion of jurisdiction likely to arise. This is by section 2479, which is as follows:

Where a new county has been heretofore, or is hereafter erected, or territory has been heretofore, or is hereafter, transferred from one county to another, the jurisdiction of the surrogate's court of each of the counties affected thereby, to take the proof of a will, or to grant letters, depends upon the locality, when the petition is presented, of the place, where the property of the decedent is situated, or where the event occurred, as the case may be, which determines jurisdiction. If, before the erection of the new county, or the transfer of the territory, letters have been granted, upon the ground that the decedent died or resided within the county, the surrogate's court from which they were issued has exclusive jurisdiction of the estate, and of all matters incidental thereto; and if the place where the decedent died or resided is embraced within another county, certified copies of any papers or proceedings, filed, entered, or recorded in the surrogate's court thereof, must be furnished, on payment of the fees therefor, by the proper officer, to any person interested in the estate; and, upon the latter's request and payment of the fees therefor, the proper officer of the court so having jurisdiction must file, enter, or record the same, in like manner and with like effect as the originals. Where the letters were granted upon any ground other than the decedent's death or residence within the county, the jurisdiction of the court from which they were issued, remains unaffected by any change in the territorial limits of its county. **§ 2479, Code Civil Proc.**

In regard to this section it has been held that the words, "when the petition is presented," in the first paragraph (which fix the time of the location of the property of the decedent or the occurring of the event which determines the jurisdiction of the Surrogate), refer to the time when the petition is presented to the Surrogate upon the return of the citation and not to the time when the petition is filed in his office. *Matter of McGinnis*, 13 Misc. 714. So that if a new county should be erected or a transfer of territory be made subsequent to the filing of a petition and before the return day of the citation issued thereon, the matter should be brought on for a hearing before the Surrogate having jurisdiction under this section and if necessary the proceeding be re-entitled in the proper court. (But see *Matter of McKeon*, 26 Misc. 464, where, part of Westchester County having been annexed to New York County, Silkman, Surr., held it was annexed for municipal purposes only, and did not affect his judicial right to grant letters on estates of residents of such annexed district.) Accordingly where one of the changes occurs contemplated by section 2479, after the filing of a

petition, but prior to the return day of the citation, it will be necessary to procure a formal order transferring the proceeding to the Surrogate of the county in which the matter is triable by reason of the change. This need not be on notice, but merely upon an affidavit showing the occurrence of the change of which presumably the Surrogate would take judicial notice, but showing the jurisdictional facts that either the property, the location of which determines the jurisdiction, or the event the occurrence of which determines the jurisdiction, is located or occurred in the territory erected into a new county or transferred from one county to the other. The Surrogate upon these facts being made satisfactorily to appear, must make an order transferring the proceeding to the court of the other Surrogate. This is by virtue of section 2480, which is as follows:

> A special proceeding pending in a surrogate's court, whose jurisdiction to entertain the same is taken away by the provisions of the last section, or in consequence of the erection of a new county, or the alteration of the territorial limits of a county, after this act takes effect, must be transferred, by order of the court in which it is pending, to the surrogate's court having jurisdiction; and the latter court has the same jurisdiction, power, and authority with respect thereto, which the former court would have had, if the territorial limits of its county had not been changed. **§ 2480, Code Civil Proc.**

GENERAL PROVISIONS

§ 47. **Presumption of jurisdiction.**—Section 2473 of the Code provides that "where the jurisdiction of a Surrogate's Court to make" in a case specified in section 2472 "a decree or other determination, is drawn in question collaterally, and the necessary parties were duly cited or appeared, the jurisdiction is presumptively, and in the absence of fraud or collusion, conclusively, established, by an allegation of the jurisdictional facts, contained in a written petition or answer, duly verified, used in the Surrogate's Court. The fact that the parties were duly cited is presumptively proved, by a recital to that effect in the decree." Laws of 1870, ch. 359, § 1. See *Power* v. *Speckman*, 126 N. Y. 354; *Bumstead* v. *Read*, 31 Barb. 661. The presumption of service of citation from such recital may be negatived, especially in case of infancy of one cited. *Hood* v. *Hood*, 85 N. Y. 561, 578.

JURISDICTION NOT LOST BY DEFECT OF RECORD

> The surrogate's court obtains jurisdiction in every case, by the existence of the jurisdictional facts prescribed by statute, and by the citation or appearance of the necessary parties. [*Dakin* v. *Demming*, 6 Paige, 95, Matter of Graham, 39 Misc. 226.] An objection to a decree or other determination, founded upon an omission therein, or in the papers upon which it was founded, of the recital or proof of any fact necessary to jurisdiction, which actually existed, or the failure to take any intermediate proceeding, required by law to be taken, is available only upon appeal. But, for the better protection of any

party, or other person interested, the surrogate's court may, in its discretion, allow such a defect to be supplied by amendment. **§ 2474, Code Civil Proc.**

§ 48. **Effect of adoption of Code.**—Article 1, of title 1, of chapter 18, closes with section 2482, which declares the applicability of the provisions of the chapter in matters of jurisdiction to cases where a will was made or the decedent died whether before or after the chapter took effect. The provision is as follows:

Each provision of this chapter, relating to the jurisdiction of the surrogate's court, to take the proof of a will, and to grant letters testamentary or letters of administration or regulating the mode of proceeding in any matter connected with the estate of a decedent, applies, unless otherwise expressly declared therein, whether the will was made, or the decedent died, before or after this chapter takes effect. All acts hitherto of surrogates and officers acting as such in completing by certifying in their own names any uncertified wills, and by signing and certifying in their own names, the unsigned and uncertified records of wills and of other proofs and examinations taken in the proceedings of probate therof, before their predecessors in office, are hereby confirmed and declared to be valid and in full compliance with the pre-existing statutory requirements. **§ 2482, Code Civil Proc.**

CHAPTER III

CLERKS AND STENOGRAPHERS IN SURROGATES' COURTS

§ 49. **The clerk of the court.**—The "Clerk of the Court" is distinguished by the Code from the "Surrogates' Clerks." The latter as will be seen directly have purely clerical functions; the former has certain specific powers and may in certain designated cases act concurrently with the Surrogate or even in his place and stead. See also "designated" or "deputized" clerks when special power is conferred on them by the Code or statutes in special counties. The sections are as follows:

Clerk of surrogate's court; deputy clerk of surrogate's court; how appointed; their powers.

By a written order filed and recorded in his office, which he may in like manner revoke at pleasure, a surrogate may appoint a clerk of the surrogate's court, and in any county containing a city of the second class, and in the county of Monroe, the surrogate may also appoint a deputy clerk of said court. Both said clerk and deputy clerk shall be paid by the county, and the board of supervisors or board of aldermen, as the case requires, must fix the compensation of the clerk and deputy clerk so appointed. The clerk and deputy clerk so appointed may severally exercise, concurrently with the surrogate, the following powers of the surrogate:

1. He may certify and sign as clerk of the court, or as deputy clerk of the court, as the case may be, any of the records of the court, including the certificate specified in section twenty-six hundred and twenty-nine of this act, and the records and papers specified in subdivision nine of section twenty-four hundred and eighty-one of this act.

2. He may issue any mandate, to which a party is entitled as of course, either unconditionally or on the filing of any paper; and may sign, as clerk of the court, or as deputy clerk of the court, as the case may be, and affix the seal of the court to any letters or mandate issued from the court.

3. He may certify in the manner prescribed by chapter ninth of this act, a copy of any paper, required or permitted by law to be filed or recorded in the surrogate's office.

4. He may adjourn to a definite time, not exceeding thirty days, any matter, when the surrogate is absent from his office, or unable, by reason of other engagements, to attend to the same.

5. He may take the acknowledgment or proof of any instrument, to be used or filed in the court of which he is clerk or deputy clerk. Said deputy clerk shall also act as confidential clerk to the surrogate.

6. The clerk of the surrogate's court of each of the counties of Kings and New York may, with the approval of the surrogate or surrogates of his county, authorize or deputize one or more of the other clerks, employed in the surrogate's office of his county, to sign his name, and exercise such of the other

powers conferred upon him by this section, as he shall designate. The surrogate may prohibit the clerk and deputy clerk, or either of them, from exercising any powers specified in this section, but the prohibition does not affect the validity of any act of the clerk or deputy clerk done in disregard of the prohibition. The clerk or deputy clerk or other person employed in any capacity in a surrogate's office, shall not act as appraiser, as attorney or counsel, or as referee or special guardian, in any matter before the surrogate.

7. The clerk of the surrogate's court, of each of the counties of this state shall immediately upon the filing in the office of the surrogate of any decree or order of such court directing the deposit of money, either actually in the hands of some person or persons or thereafter arising from the sale of real estate described in any such decree or order, with the county treasurer of his county, or in the case of the county of New York, with the chamberlain of the city of New York, or upon the filing in the said surrogate's office of any treasurer's or chamberlain's receipt stating that a sum of money has been deposited with such treasurer or chamberlain, in accordance with a decree or order of any such surrogate's court, enter in a book to be kept in his office for that purpose, to be known as a court and trust fund register, the title of the proceeding or the name of the estate in which such decree or order was made, together with a statement of the amount so deposited, or ordered to be deposited, if said decree or order contains the amount of same, and the name of the person or persons, if any, to whom said money is ordered to be paid, and the date of the filing of the same or of such receipt as herein mentioned. **§ 2509, Code Civil Proc.**

Additional powers of clerks of surrogates' courts.

The clerk of the surrogate's court, and in the county of Kings two other clerks to be designated by the surrogate, in addition to the powers enumerated in section twenty-five hundred and nine, may exercise, concurrently with the surrogate of the county, the following powers of the surrogate: On the return of a citation issued from such surrogate's court on a petition for the probate of a will, where no objection to the same is filed, or, where all the persons entitled to be cited, sign and verify the petition, or personally, or by attorney, appear on the probate thereof, cause the witnesses to the will to be examined before him. Such examination must be reduced to writing, and for such purpose, they are hereby authorized to administer and certify oaths and affirmations in such cases in the same manner and with the same effect as if administered and certified by the surrogate. **§ 2510, Code Civil Proc.**

Under section 2509 it is clear that the clerk of the Surrogate's Court may issue an ordinary citation, as that is a mandate to which a party is entitled as of course. *Matter of Hurlbut,* 43 Hun, 311 (*dictum*, but unquestionably correct). But special citations such as one issued under section 2707 (*q. v.*), i. e., in proceedings to discover property withheld, are mandates to which a party is not entitled as of course; and section 2509 defines the mandates, which the clerk may issue as those to which a party is entitled *as of course,* either unconditionally or on the filing of any paper; thus citation for probate is such a mandate but a citation under section 2707, for instance, is one to which the party is not entitled unless in addition to the filing of the paper, the Surrogate be satisfied that there are reasonable grounds for the

inquiry, and therefore the courts have held such citation not to be within the power of the clerk of the Surrogate's Court to issue. See *Mouran* v. *Hawley*, 2 Dem. 396.

The difference between citations which the clerk may issue and those which he may not, appears to hinge on whether the issue of the citation involves the exercise of judicial power by the Surrogate; such powers cannot be delegated through any of his subordinates. The word mandate in section 2509 unquestionably includes a citation (see § 3343, subd. 2, and also § 2515, Code of Civil Procedure, which begins, "A citation *or other mandate* of a Surrogate's Court," etc.). *Fithian's Estate*, 3 N. Y. Supp. 193. "The citation is the mandate of the court and is the only foundation of the proceeding. To it and the statute the respondent is bound to look for information and notice of the nature and scope of the proceeding; and his rights and those of all concerned depend entirely upon the terms of such information and notice."

There is nothing in the section just quoted authorizing the clerk of the court to sign Surrogates' decrees. And a decree not signed by the Surrogate has no validity. *Munro's Estate*, 15 Abb. 363; *McNaughton* v. *Chave*, 5 Abb. N. S. 226. Subsequent filing by the clerk gives no efficiency to such decree. The courts have gone so far as to hold, where the clerk of a Surrogate issued letters to an administratrix, using a blank which had been signed by the Surrogate, and it appeared that the Surrogate never saw the petition, or the petitioner, and never exercised any judicial function in respect to the matter, that the mere signature gave no validity to the letters and that their issuance by the clerk was inoperative and that one who had paid a debt to the administratrix under such invalid letters had no protection, and could be made to pay to the representative of the estate having valid letters. *Roderigas* v. *E. R. Sav. Inst.*, 76 N. Y. 316.

§ 50. **Surrogates' clerks.**—Clerks as distinguished from "the clerk" are to be appointed in the various counties only as permitted by statute. The number of these Surrogates' clerks is of course dependent upon the volume of business to be transacted. In New York County they are assigned to various departments, such as probate department, administration department, accounting, guardian, records, etc. The chief clerk is the clerk of the Surrogate's *Court*, the other clerks including the heads of the departments are merely clerks in the Surrogate's *office*.

Chapter 530 of the Laws of 1884 is entitled, "An act in relation to the office of the Surrogate in the county of New York." By virtue of this act, several of the provisions of the Code already quoted, are made inapplicable to the Surrogate's Court in the county of New York. The power of the board of aldermen of New York, who corresponded to the board of supervisors, over the court, over the clerks and assistants, over their salaries and over the fees in the office was completely abolished, the appointment and removal of clerks is left entirely under the control of the Surrogate. He may appoint and at pleasure remove all clerks, officers, attendants and employees in his office or connected with his court, their

number, duties and salaries are such as the Surrogate shall designate and approve, subject, however, to the revision of the board of estimate and apportionment, by which board the aggregate expenses of the office is to be fixed; the details of the annual statement are provided in the chapter (*q. v.*).

§ 51. **Security or bond by clerks.**—In New York County by the act just referred to the Surrogate was empowered to require security from his various assistants (section 5) for the faithful performance of their duty which provision is now made applicable to the whole State by section 2511 of the Code, which is as follows:

> A surrogate hereafter elected or appointed, and the sureties on his official bond, are liable for any act of the clerk or deputy clerk of the surrogate's court in the discharge of his official duties, during the surrogate's term of office, as if the act was performed by the surrogate. The surrogate may take security from the clerk or deputy clerk, or either of them to indemnify him against the liability created by this section. **§ 2511, Code Civil Proc.**

Chapter 530 of the Laws of 1884 also abolished the charging of fees excepting fees for copies of papers filed or recorded in the office, excepting mileage where the Surrogate in a case prescribed by law or in any case upon the application of a party goes to a place other than his office or court room where he is required to hold court in order to take testimony. See subd. 1 of section 7.

§ 52. **Disabilities of clerks.**—By section 2509 already quoted the clerk or any other person employed in any capacity in a Surrogate's office is prohibited from acting as appraiser, attorney or counsel, or referee, or special guardian in any matter before the Surrogate. But it seems that this prohibition can be obviated by consent of all the parties. See decision of Ransom, Surr., *In re Shipman Estate*, 5 N. Y. Supp. 559, 562, holding that the person who had been appointed referee, an assistant to the Surrogate, could not properly act except upon written consent of the parties; this case was decided in 1889. Prior to that decision there was a decision by Surrogate Rollins in 1885 (*Benedict* v. *Cooper*, 3 Dem. 362), resting upon the decision in the *Estate of Thorn*, 4 Monthly Law Bulletin, 48. The learned Surrogate construed section 2511 in connection with section 90 of the Code which by section 3355 are declared to have been enacted simultaneously. Section 90 is as follows:

Certain assistants not to be appointed referees, receivers or commissioners. (Amended, 1977, 1896.)

"No person holding the office of clerk, deputy clerk, special deputy clerk or assistant in the clerk's office, of a court of record or Surrogate's Court (nor any person holding a salaried office under the city or county government, or who receives money by virtue of an office which is a county charge), within either the counties of New York or Kings shall hereafter be appointed by any court or judge a referee, receiver, or commissioner, ex-

cept by the written consent of all the parties to the action or special proceeding, other than parties in default for failure to appear or to plead." And although certain editions of the Code have an annotation to this section to the effect that the words, "or a Surrogate's Court" are superfluous, yet the decisions substantially hold that the written consent of all parties appearing does away with the effect of section 2509. The court has even gone further, and held (*Benedict* v. *Cooper*, *supra*), that a stenographer does not have such a relation to the Surrogate's Court or office as to bring him within the scope of either section 90 or section 2509. It may therefore be stated to be the existing rule, "that upon written consent the prohibition of section 2509 may be waived," and it is submitted that the decision above cited would be a sufficient authority for a special guardian in a proper case to join in the necessary written consent. See discussion, *post*, under § 2546, part II, chap. III. In probate proceedings in the county of New York on the written consent of all the parties appearing, which may be taken to include infants appearing by special guardian, the Surrogate may appoint a referee to take and report testimony; he is also given power by the same section (2546) in his discretion to direct an assistant to take and report the testimony; neither the referee nor assistant has power to pass upon the issues involved, although either has authority to rule upon the admissibility of evidence, where objection is raised. *Matter of Allemann*, 1 Connoly, 441. Where the Surrogate in his discretion exercises his authority to appoint his assistant to take and report the testimony, the consent of the parties is wholly unnecessary. The object of this amendment was carefully reviewed by Surrogate Ransom in the case just cited in the following language:

"This amendment was prepared by my predecessor, Judge Rollins, and was adopted by the legislature at his instance. Its object was to enable the Surrogate to select an assistant to take such material, competent and relevant evidence, and such only, as pertained to the issues before the court, and thus afford the Surrogate some aid in disposing of the great and constantly increasing volume of business with which the court was being overburdened, and to permit of its being transacted with reasonable expedition. The plain language and import of the amendment show that the selection of the assistant was left to the absolute discretion of the Surrogate. To say, however, that the effect of the enactment is that the person selected is permitted to be chosen to perform the simple clerical service of noting down, without authority to rule thereon, all the evidence which the parties may see fit to produce, with the objection raised thereto, would increase instead of relieving the labor of the court and defeat the very object sought to be accomplished by the amendment. The power now questioned has, with the approval of and in pursuance of the construction given to the provision by Judge Rollins, been invariably exercised by the assistant who was appointed by him to take testimony in probate cases. His construction and practice accord with my own and are warranted by the amendment in question."

§ 53. **Additional clerks.**—Section 2508 provides for the subordinate clerks in a Surrogate's office, and is as follows:

> Each surrogate may appoint, and at pleasure remove, as many clerks for his office, to be paid by the county, as the board of supervisors of his county, or, in the city and county of New York, the board of aldermen, authorize him so to appoint. The board of supervisors or the board of aldermen, as the case requires, must fix the compensation of the clerk or clerks so appointed; and may authorize them, or either of them, to receive, for their or his own use, the legal fees for making copies of any record or paper in the office of the surrogate. A surrogate may appoint, and at pleasure remove, as many additional clerks, to be paid by him, as he thinks proper.
>
> This section was repealed so far as said section relates to the county of New York by Laws of 1884, chap. 530, sec. 11, which contains express authority for appointments in that county.

§ 54. **Stenographers in Surrogates' Courts.**—Provision is made for stenographers in Surrogates' Courts by sections 2512 and 2513, which together cover all the counties in the State, and are as follows:

> § **2512.** *Stenographer for Surrogates' Courts in New York and Kings.*
>
> The surrogate of each of the counties of New York and Kings must appoint, and may, for cause, remove, a stenographer for his court, who is entitled to a salary fixed by law, and to be paid as the salaries of clerks in the surrogate's office are paid. The surrogate of Kings county may appoint, and at pleasure remove, all attendants and messengers, and court officers in his court, who must attend, from day to day, the terms and sittings of the court to preserve order, and to perform whatever services may be required of them by the surrogate. The surrogate of Erie county may appoint, and at pleasure remove, one court officer to attend his court and to perform such duties in respect thereto as the said surrogate may prescribe. Such officer shall possess al the powers of officers designated by sheriffs to attend upon such courts, and shall each receive a salary not to exceed one thousand two hundred dollars a year to be paid in equal monthly payments by the treasurer of the County of Erie.
>
> § **2513.** *Id.; in other counties.*
>
> The surrogate of each county, except New York, Kings, Hamilton, Queens and Richmond, may, in his discretion, appoint, and at pleasure remove, a stenographer for his court, who, except in Sullivan county, shall receive a salary to be fixed by such surrogate, not exceeding in counties having a population less than thirty thousand, eight hundred dollars per annum; in counties having a population of thirty thousand and not more than fifty thousand, not exceeding one thousand dollars per annum, and in counties having a population exceeding fifty thousand, not exceeding twelve hundred dollars per annum, except that in counties in which are located cities of the second class, *or in counties in which are located three cities of the third class, such salary shall not exceed eighteen hundred dollars per annum;* and in any county wholly containing a city of the first class, such salaries shall not exceed two thousand dollars per annum. The population of the several counties shall be determined by the last preceding census. If a regular stenographer is appointed in Sullivan county, his salary shall be five hundred dollars per annum. The board of supervisors shall provide for the payment of such salary in the same manner as the other county expenses are paid. Such stenographer shall deliver to the

surrogate of the county a full copy of all the minutes taken by him; and on the receipt of his fees, not exceeding three cents per folio, a like copy to the party, or each of the parties, to the proceeding in which the minutes were taken, except that in the counties of Onondaga *and Monroe* such fees shall not exceed six cents per folio. When not actually engaged in the discharge of his duties as stenographer, he shall perform such clerical duties in connection with the surrogate's court as the surrogate directs. In counties wherein the surrogate is also county judge, the stenographer so appointed shall be the stenographer of the county court, and shall perform the duties pertaining to a stenographer of the county court without additional compensation. In counties where, for any cause, a regular stenographer for his court has not been appointed, as provided by this section, the surrogate may, in individual proceedings requiring the services of a stenographer, appoint a stenographer who shall be paid a reasonable compensation, certified by the surrogate in every case in which he takes notes of testimony, from the estate or matter in which such services are rendered.

Subd. 2 relates merely to monthly salary in Sullivan County.

It will be seen from these sections, which have not been judicially construed, except in the *Cooper* case above referred to, which was in New York County, that in the counties outside the Greater New York the stenographer, when not actually engaged in the discharge of his duties as stenographer, shall perform such clerical duties in connection with the court as the Surrogate shall direct. The reasoning of the *Cooper* case, therefore, distinguishing a stenographer from clerks or other persons employed, would not be applicable. For purposes of convenience and economy, the practice that has grown up is certainly unobjectionable, and in the absence of independent disqualifications on the part of the persons consented to or designated, the regularity of a reference had thereunder would probably be sustained.

§ 55. Duties and rights of stenographers.

§ **2541.** *Duty of stenographer.*

The stenographer of a surrogate's court must, under the direction of the surrogate, take full stenographic notes of all proceedings, in which oral proofs are given, except where the surrogate otherwise directs. The testimony must be legibly written out at length by him, from his notes; and the minutes thereof, as so written out, must, after being authenticated, as prescribed in the next section, be filed in the surrogate's office.

Stenographers in Surrogates' Courts are subject generally to the same duties as those in other courts of record. Thus it has been held, that, as they are only authorized to charge the prescribed legal rate to counsel for furnishing an official copy of the minutes, an agreement to furnish said copy more expeditiously for an advance in the legal rate cannot be enforced. *M'Carthy* v. *Bonynge,* 12 Daly, 356. See *Wright* v. *Nostrand,* 58 How. Pr. 184; *Guth* v. *Dalton, id.* 289.

See § 3311 as to fees per folio which the stenographer may charge, and as to Surrogate's power to "order that the fees for such record copy be paid out of the estate to which the proceeding relates." And see § 2558,

subd. 3 as to ordering copy of minutes to be furnished to contestant's counsel and the expense charged to the estate, if contest be in good faith.

And a stenographer wrongfully refusing to give a copy of the minutes except on receipt of excessive fees, may be punished for contempt. *Cavanagh* v. *O'Neill*, 20 Misc. 233.

The Surrogate may entertain the application of a stenographer, e. g., who has reported an accounting before a referee, for the payment of his fees, and, in a proper case, direct payment thereof out of the estate. *Matter of Maritch*, 29 Misc. 270. See also *Matter of Hurd*, 6 Misc. 171; *Estate of Maria Smith*, Surr. Decs. 1894, p. 329; *Estate of Philip McDowell*, Surr. Decs. 1896, p. 139; *Matter of Henry W. Andress*, Surr. Decs. 1898, p. 396.

§ 56. **Stipulations as to fees.**—In the *Maritch* case above cited it was held that parties to such a proceeding may stipulate that stenographer's fees be paid out of the estate. One subsequently intervening is not bound by such stipulation, and cannot be made to contribute to such payment. *Ibid.*

Strictly speaking, the representative and other parties are individually liable, *Russell* v. *Lyth*, 66 App. Div. 290; *Bottome* v. *Alberst*, 47 Misc. 665, and the position of the representative is that while he cannot bind the estate by his contract yet, in any reasonable case, the payment of the expenses of a reference will be allowed. But the legal effect of a stipulation that these fees be taxed and paid out of the estate is not so much to foreclose the Surrogate, as to operate as an agreement not to hold the representative individually. See *Bottome* v. *Nealy*, 54 Misc. 258 (App. Term); 124 App. Div. 600. See also *Harry* v. *Hilton*, 11 Abb. N. C. 448; *Kesler* v. *Bell*, 48 Misc. 428.

The attorney's stipulation binds the client. *Bottome* v. *Nealy*, *supra*.

The committee of an incompetent is held to be a "party" in the sense that he may be bound. *Bottome* v. *Alberst*, *supra*.

A special guardian should not join in the stipulation for fees; but he may acquiesce therein, by not opposing, and leave the Surrogate, on taxation, to dispose of the matter.

PART II

CHAPTER I

PROCEEDINGS IN SURROGATES' COURTS

§ 57. **No action in Surrogates' Courts.**—Surrogates have no jurisdiction over civil actions. The Code's distinction is not clearly drawn between actions and special proceedings. It defines civil actions, of which there is but one form (Code Civ. Proc. § 3333; *id.* § 3339) as "an *ordinary* prosecution, in a court of justice, by a party against another party, for the enforcement and protection of a right, or the redress or prevention of a wrong." Any other prosecution of a party for either of such purposes above named is a special proceeding. *Ibid.* § 3334. This appears to make the distinction hinge on the word *ordinary*. But this is not satisfactory in point of clearness. Nothing is gained to that end by saying a special proceeding is an extraordinary or unordinary prosecution. A clearer idea of the difference can be had. A civil action must begin with a summons. By its issuance the court may acquire a divestible jurisdiction for purposes of provisional remedies but by its *service* on the other party the action is said to be commenced. Code Civ. Proc. § 416. Thus the party seeking relief brings the other into a court of justice by his own act alone. This is not true of a special proceeding. The party seeking relief in such a proceeding applies to the court which by *its* citation or by *its* order to show cause brings the other party before it. The only exception is in regard to motions or applications for orders, notice of which may be served by one party upon another, which notice of motion brings the adverse party before the court to oppose the granting of the relief referred to in the notice. But this is more an apparent than a real exception, in that such a proceeding by motion is rarely if ever a primary but only an incidental proceeding, entitled in the primary or original proceeding, and capable of being made only by a party thereto. *Lafferty* v. *Lafferty*, 5 Redf. 326, 329, citing *Foster* v. *Foster*, 7 Paige, 48, 52. Take the case of an application for the appointment of a temporary administrator pending a long contest. Here a citation issued after petition is not necessary. But the motion for an order making such an appointment must be made by a party to the original proceeding, that is, the primary probate proceeding, and notice given to every other party thereto.

§ 58. **Proceedings, how commenced.**—The Code itself expressly provides (§ 2516): "Except in a case where it is otherwise specially prescribed

by law, a special proceeding in a Surrogates' Court must be commenced by the service of a citation issued upon the presentation of a petition. See *Matter of Gregory*, 13 Misc. 363. But, the presentation of the petition operates as does the issuance of the summons, since thereby the court acquires, in the language of the Code (§ 2516) jurisdiction to do any act which may be done before actual service of the citation. There are, of course, proceedings in Surrogates' Courts not begun by citation, but they are not special proceedings. They might be called incidental proceedings, e. g., filing objections to an executor's qualifying. This presents an issue which the Surrogate must try and determine. But his order is not appealable to the Court of Appeals. It is a discretionary determination and not a final order in a special proceeding. See *Matter of Baldwin*, 158 N. Y. 713.

But so far as any provisions of the Code are concerned which limit the time for the commencement of a special proceeding, the presentation of the petition and not the service of the citation commences the proceeding, provided the citation is properly served or its publication duly commenced within sixty days after it is issued.

> The presentation of a petition is deemed the *commencement* of a special proceeding, within the meaning of any provision of this act, which limits the time for the commencement thereof. But, in order to entitle the petitioner to the benefit of this section, a citation issued upon the presentation of the petition, must, within sixty days thereafter, be served, as prescribed in section 2520 of this act, upon the adverse party, or upon one or two or more adverse parties, who are jointly liable, or otherwise united in interest; or, within the same time, the first publication thereof must be made, pursuant to an order made as prescribed in section 2522 of this act. **§ 2517, Code Civil Proc.**

Thus, where the statute limits the right of petition for revocation of probate of a will to one year the petition need only be presented on the last day. The citation must be served within sixty days thereafter (*Pryer* v. *Clapp*, 1 Dem. 387, 389, where the petition was filed in time, that is, within a year after the recording of the decree admitting the will to probate, but the citation though promptly issued was not served until 100 days later. Held that the Surrogate thereby lost his jurisdiction) or the petitioner loses the benefit of section 2517. By "thereafter" is meant after the issuing of the citation which the Surrogate is directed to issue upon the presentation of the petition. Should this citation prove defective or there be a failure to serve all the necessary parties he may issue a supplemental citation, after and in place of the other. If that is served or publication commenced within sixty days after the supplemental citation was issued, the proceeding will be regular. *Matter of Will of Bradley*, 70 Hun, 104, 110. This case cites *Matter of Will of Gouraud*, 95 N. Y. 256, and professes to overrule the case of *Pryer* v. *Clapp*, above cited. There is, however, a distinction, for in that case it appears that the citation was not served within sixty days of its issuance and that the party had to suffer for his own lack of due vigilance, while in the two cases of *Bradley*

and *Gourand* the citation appears to have been served properly, but there was delay in issuing it by the Surrogate, for which delay the petitioner could not well be made answerable. This case further overrules *Fountain* v. *Carter*, 2 Dem. 313, which held that section 2517 gave the Surrogate no power to extend by order the sixty days referred to. It further overrules *In re Bonnett*, 1 Connoly, 294. The *Gourand* case was decided before section 2517 was enacted. So the authority of the *Bradley* case rests not on it but on the provisions of section 2481 of the Code under which the Surrogate has power to issue a supplemental citation, which power is by such decision made available in this connection to extend the time limited by statute within which service should be made.

§ 59. **The petition** in a special proceeding corresponds to the complaint in an action. It contains a plain and concise statement of the facts constituting the claim of the petitioner. The court allows oral petitions, but written pleadings may be required. Thus section 2533 is as follows:

> The surrogate may, at any time, require a party to file a written petition or answer, containing a plain and concise statement of the facts constituting his claim, objection, or defence, and a demand of the decree, order, or other relief, to which he supposes himself to be entitled. The surrogate may require the petition or answer to be verified, and a copy thereof to be served upon any other person interested. A party who fails to comply with such a requirement may be treated as a party in default. Except where such a requirement is made, or in case where a written petition is expressly required by this act, a petition, or the answer thereto, may be presented orally; in which case, the substance thereof must be entered in the records of the courts. § **2533, Code Civil Proc.**

As a matter of ordinary practice, and as a regular rule in the county of New York, the petition is always in writing, and required to be verified. Rule 14, Surr. Ct. Rules. In the absence of a standing rule of the Surrogate's Court of any county or of the requirement of the Surrogate as provided for in section 2533 an oral petition is sufficient for jurisdictional purposes, only it is required that the substance thereof must be entered in the records of the court. Except in a case of urgency it is suggested that the careful practitioner, even where oral pleadings are allowed, will reduce his to writing. *Van Vleck* v. *Burroughs*, 6 Barb. 341.

Where a written pleading is required by the Surrogate, a failure to comply with such requirement may be treated as a default; as may also a failure to comply with a further requirement that it be verified, and a copy served on any other party in interest.

§ 60. **Formal requisites of petition.**—The petition, when made in writing, should conform to the fundamental laws of pleading applicable to complaints. It should be clear and concise. Its allegations should be in form stated to be made by the petitioner, and unless stated to be made on information and belief they will be regarded as being made on the knowledge of the petitioner. Code Civ. Proc. § 524.

A petition must not contain inconsistent claims; that is to say, improp-

erly unite causes of action. See *Cocks* v. *Barlow*, 5 Redf. 406, where petitioner asked to have executors removed for misconduct and also asked that they be directed to invest certain funds as directed in the will. So there must not be a variance between citation and petition as to relief demanded. Such variance can be cured by amendment. *Spencer* v. *Popham*, 5 Redf. 425.

The tendency of the courts is to be liberal in allowing reasonable amendments. *Matter of Rubens*, 117 App. Div. 523. The object is to simplify and clarify the issues to be determined. But arbitrary amendments without leave, or those which change the nature of a proceeding to which parties have been brought in by citation are discountenanced. *Matter of Sheldon*, 118 App. Div. 488. In this case the original petition was for letters c. t. a. It failed to show petitioner's nominee's right to letters, or whether any other had prior right. Objections were accordingly filed. Thereupon petitioner filed an "amended petition," on which, however, no citation issued. A decree of the Surrogate based on this "amended" petition was reversed on the ground the only petition properly in court was insufficient to sustain the decree made.

The rules for verification are the same as for pleadings in civil actions. Substantial compliance with the Code requirements is sufficient. Thus a petition where in the verification the affiant says, "she knows the contents thereof and that the same are true," is good. The Court of Appeals held this to be equivalent to saying that "they are true to her knowledge." *Matter of Macauley*, 94 N. Y. 574, 577.

> The provisions of sections 523, 524, 525 and 526 of this act apply to a verification made pursuant to this chapter, and to the petition or other paper so verified, where they can be so applied in substance, without regard to the form of the proceeding. **§ 2534, Code Civil Proc.**

Thus, where a party to a proceeding in the Surrogate's Court is not within the county where the attorney resides (or, if the attorney is a nonresident, the county where he has his office), the verification may be made under section 525, by the attorney. *Moorhouse* v. *Hutchinson*, 2 Dem. 429, 434. When so made it must conform to the requirements of section 526, that is, it must set forth the grounds of his belief, as to all matters not stated upon knowledge, and the reason why it is not made by the party. When the attorney in verifying a pleading swears that all the allegations are within his personal knowledge, it has been held that his failure to assign a reason why the party did not verify it was merely an irregularity. *Betts* v. *Krindell*, 20 Abb. N. C. 1; *Ross* v. *Longmuir*, 15 Abb. 326. Surrogate Rollins held (*Moorhouse* v. *Hutchinson*, *supra*), that where "the attorney of record who signs the petition alleges in his affidavit of verification that the petition is true, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true, and also swears that he verifies the petition because of the absence of the petitioner from the State, and declares that the grounds

of his belief in the truth of the averments in the petition are the records of the Surrogate's Court, letters of the parties concerned, and conversations with them, it is to be held a substantial compliance with the statute."

§ 61. **The citation.**—Instead of preceding the petition, as the summons does the complaint, the citation is prayed to be issued in the petition. Upon the presentation, then, of the petition the Surrogate issues a citation. This citation is a mandate of the court directed to all the necessary parties to the proceeding requiring them to appear and show cause why the relief demanded by petitioner, which should be specified therein, should not be granted. The relief so described should be identical with that claimed in the petition. Should it inadvertently appear otherwise, application should be made to have it amended so as to conform to the petition or *vice versa* as the facts may require, which amendment the Surrogate has power to allow, *Matter of Soule*, 6 Dem. 137, 140; *Spencer* v. *Popham*, 5 Redf. 425, 428, under section 2538 which reads: "Except where a contrary intent is expressed in, or plainly implied from the context of, a provision of this chapter, the following portions of this act; to wit: title first" (i. e., §§ 721–730, entitled "Mistakes, omissions, defects and irregularities") "and articles third and fourth of title sixth of chapter eighth" (i. e., §§ 796–809, entitled "Service of papers") ". . . . apply to Surrogates' Courts and to the proceedings therein, so far as they can be applied to the substance and subject-matter of a proceeding, without regard to its form." It is indeed his duty to disregard any error or defect in proceedings which does not affect the substantial rights of parties.

> A citation must be made returnable upon a day certain, designated therein, not more than four months after the date thereof; and must specify whose estate or what subject-matter is in question. The names of all the persons to be cited, as far as they can be ascertained, must be contained in the citation. Where the name, or part of the name, of either of them cannot be ascertained, that fact must be stated in the citation. § **2519, Code Civil Proc.**

§ 62. **When names are unknown.**—In proceedings in Surrogates' Courts, the names of one or some of the parties required to be cited may at the time be wholly or partly unknown to the petitioner. In fact it is sometimes prescribed that a petitioner must pray that creditors, or next of kin or heirs, or devisees, or other persons constituting a class, be cited in the particular proceeding. When this is the case, which will be discussed further on, the Code provides (§ 2518) that "the petitioner must set forth in an affidavit (a petition duly verified, is deemed an affidavit within the meaning of this section, *ibid.*)," the names of each of them, unless the name or part of the name, of one or more of them cannot, after diligent inquiry, be ascertained by him; in which case that fact must be set forth, and the Surrogate must thereupon inquire into the matter. For the purpose of the inquiry, he may, in his discretion, issue a subpœna, requiring any person to attend before him to testify respecting the matter. If he is satisfied, upon the allegations of the petitioner, or after making the inquiry

that the name of one or more of the persons to be cited, cannot be ascertained with reasonable diligence, the citation may be directed to that person, or those persons, *by a general designation*, showing his, her or their connection with the decedent, or interest in the property or matter in question; or otherwise sufficiently identifying the person or persons intended. A citation, thus directed, has the same force and effect, as if it was directed to the person or persons intended, by their names; and where the person or persons so intended are duly cited, in any manner prescribed by law, the decree binds them as if they were named therein. A petition, duly verified, is deemed an affidavit within the meaning of this section.

§ 63. **General formalties of citation.**—It is the duty of the practitioner to see to it that all necessary names and facts are contained in the citation. This he does by means of the petition, which, when verified, serves as the affidavit above required in cases of unknown names of necessary parties, and which contains the statement of the petitioners' claim. But apart from these matters of substance and from the requirements referred to in § 3 (*supra*), there are still further rules as to form, which must be observed by the Surrogate issuing the citation.

And first, technically, the citation issues after the entry of an order, made on the prayer of the petitioner that citation issue, directing its issue. Practically, few Surrogates insist on such procedure. The practice in New York County is to issue the citation forthwith, and later to enter an order in a regular book kept for the purpose. This practice of itself is evidence of the inutility of the order. See opinion of Surrogate Coffin in *In re Merritt's Will*, 5 Dem. 544, "Although perhaps not strictly necessary an order for the issuing of the citation is usually entered." The issuing of the citation is, after all, not the act of the party, or of his attorney, but the very act of the Surrogate himself, and we fail to see the propriety or purpose of requiring that officer, to whom the prayer of the petitioner is addressed, to make a formal order directing himself to issue a citation when the Code is practically a standing order to him to issue such citation upon the presentation of the petition.

And, secondly, the citation is prepared by the Surrogate, or by his clerk, and no one else, not even the petitioner's attorney may insert anything therein unless so directed to do by the Surrogate, when it becomes his own act. Thus where, after the issuance of a citation, it was discovered that a necessary party was not named therein, and his name was thereupon inserted, but not by the clerk who had prepared the citation, it was held that the Surrogate acquired no jurisdiction over such party. *Boerum* v. *Betts*, 1 Dem. 471.

Thirdly. The citation runs in the name of the People, is addressed to the parties required to be cited, by name, or, as before explained, as a class, for example, "to all persons interested in the estate of James Brown, late of the city of New York, deceased, as creditors;" and requires their personal appearance before the Surrogate who issues the mandate (Code Civ.

Proc. § 2515) "A citation or other mandate of the Surrogate's Court must, except where it is otherwise specially prescribed by law, be made returnable before the Surrogate from whose court it was issued, [and may be served or executed in any county]" in his court on a day certain not later than four months from its date, then and there to show cause why the particular relief prayed in the petition should not be granted.

It is now customary to add a clause, whenever any of the persons cited are or may be infants, requiring them to appear by their guardians, if they have any, and if not, to appear and ask for the appointment of one *ad litem*, and further notifying such infants that upon their failure so to do, on or before the return day the Surrogate himself will appoint one to protect such infant's interest. See *Price* v. *Fenn*, 3 Dem. 341, 345. The citation must be attested by the seal of the Surrogate's Court and signed by the Surrogate himself or the clerk of the court.

§ 64. **Form of petition, order and citation.**

Petition for Citation; General Form.

Surrogate's Court,
County of

Title. }

To the Surrogate's Court of the county of

The petition of residing at in and county of respectfully shows:

I. That your petitioner is (*state in what relation the petitioner stood to the decedent*), deceased, and as such is interested in the above-entitled proceeding.

Note. Or state whatever facts are necessary to entitle the petitioner to the citation prayed for.

II. That letters testamentary (*note*) on the estate of deceased were granted by the Surrogate of the county of New York to on the day of 19 .

III. That more than has elapsed since his appointment, and the said has (*state briefly what the party to be cited has done or failed to do*).

Your petitioner therefore prays that a citation may be issued requiring the said to appear in this court, and show cause why he should not (*state briefly the relief desired*).

(Signature)
Petitioner.

Surrogate's Court
Caption.

Present:
Hon.
Surrogate.

Order for Citation.

Title. }

On reading and filing the petition of praying for (*describe relief asked briefly*).

It is Ordered, that a citation issue to (*give names*

of persons mentioned in petition), mentioned in said petition (*add, if necessary,* being all the persons interested, *or* all the heirs and next of kin, *or whatever description will designate the persons or members of a class who must be cited*) returnable the day of 19 at o'clock in the forenoon requiring them and each of them then and there to show cause why the relief prayed for in said petition should not be granted. (*Where there are infants, add* and also that said citation contain a notice to said parties who are infants, to then and there show cause why a special guardian should not be appointed by the Surrogate to appear for them and protect their interests in the above-entitled proceeding.)

Surrogate.

Citation; General Form.

THE PEOPLE OF THE STATE OF NEW YORK,
BY THE GRACE OF GOD, FREE AND INDEPENDENT.

To

SEND GREETING:

You and each of you are hereby cited and required personally to be and appear before our Surrogate of the County of New York, at the Surrogate's Court of said County, held at the New York County Court House in the City of New York, on the day of at half-past ten o'clock in the forenoon of that day, then and there to

and such of you as are hereby cited, as are under the age of twenty-one years, are required to appear by your guardian, if you have one, or if you have none, to appear and apply for one to be appointed, or in the event of your neglect or failure to do so, a guardian will be appointed by the Surrogate to represent and act for you in the proceeding.

In Testimony Whereof, We have caused the Seal of the Surrogate's Court of the said County of New York to be hereunto affixed.

Witness, Hon. a Surrogate of our said County, at the City of New York, the day of in the year of our Lord one thousand nine hundred and

{ L. S. }

Clerk of the Surrogate's Court.

Surrogate's Court,
County of New York.

In the matter of the estate of Deceased. } Proof of service of citation. (*Note.*)

State of }
County of }

.....

of being duly sworn, says that he is over the age of twenty-one years; that he made personal service of the within

Note. The citation, with sworn proof of service, or with admission duly acknowledged and certified in like manner as a deed to be recorded in the County, must be returned to the

Clerk of the Surrogate's Court before one o'clock P. M. on the day preceding the return day. Rule 2.

Note. In New York County, unless the proceeding be one excepted by Rule 3 (see § 866, *post*), add, and of the petition (or other papers, describing them) upon which it was issued.

citation in the above-entitled special proceeding on the persons named below, whom deponent knew to be the persons mentioned and described in said citation, by delivering to and leaving with each of them personally a true copy of said citation (*note*) as follows: On

NAME	PLACE	DATE OF SERVICE

(*and where there are infants, add*)

And deponent further says that the above named

are infants under the age of fourteen years, and that he served said citation on said infants personally and also by delivering to and leaving with the of said infant with whom he resides a copy, thereof on the day of 190 at N. Y.

Sworn to before me this
day of 190

Affidavit of Mailing Citation and Order under § 2524.

Surrogate's Court,
Erie County, New York.

In the matter of
Deceased.

State of New York,
County of Erie, } ss.

.....of the of in the said County of Erie, being duly sworn says that he is of the age of eighteen years and upwards, that on the day of 190 he deposited in the Post-Office in the of in said County of Erie, copies of the citation issued in the above-entitled proceeding, and of the order for the publication thereof, bearing date the day of 190 made by the HON. LOUIS W. MARCUS, as Surrogate of said County of Erie in said proceeding, each contained in a securely closed postpaid wrapper directed to the person to be served, at the place specified in said order, to wit:

NAMES.	ADDRESSES.

And deponent further says, that each wrapper contained a copy of said citation and of said order, and that copies of said citation and order are hereto annexed.

Sworn to before me this
day of 190

§ 64*a*. **Where person required as a party is unknown.**—The Code, in its provisions regarding the summons, covers two contingencies as to parties required to be therein named: The first, where the name is unknown, and a fictitious name has to be used; the second, where the person himself

is unknown, when he must be designated as unknown and also described in a manner tending to identify him. Code Civ. Proc. § 451. There is a similar distinction in regard to citations. Section 2518, already quoted, covers cases where there is knowledge by petitioner that persons exist as creditors, or as legatees, or as next of kin, but there is ignorance of their names, in whole or in part. They must be brought in, for section 2518 says they are "necessary" parties. And section 2523 also refers to persons unknown to petitioner, such as one or more unknown creditors, next of kin, legatees, heirs, devisees, etc., but thought to exist as members of a class; such persons must also be designated by a description tending to identify them, as, for example, by including them in a class. To make this clearer, suppose petitioner knows that his intestate had a brother known to be deceased. He may know that such brother left issue, but be ignorant of their names, or he may not know whether he left any issue at all, or their number if any.

If the description be comprehensive and sufficient all persons included therein are precluded by the decree as completely as if duly named in the citation. § 2518, and see *Matter of Ellis*, 22 N. Y. St. Rep. 77.

It seems if the petitioner, for example, decedent's widow, shows to the satisfaction of the Surrogate that testator left no heirs nor next of kin, the issuance of a citation may be dispensed with. See *Bailey* v. *Stewart*, 2 Redf. 212.

§ 65. **Practice as to return day.**—If practicable, the petition should state the ages and places of residence of the parties in order to guide the court in fixing the return day of the citation. So long as it is fixed within the statutory limits the Surrogate may consult his convenience and that of the petitioner in fixing it. *Matter of Washburn*, 12 Misc. 242. If it appear that all of the persons to be cited reside in the county of the Surrogate or an adjoining county, a return day will be fixed so that the citation may be served at least eight days prior thereto.

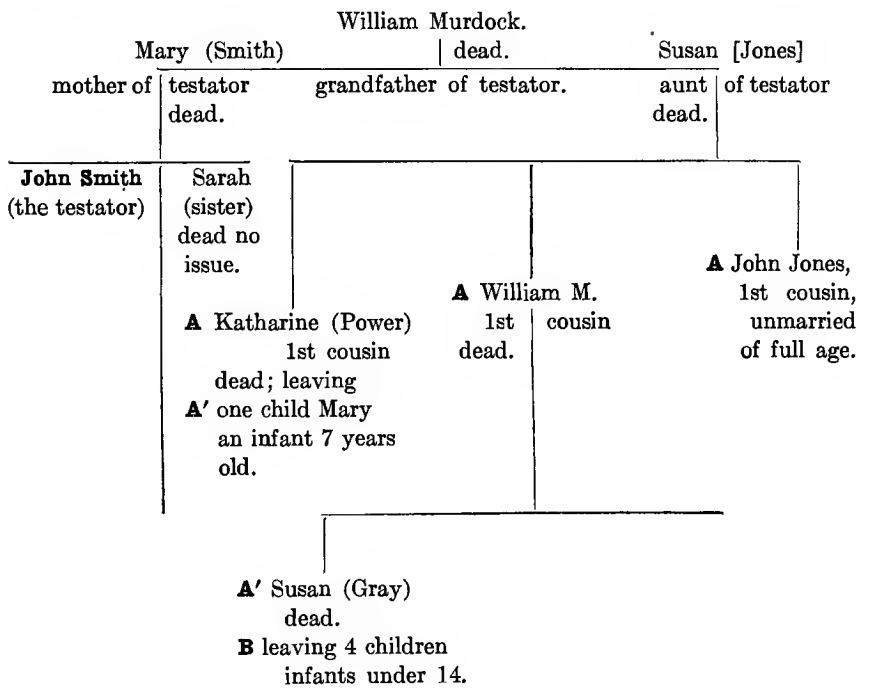
> A citation must be served, if within the county of the surrogate, or an adjoining county, at least eight days before the return day thereof; if in any other county, at least fifteen days before the return day; unless, in either case, the person served, being an adult, and not incompetent, assents in writing to a service within a shorter time. Any person, although a party to the special proceeding, may serve a citation. § **2520, Code Civil Proc.**, in part.

Service must be made so as to give eight days' notice and not to be served on the eighth day prior. The way to compute is to count eight days *excluding* the day of service. See *Small* v. *Edrick*, 5 Wend. 138; *Matter of Carhart*, 2 Dem. 627. If the person to be cited reside in any other county of the State, the return day will be fixed so that the service may be made at least fifteen days before the return day; and if out of the State, such a return day must be fixed as to enable personal service thereof to be made at least thirty days before the return day, or, if service be necessary by publication the return day must be fixed at least six weeks

off. See *In re Merritt's Will*, 5 Dem. 544; *Matter of Koch*, 19 Civ. Pro. Rep. 165. But it is not necessary that the sixth publication be complete eight days before the return day. *Matter of Denton*, 86 App. Div. 358.

The allegations of the petition are the only guide the Surrogate has by which to fix the return day. If it contains nothing to indicate this he will require an affidavit setting forth the facts for that purpose.

It will be found to be an aid to the clerk of the court particularly in probate proceedings, if petitioner will prepare and file with his petition a chart, or family tree, showing all the known relatives of decedent. Where the will relates to personal property only, the next of kin need only be shown. Where it relates to real property also the heirs at law should be shown. Thus:



Thus: if John Smith's will is one of real property as well as of personal, the children in class B and the child in class A′ are *entitled to be made* parties; whereas if it be a will of personal property alone only class A would be entitled to citation.

§ 66. **Rules for service of citation.**—Rule 3 of the Surrogate's Court of the county of New York lays down this preliminary requisite: "No mandate issued out of this court shall be deemed duly served, unless copies of the petition or other papers upon which it shall be issued, and upon which relief is sought, shall be served with it, *except the following:*

"1. Citation to attend probate.

"2. Citation to revoke probate.

"3. Citation on application for administration.

"4. Citation for intermediate account.

"5. Citation to attend judicial settlement.

"6. Citation to temporary administrator to account.

"7. Citation to principal in a bond to give new sureties in place of sureties who apply to be released.

"8. Order to temporary administrator to make deposit.

"9. Order to executor to appear and qualify.

"10. Order requiring the executor or administrator to file inventory."

Bearing this requirement in mind the next point is *mode of service.* This may be in one of three ways: personal service, substituted service and service by publication. The mode may depend upon the residence of the party, his minority or his lack of legal capacity.

§ 67. **Service of citation within the State.**

> Except where special provision is otherwise made by law, service of a citation, within the state, must be made upon an adult person, or an infant of the age of fourteen years or upwards, by delivering a copy thereof to the person to be served, or by leaving a copy at his residence, or the place where he sojourns, with a person of suitable age and discretion, under such circumstances, that the surrogate has good reason to believe that the copy came to his knowledge, in time for him to attend at the return day. **§ 2520, Code Civil Proc.,** in part.

" Where it appears by affidavit to the satisfaction of the Surrogate from whose court a citation issued that proper and diligent effort had been made to serve it upon a resident of the State, as prescribed in the last section (§ 2520), and that the person to be served cannot be found, or, if found, that he evades service, so that it cannot be made, the Surrogate may make an order directing that service thereof be made, as prescribed in section 436 of the Code: "

> The order must direct that the serving of the summons be made by leaving a copy thereof, and of the order at the residence of the defendant, with a person of proper age, if upon reasonable application, admittance can be obtained, and such a person found who will receive it; or, if admittance cannot be so obtained, nor such a person be found, by affixing the same to the outer or other door of the defendant's residence, and by depositing another copy thereof properly enclosed in a postpaid wrapper, addressed to him, at his place of residence, in the post-office at the place where he resides;

" and the provisions of that section and of section 437, of this act "

> The order and the papers upon which it was granted, must be filed, and the service must be made, within ten days after the order is granted: otherwise the order becomes inoperative. On filing an affidavit, showing service according to the order, the summons is deemed served, and the same proceedings may be taken thereupon, as if it had been served by publication. . . .

" relating to the service of a summons, apply to the service of a 'citation' made pursuant to such an order." Code Civ. Proc. § 2521. This section confers the same authority upon the Surrogate as is possessed by a judge of

a court of record. *Scharmann* v. *Schoell*, 38 App. Div. 528. Therefore, upon proof of service of citation as provided in this section the court acquires *jurisdiction of the person*, and may enter an effectual order. The order so made, if not complied with, will be a sufficient basis for an action against the surety on the official bond of the disobedient representative. *Ibid.*, citing *Hunt* v. *Hunt*, 72 N. Y. 217; *Burton* v. *Burton*, 45 Hun, 68; *Continental Nat. Bank* v. *Thurber*, 74 Hun, 632.

§ 68. **When service without the State or by publication.**—In any one of the four following cases the Surrogate who has issued the citation may make an order directing the citation to be served without the State or by publication:

1. Where it is to be served upon a foreign corporation, or upon a person who is not a resident of the state.
2. Where the person to be served, being a resident of the state, has departed therefrom, with intent to defraud his creditors, or to avoid the service of process.
3. Where the person to be served, whether an adult or an infant, is a resident of the state, but is temporarily absent therefrom.
4. Where the person to be served is a resident of the state, or a domestic corporation, and an attempt was made to serve a citation, issued from the same surrogate's court, upon the presentation of the same petition, before the expiration of the limitation applicable to the enforcement of the claim set forth in the petition, as fixed in chapter fourth of this act; and the limitation would have expired, within sixty days next preceding the application for the order, if the time had not been extended by the attempt to serve the citation. **§ 2522, Code Civil Proc.**

§ 69. **When name or residence unknown.**—Service can also be made pursuant to an order directing the service of a citation without the State, or by publication in the two following cases:

1. Upon a party, to whom a citation is directed, either by his full name or part of his name, where the surrogate is satisfied, by affidavit, that the residence of that party cannot, after diligent inquiry, be ascertained by the petitioner.
2. Upon one or more unknown creditors, next of kin, legatees, heirs, devisees, or other persons included in a class, to whom a citation has been directed, designating them by a general description, as prescribed in this article. § **2523, Code Civil Proc.**

It will be noted the Surrogate is not bound to make an order for service by publication merely because there are non-residents. These sections give him discretionary power to do so. *Matter of Washburn*, 12 Misc. 242.

But it may be to petitioner's interest to ask for it. For example, in *Matter of Killan*, 172 N. Y. 547, rev'g 66 App. Div. 312, the settlement of an account was held void against non-cited unknown persons interested, who might have been made parties by proceeding under the foregoing sections.

§ 70. **Form of order.**

Surrogate's Court
Caption.

Present:
Hon.
Surrogate.

Order for Service of Citation under §§ 2522 and 2523.

Title. }
}

Upon filing the verified petition of the executor named in the will of late of the City of New York, deceased, by which the petitioner has made proof to my satisfaction that

are legatees or next of kin (*or designate their relation to decedent*) of said deceased, and that they are not residents of this State, and that personal service of the citation herein, cannot with due diligence be made upon them within the State; (and by which said petition, the petitioner has also made proof to my satisfaction that there are other legatees or next of kin of said deceased, whose names and places of residence are unknown, and cannot after diligent inquiry be ascertained by the petitioner), (and also that

are legatees, or next of kin of said deceased, and that their places of residence are unknown, and cannot after diligent inquiry be ascertained by the petitioner).

Now, on motion of of counsel for the said petitioner, Ordered: That service of the citation in the above-entitled matter, upon aforesaid persons, viz.

be made by publication thereof in two newspapers, to wit: in the published in the City of New York, and in the once a week for six successive weeks; or, at the option of the petitioner, by delivering a copy of the citation to the above-named person, in person without the State;

And it is further Ordered and Directed, That on or before the day of the first publication, the petitioner deposit in the post-office at the City of New York sets of a copy of the citation and of this order, each set contained in a securely closed postpaid wrapper, directed to the following persons respectively, at the places designated below:

(And it is further Ordered, That service of citation in the above-entitled matter upon those persons whose names and places of residence are unknown, and cannot after diligent inquiry be ascertained by the petitioner herein, and also upon whose places of residence are unknown, and cannot after diligent inquiry be ascertained by the petitioner herein, be made by publication thereof in two newspapers, to wit: in the published in the City of New York, and in the

once a week for six successive weeks; or, at the option of the petitioner, by delivering to and leaving with without the State, a true copy of the said citation.

And I being satisfied by the said petition that the petitioner cannot with reasonable diligence ascertain a place or places where the said legatees or next of kin would probably receive matter transmitted through the post-office, hereby dispense with the deposit of any papers therein.)

Surrogate's Court,
County of
Present:

Surrogate.

Short Form of order for Citation and for Service of same by Publication combined.

In the matter of Proving the Last Will and Testament of

Deceased.

On reading and filling the petition of

propounding the Last Will and Testament of late of the of in the County of Westchester, deceased, for probate:

It is Ordered, that a citation issue to the proper persons, pursuant to the prayer of said petition, requiring them to appear in this court, on the day of 190 at o'clock in the forenoon of that day, at the Surrogate's office in the of to attend the probate of said will.

It is further Ordered, that service of said citation upon the person hereinafter named of said decedent non-resident of this State, be made by publication thereof in the two newspapers published in said County, called

not less than once in each of six successive weeks; or, at the option of the petitioner by delivering a copy of the said citation, without the State, to each of said persons in person, at least days before the return day thereof.

And it is further Ordered, that on or before the day of the first publication of said citation, the petitioner deposit in the post-office at a copy of said citation and this order, contained in a securely closed postpaid wrapper, directed to the following named person at the place below named and set opposite name to wit:

§ 71. **How to serve by publication.**—The provisions of the Code contained in § 2524, as amended by chapter 606 of Laws of 1899, now read as follows (the amendment of 1899 is italicized):

Where an order, directing the service of a citation without the state, or by

publication, is made as prescribed in either of the last two sections, the party applying therefor must produce proof, by affidavit or otherwise, to the satisfaction of the surrogate, that the case is one of those specified in those sections. The order must direct that service of the citation, upon the person named or described in the order, be made by publication of the citation in two newspapers, designated as prescribed in this article, *unless from the petition it appears that the estate amounts to less than two thousand dollars, in which case only one newspaper shall be designated,* for a specified time, which the surrogate deems reasonable, not less than once in each of six successive weeks; or, at the option of the petitioner, by delivering a copy of the citation, without the state, to each person so named or described, in person, and if the person to be served is an infant under the age of fourteen years, also to the person with whom he is sojourning, or, if the service is made upon a corporation, to an officer thereof specified in section four hundred and thirty-one or four hundred and thirty-two of this act. It must also contain either a direction that on or before the day of the first publication, the petitioner deposit, in a specified post-office, a copy of the citation and of the order, contained in a securely closed postpaid wrapper, directed to the person to be served, at a place specified in the order, and if the person to be served is an infant under the age of fourteen years, a further copy, likewise contained in a securely closed postpaid wrapper, directed to the person with whom such infant is sojourning or, a statement that the surrogate, being satisfied, by the affidavit upon which the order was granted, that the petitioner cannot, with reasonable diligence, ascertain a place or places where the person to be served would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein. **§ 2524, Code Civil Proc.**

§ 72. **What mode of service depends on.**—The foregoing section shows clearly when the practitioner may resort to substituted service or service by publication. And, it may be added, in any of the six cases therein set forth the mode of service is thereby covered. But this all relates to adults and infants over fourteen years of age. In the cases of infants under fourteen years and of persons without legal capacity, such as habitual drunkards, idiots, lunatics, etc., there are additional requirements to be observed, which may also in the discretion of the Surrogate be extended to the case of an infant of fourteen years and upwards. No infant is bound by a decree in a proceeding to which he was not duly made a party. Nor does the decree foreclose the Surrogate himself who made it if and when the infant asserts rights sought to be affected by it.

This is the langauge of the Code in this regard:

Where a person, cited or to be cited, is an infant of the age of fourteen years or upwards, or where the surrogate has, in his opinion, reasonable grounds to believe that a person, cited or to be cited, is an habitual drunkard, or for any cause mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affiars, the surrogate *may,* in his discretion (see *Matter of Stephen,* 2 N. Y. Supp. 36), with or without an application therefor, and in the interest of that person, make an order requiring that a copy of the citation be delivered, in behalf of that person, to

> a person designated in the order; and that service of the citation shall not be deemed complete until such delivery. Where the person, cited or to be cited, is an infant *under* the age of fourteen years, or a person judicially declared to be incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness, and the surrogate has reasonable ground to believe that the interest of the person, to whom a copy of the citation was delivered, in behalf of the infant or incompetent person, is adverse to that of the infant or incompetent person, or that, for any reason, he is not a fit person to protect the latter's rights, the surrogate may likewise make such an order; and as a part thereof, or by a separate order, made in like manner at any stage of the proceedings, he may appoint a special guardian *ad litem* to conduct the proceedings in behalf of the incompetent person, to the exclusion of the committee, and with the same powers, and subject to the same liabilities, as a committee of the property. § **2527, Code Civil Proc.**

This section it will at once be seen, provides for an extra service, in addition to the regular service required to be made on infants or incompetents. *Matter of Cartwright*, 3 Dem. 13. Such regular service is made precisely as service of a summons is made in analogous cases. See Code Civ. Proc. § 2526.

> Service of a citation must be made upon an infant under the age of fourteen years, a person judicially declared to be incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, or a corporation, in the manner prescribed for personal service of a summons upon such a person, or upon a corporation, in article first of title first of chapter fifth of this act. **§ 2526, Code Civil Proc.**

Service upon a person *non compos* not in compliance with this section will be good ground for reopening the decree entered if the interests of the incompetent person so require (*Matter of Toulon*, 66 Hun, 199), and the same is true as to an infant. *Potter* v. *Ogden*, 136 N. Y. 384.

§ 73. **Who may serve the citation.**—Any person, even though a party to the special proceeding, may serve a citation. Code Civ. Proc. § 2520. Thus a service by an executor or legatee has been upheld. *Wetmore* v. *Parker*, 7 Lansing, 121, affirmed in 52 N. Y. 450, 456. But Rule 18 of the General Rules of Practice is undoubtedly applicable, to wit; that no service shall be made by any person who is less than eighteen years of age.

§ 74. **Time of service.**—The next requirement is *time* within which service of citation must be made. See concise discussion by Coffin, Surr., in *Matter of Porter*, 1 Misc. 489. The object of the citation is to apprise the person cited of the claim which the petitioner makes in time sufficient to enable him to prepare to meet it. What is sufficient or reasonable time is now fixed by law. And the time so limited varies with the mode and place of service.

1. If personal service is made in the Surrogate's county, or an adjoining county, it must be made at least eight days before the return day named in the citation. Code Civ. Proc. § 2530.

2. If personal service is made in any other county, it must be made at least fifteen days before such return day. *Ibid. Matter of Washburn,* 12 Misc. 242, overruling *Matter of Porter,* 1 Misc. 489.

3. If service is made by delivering a copy of the citation without the State, pursuant to the order in such case required, it must be made at least thirty days before such return day provided it is made within the United States, and at least forty days before if made without the United States. *Matter of Merritt,* 5 Dem. 544; Code Civ. Proc. § 2525.

4. If service is made by publication the notice required is fixed by the order directing publication. For that order requires publication not less than once in each of six successive weeks and must contain a direction that on or before the day of the first publication the petitioner deposit in a specified post office a copy of the citation and of the order addressed to the party cited. This cannot be dispensed with unless the Surrogate is satisfied by affidavit that the petitioner cannot with reasonable diligence ascertain a place to which to address such a copy. Code Civ. Proc. § 2524. We can therefore say that in the case of service by publication the time required is six weeks. See *Estate of Koch,* 12 N. Y. Supp. 94. See *Matter of Denton,* 86 App. Div. 358. In 40 Misc. 326, the court below pointed out that § 441 did not apply; for a summons requires defendant to appear in so many days, whereas the return day is a fixed date.

§ 75. **Proof of service.**—If personal service has been made, proof of such service is made by the affidavit of the person who delivered the citation; and such affidavit should state concisely the important facts, that deponent is over eighteen years of age, that on a given day (not "on or about" a day named, which will be fatally defective, *Smythe* v. *Rowe,* 4 Law Bull. 60) he served the within, or annexed, citation on the person to whom it was directed, whom he knew to be such person; then stating mode of service, as, for example, where a copy of the petition is required to be served with it "by delivering to and leaving with him a copy thereof together with a copy of the petition" on which the same was issued. Where the party served is an infant or incompetent, the additional service required must be alleged. Proof of the publication of the citation must be made by the affidavit of the printer or publisher, or his foreman, or principal clerk. Proof of deposit in the post office, of a paper required to be deposited must be made by the affidavit of the person who deposited it. Code Civ. Proc. §§ 2524, 444. See also § 2532, Code Civil Proc.

§ 76. **Appearance.**

> In a surrogate's court, a party of full age may, unless he has been judicially declared to be incompetent to manage his affairs, prosecute or defend a special proceeding, in person or by attorney regularly admitted to practice in the courts of record, at his election, except in a proceeding to punish him for contempt, or where he is required to appear in person, by special provision of law, or by a special order of the surrogate. . . . The appearance of a party, against whom a citation has been issued, has the same effect, as the ap-

pearance of a defendant, in an action brought in the Supreme Court. **§ 2528, Code Civil Proc.,** in part.

We omit here portion as to waiver of issuance and service of citation.

See also Laws of 1847, chap. 470, § 46, and repeal of same by Laws of 1880, chap. 245, § 1, subd. 24; also Laws of 1870, chap. 359, § 2, applying only to New York County now made general by above section. But there is this difference, that, inasmuch as the jurisdiction of a Surrogate or of his court is statutory a voluntary appearance in a special proceeding is wholly without effect if the jurisdiction has been lost, by lapse of time, or by other cause.

Thus "where a Surrogate has lost jurisdiction of a cause by failure to serve a citation within the time prescribed by statute, the error is not cured by a voluntary general appearance, which, by Code Civ. Proc. § 424, is made equivalent to personal service of process, the objection being not that there has been no service, but that service has not been made within the requisite time." From official syllabus, *Pryer* v. *Clapp*, 1 Dem. 387.

But where there is merely an alleged defect in the petition affecting jurisdiction over the person, his voluntary general appearance has been held to be a waiver of such defect. *Peters* v. *Carr*, 2 Dem. 22, citing *Hoag* v. *Lamont*, 16 Abb. N. S. 91, 96; *Sawmill Co.* v. *Dock*, 3 Dem. 55; *Matter of Hitchler*, 21 Misc. 417.

§ 77. **Non-resident—Appearance for.**—An attorney appearing for a non-resident will, in New York County, be required to file written proof of retainer, or authority to appear, or his appearance will be ignored, and service of citation required. *Matter of Dusenbury*, 33 Misc. 166; *Estate of Weiss*, Surr. Decs. 1896, p. 597.

§ 78. **Foreigners; Consuls.**—Under certain treaty provisions, which can be readily procured from the State Department at Washington for a small fee, the accredited local consul of a foreign nation has a status to represent non-resident subjects of his government. For example, he may petition in probate, or for letters in intestacy, or he may appear and execute waivers and consents.

See *Matter of Peterson*, 51 Misc. 367; *Matter of Davenport*, 43 Misc. 573; *Matter of Lobrasciano*, 38 Misc. 415; *Matter of Fattosini*, 33 Misc. 18; *Matter of Tartaglio*, 12 Misc. 245. But if the non-resident foreigner be an infant, the issuance and due service of citation cannot be dispensed with. *Matter of Peterson*, *supra*.

The consul, petitioning, should allege the treaty, or a treaty to the benefit of which his governmental ward is entitled under a "most favored nation" clause. If the allegation is put in issue, the exemplified record from Washington is adequate proof.

§ 79. **Special appearance.**—A party to a special proceeding in a Surrogate's Court may of course appear specially, as, for instance, solely for the purpose of objecting to the jurisdiction on appropriate grounds. But it must be remembered that such an appearance must not be encumbered with any plea to the merits, as no protest of limited appearance can in

such case avail to prevent the appearance from being deemed a general one. See *Reed* v. *Chilson*, 142 N. Y. 152. Thus where the person served claimed in his answer upon the return of a citation that the order for its service was irregular and jurisdiction had therefore not been acquired, he was held to have waived it because he went further, and raised objections on the merits to petitioner's claim. *Matter of Macauley*, 27 Hun, 577, 578, and 94 N. Y. 574, citing *Barrard* v. *Burrowes*, 2 Robertson, 213. And where a party cited to appear on the probate of a will, appeared by counsel, and his written appearance was filed with the court, and he made no objections on the probate, held that the court had full jurisdiction over him, although the fact that the will was one executed in duplicate, was not stated in the petition. *Crossman* v. *Crossman*, 2 Dem. 69, 80, citing *Allen* v. *Malcolm*, 12 Abb. N. S. 335, and *Morrell* v. *Dennison*, 8 Abb. Pr. 401.

A general appearance will cure void service; thus, where persons cited were non-residents, and the citation was served not by publication nor personally without the State, but was served within the State, and therefore the service was void, it was held that a personal appearance without objection by the non-resident would have obviated this defect. *Matter of Porter*, 1 Misc. 489, 490. This is overruled in 12 Misc. 242, as to such service being void.

§ 80. **Waiver.**—Where there is no contest, and all the parties are willing and competent so to do, they may execute formal waivers of the issuance and service of a citation under § 2528 of the code and consent to the granting of the relief prayed in the petition. If this be done, the fact should be alleged in the petition. See *Matter of Gregory*, 13 Misc. 363, holding that waiver of service cannot be accepted in lieu of the issuance and service of citation. Infants cannot waive service of the citation although a guardian can by a notice of appearance give the court jurisdiction. *Thistle* v. *Thistle*, 5 Civ. Proc. R. 43. By this is meant a general guardian not ineligible by reason of having any interest adverse to the infant's. For no special guardian *ad litem* is appointed until the citation has actually been served on the infant (see *Ingersoll* v. *Mangam*, 84 N. Y. 622; *Davis* v. *Crandall*, 101 *id.* 311–321; *Crouter* v. *Crouter*, 133 *id.* 56; *Potter* v. *Ogden*, 136 N. Y. 384, 392), nor before the return day unless the infant petitions for an appointment. *Matter of Leinkauf*, 4 Dem. 1, 2. The guardian, whether general or special, can thus never waive service of a citation. It is bad practice to secure waivers before the proceeding is begun. In *Matter of Graham*, 39 Misc. 226, Silkman, Surr., held that waivers antedating the petition were invalid, and that the Surrogate's jurisdiction depended upon strict compliance with the statute. Such a waiver is nugatory.

See § 281, *post*, as to waiver in probate.

§ 81. **Formalities of publication.**—The provisions regarding the cases in which service of the citation by publication may or must be made have been already given. The *modus operandi* remains to be discussed.

If the circumstances exist covered by sections 2522 and 2523 the order directing service by publication is applied for upon affidavits, or such other

proof as may satisfy the Surrogate, stating facts showing the case to be one under one of such sections.

> The order must direct (see section 2524) that service of the citation upon the person named or described in the order, be made by publication of the citation in two newspapers, designated as prescribed in this article (which includes §§ 2115–2538) . . . . [see exception of estates less than $2,000] for a specified time, which the surrogate deems reasonable, not less than once in each of six successive weeks; or, at the option of the petitioner, by delivering a copy of the citation, without the state, to each person so named or described, in person, and if the person to be served is an infant under the age of fourteen years, also with the person with whom he is sojourning, or, if the service is made upon a corporation, to an officer thereof specified in sections 431 or 432 of this act. It must also contain either a direction that on or before the day of the first publication the petitioner deposit, in a specified post-office, a copy of the citation and of the order, contained in a securely closed postpaid wrapper directed to the person to be served, at a place specified in the order, and if the person to be served is an infant under the age of fourteen years, a further copy, likewise contained in a securely closed postpaid wrapper, directed to the person with whom such infant is sojourning; or a statement that the surrogate being satisfied, by the affidavit upon which the order was granted, that the petitioner cannot with reasonable diligence, ascertain a place or places where the person to be served would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein. **§ 2524, Code Civil Proc.**, in part.

The whole publication may be vitiated if the order is not correctly framed. Every requirement of the statute must be observed (*Sawmill Co.* v. *Dock*, 3 Dem. 55, 56), unless there be a voluntary appearance by adults. As the provisions of the section are very similar to those of section 440 relating to the order for publication of summons decisions under that section are applicable. Thus see *Smith* v. *Wells*, 69 N. Y. 600, where copy summons and complaint was deposited in post office but addressed differently than required in the order. And *Brisbane* v. *Peabody*, 3 How. 109, where publication was made in a paper other than one designated in the order, and see generally notes to section 440 in Stover's Code, 6th ed. The directions of the order must be strictly followed.

§ 82. **Papers in which publication should be made.**—The act "to designate a state paper" (Laws, 1854, chap. 197) is now repealed (see Laws, 1884, chap. 133, and Laws, 1885, chap. 262) and the practitioner is only concerned with the papers designated in the order. Where the Code directs publication of a citation, or the service thereof by publication, the publication must be published in a newspaper published in the county. Code Civ. Proc. § 2535.

When the Surrogate thinks that the person or persons intended to be served or notified can be given surer notice, he may, in his discretion, direct additional publication in any other newspaper, either in the same or in another county. *Ibid.*

Within ten days after the publication is complete, proof by affidavit of

the publishers, printers, or foreman, or one of them, of the publication in the newspaper in which the publication was made shall be made and tendered to the attorney or other person ordering or directing such publication. But delivery is not compulsory in case of private persons until payment of the bill for the publication. Laws, 1884, chap. 133, § 7.

§ 83. **Time of publication.**—The Code provides as a minimum time during which the publication must continue "not less than once in each of six successive weeks." Code Civ. Proc. § 2524. And in section 440 the words used are "not less than once a week for six successive weeks."

There is no longer any uncertainty as to just what this means. The publication is not complete until the expiration of forty-two days from the first publication excluding the first day. *Richardson* v. *Bates*, 23 How. Prac. 516; *Board* v. *Heyman*, 3 Abb. Prac. (N. S.) 396; *Matter of Koch*, 19 Civ. Proc. Rep. 165. That is, there is required a full six weeks' consecutive publication, and not merely six publications in six different weeks. *Market Nat. Bank* v. *Pacific Nat. Bank*, 11 Abb. N. C. 104; 89 N. Y. 397, 400, where the court says, "Section 400 provides for publication for a *specified time*, 'not less than once a week for six successive weeks.' The number of weeks is specified and not the number of times; section 441 declares that the time shall be complete upon the day of the last publication, and section 787 that the period of publication must be completed so as to include the day which completes the *full period of publication*. It will be perceived that the publication must be made for a specified period of time, and when the statute provides for six weeks it is obvious that this period will not elapse prior to its expiration. It does not provide for a publication six times within six weeks, but 'for a time not less than once a week for six successive weeks.' The publication evidently means rather more than printing the notice. The law intended a full six weeks' publication, and not six times in six different weeks." But the sixth publication need not be eight days before the return day. *Matter of Denton*, 86 App. Div. 359.

An illustration will make this very clear. An attorney under an order for publication publishes a citation Saturday, January 5; Friday, January 11; Thursday, January 17; Wednesday, January 23; Tuesday, January 29, and Monday, February 4, 1895. Here are six publications—once a week and in six successive weeks—and yet under this decision, and all the decisions, insufficient, for instead of giving six weeks' or 42 days' notice to the person published against and intended to be thereby notified, it gives him four weeks' and two days' or 30 days' in all, notice, which is a serious discrepancy. See *Waters* v. *Waters*, 7 Misc. 519.

However, it is not necessary to show publication on the same day of each week; it is sufficient if made on any day of each week for the requisite number of weeks, *provided* six weeks' notice be given. See *Wood* v. *Knapp*, 100 N. Y. 109, 114, and cases cited, noting distinction in circumstances.

If, while the publication is progressing, personal service without the State be made, it would be unnecessary to complete the publication, although the service would not be complete until the time prescribed for the

publication has expired; that is to say, personal service without the State, under an order for service by publication, is only equivalent to publication. *Fiske* v. *Anderson*, 33 Barb. 71.

Where publication must be in two papers, it has been held, under section 440, that publication must be continuous in each, not necessarily concurrent. *Herbert* v. *Smith*, 6 Lans. 493.

In case the death of a petitioner abates the proceeding the publication terminates, if incomplete on the day of such death. *Reilly* v. *Hart*, 55 Hun, 465, affirmed 130 N. Y. 625.

CHAPTER II

PARTIES

§ 84. **Infants.**—Parties in Surrogates' Courts are differentiated either as adults or as infants. Infants are divided under two classes: infants under 14, and those of or over 14 years of age. All infants must appear by guardian; this is manifest from the wording of sections 2527 and 2530 of the Code of Civil Procedure. Section 2527 in part provides, that where a person cited or to be cited in a proceeding in the Surrogate's Court is an infant, the Surrogate may incidentally in his order for additional precaution in the service of the citation provided for by the section, or by a separate order at any stage of the proceedings, appoint a special guardian *ad litem* to conduct the proceedings. See also *Matter of Watson*, 2 Dem. 642. Section 2530 is as follows:

> Where a party, who is an infant, does not appear by his general guardian; or where a party, who is a lunatic, idiot, or habitual drunkard, does not appear by his committee, the surrogate must appoint a competent and responsible person, to appear as special guardian for that party. Where an infant appears by his general guardian, or where a lunatic, idiot, or habitual drunkard, appears by his committee, the surrogate must inquire into the facts, and must, in like manner, appoint a special guardian, if there is any ground to suppose that the interest of the committee or general guardian is adverse to that of the infant, or incompetent person; or that, *for any other reason* the interests of the latter require the appointment of a special guardian. A person cannot be appointed such a special guardian, unless his written consent is filed, at or before the time of entering the order appointing him. **§ 2530, Code Civil Proc.**

The general guardian is entitled to represent his wards unless their interests require that they should be represented by a special guardian, or unless there is ground to suppose that the interest of the general guardian is adverse to that of the infant. *Farmers' L. & T. Co.* v. *M'Kenna*, 3 Dem. 219. And in New York County Rule 12 provides as follows:

"Whenever an infant interested in any proceedings in said Surrogate's Court has a general guardian, no decree will be entered without appointing a special guardian to represent said infant's interest therein, unless such general guardian shall file his appearance in writing and his affidavit of no adverse interest, as required by Rule 10, with the clerk of said Surrogate's Court." *Farmers' L. & T. Co.* v. *M'Kenna, supra.*

Where there is a general guardian, therefore, he is primarily entitled to appear and no appointment of a guardian *ad litem* is in such a case proper unless it be affirmatively shown upon the inquiry by the Surrogate into

the facts, either, that there is ground to suppose that his interest is adverse to that of the infant, or that for any other reason the interests of the latter require the appointment of a special guardian. If it is intended, therefore, where there is a general guardian, to apply for the appointment of a guardian *ad litem*, notice of such application must be first given to the general guardian. *Farmers' L. & T. Co.* v. *M'Kenna, supra.* A *foreign* guardian may petition for appointment of special guardian of his infant. *Rogers* v. *McLean*, 34 N. Y. 536; *Freund* v. *Washburn*, 17 Hun, 543.

If there is no general guardian, or if his right to represent the infant is lost by reason of the causes specified in section 2530, then the Surrogate *must* appoint a special guardian.

In transfer tax proceedings where the infant's interest is not presently involved, the appointment of a special guardian is unnecessary. *Matter of Post*, 5 App. Div. 113.

§ 85. **Upon whose application special guardian may be appointed.**— Where the infant is over the age of 14 years, it is proper that the petition for the appointment of a special guardian be made by the infant. Where the infant is under the age of 14 years, it is customary that the application be made on his behalf by his parent or next friend.

Rule 10 of the Surrogate's Court in the county of New York provides: "No special guardian to represent the interests of an infant in any proceeding in said Surrogate's Court will be appointed on the nomination of a proponent or the accounting party, or his attorney. See *Matter of Henry*, 2 Howd. N. S. 250. The right of the infant to apply for the appointment is undoubted. It is directly inferable from section 2531, which is as follows:

> Where a person, *other than the infant*, or the committee of the incompetent person, applies for the appointment of a special guardian, as prescribed in the last section, at least eight days' notice of the application must be personally served upon the infant, or incompetent person, if he is within the state, and also upon the committee, if any, in like manner as a citation is required by law to be served. But, except in a case specified in title fifth of this chapter, the surrogate may, by an order to show cause, prescribe a shorter time, and direct the service of the order to be made in such a manner as he deems proper. The application may be made at the time of presenting the petition, and, in that case, the order to show cause may, in the surrogate's discretion, accompany the citation. **§ 2531, Code Civil Proc.**

See also *Matter of Ludlow*, 5 Redf. 391, 392.

In the third place the Surrogate has the right to appoint upon his own motion. It is not necessary, where there are infant parties, that any application should be made for the appointment of a special guardian, either prior to or on the return day. If on the return of the citation no application for the appointment of such a guardian has been made by any one voluntarily, whether by the infant or by his next friend, or any other person, the Surrogate may of his own motion appoint a person to protect the interests of the infant; in such a case it is immaterial whether the infant is

under or over the age of 14, as the consent of the infant is not necessary to the appointment. *Brick's Estate*, 15 Abb. Pr. 12. See also *Matter of Seabra*, 38 Hun, 218. Unless the infant is represented by general or special guardian, he is not properly a party to the proceeding. The failure to appoint the guardian *ad litem* is an irregularity, if the objection is properly made (*Frost* v. *Frost*, 15 Misc. 167), but it does not affect the jurisdiction of the court over the proceeding generally, and therefore upon the discovery of the irregularity the court may appoint a guardian *nunc pro tunc*. See *Rima* v. *Rossie Iron Works*, 120 N. Y. 433. *Matter of Jones*, 54 Misc. 202. But this will not avail to prejudice the infant's rights. *Matter of Bowne*, 6 Dem. 51. If the Surrogate finds after hearing the matter that one of the parties is an infant he will usually stop the proceeding, appoint the guardian, give him opportunity to go over the testimony and recall, for his cross-examination, if necessary, any witness.

It is manifest from the wording of section 2531 above quoted that the notice thereby required to be given, does not apply to cases where the Surrogate himself appoints a special guardian of his own motion. *Matter of Monell*, 19 N. Y. Supp. 361. The object of the service of the notice thereby prescribed is to enable the infant to have some one appear upon the application and prevent the appointment of a person in any respect unsuitable or having interests in any way adverse to those of the infant. See *Pinckney* v. *Smith*, 26 Hun, 524.

Where the county judge acts as Surrogate, he has the power to appoint a guardian *ad litem* in proceedings pending in the Surrogate's Court, and an error by which the order appointing the guardian is entitled in the County Court does not invalidate the appointment, as it will be presumed that he acted in the capacity in which he had a right to make the appointment. See *Albrecht* v. *Canfield*, 92 Hun, 240.

§ 86. **When application should be made.**—It is manifest in the first place, that no appointment of a special guardian in the Surrogate's Court, can be made for an infant not a party to the proceeding. Surrogate Coffin held (*Matter of Watson*, 2 Dem. 642) that it was wholly incompetent for him to appoint a special guardian of an infant purposing to initiate a proceeding for the probate of a will.

There is no statutory provision requiring an infant to institute a special proceeding in a Surrogate's Court by special guardian. The infant may present his petition upon which the Surrogate issues his citation; when this has been done the petitioner is a party to a proceeding, and, on the return day of the citation, if it appears that the party is an infant, the Surrogate must appoint a special guardian for him. The first rule, therefore, to observe is, that the infant must be a party to the proceeding before the appointment can be made. Therefore if the infant is not the petitioner in the proceeding, an application for the appointment of a special guardian is premature and the appointment wholly irregular if made prior to the service upon the infant of the citation in the proceedings which makes him a party; and if the service is irregular it is not regularized by mere proof that a

special guardian was actually appointed. See *Hogle* v. *Hogle*, 49 Hun, 313; *Davis* v. *Crandall*, 101 N. Y. 311.

And similarly, if service of citation has been had upon the infant unlawfully or irregularly it will vitiate the appointment of the special guardian. See *Potter* v. *Ogden*, 136 N. Y. 384, where the second headnote concisely states the rule as follows:

"The appointment of a special guardian for an infant in proceedings in a Surrogate's Court is void, unless previous to such appointment jurisdiction over the infant has been acquired by the service of a citation in the manner prescribed by law."

Where the Surrogate makes the appointment of his own motion, it is manifest that he cannot appoint until the return day of the citation.

The provisions of sections 468 to 477 of the Code, regulating the mode in which infants may bring and defend *actions*, do not apply to special proceedings in Surrogates' Courts. One reason why the Surrogate cannot appoint before the return day is, that there may be a general guardian who is not bound to appear for the infant until the return day; and where at the time the petition is made and the citations issued there is no general guardian of the infant yet *non constat* but that a general guardian may be appointed before the return day, even by the Surrogate of another county, and Surrogate Coffin accordingly held, that an application by an infant party for an appointment of a special guardian, made before the return day, was premature for this reason. *Matter of Leinkauf*, 4 Dem. 1. This decision, however, should not be extended so far as to prevent the making of the application by the infant or by some person other than the infant before the return day. In the latter case under section 2531, it is distinctly provided, that the application may be made at the time of presenting the petition. And where the infant is over fourteen years of age, and desires to nominate his guardian; or where the parent or next friend desires to nominate a guardian for an infant under 14 years of age it is proper to file the petition looking to such appointment *after* the infant shall have been duly served with the citation. The proposed order should be submitted with the petition, and will usually be signed by the Surrogate upon the return day. Similarly where it proves necessary to serve the infant with the citation by publication an appointment of a special guardian prior to the expiration of the time during which publication must be made, is premature and irregular. *Darrow* v. *Calkins*, 154 N. Y. 503. The person who is entitled to appear as general guardian of the infant, must be one actually and legally such general guardian. The parent of the child as guardian in socage, by nature, or otherwise has no right to appear in the capacity of general guardian; and where through oversight a parent has so appeared for infant parties, in a probate proceeding, even in good faith, the rights of the infant are in no respect concluded, nor can the Surrogate subsequently to the making of the decree attempt to regularize the proceedings by appointing the parent special guardian *nunc pro tunc*. *Matter of Bowne*, 6 Dem. 51. The power to appoint *nunc pro tunc* must

be exercised during the life of the proceeding (see *Saltus's Estate*, 1 Tucker, 230), and has been exercised almost uniformly only in cases where the infant was actually served and a party to the proceeding, and never it is believed has it been exercised for the purpose of attempting to make the infant a party of record to proceedings in which jurisdiction of the person of such infant was not in fact had by the Surrogate.

§ 87. **Formalities of appointment.**—Where the infant or some one upon his behalf applies for the appointment of a guardian *ad litem*, the application is made by petition duly verified substantially as follows:

Petition by infant over 14 years of age for the appointment of Special Guardian.

Surrogate's Court,
County of

Title. }

To the Surrogate's Court of the County of

The petition of respectfully shows:

I. That he is an infant over 14 years of age, and was years of age on the day of 19

II. On information and belief that on the day of 19

[Here state the nature of the proceeding, as, for example, the last will and testament of late of deceased, was duly filed in the office of the Surrogate in the county of for probate, which said will is a will of real (or of personal) property (or of real and personal property) and proceedings for the proof of such will are now pending before said Surrogate.]

III. That your petitioner is one of the parties named in the citation issued in said proceeding (or that your petitioner was made a party to the above proceedings by an order of this court, made the day of 19) and that the citation (or supplementary citation) in such proceeding was duly served on your petitioner on the day of 19 ; that he has no general guardian in the State of New York (*note*), that your petitioner's parents are living (or that your petitioner's father or mother is the only living parent) and that petitioner resides at in the State of with

Note. Where the petitioning infant has a general guardian state the facts in reference to such guardian.

IV. Your petitioner therefore prays the appointment of Esq., counsellor at law of as his special guardian in the above entitled proceeding, to appear for the petitioner and to protect his interests therein (*add, in New York County, and he has not been influenced in making this application for the appointment of such special guardian by any person*).

V. That no previous application for this relief has been

made (*or if previous application has been made, state the facts and the action of the Surrogate*).

WHEREFORE the petitioner prays that an order of this court may be made appointing the said Esq., counsellor at law, as special guardian of the petitioner, to appear for him and protect his interests herein.

(Verification.)

(Signature.)

Petition where infant is under the age of 14 years. *Note.*

Note. Where the application for the appointment of special guardian is on behalf of an infant under 14, the application should be made by one of the child's parents or if an orphan by its general guardian, and if there is no general guardian, its next friend or any party to the proceeding not excluded by the rule may petition for the appointment.

Note. Under § 2530 the infant *may* appear by general guardian without action by Surrogate, but if the general guardian petitions for appointment of third person state any reason, such as adverse interest, why appointment of special guardian is necessary.

Surrogate's Court,
County of
Title.

To the Surrogate's Court of the County of

The petition of respectfully shows:

I. That is an infant under the age of years and was years of age on the day of 19 ; that said infant is a necessary party in the above entitled proceedings being a (*legatee, or devisee or next of kin or state relationship*) of late of the county of deceased, and was duly served with the citation herein on the day of 19

II. That your petitioner is (*here state relationship of petitioner to the infant on whose behalf application is made*) of the said infant and that said infant resides with at

III. That said infant has no general guardian (*or if it has a general guardian state the particulars*). *Note.*

IV. The petitioner on behalf of said infant alleges that it is necessary that a special guardian of said infant, be appointed in the above entitled proceedings, to appear for such infant and to protect his interests therein.

V. That no previous or other application for this relief has been made.

WHEREFORE this petitioner prays that an order of this court may be made appointing Esq., counsellor at law, of as a special guardian to appear for said infant and to protect his interests herein.

(Verification.)

(Signature.)

§ 88. **Special rules in New York County.**—In the county of New York the Rules of the Surrogate's Court carefully define the precautions in favor of infants and are as follows:

RULE X

"No special guardian to represent the interests of an infant in any proceeding in said Surrogate's Court, will be appointed on the nomination

of a proponent or the accounting party, or his attorney, or upon the application of a person having an interest adverse to that of the infant. To authorize the appointment of a person as a special guardian on the application of an infant or otherwise in a proceeding in this court, or to entitle a general guardian of such infant to appear for him in such proceeding, it must appear that such person, or such general guardian, is competent to protect the rights of the infant, and that he has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of or any party to the proceeding.

"Where the application for the appointment of a special guardian is made by another than the infant, or where the general guardian appears in behalf of the infant, it must appear that such applicant or general guardian has no interest adverse to that of the infant.

Note. Where mother of an infant under 14 is disqualified by adversity of interest from applying, the Surrogate may impute the same adversity of interest to a sister of the infant. *Estate of Conrad Stein,* Law Journal, June 17, 1902, citing *Estate of S. Shethar,* Surr. Decs. 1898, p. 387; *Estate of F. Schaeffer,* Law Journal, March 10, 1900; *Estate of I. Meyer,* Surr. Decs. 1901, p. 18.

"No party to a proceeding will be appointed special guardian of any other party thereto. If such applicant or general guardian is entitled to share in the distribution of the estate or fund in which the infant is interested, the nature of the interest of such applicant or general guardian must be disclosed. The application for the appointment of a special guardian as well as the appearance filed by a general guardian of a minor must, in every instance, disclose the name and residence and relationship to the infant of the person with whom the infant is residing, whether or not he has a parent living, and, if a parent is living, whether or not such parent has knowledge of and approves such application and appearance; and such knowledge and approval must be shown by the affidavit of such parent. If the infant has no parent living, like knowledge and approval of such application or appearance by the person with whom the infant resides must be shown in like manner. Where such application is made by an infant over the age of 14 years, his petition must show and be accompanied by the affidavit of the parent (in case the latter has an interest adverse to that of the infant), showing, in addition to such knowledge aforesaid, that such parent has not influenced the infant in the choice of the guardian."

Rule XI

"In any proceeding for a judicial settlement of the account, wherein a special guardian shall be appointed or a general guardian shall appear to protect the interests of an infant party to such accounting no decree will be entered as upon default against such infant, but such decree shall be so entered only on the written report of the guardian appearing for such

infant that he has carefully examined the account and finds it correct, and upon two days' notice to the guardian of the settlement thereof."

RULE XII

"Whenever an infant interested in any proceeding in said Surrogate's Court has a general guardian, no decree will be entered without appointing a special guardian to represent said infant's interest therein, unless such general guardian shall file his appearance in writing and his affidavit of no adverse interest, as required by Rule X, with the Clerk of said Surrogate's Court."

§ 89. **Qualification by nominee.**—The competency of the person sought to be appointed as special guardian is shown by means of the consent and affidavit required of the person nominated to be filed with the application or at or before the time of entering the order appointing him. See section 2530. The following forms are suggested:

Consent of special guardian.

Surrogate's Court,
County of
Title. }

I counsellor at law, hereby consent to be appointed by the Surrogate of the County of the special guardian of an infant, for the sole purpose of appearing for and taking care of his interests in the above entitled proceedings, and I hereby state that I have no interest in said proceedings adverse to that of said infant and am not connected in business with the attorney or counsel of or any party hereto.

(Dated.) (Signature.)

(Acknowledgment.)

This consent of the special guardian ought to be acknowledged, but a failure to properly acknowledge it has been held not to be a jurisdictional defect but an irregularity. *Sheel* v. *Cohen*, 55 Hun, 207, 210, citing *Tobin* v. *Carey*, 34 Hun, 432. In the case cited the General Term held, that an order made on consent of all the parties who had appeared permitting the proper acknowledgment to be filed *nunc pro tunc* validated the appointment, having been timely made. This was in an action involving rights in real property and would probably be held applicable in a Surrogate's Court, but not to the extent of cutting off rights of an infant party.

Affidavit of special guardian.

Surrogate's Court,
County of
Title. }

State of New York }
County of } ss.:

being duly sworn deposes and says: I am a counsellor at law in having an office at

reside at I am perfectly able and competent to protect the interests of an infant party to the above entitled proceedings; I have no interest adverse to that of said infant; I am not connected in business with the attorneys or counsel for the proponent (*or where proceeding is other than for the probate of a will, describe the petitioner*); I am of sufficient ability to answer to said infant for any damages which may be sustained by reason of my negligence or misconduct in this proceeding; and am worth the sum of dollars, over and above all debts and liabilities, besides property exempt by law from levy and execution.

(Jurat.) (Signature.)

Where the application is made by an infant over 14 years of age it is proper to submit also the affidavit of parent or person with whom the infant resides indicating the relationship of such infant, and whether or no the parent or other person has knowledge of and approves the application. This affidavit may be substantially as follows:

Affidavit of parent or person with whom infant resides.

Surrogate's Court
County of

Title. }

State of New York }
County of } ss.:

being duly sworn deposes and says: I reside in I am (*state whether father or mother, or what relation deponent sustains to the infant*) of an infant party to the above entitled proceedings; the said infant resides with me and is now years of age; I have no interest in the above entitled proceedings in any manner or form (*or if affiant has an interest state what it is*); I have not influenced my in any way as to the appointment of a special guardian or in this application; but he has made such application of his own volition and without any influence from me; I have knowledge of this application now being made by my said for the appointment of Esq., as his special guardian, and approve of such application as I am well acquainted with said and believe him in every respect competent to protect the interest of my said in the proceedings pending.

(Jurat.) (Signature.)

§ 90. **The order.**—Upon the return day the Surrogate may make the order appointing the special guardian substantially in the following form:

Surrogate's Court
Caption.

Present:
Hon.
Surrogate.

Order appointing special guardian.

Title. }

It appearing to my satisfaction by the verified petition herein of an infant over the age of 14 years (or of the father or mother or next friend of an infant under the age of 14 years), verified the day of 19 that said one of the heirs at law (or next of kin) of the above named decedent is an infant having no general guardian (*or* is an infant having a general guardian, whose interests are adverse to those of his said ward by reason of *here state facts constituting adverse interest or any other reasons making it inexpedient that the general guardian should appear for and represent the infant*) (and has been duly served with the citation herein and is a party to the above entitled proceedings).

Now on reading and filing the affidavit and consent of Esq., counsellor at law in to become special guardian for the said infant for the sole purpose of taking care of his interests in the above entitled proceedings,

It is hereby Ordered that the said be and hereby is appointed the guardian of the said infant, to appear and protect his interests in this matter.

Surrogate.

§ 91. **Qualification of a special guardian.**—It has been held that special guardians are the most important officers in a Surrogate's Court, their responsibility being greater even than that of a referee. *Estate of Wadsworth*, 24 N. Y. St. Rep. 416. The person appointed should be a lawyer (see *Spicer's Will*, 1 Tucker, 80), as he must be competent to protect the rights of the infant; he must have no rights adverse to those of the infant and he should not be connected in business with the attorney or counsel of any party to the proceeding. See *Ex parte Tillotson*, 2 Edwards' Ch. 113; *Ex parte Lansing*, 3 Paige, 264.

Rule X in New York County provides that no party to a proceeding will be appointed special guardian of any other party thereof.

The Code in section 2530 merely requires that he be a "competent and responsible person." The statute thus fails to prescribe definite qualifications, but it has been held: "It is good practice to require the same qualifications as are required of a guardian *ad litem* for an infant defendant in the Supreme Court." *Story* v. *Dayton*, 22 Hun, 450. See also *Matter of Henry*, 2 Howd. Pr. N. S. 250.

The word "responsible" means that he should be of sufficient ability pecuniarily to answer to the infant for any damage which may be sus-

tained by his negligence or misconduct. See *Spellman* v. *Terry*, 74 N. Y. 448.

It was formerly held that the appointment of a special guardian in the Surrogate's Court terminated with the proceeding in that court, and that if an appeal was necessary and the infant's interest required further protection it was the province of the Appellate Court to appoint a guardian *ad litem* for that purpose. *Schell* v. *Hewitt*, 1 Dem. 249, 250, Rollins, Surr., citing *Kellinger* v. *Roe*, 7 Paige, 364; *Underhill* v. *Dennis*, 9 Paige, 209; *Chaffee* v. *Baptist Miss. Conv.*, 10 Paige, 85; *Moody* v. *Gleason*, 7 Cowen, 482; *Fish* v. *Ferris*, 3 E. D. Smith, 567. The better rule, however, seems to have been established by the Appellate Division, 2d Department, in a recent case (*Matter of Stewart*, 23 App. Div. 17), where the court denied an application for the appointment of a special guardian *ad litem* to take, perfect, and prosecute an appeal from a final decree of the Surrogate of Westchester County.

The court by Goodrich, P. J., denied the application, on the ground that the special guardian appointed by the Surrogate is not *functus officio* by the rendition of the decree.

The Code of Civil Procedure, section 2573, provides that where an appeal shall be taken from such a decree, "Each party to the special proceeding in the Surrogate's Court, and each person not a party who is or claims to have, in the subject-matter of the decree or order, a right or interest which is directly affected thereby . . . . must be made a party to the appeal." And the court held that as the time to appeal could be set running only by service of due notice of the entry of the decree upon the special guardian, it was manifest that the mere entry of the decree did not make him *functus officio* and that he would therefore be a party respondent to an appeal taken by another party, and that he had the undoubted right to take and prosecute an appeal as guardian and that his duties and office continued until the final determination of any appeal from the Surrogate's decree.

§ 92. **The position of the special guardian.**—The special guardian as a party to the proceeding is answerable to the court as well as to the infant; he is an officer of the court and he must report to the court his performance of the duties imposed upon him by virtue of his appointment. This report should give a full account of the matters in his charge, and where he is appointed upon an accounting or any proceeding involving the examination of papers or the performance of specific acts, his report should contain a specific statement in regard to such examination and his conclusions as to the rights of his infant *ad litem*. *Estate of Wadsworth*, 24 N. Y. St. Rep. 416. He is more than an attorney. He is a sort of trustee *ad litem*. Hence he must err on the side of caution, e. g., on an accounting, while he should not lightly increase the cost of the proceeding by meticulous objection, yet if he is in doubt he should put questionable items in issue, if they affect the infant's share, regardless of the desire of adult parties to accelerate a decree. The Referee or Surrogate can always overrule his objections, but

his affidavit of qualification is a sort of bond or undertaking of responsibility. See *Matter of Parr*, 45 Misc. 564; *Edsall* v. *Vandemark*, 39 Barb. 589. So, again, in probate, he may safely contest a will even though it has a clause recalling bequests to a beneficiary contesting the same. Such a provision will not be enforced against an infant. It would be against public policy. *Bryant* v. *Thompson*, 59 Hun, 545.

The Surrogate's decree will only be made upon all the papers and (in the absence of mistake) it may be said as a general rule that there is no default as to infants in a Surrogate's Court, and that no decree will usually be made affecting an infant party, except upon *prima facie* proof that that infant's interests have been conserved. In New York County Rule XI, already quoted, emphasizes this by providing that in proceedings for the judicial settlement of an account no decree will be entered as upon default against an infant party, but only on the written report of the guardian (special or general as the case may be) who appeared for the infant, "that he has carefully examined the account and finds it correct."

Under the head of stenographers' fees, *ante*, it is noted that special guardians may acquiesce in but should not consent to stipulations as to fees on references.

§ 93. **Adult parties—Necessary and proper parties.**—There are no peculiar rules covering adult parties as such, in Surrogates' Courts, but it is proper to observe that in such courts all parties whether infant or adult fall under two designations, those who must be and those who may become parties to a proceeding, i. e., necessary, and proper parties. Necessary parties in Surrogates' Courts are those whom the statute authorizes to initiate a proceeding, or requires to be cited by the one initiating the proceeding. Reference must be had to the discussion of the various proceedings, *q. v.;* but an illustration is not here amiss. Upon a proceeding to probate a will the statute, to which reference must always be made, provides (Code Civ. Proc. § 2614) that any person designated in the will as executor, devisee, or legatee, or "any other person interested in the estate," or a creditor of the decedent, may petition for its probate. That is, any person falling within any one of the foregoing designations may become the petitioner, or proponent. The persons who *must* be cited upon such petition are, if the will relates, for example, to both real and personal property "the husband, or wife, if any, and all the heirs, and all the next of kin of the testator." See Code Civ. Proc. § 2615. The first noticeable point is that "necessary" parties often, if this example be a proper criterion, are designated by a general term as members of a class, as creditors, heirs, next of kin, "persons interested," legatees and devisees. These terms must be clearly understood at the outset. Some of them the Code itself defines. Thus, "the expression 'persons interested' where it is is used in connection with an estate, or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee, or otherwise, except as a creditor." Code Civ. Proc. § 2514, subd.

11. See *Matter of Brown*, 60 Misc. 628. So also "next of kin" is defined as including "all those entitled under the provisions of law relating to the distribution of personal property, to share in the unbequeathed residue of the assets of a decedent after payment of debts and expenses, other than a surviving husband or wife." *Id.* subd. 12. But even these definitions are not sufficient of themselves without further reference. An examination of the authorities covering each class will be of great assistance.

§ 94. **Heirs.**—The word heirs is intended to include those persons in whom the title to real property vests upon the death of another person called the *ancestor* (heirs are the persons related to one by blood, who would take his real estate if he died intestate), and the word embraces no one not thus related. *Tilman* v. *Davis*, 95 N. Y. 17, 24. *Nemo est hæres viventis*. An heir acquires property not by his own act (so one who willfully murders his decedent forfeits his rights as heir *ipso facto*. *Riggs* v. *Palmer*, 115 N. Y. 506), nor by the act of the ancestor (for he would in such event take not as an heir but as an assignee, that is, by purchase), but by operation of the law, which in this State sets forth in the Statute of Descents [Decedent Estate Law, Article III], the persons or classes of persons on whom upon the death of an owner of property, the inheritance would be cast.

These persons are thus designated:

1. Lineal descendants.
2. Father.
3. Mother.
4. Collateral relatives.

This may be summarized by saying that heirs-at-law are either lineal or collateral.

§ 95. **Children.**—Among lineal heirs must now be reckoned: First, adopted children; and second, illegitimates, duly legitimatized.

I *Adopted* children. (See *post*, Adoption.)

"A child when adopted shall take the name of the person adopting, and the two henceforth shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation, *including the right of inheritance*," (See Laws, 1873, chap. 830, § 10, as amended by Laws, 1887, chap. 703, and see note in 29 Abb. N. C. p. 49, on the effect of this.)

II *Illegitimate* children in default of lawful issue [Laws, 1855, chap. 547, IV Rev. Stat. (8th ed.) 2468]. See DESCENT AND DISTRIBUTION, *post*.

"§ 1. (Illegitimate children in default of lawful issue may inherit real and personal property from their mother as if legitimate; but nothing in this act shall affect any right or title in or to any real or personal property already vested in the lawful heirs of any person heretofore deceased." See *Ferris* v. *Pub. Admin'r*, 3 Bradf. 249, held, "not to affect right to administer" of next of kin). The first act in this State making legitimate the illegitimate children of parents who married after the birth of such illegitimate children, was chapter 531, Laws of 1895, which act legitimatized all illegitimate children whose parents had before that time, or might

thereafter, intermarry. This act provided that vested interests or estates should not be divested or affected by that act.

It continued in force until it was repealed by the Domestic Relations Law (chap. 272, Laws of 1896), section 18 of which declared that "an illegitimate child whose parents have heretofore intermarried, or shall hereafter intermarry, shall thereby become legitimate and shall be considered legitimate for all purposes, entitled to all the rights and privileges of a legitimate child; but an estate or interest vested before the marriage of the parents of such child shall not be divested or affected by reason of such child being legitimatized." Section 18 of the Domestic Relations Law was amended by chapter 725, Laws of 1899, the amendment protecting trusts created at the time of the remarriage, as well as estates or interests then vested. *Matter of Barringer*, 29 Misc. 457, 459.

The act of 1895 and that of 1896 are retroactive, so far as they change the status of illegitimates born before the acts in question went into effect. But while all such previous illegitimates are from May 3, 1895, to be regarded as legitimates, with full capacity to take by descent or under the Statute of Distributions, the legislature did not intend by such legitimation to divest interests vested before the act of 1895, or during the illegitimacy of any child who may be under either of the acts restored by them to a state of legitimacy. Both the act of 1895 and that of 1896 contain clauses which, in terms, purport to save interests vested in the one case at the passage of the act, and in the other at the time of the intermarriage of the illegitimate's parents. *Ibid.* Where there is lawful issue, illegitimates (unless legally adopted) are not entitled to citation, *Matter of Losee*, 119 App. Div. 107, aff'g 46 Misc. 363.

§ 96. **Surrogate to determine status.**—It may be said in this connection that should any uncertainty exist as to whether a certain party in any proceeding in a Surrogate's Court is within this or any class to whom a devise or bequest is made, that court is competent to pass upon the question. The Surrogate, accordingly, may take as evidence declarations as to pedigree to determine status of one claiming to be an heir, or next of kin. *Matter of Fail*, 56 Misc. 217, citing *Eisenlord* v. *Clum*, 126 N. Y. 564. It certainly creates no occasion for appealing to the equity jurisdiction of the Supreme or any other court. See *Crouse* v. *Wilson*, 73 Hun, 353, 356, where residuary estate was willed to testator's "heirs and next of kin, in the same proportion that is provided by the laws of the State of New York in cases of intestacy," citing *Garlock* v. *Vandevort*, 128 N. Y. 374; *Riggs* v. *Cragg*, 89 N. Y. 480; *In the Matter of Verplanck*, 91 N. Y. 439. If the word "heirs" is used by a testator to indicate the beneficiaries of a bequest of personal property, it will be interpreted as equivalent to "next of kin," the court seeking not so much for exact definitions as to carry out the intention of the testator. *Tilman* v. *Davis*, 95 N. Y. 17; *Matter of Sinzheimer*, 5 Dem. 321, 322. See *post*, "Construction of Wills." In the *Matter of McGarren*, 112 App. Div. 503, it was held that a Surrogate of whom a woman petitioned for letters as "widow," could examine the record of an

annulment action, in the Supreme Court, to determine whether the decree therein, annulling her marriage to decedent, and set up in the answer to the petition, was based on summons *duly served* upon her. The Appellate Division held that if a judgment depends upon a fact *litigated in the action*, the Surrogate could not examine it, but is bound by it so long as it stands unreversed. Hence, in either event whether he finds the decree valid, as duly entered or is bound by it as it stands, in the case cited he was bound to deny petitioner's status as widow.

But the Surrogate has no jurisdiction to inquire into or settle the rights of heirs-at-law in real estate or its proceeds, or to divide the proceeds according to the laws of descent. *Matter of McKay*, 37 Misc. 590, and cases discussed; *Matter of Woodworth*, 5 Dem. 156, 160; *Shumway* v. *Cooper*, 16 Barb. 556. If an administrator receive such proceeds he will not be allowed to include them in his account to the Surrogate's Court. *Matter of McKay*, *supra*. Nor can he be allowed commissions thereon. *Ibid.* Of course in proceedings to sell decedent's real estate to pay debts, the Surrogate's decree will distribute surplus to heirs. See *post*, under, §§ 2793, C. C. P. *et seq.*

§ 97. **Next of kin.**—The Code definition has been given in full in section 93. By its terms reference is necessary to the Statute of Distributions which governs every case. [See Decedent Estates Law, Article, III, and see *post*, under "Administration" and "Distribution of Estate." The proper primary significance of the words is "those related by blood who would take personal estate of one who dies intestate." *Tilman* v. *Davis*, 95 N. Y. 17, 25.] The term "next of kin" is unfortunately not used with exactness. "It has been considerably discussed whether these words used *simpliciter*, mean the nearest blood relations, or mean the next of kin according to the Statute of Distributions, including those claiming *per stirpes* or by representation." Church, Ch. J., in *Murdock* v. *Ward*, 67 N. Y. 387, 389. The latter has been held to be the correct meaning. *Slosson* v. *Lynch*, 28 How. Prac. R. 417. The English rule was different (*Fettiplace* v. *Gorges*, 1 Ves. Jr. 46) i. e., that the husband succeeds to the wife's personal estate as her next of kin. Commenting on this Chancellor Kent says: "It would seem to be more proper to say that he takes under the statute of distribution as husband, with a right in that capacity to administer for his own benefit." 2 Kent's Com. 136, and see cases cited. It ought to mean "nearest of kin," but that idea is expressed by saying "next of kin in equal degree," so that the practitioner must not be unprepared to find that by next of kin is often included more than one degree of relationship such as brothers and sisters, together with children of a deceased brother or sister, included by "representation." See amended subd. 12 of § 2732, C. C. P. See *Matter of Healy*, 27 Misc. 352. "Next of kin" standing alone never means heirs-at-law (*N. Y. L. I. & Trust Co.* v. *Hoyt*, 161 N. Y. 1, 9), though "heirs" has sometimes been held to be equivalent to "next of kin." *Armstrong* v. *Galusha*, 43 App. Div. 248, 256, citing *Tilman* v. *Davis*, 95 N. Y. 17.

For purposes of citation, and of making them parties to proceedings, the nearest of kin are to be ascertained.

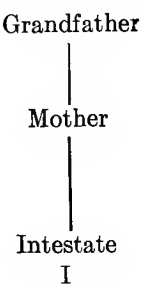
A surviving husband or wife is not within this designation. Bouv. Dict. sub. "Next of Kin;" Redfield on Wills, 78, § 13, vol. 2; 2 Kent's Com. 136; *Murdock* v. *Ward*, 67 N. Y. 387, 389; *Platt* v. *Mickle*, 137 *id.* 106; *Luce* v. *Dunham*, 69 *id.* 36; *Matter of Devoe*, 66 App. Div. 1, 6, aff'd 171 N. Y. 281. It includes only

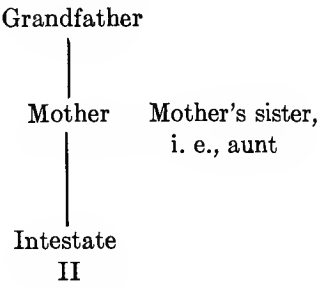
1. Children and their descendants.
2. Father.
3. Mother and brothers and sisters and the legal representatives of deceased brothers or sisters.
4. Collateral relatives.

But such husband or wife should be cited in the proceeding, for the Statute of Distributions makes them distributees in certain cases. The statute provides in subdivision 5: "In case there is no widow, no children and no representatives of a child, then the whole surplus shall be distributed to the next of kin, in equal degree to the deceased and their legal representatives." Who are the "next of kin in equal degree" to the deceased is to be decided by the rule of the ecclesiastical law, which has always controlled in such matters, as a part of the common law. *Sweezy* v. *Willis*, 1 Bradf. 495–497.

Consanguinity is the connection or relation of persons descended from the stock or common ancestor. Lineal consanguinity is reckoned in the same way in the canon and common law, the rule being: to begin at the common ancestor, and reckon downwards, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. The civil law, on the other hand, computes by counting upwards from either of the persons related, to the common ancestor, and then downwards again to the other, reckoning a degree to each person, both ascending and descending. In other words, the former start from the ancestor, the latter from the intestate, in computing the degree of consanguinity. The spiritual courts adopted the rule of the civil law in reckoning propinquity of degree (Bl. Com. II, chap. 32; Co. Litt. 23; Williams on Exrs. 344 *et seq.*) and while the Statute of Distributions altered in several particulars the mode of distribution consequent upon the computation of the civil law, nevertheless when the statute directs distribution to the next of kin, the rule of the civil law prevails for the purpose of reckoning propinquity of consanguinity. See *Sweezy* v. *Willis*, *supra; Hurtin* v. *Proal*, 3 Bradf. 414, 419. See opinion of Surrogate. Thus, the accompanying diagrams show: I. By either common or civil law, the grandfather in I is two degrees removed from the intestate. In II, reckoning by the civil law, the intestate and aunt are three degrees apart, reckoning one degree, ascending, to the mother, two, still ascending to the grandfather, and three, descending to the aunt. By the common law, the most remote from the common ancestor is the intestate, who is therefore two degrees only removed from the

aunt. The importance of this is great, as under the common law aunt or grandfather are within the same degree of nearness, while under the civil law the aunt is one degree further removed, which is very important when questions of rights to administration, or to a distributive share, are concerned.





The words "next of kin" may be extended by judicial construction. Thus when a statute gave a creditor who had neglected to present his claims right to recover the same of the "next of kin of the deceased to whom any assets shall have been paid or distributed" it was held that it was not used in its strict sense, but included every relation of the deceased to whom any assets had been paid. *Merchants' Insurance Co.* v. *Hinman et al.*, 15 How. Prac. R. 182.

§ 98. **Persons interested.**—In addition to the definition quoted in section 93 of this phrase, there are several adjudications as to who is and who is *not* a person interested in the sense of the statute. Thus legatees of a deceased legatee of a testator have been held to be "persons interested" in that testator's estate. *Fisher* v. *Banta*, 66 N. Y. 468, 481. So also a residuary legatee under the will of a nephew of an intestate. *Matter of Prout*, 52 Hun, 109. A debtor to an estate is not a person interested in it within the meaning of the statute. *Estate of Berney*, 2 McCarthy, 455. One to whom a share in a trust legacy has been assigned has been held to come under subdivision 11. *In re Rogers's Estate*, 16 N. Y. Supp. 197. Where the Code provides that a "person interested" may "object to an appointment or may apply for an inventory, an account or increased security, an allegation of his interest duly verified, suffices, although his interest is disputed; unless he has been excluded by a judgment, decree, or other final determination, and no appeal therefrom is pending." Code Civ. Proc. § 2514, subd. 11; *Bonfanti* v. *Deguerre*, 3 Bradf. 429. The sworn statement of interest gives the person making it a *prima facie* standing. The Surrogate may require further proof of interest if the claim is disputed. But in the case just cited where an administrator with a will annexed, being called upon to account, claimed that the petitioner had assigned all his rights in the estate, the Surrogate held that if the interest was sworn to, and the denial of such interest raised an issue, such as the validity of the assignment, which was beyond the Surrogate's jurisdiction to try, the Surrogate would

not try it, and would entertain the petition on the *prima facie* standing of the petitioner. See also *Matter of Clute*, 37 Misc. 710, 714; *Matter of Randall*, 152 N. Y. 508. If, in answer to one petitioning for relief, a release is alleged or produced of all petitioner's rights in the estate, it is conclusive on the Surrogate, and bars the petitioner until set aside in a court having jurisdiction. *Matter of Wagner*, 119 N. Y. 28; *Matter of U. S. Trust Co.*, 175 N. Y. 304, aff'g 80 App. Div. 77 (opinion of Hatch, J.). If a question as to a person's interest in a proceeding is raised the Surrogate will determine the disputed point unless it raises an issue he is without jurisdiction to try, such as the validity of an assignment of interest. *Ibid.* But he may decide whether, as a matter of fact, an assignment was made. *Ibid.; Matter of Geis*, 27 Misc. 490. In that event (see *Bonfanti* v. *Deguerre, supra*), the application will be rejected if the lack of interest appear on the face of the petition (*Woodruff* v. *Woodruff*, 3 Dem. 505, and *Matter of De Pierris*, 79 Hun, 279); but not if allowed by the respondent, or party required to be cited, and the verified allegation of petitioner gives him a *prima facie* standing (*Bonfanti* v. *Deguerre, supra*); but the words "person interested" may be limited by the context in which they are found. Thus in § 2653*a* of the Code relating to an action to determine the "validity" of a will, under which the proofs are limited to the *factum* of the will, the words used are "any person interested in a will or codicil offered for probate." This has been held not to include any one who does not take under the will, not even a child. *Lewis* v. *Cook*, 150 N. Y. 163; *Whitney* v. *Britton*, 16 App. Div. 457.

§ 99. **Creditors.**—Creditors are often necessary parties to proceedings and their interest as such is alleged and proved substantially as is that of "persons interested" although the Code distinctly excludes creditors from the definition of "persons interested." Code Civ. Proc. § 2514, subd. 11. But see *Rafferty* v. *Scott*, 4 App. Div. 429; *Wever* v. *Marvin*, 14 Barb. 376; *Burwell* v. *Shaw*, 2 Bradf. 322; *Thomson* v. *Thomson*, 1 Bradf. 24; *Cotterell* v. *Brock*, 1 Bradf. 148; cf. *Matter of Stevenson*, 77 Hun, 203. See *Gove* v. *Harris*, 4 Dem. 293, where Rollins, Surr., says: "I have repeatedly held, in applications by persons claiming to be creditors, for orders directing the filing of inventories or accounts, that a mere allegation that such applicants were 'creditors' would entitle them to the relief asked, unless that allegation were denied, but that in the event of such denial, the applicant should be required to set forth *facts* which if undisputed would show that his claim to be a creditor was well founded. It seems to me that the practice should be the same in a proceeding like the present" (which was an application for subpœna commanding production of will, with a view to propounding same for probate). "The petitioner's claim to be a creditor is here denied. Before his right to further prosecute the proceeding is recognized he must make a more definite statement of the nature of his claim by setting forth the facts upon which it is founded," citing *Creamer* v. *Waller*, 2 Dem. 351.

Creditors may be petitioners or respondents as the case may be. The

statute must control every case. Thus, the statute permits a creditor to be proponent of a will, but nowhere is there provision made for his being respondent on the probate. That being the case, a creditor cannot come in afterwards and move to revoke probate. *Heilman* v. *Jones*, 5 Redf. 398, 400. The word "creditor" has a wide significance under the Code. Section 2514, subdivision 3, provides: "The word 'debts' includes every claim and demand, upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action; and the word 'creditor' includes every person having such a claim or demand." But this means only "having such a claim or demand" against the deceased only. *Matter of Underhill*, 117 N. Y. 471; *Matter of Redfield*, 71 Hun, 344, 346; *Duncan* v. *Guest*, 5 Redf. 440.

It does not mean a creditor of a creditor, or a creditor of one of the next of kin, or of a legatee. The Surrogate has no power to inquire into the merits of such a one's claim.

Section 2743 provides:

> Where an account is judicially settled as prescribed in this article, and any part of the estate remains and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the persons so entitled according to their respective rights. In case of whole or partial intestacy, the decree must direct immediate payment . . . . to creditors. . . . If any person who is a necessary party for that purpose has not been cited, or has not appeared, a supplemental citation must be issued as prescribed in section 2727. . . . Where the validity of the debt, claim, or distributive share is admitted, or has been established upon the accounting or other proceeding in the surrogate's court, or other court of competent jurisdiction, the decree must determine to whom it is payable, the sum to be paid by reason thereof and all other questions concerning the same. . . . **§ 2743, Code Civil Proc.** in part.

Chap. 595 of the Laws of 1895, by which the foregoing section was originally amended to read as above, also amended section 1822 of the Code by providing for the filing of a written consent, signed by the claimant against a decedent's estate and the executor or administrator, with the Surrogate, consenting that a disputed claim may be heard and determined by the Surrogate upon the judicial settlement of the account. (*Post*, sub. Accountings.) *With the exception of claims so stipulated over* the necessary implication from section 2743 is or has been held to be (*Martine's Estate*, 11 Abb. N. C. 50; *McNulty* v. *Hurd*, 72 N. Y. 518, 520; *Glacius* v. *Fogel*, 88 N. Y. 434; *Fiester* v. *Sheppard*, 92 N. Y. 251; *Giles* v. *De Tallyrand*, 1 Dem. 97; *Lambert* v. *Craft*, 98 N. Y. 342, 347; *Matter of Will of Walker*, 136 N. Y. 20, 27) that the Surrogate has no authority to determine respective rights of contending parties nor pass on disputed claims. See *Greene* v. *Day*, 1 Dem. 45 (official syllabus). "The rule still prevails, under the Code of Civil Procedure (§ 2743) which must be deemed to have been substantially deduced, by the adjudications, from the former statute (R. S. part 2, chap.

6, tit. 3, § 71) viz.: 1st. That the delegation, to Surrogates, of authority to decree, upon the final accounting of an executor or administrator, a distribution to claimants 'according to their respective rights,' gave them no power to ascertain and determine what those rights were, except in cases where they were conceded to exist. 2d. That the imposition, upon the Surrogate, of the duty 'to settle and determine *all* questions concerning any debt, claim, legacy, bequest or distributive share' empowered him to settle and determine such question, *and such only*, as were not a matter of dispute between the parties, or in simpler phrase, *such questions as there was no question about.* The Surrogate's Court being utterly devoid of jurisdiction to adjudicate finally upon the validity of an alleged creditor's disputed claim against a decedent's estate, an allegation by any person, that he is a creditor of the estate is *conclusive* for the purpose of entitling him, under Code Civ. Proc. § 2731, to become a party to a contest over the correctness of its executor's account." Both creditors, or persons interested in an estate, may, under proper circumstances and although not cited, appear (*Martine's Estate*, 11 Abb. N. C. 50. Thus creditors whose claims are not barred by the statute of limitations may come in and object to claims which are barred, if assets are insufficient to pay both. *Matter of Kendrick*, 107 N. Y. 104) and make themselves parties to a given proceeding, such as for example a proceeding for judicial settlement of an executor's account initiated by an executor under section 2728. Nor is this right lost by omitting to present creditor's claim pursuant to executor's notice. *Greene* v. *Day*, 1 Dem. 45, and see cases chronologically arranged in decision. But, it seems, they can appear only "upon the hearing." *Estate of Wood*, 7 N. Y. St. Rep. 721. See "Accounting" for effect of recent amendments of Code.

§ 100. **Devisees and legatees.**—These terms have strictly distinct meanings. A devisee is one who takes realty, and a legatee one who takes personalty under a will. See *Weeks* v. *Cornwell*, 104 N. Y. 325, 343, where Court of Appeals included, by reason of the context and in order to carry out testator's intentions, devisees under legatees. They are certainly "interested" in the estate, but are not necessarily to be cited, although they may usually intervene in proceedings in which their interests are involved.

They may propound the will for probate. And a legatee named in a will prior in date to that offered for probate may come in and oppose probate of the subsequent will. § 2617, C. C. P. McClellan's Practice in Probate Courts, p. 55, citing *Matter of Will of James Malcolm*, Dayton's Sur. 3d ed. 159.

§ 101. **Assignees.**—If a devisee or legatee assigns his interest he loses his right to be a party, and while the assignee or receiver of a legatee or devisee is not entitled to stand in his shoes and become a party to the proceedings at the same stages, yet he is amply protected by the provision that he may come in on the distribution, and the Surrogate is empowered to decree payment to him of his share, or he may even be allowed to peti-

tion for an accounting. See Code Civ. Proc. § 2743. It has been held that such an assignee should be cited to attend the proceedings on accounting and distribution. *Estate of Gilligan*, 1 Con. 137.

In the case cited the petitioner for the accounting was one who had been appointed receiver of the administrator called to account. Held, the receiver was the assignee of the administrator's share in his intestate's (wife's) estate, and as such entitled to petition, or to be cited, or to intervene, citing *Gibbons* v. *Shepard*, 2 Dem. 247. In *Matter of Losee*, 119 App. Div. 107, B assigned his distributive share and died. In a subsequent proceeding it was held (*a*) his representative had no standing; (*b*) that as the proceeding was an application for letters involving question of priority of right the assignee had no standing, since the validity of the assignment was disputed, and the Surrogate could not pass on such an issue.

Attention must be called to chapter 692, Laws 1904, which affects the

Page 102: The third paragraph calling attention to Chap. 692 of the Laws of 1904 requires this additional note: "This act was repealed by the Consolidated Laws, but its provisions are re-enacted in Personal Property Law in § 32, and in Real Property Law in § 274."

index under decedent's name, in special book.

§ 102. **Interest of individuals not of a class; surviving husband or wife.** —Persons may be necessary or proper parties to proceedings in Surrogates' Courts, not only because they belong to one of the classes just enumerated, such as heirs, next of kin, persons interested, creditors, devisees, or legatees, but by reason of the relations they may sustain to the decedent or to one already a party to the proceeding, as a surviving husband, a widow, one named as executor, or chosen as administrator, one who becomes surety for an executor, administrator or trustee, a guardian, a posthumous or illegitimate child. A surviving husband or wife require particular mention in this connection. By subdivision 12 of section 2514, they are both distinctly excepted from the definition of "next of kin." By subdivision 11, however, they are declared to be persons interested. Under sections 2614–2615 either may petition for probate, and is entitled to citation, being named before heirs or next of kin.

A widow, when entitled to be a party, is so *de sui juris*, and not as heir or next of kin. *Wright* v. *Trustees of M. E. Church*, Hoff. Ch. 202; *Drake* v. *Pell*, 3 Edw. Ch. 251; *Slosson* v. *Lynch*, 43 Barb. 147; *Murdock* v. *Ward*, 67 N. Y. 387; *Luce* v. *Dunham*, 69 N. Y. 36. But where the court is satisfied that, though those terms were used the testator intended to include the surviving husband or wife, such intention will be carried into effect. *Murdock* v. *Ward*, 67 N. Y. 387; *Betsinger* v. *Chapman*, 24 Hun, 15, 18, affirmed 88 N. Y. 487, and cases discussed.

If there is nothing in the context to show that the widow was intended to be included, the words will be given their primary meaning (*Id.; Keteltas* v. *Keteltas*, 72 N. Y. 312, 316. See the numerous cases cited by appellant herein on pp. 313–314. For what is primary meaning see preceding sections, and *Tilman* v. *Davis*, 95 N. Y. 17, 24, whereunder see examina-

tion of English decisions by Earl, J., on p. 27), for neither term is likely to be used by any testator to designate persons who were not related to him by blood. *Id.*

In the case of statutes also the intention of the legislature is the thing to be discovered, and, once known, words of description may be extended accordingly to include subjects to which they are not directly applicable. *Betsinger* v. *Chapman*, 88 N. Y. 488, 494, where object of Revised Statutes (p. 2, ch. 6, title 5, §§ 9–10) being to give a remedy by action against executors and administrators to "any legatee or any of the next of kin entitled to share in the distribution of the estate," held, to include widow as a distributee under the statute of distributions. The rights of a surviving husband or wife and their status as parties may be materially affected by the fact of a divorce formerly granted to or from the decedent. The Code provides (§ 1759, subdivision 3, as amended by ch. 891, Laws of 1895), "If when final judgment is rendered, dissolving the marriage, the plaintiff—which under this section is the wife—is the owner of any real property; or has, in her possession, or under her control, any personal property, or thing in action, which was left with her by the defendant, or acquired by her own industry, or given to her by bequest or otherwise; or if she is or may thereafter become entitled to any property by the decease of a relative intestate, the defendant shall not have any interest therein, absolute or contingent, *before or after her death.* 4. Where final judgment is rendered dissolving the marriage, the plaintiff's inchoate right of dower, in any real property, of which the defendant then is or was theretofore seized, is not affected by the judgment."

And *per contra* section 1760 (action brought by husband), provides: "A judgment dissolving the marriage does not impair or otherwise affect, the plaintiff's rights and interests, in and to any real or personal property which the defendant owns or possesses, when the judgment is rendered.

3. "Where judgment is rendered dissolving the marriage, the defendant (i. e., the wife) is not entitled to dower in any of the plaintiff's real property, or to a distributive share in his real property." The rights of a surviving husband or wife who was divorced may also be affected by the guilt or innocence of the survivor. Thus a woman divorced from decedent for her adultery is, under the provisions of the Code just quoted, not entitled to dower nor to a distributive share. If she had obtained the divorce, however, from decedent for his guilt, her dower rights are not divested from real property owned by him at or prior to the judgment of divorce.

But the divorce, whether in her favor, or against her, disentitles her to administer upon his estate, for she is not his widow in the eyes of the law, as well as to any distributive share in his personal estate, since her rights *quoad hoc* were determined by the judgment which has this very matter in view allowing and fixing her alimony. *Matter of Estate of Ensign*, 103 N. Y. 284; *Kade* v. *Lauber*, 16 Abb. Prac. N. S. 288. Although blameless, no dower attaches in her favor to lands acquired by him after the divorce. Her coverture, as to him, ended with the judgment. Under the provisions

of law it is possible that he may marry again, in which case his last wife if she survive him is his "widow." Any other doctrine would tend to produce confusion, and is shown to be fallacious in *Matter of Estate of Ensign*, 103 N. Y. 284, where Finch, J., grimly asks, admitting the possibility of a man's legally marrying in another State, or even in this by consent of the court: "Suppose that, with unusual activity, he should leave four (such 'widows') how would each one get one-third of the personalty?"

See, for exhaustive opinion on effect of divorce, right to remarry in another State, and validity of new marriage, and effect of rule "straining after legitimatization of offspring," opinion of Beckett, Surr., in *Matter of Garner*, 59 Misc. 116.

§ 103. **Executors or administrators,** whether one or several, are looked upon as one, so far as being parties is concerned. Code Civ. Proc. § 1817. "In an action or special proceeding against two or more executors and administrators, representing the same decedent, all are considered as one person." But this relates only to such as have received letters testamentary. One to whom letters have not been issued is not a necessary party to an action or special proceeding, in favor of or against the executors, in their representative capacity. Code Civ. Proc. § 1818; *Moore* v. *Millett*, 2 Hilt. 522. But see *Hunter* v. *Hunter*, 19 Barb. 631. And this means one to whom letters have not been issued *in this State*. Thus if there are two coexecutors of a non-resident testator in another State, and only one takes out letters in this State, such one is the only one necessary as a party to proceedings in this State. *Lawrence* v. *Townsend*, 88 N. Y. 24, 32. When executors are necessary parties all must join or be joined. *Matter of Slingerland*, 36 Hun, 575, 577; *Scranton as Ex'r* v. *Farmers' & Mechanics' Bank, etc.*, 24 N. Y. 424.

§ 104. **Intervening.**—Upon the probate of a will, any person, although not cited, who is named as a devisee or legatee in the will, or as executor, trustee, devisee or legatee in any other paper purporting to be a will of the decedent or who is otherwise interested in sustaining or defeating the will, may appear, and, at his election support or oppose the application. A person so appearing becomes a party to the special proceeding. Code Civ. Proc. § 2617. See *Lafferty* v. *Lafferty*, 5 Redf. 326, 329, citing *Booth* v. *Kitchen*, 7 Hun, 255, 259, 260, 264; *Walsh* v. *Ryan*, 1 Bradf. 433; *Marvin* v. *Marvin*, 11 Abb. N. S. 97; *Children's Aid Society* v. *Loveridge*, 70 N. Y. 387, 391; *Terhune* v. *Brookfield*, 1 Redf. 220. This rule applies in cases other than probates. In any case the party, having the necessary interest, must petition the Surrogate for leave to come in, and in every proper case such leave will be given; otherwise he may become a mere "interloper" and his claim of rights disregarded. *Matter of Garner*, 59 Misc. 116; *Matter of Hamilton*, 76 Hun, 200. No motion, or any other steps, can be taken by such person in the proceeding until after he becomes a party. *Foster* v. *Foster*, 7 Paige, 48, 52; *Lafferty* v. *Lafferty*, 5 Redf. 326, 329. It is no answer to his application that as to him the Statute of Limitations has run if the court has jurisdiction of the *rem*. *Matter of*

Ibert, 48 App. Div. 510; *Matter of Bingham*, 127 N. Y. 296. If any one already a party to a proceeding in a Surrogate's Court dies, his representative is entitled to come in and protect his interest in his decedent's place and stead. *Van Alen* v. *Hewins*, 5 Hun, 44. A proceeding for probate of a will, being a proceeding *quasi in rem*, does not abate by the death of a party, whether proponent or contestant or even of *all* the parties. *Lafferty* v. *Lafferty*, 5 Redf. 326. The proceeding lives, and must continue unabated, until the will be either admitted to or refused probate. *Van Alen* v. *Hewins*, 5 Hun, 44; *Brick* v. *Brick*, 66 N. Y. 144. The right of a representative of a party to intervene upon such party's decease is thus an essential right. *Merritt* v. *Jackson*, 2 Dem. 214, Rollins, Surr.: "It seems eminently proper, even if it is not essential, that one who is the acknowledged representative of a party deceased, and who asks as such to intervene, should be allowed to do so." Whatever the proceeding, the party petitioning for leave to intervene must allege the facts constituting his interest or title to be brought in; such as, that he is a "person interested in the estate" (see § 98 and cases cited) or a creditor who desires, for example, to come in upon an accounting; or that he "has in the subject-matter of the decree or order, a right or interest, which is directly affected thereby (thus counsel for contestant of a will to whom the Surrogate had made an allowance were held to be properly parties to an appeal taken by the executrix. *Peck* v. *Peck*, 23 Hun, 312. See also *Wilcox* v. *Smith*, 26 Barb. 316; *Matter of Thompson*, 11 Paige, 453; *Jauncey* v. *Rutherford*, 9 Paige, 273) and which appears on the face of the papers presented in the Surrogate's Court, or has become manifest in the course of the proceedings" in case he desires to become a party upon an appeal. Code Civ. Proc. § 2573.

§ 105. **Mode of intervention.**—The ordinary manner of intervention is by order of the Surrogate upon the applicant's petition, or upon his appearance in open court, on the return day, and filing a sworn claim of interest. The evidence on the question of interest is taken *pari passu* with that relating to the will, in case of probate, and is not deemed a separate proceeding. *Norton* v. *Lawrence*, 1 Redf. 473, 475. But under Rule 4 of the court in the county of New York, the Surrogate first hears and passes upon the question of the status of the contestant, if it has been drawn in question, "unless for the convenience of the parties or the court, the Surrogate shall order otherwise." A claimant, not entitled to be cited as heir-at-law or next of kin, may become a party to an accounting proceeding by presenting his claim and filing a consent. *Matter of Ingraham*, 35 Misc. 577.

In case a person becomes a necessary party on appeal under § 2573, *supra*, he may be brought in by an order of the Appellate Court, made after the appeal is taken. Or the Appellate Court may prescribe the mode of bringing him in, as by publication, by personal service, "or otherwise."

And it has been held that when the appeal is pending the Surrogate's Court has no longer power to make an order allowing a party to intervene

but that he may only apply to the Appellate Court. *Matter of Dunn*, 1 Dem. 294, citing the following: *Foster* v. *Foster*, 7 Paige, 48; *Marvin* v. *Marvin*, 11 Abb. Pr. 97; *Matter of Wood*, 5 Dem. 345. But a creditor of, or person interested in the estate or fund affected by any decree or order, who was not a party to the special proceeding, but who was entitled by law to be heard therein upon his application, or who has acquired since the decree or order was made a right or interest which would have entitled him to be heard, if it had been previously acquired, may intervene and appeal. The facts which entitle such a person to appeal must be shown by an affidavit, which must be filed, and a copy thereof served with the notice of appeal. Code Civ. Proc. § 2569. See *Foster* v. *Foster*, 7 Paige, 48; *Marvin* v. *Marvin*, 11 Abb. N. S. 97; *Delaplaine* v. *Lawrence*, 10 Paige, 602.

§ 106. **Practice on intervention.**—The following precedents used upon a proceeding for the probate of a will, sufficiently indicate the forms to be followed where a party desires to intervene:

Petition of an heir-at-law for leave to intervene.

Surrogate's Court,
County of
Title. }

To the Surrogate's Court of the county of

The petition of respectfully shows:

I. That he is (e. g., an infant over 14 years of age, and was years of age on the day of 19), that he resides in (with his).

II. On information and belief, that on the day of one departed this life leaving his last will and testament, which on the day of was duly filed in the office of the Surrogate of the county of for probate; and that proceedings for the probate of said will are now pending before said Surrogate; and that said will is a will of real and personal property (*or* of real, *or* of personal property).

III. That your petitioner is one of the heirs-at-law of said decedent (*or* one of the next of kin, *or state relationship in full if necessary by showing kinship through common ancestor in case of collaterals, or by specifying that the decedent was an uncle, aunt, or brother or sister, or whatever the relationship may have been.*) *Note.*

IV. Your petitioner further says, that he is interested in the said will [*state briefly the facts showing whether the petitioner is interested in sustaining or defeating the will, and if the petitioner desires to defeat the will, state briefly the facts on which the petitioner intends to rely. For example, as follows:* That your petitioner is informed and verily believes that said will was procured by undue influence, *or*, that at the time it was made, the petitioner was without testamentary capacity to make

such a will; and your petitioner is advised and verily believes that said will is not in fact the last will and testament of said testator, but that probate should be denied the same; and he is further advised that if probate is denied the same, your petitioner will be entitled to share in the real or in the personal, or in the real and personal estate of said decedent (*or if petitioner claims by representation say,* entitled to that share in the realty, or personalty, or in the real and personal estate of said decedent, which his mother, *or* father, would have been entitled to if living, as one of the heirs, or next of kin of said alleged testator)].

WHEREFORE, your petitioner prays that an order of this court may be made adjudging your petitioner to be a necessary party to the above entitled proceeding and directing a supplemental citation to issue directed to him and to be served upon him according to law.

(Signature.)

(Verification.)

Surrogate's Court
Caption.

Present:
Hon.
Surrogate.

Title.

Order allowing party to intervene. *Note.*

On reading and filing the petition of (if necessary say an infant over the age of 14 years or where infant is under the age of 14 years and petition is made by parent or general guardian or next friend state the fact), verified the day of 19 from which it appears that the petitioner, (*if necessary* an infant as aforesaid) is interested in the probate of the will of deceased, proceedings for which are now pending in this court, and that the said petitioner desires to intervene in such proceedings that his interests therein may be protected.

Now after hearing counsel for said petitioner and for the proponent respectively, and on motion of of counsel for the petitioner,

It is Ordered that the said (an infant over *or* under the age of 14 years) be and he hereby is adjudged to be a necessary party to the above entitled proceeding and should be cited therein; and it is

Further Ordered that a supplemental citation issue forthwith directed to the said be served upon him according to law. *Note.*

Note. These precedents are only necessary where the proponent's attorney puts in issue the right of the petitioner to be made a party. If this right to intervene is not put in issue, the supplemental citation may issue on consent, without the formality of an application to the court.

Note. Where the petitioner who is permitted to intervene is an infant he should petition for the appointment

of the special guardian directly upon the order permitting him to intervene. If no application is made by him or on his behalf, the Surrogate will appoint a special guardian upon his own motion.

§ 107. **Order not necessary.**—It is not necessary but it is better practice that an order be entered on the intervenor's petition, granting his request. The same result is secured by issuing a citation to him and proof of service of such citation upon him is sufficient proof of his regular standing as a party to the proceeding. For the Surrogate, of his own motion, if he discover that any one is a necessary party to a pending proceeding, will bring him in, and if such a party be a minor, will appoint a special guardian. It is quite immaterial how he ascertains that such a one is a necessary party. The affidavit of an attorney is quite sufficient. *Russell* v. *Hartt*, 87 N. Y. 18, 23. So, in a case before the Surrogate of New York, the omission of a minor as a party to the proceeding was discovered by the Surrogate himself, after twelve years of litigation, and a special guardian appointed. *Saltus's Estate*, 1 Tucker, 230.

§ 108. **Effect of death of a party.**—At common law when a sole party to a legal action died before trial, the action abated, and there was no way to revive or continue it. *Matter of Palmer*, 115 N. Y. 493–495; *Evans* v. *Cleveland*, 72 N. Y. 486. The right to revive and continue such actions in the names of the administrators or executors of a deceased party always depends upon statutes. *Matter of Camp*, 81 Hun, 387, 388. Prior to 1891, the provisions of the Code upon this subject related only to actions. They were then amended so as to apply also to special proceedings, but not in Surrogates' Courts, except as expressly made applicable. Sections 765 and 785, are such sections made applicable by § 3347, subd. 6. They provide, 1. That no judgment may be entered against a party who dies before a verdict, report, or decision is actually rendered against him. 2. Where a party entitled to appeal from a judgment or order, or to move to set aside a final judgment for error in fact, dies either before or after this chapter takes effect, and before the expiration of the time within which the appeal may be taken, or the motion is to be made, by the heir, devisee, or personal representative of the decedent, at any time within four months after his death. This indicates that certain special proceedings in Surrogates' Courts abate on the death of a party, and that others may not. And, first, if the proceeding be *in rem* the jurisdiction of the Surrogate, once acquired, is not divested by the death of one of the parties, or even of all the parties. *Lafferty* v. *Lafferty*, 5 Redf. 326. Thus a probate proceeding, which is of this description, or, speaking exactly, a proceeding *quasi in rem*, is one in which the Surrogate's function is not to

determine issues or rights between parties, and if the will is contested the issues then raised are deemed incidental to the general inquiry as to its probate, but whether or not the instrument propounded as the last will and testament of the decedent is a valid will, and is in very fact his last will. This inquiry is not affected by the death of a party to the proceeding and does not abate by reason thereof. *Brick* v. *Brick*, 66 N. Y. 144. The interests of the deceased party can if they survive, be represented by his legal representatives, whose application to be made parties should be granted. *Van Alen* v. *Hewins*, 5 Hun, 44, 47, citing *Brick's Estate*, 15 Abb. Pr. 12; *Campbell* v. *Thatcher*, 54 Barb. 382; *Campbell* v. *Logan*, 2 Bradf. 90; *Pew* v. *Hastings*, 1 Barb. Ch. 452; *Kerr* v. *Kerr*, 41 N. Y. 272–277, and see *Merrick* v. *Jackson*, 2 Dem. 214; *Lafferty* v. *Lafferty*, 5 Redf. 326. If no application is so made by them and the Surrogate proceeds with the probate, his decree is binding on all the surviving parties to the proceeding. *Brick* v. *Brick*, 66 N. Y. 144. So, also, in a proceeding *in rem*, such as a probate proceeding, the relation in which the party dying stands to the proceeding does not affect this question of abatement. Thus where a proponent died it was held the proceeding did not abate, but could be revived and continued (*Matter of Govers*, 5 Dem. 40); and similarly in a case where a contestant died. *Van Alen* v. *Hewins*, 5 Hun, 44. Where a proponent dies, who is also a beneficiary under the will, his executor or administrator should make an *ex parte* application to be made a party to the original proceeding, and when made a party he should then apply, on notice, for a revival in his name as proponent. It seems that this is better practice than that heirs or next of kin of the testator, other than the original proponent, if any there be, should apply to be substituted as proponents. *In re Govers*, 5 Dem. 40. The theory being that the proponent's executor is under the duty of seeking to reduce to possession that which his testator is entitled to under the will he had propounded and, to that end, to proceed with its probate.

If, however, the proponent have no beneficial interest under the will, and die, his executor is not bound to come in. So if one is named an executor in a will and in that capacity offers it for probate, and dies, pending the proceeding his estate can have no possible interest in intervening. In such a case any other person who would have been originally qualified to offer the will may come in and apply for a revival of the proceeding in his own name as proponent; of course first intervening if he be not already a party.

Such an application should not be *ex parte* but upon notice to all other parties to the proceeding.

§ 109. **Same, continued.**—But if the proceeding be *in personam* then the death of a party may materially change the situation. Thus a proceeding to compel the judicial settlement of an executor's account cannot survive the executor's death. *Boerum* v. *Betts*, 1 Dem. 471, 474, citing *Leavy* v. *Gardner*, 63 N. Y. 624; *Matter of Grove*, 64 Barb. 526; *Daking* v. *Demming*, 6 Paige, 95; *Montross* v. *Wheeler*, 4 Lans. 99; *Farnsworth* v.

Oliphant, 19 Barb. 30. And where an administrator himself instituted proceedings to settle his own account and died pending the Surrogate's decision it was held the proceeding abated and could not be revived. *Herbert* v. *Stevenson*, 3 Dem. 236. But this is without prejudice to the right given by the amendments of 1884 and 1891 to the Code (see § 2606) under which an executor or administrator of a deceased executor, administrator, guardian, or testamentary trustee, may be compelled to account for property for which his decedent could have been compelled to account (see Accountings) which is a new remedy, pursued in an independent proceeding. See *Matter of Tredwell*, 85 App. Div. 570, where executor died pending his accounting, and his representative being required to account for his decedent's acts sought to revive original proceeding. (See, *post*, Accountings.)

It is also important that the distinction be kept in mind which the Code now draws between special proceedings in general and special proceedings in Surrogates' Courts. Thus when in § 755 it was enacted that "a special proceeding does not abate by any event if the right to the relief sought in such special proceeding survives or continues," etc., it must be remembered that in § 3347 in subd. 6 it is provided that that section applies to proceedings only in the Supreme Court, the city court of the city of New York, or a county court. *Matter of Camp*, 81 Hun, 387, 388. See all of title IV, ch. 8, §§ 755–766, also § 785 in connection with subd. 6 of § 3347. The fact that the §§ 755, etc., were amended in 1891 does not make them applicable to all special proceedings. They are still subject to the limitations of § 3347. But if the party seeking to compel the executor or administrator to account dies while the proceeding is pending, the person succeeding to his interest may on proof of his interest intervene and continue the proceeding (*Matter of Fortune*, 14 Abb. N. C. 415) whether he be his personal representative or merely his assignee.

Section 766 of the Code provides that where . . . . a special proceeding is authorized or directed by law, to be brought by or in the name of a public officer, or by a receiver or other trustee, appointed by virtue of a statute, his death or removal does not abate it, but the same may be continued by his successor, etc.

By § 3347 of the Code, subd. 6, it appears that § 766 of the Code does not apply to Surrogates' Courts. But in the case of an executor or administrator or other person directed by a decree in proceedings for the sale of a decedent's real estate to sell such real estate, it is provided by § 2760 of the Code that,

"The death, removal, or disqualification before the complete execution of a decree of all the executors, or administrators, does not suspend or affect the execution thereof; but the successor of the person who has died, been removed, or become disqualified, must proceed to complete all unfinished matters as his predecessors might have completed the same. . . ." See also *Matter of Camp*, 81 Hun, 387.

CHAPTER III

HEARINGS AND TRIALS

§ 110. **Practice similar to that in all courts of record.**—Practice in Surrogate's Courts conforms substantially to that in other courts of record. *Goulburn* v. *Sayre*, 2 Redf. 310. Of course this general statement is subject to the limitation that the whole jurisdiction of the court is statutory. The general rule as to practice in Surrogates' Courts is defined by subd. 11 of § 2481 (*supra*) which provides, in effect, that where jurisdiction is given in any matter to the Surrogate's Court and the practice is not prescribed it shall proceed, "According to the course and practice of a court having by common law jurisdiction of such matters." Consequently, Surrogates' Courts have been accustomed to allow the resort to the ordinary machinery of practice. So, for example, the right to shorten the time of notice of a motion by an order to show cause has been very generally exercised. See *Filley's Estate*, 20 N. Y. Supp. 427; *Cluff* v. *Tower*, 3 Dem. 253, where Judge Rollins held (under subd. 6 of § 2481) that a proceeding to open, vacate, etc., a decree or order of his court (the power to do which by this section is directed to be exercised only in like case and in the same manner as a court of record and of general jurisdiction would exercise the same power) might be begun either by a notice of motion or by an order to show cause, but while, generally speaking, the rule is as above stated, yet, where practice in the other courts of record in special cases or in particular respects is changed, it will not be deemed to extend to Surrogates' Courts unless clearly made applicable thereto, or unless it clearly comes under one of the subdivisions of § 2481 as aforesaid. So, in *Matter of Tilden*, 98 N. Y. 434, it is held that a proceeding to open or vacate a decree is a special proceeding, and itself terminates in a final order. So, where the relief sought is *in personam*, such special proceeding must be begun by citation, or no jurisdiction of the person could be acquired, that is against nonresidents. See *Bullowa* v. *Provident Life, etc.*, 125 App. Div. 545. See *Havemeyer's Estate*, 35 N. Y. Supp. 480, making inapplicable to Surrogate's referees the amendment of § 1022, Code Civ. Proc., as to separate statement of facts found and conclusions of law.

This was so held in spite of § 2546 of the Code, which makes applicable to references in the Surrogate's Court all the provisions of the Code applicable to references in the Supreme Court, "so far as that can be applied in substance, without regard to the form of proceeding." This, however, was in view of § 2545 which remained unamended, and under which the Surrogate, upon the trial by him of an issue of fact, is required to file in his office his decision in writing, which must state separately the facts

found and the conclusions of law. Surrogate Fitzgerald held, that it would be highly improbable to suppose that the legislature intended to create the anomalous condition of relieving referees appointed by the Surrogate's Court from making the findings which are exacted from the court itself. But, while we believe he was technically right, in a later case [*Matter of Woodward*, 69 App. Div. 286, 290 (2d Dept.)], the contrary decision of the Surrogate of Kings County was affirmed, holding that § 1022 was applicable (in references in special proceedings under § 2546), as its provisions could be "applied in substance."

The Appellate Court went further and held that when a referee filed a short decision, the Surrogate himself was relieved of the duty imposed by § 2545 of stating separately the facts found and the conclusions of law. But by ch. 85, Laws 1903, § 1022, was subsequently changed again to require findings by court or referee. This is, therefore, merely discussed to indicate the attitude of the courts on the assimilation of practice.

§ 111. **Same.**—Similarly the rules which are applicable in other courts of record in the conduct of trials will be enforced in Surrogates' Courts. The examination and cross-examination of witnesses, the compelling of the attendance of witnesses, the privilege to which witnesses are entitled, the admissibility of the evidence adduced and the competency of the witnesses examined are to be regulated by the generic rules. We have already seen that among the powers of the Surrogates is the power to issue subpœnas, or subpœnas *duces tecum*, and to punish for contempt in like case and in like manner as any court of record. So he may under § 2008, C. C. P., issue a writ of *habeas corpus* "for the purpose of bringing before the court a prisoner, detained in a jail or prison within the State, to testify as a witness in the . . . . special proceeding, in behalf of the applicant." All statutory provisions as to proceedings in Surrogates' Courts must of course be carefully observed, but amendments of the Code prescribing new methods of practice or procedure can have no *ex post facto* operation (see subd. 11 of § 3347, excluding all proceedings pending in Surrogates' Courts upon the first day of September, 1880, when the act went into effect), that is to say (*Mills* v. *Hoffman*, 92 N. Y. 182), if the amendments relate to a matter of substantial right they ought to be construed as inapplicable to proceedings pending before they went into effect; but as regards mere incidental details of procedure they may properly be deemed operative as to all motions or applications made in proceedings after the amendment goes into operation. This would seem to be the rule deducible from the decisions.

§ 112. **Attorneys.**—In regard to parties the Surrogate's power has already been discussed. Over attorneys he, undoubtedly, has powers similar to those of any court of record, such as the power to direct substitution of one attorney for another (*Chatfield* v. *Hewlett*, 2 Dem. 191); and as incidental thereto to determine the terms and conditions upon which the substitution should be made. Surrogate Coffin in 1883 (*Hoes* v. *Halsey*, 2 Dem. 577), doubted the power of the Surrogate to prescribe the

terms on which a change of attorneys could be effected. The better rule, however, had been laid down by Surrogate Rollins the year before (*Chatfield* v. *Hewlett, supra*), in a well reasoned opinion basing the power claimed upon the Code of Civil Procedure generally and in particular upon § 17 which authorized the general term justices of the Supreme Court with certain chief justices of the Superior City Courts to establish rules of practice to be binding upon all courts of record. The learned Surrogate pointed out that it was doubtful whether the Surrogate could lawfully have exercised such power, prior to the Code, citing *Coates* v. *Cheever*, 1 Cow. 463, 475; *Cullen* v. *Miller*, 9 N. Y. Leg. Obs. 62, 66; *Petition of Hunt*, 1 Tuck. 55; *Matter of Sommerville, id.* 76. But among the rules of practice commonly known as the "Court Rules" was the following: Rule 10. "An attorney may be changed by consent, or upon application of the client upon cause shown, and upon such terms as shall be just, by order of the court or a judge thereof, and not otherwise." By one of the statutes amending the Code, making the Surrogates' Courts courts of record, the procedure in such courts was made subject to these rules. Laws 1887, ch. 416. Section 17 of the Code above referred to went into operation on September 1, 1877. There can be no question, therefore, that since that time Surrogates have had authority to direct substitution of attorneys in proceedings pending before them upon such terms as to compensation of the retiring attorney as seem reasonable and just. See also *Matter of Fernbacher*, 18 Abb. N. C. 1; *Eisner* v. *Avery*, 2 Dem. 466. In *Matter of Caldwell*, 188 N. Y. 116, the executors employed attorneys designated by the testator in his will. But they also employed other counsel. The court held that while the designation in the will could only be treated as the expression of a wish, yet having employed them the executors could pay them out of the estate, whereas they must personally pay the additional counsel retained.

§ 113. **Lien of attorneys—How enforced.**—Since a court of record has undoubtedly the power to determine the amount of an attorney's lien for services by direct inquiry or by reference, the Surrogate may do the same (*Barber* v. *Case*, 12 How. Pr. 351; *Gillespie* v. *Mulholland*, Daly, Ch. J., 12 Misc. 40, 43, dist'g *McKibbel* v. *Nafis*, 27 N. Y. Supp. 723); and if the matter is referred by the Surrogate the reference will be subject to the usual rules governing references in Surrogates' Courts. See below; also *Matter of Smith*, 111 App. Div. 23 (opinion of Chase, J.) The lien was sustained as a charge against the estate, and execution against the representative personally was refused. Section 66 of the Code was amended (L. 1899, ch. 61) just after decision in *Matter of Lex'n Ave., No.* 1, 157 N. Y. 678, aff'g 30 App. Div. 602, by including special proceedings and protecting the lien of attorneys therein upon the client's cause of action, claim or counterclaim. The section now reads:

> § 66. **[Am'd, 1879, 1899.] Compensation of attorney or counsellor.**—The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the com-

mencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien.

Note. Now in Judiciary Law, §§ 474–475.

But the lien must be upon something over which the Surrogate has jurisdiction. So in *Matter of Robinson*, 59 Misc. 323, Ketcham, Surr., refused to proceed under § 66 to pass on the lien of former attorneys for a trustee upon books and papers which the trustee alleged belonged to him, and to be necessary in order to preparing and settling his account. There was no proceeding pending to which a decree as to the lien could have been made an incident.

§ 114. **Protection of lien by Surrogate.**—Accordingly, it is now held that the power of the Surrogate's Court to protect the lien of an attorney has been assimilated to that of the Supreme Court and other courts of record. *Matter of Regan*, 167 N. Y. 338, 343, rev'g 58 App. Div. 1, and aff'g 29 Misc. 527. (See opinion of Surrogate.) See *Matter of Robinson*, 125 App. Div. 424 (no lien on estate).

The decision in *Matter of Krakauer*, 33 Misc. 674, is not in conflict. It was there held only that there was no proceeding pending in which this incidental power of protection could be exercised. No order for substitution of attorneys can be made, and the lien of the first attorneys protected when no proceeding is pending to which the order can relate. *Ibid.*, citing *Matter of Hoyt*, 5 Dem. 432, 445; *Estate of Aaron*, 7 N. Y. Supp. 735.

So, in the *Regan* case the power of the Surrogate was upheld to vacate the satisfaction of a decree to let in attorneys who had a *liquidated claim*, which attached by way of lien to the decree in their client's favor under § 66.

The question was not squarely before the court whether the case would be different if, first, the claim was unliquidated, or second, the client was able to respond pecuniarily apart from the proceeds of the attorney's industry.

The Surrogate has power, pending his determination of the merits of the question of substitution or of lien to order the attorney to deposit the moneys of the estate or client in a trust company to abide his decision. *Oraindi's Estate*, 9 N. Y. Supp. 873; *Matter of Regan*, 29 Misc. 527, 531; *Matter of Rowland*, 55 App. Div. 66. See *Matter of Fitzsimmons*, 174 N. Y. 15, and cases cited at p. 20. In this case the attorney had an agreement with a party (who contested the administratrix' account) for his fees. The administratrix collusively settled with the client behind the attorney's back. The client executed withdrawal of objections and consent to a decree. The Surrogate continued the proceeding on the attorney's petition

for the purpose of determining the lien. The Appellate Division reversed and denied the petition and ordered the decree to be entered. The Court of Appeals sustained the Surrogate, and held the order of the Appellate Division to be a final order and appealable to that court.

This case also involved the questions whether the agreement in question was champertous or unconscionable, under §§ 73–74 of the Code. See opinion Martin, J., pp. 21–25. [These sections are now in Penal Code.]

On latter point see also *Morehouse* v. *B. H. R. R. Co.*, 185 N. Y. 520.

See also *Matter of Williams*, 187 N. Y. 286. This was a case where the attorney's lien was impressed in proceedings under § 66 upon income from a trust fund which the trustee refused to pay, and which the attorney compelled payment of by proceedings in the Surrogate's Court. Held that while exempt from claims of creditors so far as not needed for beneficiary's support it was not exempt from the attorney's lien. Three judges dissented (see p. 293).

In *Matter of Tyndall*, 117 App. Div. 294, it is held that where an attorney brought suit in the Federal court *in forma pauperis* under an agreement with the special guardian of infant plaintiff for 50% of the recovery, the Surrogate properly remitted him to the Federal court for his remedy. The attorney in this case had been appointed general guardian of his infant plaintiff and secured an *ex parte* order of the Surrogate approving his 50% share. After getting the money he accounted in the Surrogate's Court. But the citation was not served on the infant in person. The decree provided for his retention of the 50%. Another general guardian having been appointed a supplementary accounting was had in which a special guardian objected to this 50% payment. Whereupon his objection was sustained, the former decree held not binding as jurisdictionally defective, and that under the state law the 50% agreement was not enforceable, as made for one suing *in forma pauperis*.

§ 115. Miscellaneous provisions as to trials in Surrogates' Courts.— Section 2545 of the Code was a new provision prescribing the practice in Surrogates' Courts, with regard to exceptions on a trial in such court. The section is as follows:

§ 2545. *Exceptions upon trial.*

An exception may be taken to a ruling by a surrogate, upon the trial by him of an issue of fact, including a finding, or a refusal to find, upon a question of fact, in a case where such an exception may be taken to a ruling of the court upon a trial, without a jury, of an issue of fact, as prescribed in article third of title first of chapter tenth of this act. The provisions of that article, relating to the manner and effect of taking such an exception, and the settlement of a case containing the exceptions, apply to such a trial before a surrogate; for which purpose, the decree is regarded as a judgment, and notice of an exception may be filed in the surrogate's office. Upon such a trial, the surrogate must file in his office his decision in writing, which must state, separately, the facts found and the conclusions of law. Either party may, upon the settlement of a case, request a finding upon any question of fact, or a ruling upon any question of law; and an exception may be taken to such a finding or ruling, or

to a refusal to find or rule accordingly. An appeal from a decree of an order of a surrogate's court brings up for review, by each court to which the appeal is carried, each decision, to which an exception is duly taken by the appellant, as prescribed in this section. But such a decree or order shall not be reversed, for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby.

§ 116. **The practice hereunder.**—The foregoing section has been very largely discussed in the courts. In the first place it is to be observed that the particular procedure prescribed by it for Surrogates' Courts is unaffected by amendments to the Code covering the practice in this regard in other courts of record, unless the legislative intent is clear as noted in § 110. It is to be observed, in the next place, that § 2545 refers to §§ 992 *et seq.*, with regard to the cases in which exceptions may be taken as upon trials before other courts of record without a jury of an issue of fact; but the first two paragraphs of the section are limited by the subsequent paragraphs which are specific and limit the practice in the Surrogate's Court. Thus, the findings of fact must be requested *upon the settlement of the case,* and at no other stage of the proceedings. *Hartwell* v. *McMaster,* 4 Redf. 389; *Matter of Hoyt,* 5 Dem. 432; *Matter of Dodge,* 105 N. Y. 585, aff'g 40 Hun, 443; *Matter of Prout,* 11 N. Y. Supp. 160. And a Surrogate cannot be required to determine particular questions before rendering his decision. *Tilby* v. *Tilby,* 3 Dem. 258, citing *Hartwell* v. *McMaster,* 4 Redf. 389; *Matter of Chauncey,* 32 Hun, 430. It is to be noted further that this section regulates specifically the method by which a review of errors on a trial before a Surrogate may be had by the Appellate Court. This method is exclusive. See *post,* ch. VI on Appeals. In this connection the Court of Appeals (Ruger, Ch. J., in *Matter of Hawley,* 100 N. Y. 206, 210) uses the following language: "The provision of the Code of Civil Procedure regulating the method by which a review of the errors occurring upon a trial before a Surrogate can be secured . . . . also furnishes the strongest implications that such errors are not remediable by any other proceeding."

§ 117. **When section 998 is applicable.**—Since § 2545 prescribes that the decree of the Surrogate is to be regarded as a judgment and makes applicable to trials in Surrogates' Courts those provisions of ch. 10, title 1, article 3 (§§ 992 *et seq.*) which relate to the manner and effect of taking exceptions to rulings of the Surrogate both upon the trial of an issue of fact and in finding or refusing to find a question of fact and also relating to the settlement of a case containing the exceptions, the practice may be assumed to be substantially assimilated to the proceedings on and after the trial of an action by the Supreme Court. *Waldo* v. *Waldo,* 32 Hun, 251; *Hewlett* v. *Elmer,* 103 N. Y. 156. This is manifest, not only by implication from the provision of § 2545, but also from the wording of §§ 2575 and 2576 (see ch. VI on Appeals, *post*), which provides for a case on appeal to be made and settled by the Surrogate in the manner prescribed by law, for the making and settling of a case upon an appeal in an action. See *post. Ibid.* It must be borne in mind, in view of what has already

been said, that these provisions of § 2545, and those incidental thereto which are about to be discussed, being specific, do not apply to any other trial except a trial by the Surrogate of an issue of fact. Where the decree appealed from is not made upon the trial by a Surrogate of such an issue, it is not within the practice prescribed by § 2545 or § 2576. For example: Where the decree of a Surrogate charges a trustee with interest and denies him commissions upon the settlement of his account and the trustee appeals, there is no provision in this section of the Code, for the making or settlement of a case, consequently, it has been held in such a case that § 998 of the Code controls. *Matter of Jackson*, 32 Hun, 200. Section 998 is as follows:

> **§ 998.** *When appeals, etc., may be heard without a case.*
>
> It is not necessary to make a case, for the purpose of moving for a new trial, upon the minutes of the judge, who presided at a trial by a jury; or upon an allegation of irregularity, or surprise; or where a party intends to appeal from a judgment entered upon a referee's report, or a decision of the court upon a trial, without a jury, and to rely only upon exceptions, taken as prescribed in section 994 of this act.

§ 118. **Surrogate's duty as to findings.**—When the practice was yet undefined by judicial decisions the case arose of an appeal from a Surrogate's decree confirming a referee's report. In view of the fact that the referee had already separately stated his findings of fact and of law, the Surrogate refused to make additional findings and on appeal to the Fourth Department, General Term, his decree was reversed. *Matter of Keef*, 43 Hun, 98.

This is overruled in *Matter of Yetter*, 44 App. Div. 404, 408, where the court approved the contrary rule laid down in *Matter of Niles*, 47 Hun, 348, namely, that under § 2546, where a reference has been ordered, it is not necessary where exceptions taken to the report of the referee are overruled by the Surrogate, to file exceptions again to the Surrogate's decree in order to entitle the aggrieved party to review the error complained of on an appeal from that decree. So, in *Matter of Bettman*, 65 App. Div. 229, it was similarly held, the court saying: "When the Surrogate confirmed the report, he adopted the findings of fact and conclusions of law reported by the referee as his own, and in all respects complied with the law. The same rule holds where the Surrogate sustains exceptions, on the coming in of the report, to the referee's conclusions of law. *Matter of McAleenan*, 53 App. Div. 193, 198. In *Matter of Barefield*, 177 N. Y. 387, the referee made the usual findings and conclusions. The Surrogate, on the motion to confirm came, however, to entirely different conclusions. He made a decree, containing no findings of fact. Whereupon the Appellate Division reversed him (82 App. Div. 463). But the Court of Appeals reversed the Appellate Division. Unfortunately, instead of explicitly asserting the rule in the *Bettman* case, the Court of Appeals merely held that the effect of the absence of separate findings by the Surrogate, coupled with the reversal of the Appellate Division *not being stated to be*

on the facts, was to compel the presumption that all facts necessary to sustain the decree *had been duly found.*

But when the Surrogate determines a proceeding after the trial *by him* of an issue of fact, under § 2545, he is required to "file in his office his decision in writing, which must state, separately, the facts found and the conclusions of law." *Matter of Widmayer*, 52 App. Div. 301. And if he does not do so the case may be remitted to him for that purpose. *Matter of Sherwood*, 75 App. Div. 342; *Matter of Daymon*, 47 App. Div. 315, citing *Hall* v. *Beston*, 13 App. Div. 116; *Shaffer* v. *Martin*, 20 App. Div. 304. See also *Matter of Sprague*, 125 N. Y. 732; *Hewlett* v. *Elmer*, 103 N. Y. 156, 164; *Matter of Kellogg*, 104 N. Y. 648; *Angevine* v. *Jackson*, 103 N. Y. 470; *Burger* v. *Burger*, 111 N. Y. 523; *Matter of Bradway*, 74 Hun, 630; *Matter of Marsh*, 45 Hun, 108; *In re Falls' Estate*, 10 N. Y. Supp. 41; *Matter of Otis*, 6 N. Y. St. Rep. 631; *Matter of Peck*, 39 N. Y. St. Rep. 234; *Matter of Hood*, 104 N. Y. 103, 106; *Matter of Kaufman*, 39 St. Rep. 236.

The Court of Appeals has summarized the practice in the following language:

"Those provisions (§ 2545) point out the practice, to be followed with care and precision. The Surrogate is required to file in his office his decision stating separately the facts found, and the conclusions of law. Either party may except to the findings of fact or of law, and upon the settlement of the case may request findings, and take exceptions to a refusal, and the appeal brings up for review in the Appellate Court any question of fact or law thus raised by exceptions taken. The purpose was to assimilate the practice upon appeals from a Surrogate's decree in the prescribed cases to that which regulated appeals from a judgment rendered by the court or a referee, and to substitute a system which would point out specific errors, and evolve the exact questions intended to be reviewed. *Angevine* v. *Jackson*, 103 N. Y. 470, 471." In *Matter of Schroeder*, No. 2, 113 App. Div. 221, it was held that a failure to request findings constituted a waiver, and the court denied a motion to recommit the report in order to findings. (But, see opinion of Clarke, J., showing peculiar facts in the case.)

§ 119. **Exceptions must be made as prescribed in the Code.**—The appellant cannot secure a review of the Surrogate's decision by a mere exception "to the decree and each and every part of it;" such an exception is useless. *Angevine* v. *Jackson, supra; Ward* v. *Craig*, 87 N. Y. 550; *Hepburn* v. *Montgomery*, 97 *id.* 617. See also *Matter of Falls*, 10 N. Y. Supp. 41; *Matter of Peck*, 39 N. Y. St. Rep. 234. The only exception to this rule is where, as has occasionally happened, the Surrogate, although expressly requested to make findings, refused to do so or to make a record of his refusal. If an exception to such refusal is duly taken it will raise a question for the Appellate Court, and the decree will be reversed (*Matter of Kaufman*, 39 St. Rep. 236), if it appears that this refusal is prejudicial to the appellant. *Matter of Hicks*, 14 St. Rep. 320. While the language of the Code makes it the duty of the Surrogate to make these findings, the omis-

sion to do so is a mere irregularity, and will not avail the appellant if he has not procured to be made, or attempted to procure to be made such findings or refusals and had his exceptions duly noted. *Matter of Hood*, 104 N. Y. 103. See also *In re Hesdra's Estate*, 4 Misc. 37; *Matter of O'Brien*, 5 Misc. 136, 138.

§ 120. **Procedure defined by the Court of Appeals.**—The opinion of the Court of Appeals in *Burger* v. *Burger*, 111 N. Y. 523, at page 528, is most instructive. "We think the true rule under the Code is, that an appeal on the facts from the decree of a Surrogate, admitting or refusing to admit a will to probate, brings up for review in the Supreme Court the question of sufficiency, weight, or preponderance of evidence, and the general merits of the decision; and that it is not necessary that any exception should have been taken to the findings of fact, or that there should have been any request for findings in order to give the general term jurisdiction to review the facts, and reverse or affirm the decision of the Surrogate thereon. But where the appeal is also upon the law, only such questions of law can be considered as have been properly raised by exception. If the exception was taken to the conclusion of law of the Surrogate, it raises the question whether it was justified by the facts found. If taken to a finding of fact, it presents the question whether there was any evidence to sustain the finding. So, where the Surrogate refuses to make any finding whatever on a question of fact, or where he makes or refuses to make a ruling upon any question of law, an exception lies, and his decision may be reviewed in the Appellate Court. But an exception to facts found, or to a refusal to find upon a question of fact, is only important to entitle the appellant to have a review, first in the Supreme Court, and afterwards in this court, of the strictly legal question which it is the office of an exception to present. But in the Supreme Court the facts are open for review without any exception. An application to a court for a new trial on the facts in no proper sense presents a question of law. It is an appeal to the conscience of the court, and it is asked to consider whether, on the whole facts, a new trial ought not to be had. The review on the facts by the Supreme Court, of a decision of a Surrogate admitting a will to probate, still retains, in many features, the character of a rehearing in equity. This is quite clear from § 2586 of the Code, which permits the general term, on appeal from the Surrogate on the facts, to receive further testimony or documentary evidence and appoint a referee, and declares the Appellate Court has the same power to decide the questions of fact which the Surrogate had."

As a matter of a minor detail it has been held that it is the Surrogate's duty to note on the margin of each request to find his assent or refusal to find the same. *Matter of Wheeler*, 28 N. Y. St. Rep. 638. This serves a double purpose; it enables the exception to his findings or refusals to find to be noted in an orderly way; and also enables the Appellate Court to ascertain without laborious inquiry and careful comparison whether a failure to find has or has not wrought injustice.

§ 121. **Witnesses.**—Such statutory rules as are prescribed in particular

proceedings as to competency, etc., of witnesses will be found in the discussion of the appropriate topics, *post.* But in view of the attempt to follow the order of the sections in the Code it is necessary here to take up the provisions of § 2544, which is as follows:

> § **2544.** *Bequest, etc., does not disqualify, etc., witness.*
> A person is not disqualified or excused, from testifying respecting the execution of a will, by a provision therein, whether it is beneficial to him or otherwise.

It is stated in the note to this section, in Throop's edition of the Code of Civil Procedure, that it was substituted for § 6, and a part of § 50 of part 2, ch. 6, title 1 of the Revised Statutes. Those sections were, substantially, as follows: Section 6 provided that the creditor being a subscribing witness whose debt is by the will made a charge upon lands devised, should notwithstanding such interest, be a competent witness to prove the will. Section 50 provided that: "If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest, or appointment of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will in like manner as if no such devise or bequest had been made." Section 51, referring to the same subject, provided: "In case such witness would have been entitled, as heir or next of kin, to a share in the estate of such testator if he had died intestate, that he might recover from the devisees and legatees in the will, if established, his proportion of such estate, not exceeding, however, the amount devised to him by the will." Section 6 of the Revised Statutes was expressly repealed by ch. 245 of the laws of 1880, and thereby rendered all interested witnesses, save those mentioned in § 50, which was expressly excepted from the repeal, incompetent to testify as subscribing witnesses. Section 2544 was, therefore, adopted as a substitute for § 6, and was intended to enlarge the former exception and embrace not only the special case provided for by the repealed section, but all other possible cases where an interest in the event of a controversy over the probate of a will, might, under the existing statute, disqualify a subscribing witness from testifying to its execution. Although it may not be easy to specify such cases the legislature, probably out of abundant caution, deemed it prudent by general words to embrace all subscribing witnesses by a comprehensive exception from disqualification by reason of interest. The language of the enactment seems to support this view. The evidence authorized to be given by § 2544 refers to that given in Surrogates' Courts alone, and relates solely to the subject of the execution of the will. It was clearly intended to operate as a substitute for prior statutes that related to subscribing witnesses alone, and there was no reason for including other persons in its provisions.

The reason for exempting such witnesses from the application of the general rule of exclusion, made by § 829, is obvious, as their testimony is made indispensable, if obtainable, to the probate of a will. Sections 2618, 2619. Otherwise numerous wills to which legatees and others interested, who had, through ignorance, carelessness or inadvertence become attesting witnesses, would fail in their probate, and the wishes of their makers in respect to the disposition of their property be altogether defeated. To obviate these consequences the provisions of the various statutes referred to were adopted. To carry the effect of § 2544 beyond the object alluded to would make interested witnesses competent to testify to facts no more essential to the establishment of wills than many other transactions respecting which they are obviously, under § 829, incompetent now to testify. *Matter of Eysaman*, 113 N. Y. 62, pages 75, 76, 77, opinion of Ruger, Ch. J., and cases cited; *Matter of Brown*, 31 Hun, 166.

No disqualification is imposed by this section, except upon persons who could be called to testify respecting the execution of the will, that is, the subscribing witnesses. *Matter of Eysaman, supra; Estate of Voorhis*, 1 How. N. S. 261. It does not apply to an executor as such. *Children's Aid Society* v. *Loveridge*, 70 N. Y. 387.

Surrogate Tucker held in 1867, that there could be no doubt but that a person named in a will as executor, who is also a subscribing witness, could be examined as a witness on the probate. Section 2544 in no respect alters this rule. *Rugg* v. *Rugg*, 83 N. Y. 592; *McDonough* v. *Loughlin*, 20 Barb. 238. The section contemplates by the words, "A provision therein . . . . beneficial . . . . or otherwise," a legacy, or a bequest. Consequently, not only is an appointment as executor not deemed to be a provision beneficial or otherwise, within the meaning of this section, but a gift by will of a sum of money as compensation for his services, even where it is provided that it shall be over and above his commissions, has been distinctly held not to be such a devise or legacy as would be forfeited, in case the executor so provided for, was also a subscribing witness and necessary to the probate of the will. *Pruyn* v. *Brinkerhoff*, 57 Barb. 176; *Matter of Chase*, 41 Hun, 203; *Rugg* v. *Rugg*, 83 N. Y. 592; *In re Will of Huestis*, 23 N. Y. Weekly Dig. 224; *Reece* v. *Crosby*, 3 Redf. 74; *McDonough* v. *Loughlin, supra; Children's Aid Society* v. *Loveridge*, 70 N. Y. 387; *Matter of Folts*, 71 Hun, 492. But, of course, where the executor who witnesses a will is the principal legatee in addition to the interest above described, that fact brings him within the statute avoiding his legacy, if the will cannot be proved without his testimony. *Matter of Smith*, 95 N. Y. 516, explained by Ruger, Ch. J., in *Matter of Wilson*, 103 N. Y. 374, and see *Lane* v. *Lane*, 95 N. Y. 494.

§ 122. **When witness can take.**—Section 2544 refers to every witness whose testimony is essential to the proof of the will containing the provision constituting him a person interested. Where there are but two witnesses and both reside within the State, the evidence of neither can be dispensed with, and consequently any "beneficial devise, legacy, interest,

or appointment made to either in the will is void under the statute." *Matter of Will of Orson*, 18 Weekly Dig. 306; *Matter of Brown*, 65 How. 461. Where, however, of two witnesses, one is a non-resident and the will is proved without the testimony of the non-resident witness, he is not disqualified from taking under the will. *Cornwell* v. *Wooley*, 43 How. 475. So, where there are more than two witnesses, and the will is sufficiently proved by two of them without the testimony of the witness interested in any provision of the will, there is no disqualification under the statute. *Cornwell* v. *Wooley, supra; Caw* v. *Robertson*, 5 N. Y. 125. See also *Matter of Beck*, 26 Misc. 179, aff'd 6 App. Div. 211, and 154 N. Y. 750. The question whether the subscribing witness will, by testifying, forfeit his legacy is not material on the probate proceedings. *Matter of Beck, supra;* 6 App. Div. 211, 214. It comes up when he seeks to retain his legacy, as on accounting. *Ibid.*, citing *Caw* v. *Robertson, supra; Cornwell* v. *Wooley*, 1 Abb. Ct. App. 441; *Matter of Brown*, 31 Hun, 166.

If his testimony is given, he cannot be allowed to withdraw it on the ground that he will imperil his legacy or devise. *Ibid.* If later, at the proper stage, he can demonstrate that the probate proof was sufficient, apart from his testimony, he may be allowed to have his legacy. So where there were three subscribing witnesses to a will, and it appeared from the Surrogate's record, that is to say, the record of the will and of the proceedings and the examination taken by the Surrogate, that the will was proved by the testimony of two of the subscribing witnesses, and that the third had been sworn "to testify as to the questions which should be put to him by the Surrogate touching the circumstances of executing the said will, and how his name came to be attached to said will as a witness," and it further appeared that his examination did not elicit the material facts ordinarily shown by a subscribing witness, his legacy would not be avoided. *Caw* v. *Robertson, supra.* See also *Matter of Owen*, 48 App. Div. 507. When legatees under a will are subscribing witnesses to a codicil to that will, it is held that their testimony on probate of such codicil does not preclude them from taking under the will, where it alone is proved, and the codicil is not necessary to the proof of the will. *Matter of Johnson*, 37 Misc. 334.

§ 123. **Taking evidence.**—Except where a contrary intent is expressed in, or plainly implied from the context of, a provision of ch. 18 of the Code, which relates to Surrogates' Courts, the following sections apply to such courts and to proceedings therein: §§ 870–886, *q. v.*, relating to depositions taken and to be used within the State; §§ 887–913, *q. v.*, relating to depositions taken without the State for use within the State. Code Civ. Proc. § 2538. It is added, that they shall apply "so far as they can be applied to the substance and subject-matter of a proceeding, without regard to its form." In this connection, therefore, we now turn to the subject of taking testimony, by deposition, before the Surrogate, and before referees appointed by the Surrogate.

§ 124. **Commissions.**—Section 888 of the Code, which prescribes the

cases in which a commission may issue, is, as we have just noted, made applicable to Surrogates' Courts by § 2538. See *In re Plumb*, 64 Hun, 317, affirmed in 135 N. Y. 661. He had such power, originally, under ch. 460 of the Laws of 1837, § 77, but it was repealed in 1880 (ch. 245, § 1), and the Code provisions thereafter governed. By amendment to § 888 in 1894, a subdivision (6), was added reading, "In special proceedings." Standing alone this would seem to cover proceedings in Surrogates' Courts, but in fact does not except by virtue of § 2538. Attention is called to this somewhat confusing method of enactment in the Code which compels the practitioner to search carefully for modifying provisions before he dare rely on the *prima facie* meaning of any section. (This is one of the features of the Code which call for special attention in the event of a revision.)

The amendment of 1894 to § 888, was probably passed in view of a decision (*In re Plumb*), above cited, where the express language of the section making its provisions applicable only to actions had been relied on in opposing the granting of a commission in a Surrogate's Court.

There being now no question as to the Surrogate's power to issue a commission (*Bristed* v. *Weeks*, 5 Redf. 529; *Cadmus* v. *Oakley*, 2 Dem. 298; *Henry* v. *Henry*, 4 Dem. 253; *Bull* v. *Kendrick*, 4 Dem. 330), it is first to be stated that the same procedure is followed as is required in civil actions. And the decision of the courts in relation thereto will also be applicable so far as the substance and subject-matter of the proceeding admits. Thus, the party applying for the issuance of the commission must show by affidavit that the testimony of the witness is material, that he is without the State, and, since the right is altogether dependent on statute (*Matter of an Attorney*, 83 N. Y. 164; *McColl* v. *Sun Mutual Ins. Co.*, 50 N. Y. 332) that the case is one in which the proceeding is properly to be allowed. See *Matter of Neiding*, 56 Misc. 216, rev'd 123 App. Div. 894. (See opinions in both courts.) The administrator moved for a commission to take testimony abroad as to his legitimacy, which involved impugning a foreign decree of bastardy in a proceeding "for reimbursement for spoliation of the virgin honor" of his mother. The Surrogate denied it on the ground he could not attack a decree under which he had accepted benefits. The Appellate Division reversed on the ground the judgment was in the matter of a police regulation having no extraterritorial effect.

The commission must name the commissioner and the witnesses. *Wallace* v. *Blake*, 4 N. Y. Supp. 438. The latter should be specifically designated. If not named, the order is irregular, unless the unnamed witnesses are described as of a class, or are designated as about to be produced to testify to a particular distinct fact. *Matter of Anderson*, 84 App. Div. 268. If the witnesses are unknown but sufficiently described, the order is not irregular.

Usually, the commission issues upon interrogatories, direct and cross (see Code Civ. Proc. §§ 891 *et seq.*), to be proposed by the parties and settled by the court. These interrogatories must be pertinent and material to the issues raised. *Walton* v. *Godwin*, 54 Hun, 387; *Thorp* v. *Riley*, 3 N. Y.

Supp. 547; *Uline* v. *N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 175; *McDonald* v. *Garrison*, 9 Abb. 178; *Blaisdell* v. *Raymond*, 9 Abb. 178*n*.

If the Surrogate in settling interrogatories allows an improper interrogatory, the remedy is by objection, on the hearing when the testimony is read. If, however, he disallows a pertinent interrogatory, the remedy is by appeal from the order. *Uline* v. *N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 175.

§ 125. **The order.**—An order must be entered, for a commission on stipulation cannot issue except an order, on consent, be first entered.

Interrogatories are to be annexed unless the order provide for an open commission to examine wholly or partly upon oral questions. But it seems an open commission should not issue except in cases where it clearly appears to be necessary for the purposes of justice (*Beadleston* v. *Beadleston*, 2 N. Y. Supp. 814; *Clark* v. *Sullivan*, 8 N. Y. Supp. 565; *Purdy* v. *Webster*, 3 How. N. S. 263; *Heney* v. *Mead*, 4 Law Bull. 10; *Dickinson* v. *Bush*, 17 Week. Dig. 17), and never when the adverse party is an infant, or the committee of a person judicially declared to be incapable of managing his affairs, by reason of lunacy, idiocy, or habitual drunkenness; or where the testimony is to be taken elsewhere than in the United States, or in Canada. Code Civ. Proc. § 895; *Bull* v. *Kendrick*, 4 Dem. 330. If an open commission be ordered the witnesses should be named. *Matter of Anderson*, 84 App. Div. 268.

If written interrogatories are in the discretion of the court dispensed with it may be on terms. So, in *Deery* v. *Byrne*, 120 App. Div. 6, the condition was imposed that the reasonable expense of the other side in traveling to the foreign place and attending the hearing should be *paid in advance*. (See opinion.)

This was in an action under § 2718 on a claim against a decedent's estate. See also *Paddock* v. *Kirkham*, 102 N. Y. 597. In *Matter of Sentell*, 53 Misc. 165, however, an open commission having been ordered, the guardian *ad litem* moved for an allowance to cover his expenses in attending on its execution. The Surrogate held he had no power to provide for it and instead vacated his order and made a new one directing a commission on written interrogatories. The Surrogate has discretion to grant or refuse the order. *Jones* v. *Hoyt*, 10 Abb. N. C. 324. But the order is appealable (*Jemison* v. *Bank*, 85 N. Y. 546) and will be reversed if it appear the discretion was unwisely or improperly exercised. *Jones* v. *Hoyt*, *supra*. If it appear that the party asking for the commission relies largely upon the testimony which it is claimed the witness to be examined will give, the order should be granted. *Smith* v. *Talmadge*, 3 Law Bull. 97. And if a commission is issued to take testimony without written interrogatories, as prescribed in § 893 or § 894, notice of time and place of examination of any witnesses thereunder (in which notice the witness must be named), must be served by the party on whose behalf the witness is to be examined on the attorney for the adverse party at least five judicial days before the deposition is taken; which time must be lengthened by one judicial day

for each fifty miles by the usual route of travel, between such attorney's residence and the place where the deposition is to be taken. Code Civ. Proc. §§ 896, 899; *Matter of Kendall*, 2 Law Bull. 51.

§ 126. **Same.**—The commissioner must be named in the commission. *Spurr &c.* v. *Empire State Surety Co.*, 117 App. Div. 816. He is held to be an officer of the court and in executing the commission to stand in the place of and to represent the court. So where a commissioner was appointed under the act of 1837, to take the testimony of the witnesses to a will in Scotland it was held that the production of the original will before him in Scotland was substantially a production of the will before the court. *Russell* v. *Hartt*, 87 N. Y. 18, 25; *Matter of Delaplaine*, 45 Hun, 225; *Matter of Cameron*, 47 App. Div. 123, 125. See *post*, PROBATE.

On the other hand, the Surrogate is not bound to wait indefinitely for the execution of the commission. So where a hearing closed before the return of a commission to take testimony in a foreign country, and it appeared that by the exercise of diligence it could have been executed in time, the Surrogate in his discretion refused to open the hearing to receive it. *Leslie* v. *Leslie*, 15 Week. Dig. 56. The Surrogate's power to issue a commission, was, at first, sought to be limited to probate proceedings, but the courts held that it was not the legislative intent so to limit it but that it could be exercised in any proceeding. See *Matter of Plumb*, 64 Hun, 317. See also *Estate of Voorhis*, 5 Civ. Pro. Rep. 444. The power to issue a commission in an appropriate case should be exercised before the trial or hearing. *In re Plumb*, 135 N. Y. 661. For when the application is postponed until a large amount of testimony has been taken, the Surrogate may exercise his discretion in regard to issuing the commission. *Matter of Hodgman*, 11 App. Div. 344. This case, however, was complicated by the fact that the term of the Surrogate before whom the proceeding was pending was about to expire, and the delay which the execution of the commission would have occasioned, would have been prejudicial.

§ 127. **Precedents.**

Application for commission under section 888 of the Code

Surrogate's Court,
County of

Title. }

State of New York }
County of } ss.:

being duly sworn, deposes and says: that he is the petitioner in (*or* one of the parties to *or* attorney for one of the parties to, etc.) the above entitled proceeding which is now pending in the Surrogate's Court of the County of

That is a resident of ; that the deponent requires the testimony of said witness upon the trial of the issues involved in the above entitled proceeding; that said is a necessary and material witness on behalf of the deponent who is a party to the above entitled proceeding; and

the deponent further says: that it is necessary in order to protect the rights of said upon the hearing and determination of the issues in this proceeding that an order be made by the Surrogate authorizing the issuance of a commission to one or more competent persons named therein (*or specify such person or persons by name as may be desired by applicant*) authorizing them or any one of them to examine the said , the witness named therein, under oath, upon the interrogatories to be annexed to such commission, to take and certify the deposition of such witness and to return the same with the commission according to the directions given in (*or* with) said commission.

(Jurat.)

Surrogate's Court
Caption.

Present:
Hon.
Surrogate.

Order for commission.

Title.

On reading and filing the affidavit of verified the day of 19 by which it appears to the satisfaction of the Surrogate, that the testimony of therein named, is material to the applicant, and that said is not within the State of New York, and that the issuance of a commission in the above entitled proceeding is necessary (*and if application has been opposed*, and on reading and filing—*specify opposing papers*) after hearing Esq., in support of said application (and Esq., in opposition thereto) and on motion of

It is Ordered, that a commission issue in the above entitled proceeding directed to (and) of in the State of (*or specify if it is a foreign country*) to examine of the witness named in the above affidavit, under oath, upon the interrogatories to be annexed to such commission, to take and certify the deposition of such witness and to return the same with the commission according to the directions given in (or with) the commission.

And it is further Ordered, that (*here specify other parties to the proceeding*) be at liberty to join in such commission.

And it is further Ordered, that the hearing of the issues in the above entitled proceedings be and they hereby are stayed until the further order of this court. *Note.*

Note. The Surrogate is at liberty to proceed with the hearing if the execution of the commission is unreasonably delayed.

Unless the interrogatories to be annexed to the commission are settled by consent of the parties, they must be settled upon notice by the Surrogate as prescribed by the general rules of practice. (§ 891, Code Civ. Proc.)

The interrogatories when settled must be annexed to the commission. Either party must be allowed to insert therein any question *pertinent to the issue* which he proposes. The Surrogate, in settling them, can exclude questions clearly not pertinent. But unless so he will usually allow them subject to objection at the trial. See *Irving* v. *Royal Exch. Assurance of London*, 122 App. Div. 56. Unless the parties stipulate in writing, or the order granting the commission prescribes how it shall be returned, the Surrogate must indorse upon the commission the proper direction for that purpose. (§ 892, Code Civ. Proc.). The usual practice is to return the commission through the post office.

§ 128. **Aged, sick or infirm witnesses.**—The Code provides explicitly for the examination of witnesses suffering from physical disability.

> *Testimony of aged, sick, or infirm witness.*
>
> Upon the application of a party to a special proceeding, and upon proof, by affidavit, to the satisfaction of the surrogate, that the testimony of a witness in his county, who is so aged, sick, or infirm, as to be unable to attend before him to be examined, is material and necessary to the applicant, the surrogate must, where the special proceeding was instituted to procure the probate or revocation of probate of a will, and, in any other case, may, in his discretion, proceed to the place where the witness is, and there, as in open court, take his examination. Such a notice of the time and place of taking the examination, as the surrogate prescribes, must be given, by the party applying therefor, to each other party, except a party who has failed to appear as required by the citation. The surrogate may also, in his discretion, require notice to be given to any other person interested. **§ 2539, Code Civil Proc.**

The above provisions, being special, apply in Surrogates' Courts rather than the general provisions of §§ 870 *et seq.*, and such an examination as they relate to must be taken under § 2539, and not under the other. *Estate of M'Coskry*, 5 Dem. 256.

§ 129. **Same.**

> *Testimony of aged, sick, or infirm witness in another county.*
>
> In a case specified in the last section, except that the witness is in another county, where the witness is a subscribing witness to a will, if the surrogate has good reason to believe that the witness cannot attend before him, within a reasonable time, to which the hearing may be adjourned, he may make an order, directing that the witness be examined before the surrogate of the county in which he is; specifying a day, on or before which a certified copy of the order must be delivered to the latter surrogate; and directing notice of the examination to be given to such persons, and in such manner, as he thinks proper. A copy of the order, attested by the seal of the surrogate's court, must be transmitted by him to the surrogate designated in the order, together

with the original will, where the testimony relates to the execution of a written will. The latter surrogate must, thereupon, on the day specified in the order, or on another day to which he may adjourn the examination, take the examination of the witnesses, as if he possessed original jurisdiction of the special proceeding. The examination, after it is reduced to writing, and subscribed by the witness, or otherwise duly authenticated, together with a statement of the proceedings upon the execution of the order, must be certified by the surrogate taking the examination, attested by the seal of his court, and returned without delay, with the original will, if any, to the surrogate who directed the examination, by whom all those papers must be filed. And in other cases named in said section 2539, he may appoint a referee to take the testimony, who shall report the same to the said surrogate. An examination so taken has the same effect, as if it was taken before the latter surrogate. **§ 2540, Code Civil Proc.**

§ 130. **Analysis of sections 2539 and 2540.**—These two sections have been but seldom construed. From their provisions it will be seen that several cases are contemplated capable of arising.

A. Proceedings for probate or revocation of probate of a will. In these proceedings, if the aged, sick or infirm witness is in the Surrogate's county, the Surrogate *must*, upon satisfactory proof of the facts, by affidavit, go in person and examine such witness. If the witness is in another county, then the Surrogate of that county may be designated, who in turn must upon receipt of the authorization provided by § 2540 go *in person* and examine such witness. *Matter of McCloskey*, 10 Civ. Pr. R. 178. But, while I find no case in point, I am of opinion that the power which, in New York County, the Surrogate possesses *in probate cases* to appoint a referee on consent, or to direct his assistant, to take and report the testimony (see § 52, *ante*) would give the Surrogate of that county power under § 2539 to use the same agencies to secure the testimony of an aged, sick or infirm witness *in that county* in a probate case.

B. Proceedings other than probate or revocation of probate. In other proceedings the Surrogate is not required to go in person, or to designate another Surrogate to go in person; but may, whether the witness be in his county or in that of another Surrogate, appoint a referee to examine him and report, with the same effect as if he personally had taken the testimony.

Section 2540 is loosely drawn, and must be carefully read. The last two sentences really form a separate section, referring to both §§ 2539 and 2540. The first Surrogate referred to in § 2540 is, of course, the Surrogate before whom the proceeding is pending, who makes the order designating another Surrogate "where the witness is a subscribing witness to a will." The rest of the section, except these last two sentences, refers to the examination of such a witness, and no other.

§ 131. Precedents.

Affidavit to procure examination of aged, sick or infirm witness under § 2539 of the Code.

Surrogate's Court,
County of

Title. }

State of New York }
County of } ss.:

being duly sworn, says, that he is the attorney for the proponent *or* (*other party* herein *or specify the proceeding*); that is one of the subscribing witnesses (*or*, is a material and necessary witness in support of, *or*, in opposition to, the petition therein); that said is past years of age, and is confined to his house, No. street, in by age and infirmity (*or*, sickness), and is unable to attend before the Surrogate, to be examined in this matter.

Sworn to before me this }
day of 19 }

(Signature.)

A physician's certificate duly verified may also reasonably be required by the Surrogate.

Order for examination of aged, infirm or sick witness, under §§ 2539–40 of the Code.

Surrogate's Court,
County of

Title. }

On reading and filing the affidavit of verified the day of from which it appears to the satisfaction of the Surrogate, that the testimony of of No. street, in the city of is material and necessary to prove the due execution of said will (*or specify proceeding and issue*) and that the said is aged and infirm (*or* sick), and the Surrogate having good reason to believe that the witness cannot attend before the Surrogate within a reasonable time:

Now, on motion of the attorney for the proponent of said will (*or* the petitioner, *or* a party, etc.)

It is ordered, that the said be examined before * me (*or*, counsellor at law, who is hereby appointed referee for that purpose) at the residence of said No. street, in the city of New York, on the day of 19 or on an adjourned day to be fixed by me.

(*Where witness resides in another county, continue from * above,*) the Hon. Surrogate of the county of on the day of 19 or on an adjourned day to be fixed by him; and that a copy of this order attested by the seal of this court be transmitted to said Surrogate, on or before the day of 19 (*In will cases add,* together with the original will.)

(*In any case add:*) That day's written notice be given personally (*or specify manner of giving notice*) to the attorney of (*adverse and other interested parties*) of such examination.

That all proceedings herein stand adjourned till the day of 19 at o'clock M.

But "in the other cases named in section 2539, i. e., other than probate or revocation of probate, he, i. e., the Surrogate before whom the proceeding is pending, may appoint a referee," etc. *Matter of Gee*, 33 N. Y. Supp. 425, Arnold, Surr. Unless this be kept clearly in mind, much needless confusion and delay might be caused the practitioner. It is clear from these sections that in probate proceedings the testimony of an aged, sick or infirm witness who is in another county cannot legally be taken before a referee. *Matter of McCoskry*, 5 Dem. 256, except, *quære* as above, in New York County.

Notice of examination of aged, sick or infirm witness.

Note. When examination is to be had before Referee say, that I shall bring on the examination of at before Hon. the Referee designated for that purpose by order of the Surrogate of the county of made and entered the day of 19 at o'clock M. of that day.

Surrogate's Court,
County of
Title.

Please take notice, that (*note*) the Surrogate of county, will take, in this matter, the examination of (one of the subscribing witnesses to the will of late of deceased), at the residence of said No. street, in the city of county of on the day of 19 at o'clock in the noon.

(Dated.) (Signature.)
Attorney (etc.),

To (*names of those to whom notice is required.*)

Note. Add, either on face of notice or by indorsement: This notice is served upon you pursuant to an order of Hon. Surrogate of the county of made and entered the day of 190

Attorney for

Record of examination.

Note. It would seem under the last sentence of § 2540 as if the papers should be entitled before the Surrogate of original jurisdiction.

Surrogate's Court,
County of *note.*
Title.

Examination of a witness sworn and examined in the above-entitled special proceeding, before Hon. Surrogate of the county of pursuant to an order of the Surrogate of the county of made on the day of 19

State of New York } ss.:
County of }

The said being duly sworn and examined on be-

half of says (the testimony may by consent be taken in narrative form, both as to direct and cross-examination, otherwise it should be set forth in question and answer).

Note. The testimony must be subscribed by the witness (§ 2540).

Note.

Surrogate's Court,
County of

Certificate of Surrogate to examination.

Title.

I, Surrogate of the county of hereby certify that, pursuant to the annexed order of Hon. Surrogate of the county of directing that an aged and infirm (*or* sick) witness be examined before me on the day of 19 I attended on said day, at No. street, in the (*city*) of the residence of said (*here state any adjournment or other proceeding*), and there took the examination of said witness, and that I caused the examination of said witness to be reduced to writing, as above, and the same was subscribed by said witness in my presence (*also other authentication under section* 2542 *should be recited*) and is hereby annexed.

In testimony whereof, I have hereunto set my hand, and have affixed the seal of my court, the day of 19 in attestation thereof.

(Seal.) (Signature.)
Surrogate.

§ 132. The testimony.

How minutes of testimony authenticated.

The minutes of testimony, written out as prescribed in the last section, or taken by the surrogate, or under his direction, while the witness is testifying, must, before being filed *be authenticated by the signature of the stenographer, referee, the surrogate,* or *the clerk of the surrogate's court,* to the effect that they are correct. § **2542, Code Civil Proc.**

Minutes of testimony; to be bound in volumes, etc.

In the city and county of New York, in the county of Kings, and in any other county where the supervisors so direct, the minutes of testimony written out by the stenographer must be bound, at the expense of the county, in volumes of convenient size and shape, indorsed "Stenographic minutes," and numbered consecutively. Upon the record of a decree made in any contested matter, the surrogate must cause to be made a minute, referring to each volume of the stenographic minutes, and to the pages thereof containing any testimony relating to the matter. § **2543, Code Civil Proc.**

§ 133. **References in Surrogates' Courts.**—We now pass to the discussion of references by a Surrogate. Notwithstanding the provision below noted as to the similarity of such references to references in the Supreme Court, they have nevertheless been made the subject of particular dis-

cussion which requires to be carefully noted. The Surrogate's power to refer is based upon § 2546, which is as follows:

Surrogate may refer question of fact or account.

In a special proceeding other than one instituted for probate or revocation of probate of a will, the surrogate may, in his discretion, appoint a referee to take and report to the surrogate the evidence upon the facts, or upon a specific question of fact; to examine an account rendered; to hear and determine all questions, arising upon the settlement of such an account, which the surrogate has power to determine; and to make a report thereon; subject, however, to confirmation or modification by the surrogate.

But no referee to examine an account rendered, whether intermediate or final, or to hear and determine all questions arising upon the settlement of such an account, shall be appointed, where the estate or fund does not exceed one thousand dollars in value, or in any case where the item or items in such account to which objections have been made do not aggregate more than two hundred dollars.

Such a referee has the same power, and is entitled to the same compensation as a referee appointed by the Supreme Court, for the trial of an issue of fact in an action; and the provisions of this act, applicable to a reference by the Supreme Court, apply to a reference made as prescribed in this section, so far as they can be applied in substance without regard to the form of proceeding.

The Surrogate of the County of New York, may, on the written consent of all parties appearing in a probate case, appoint a referee, or may, in his discretion, direct an assistant to take and report the testimony, but without authority to pass upon the issues involved therein.

Unless a referee's report is passed upon and confirmed, approved, modified or rejected by a surrogate within ninety days after it has been submitted to him, it shall be deemed to have been confirmed as of course, and a decree to that effect may be entered by any party interested in the proceeding upon two days' notice. **§ 2546, Code Civil Proc., as am'd by L. 1908, Chap. 128.** (Amendment of 1908 italicized.)

§ 134. **Development of Surrogate's power to refer.**—The Surrogate's power to refer was originally limited to accountings, but on the adoption of the Code his power was amplified and now in virtue of frequent amendments may be summarized as follows: As to the examination of an account rendered if the estate exceed $1,000 in value, and the objections affect items aggregating *more than* $200, the Surrogate may appoint a referee to hear and determine; in addition to this he may appoint a referee to take and report evidence on any specific issue or upon all the issues in any other proceeding in his court except one instituted for probate or revocation of probate of a will. But in addition to this it is provided that in New York County the Surrogate may, even in probate cases, appoint a referee to take and report the testimony, provided written consent of all the parties appearing on the probate is filed. Such referee is without authority to pass upon the issues involved. In proceedings to remove an administratrix the Surrogate ordered a reference "to take testimony and report with his opinion thereon." Held valid. *Matter of Ferrigan*, 42 App. Div. 1, 4, aff'd 160 N. Y. 689; *Matter of Hale*, 45 App. Div. 578. So, also, to take

testimony as to whether a disputed claim had been rejected, and whether the Statute of Limitations had run. *Matter of Hoes*, 54 App. Div. 281. So, also, in a proceeding to sell decedent's realty. *Matter of Walker*, 43 Misc. 475. The Surrogate it will be noted has also power without the consent of the parties, and of his own motion, to direct one of his assistants to take and report the testimony in a similar case and he is subject to this same limitation as to passing on the issues.

With this summary analysis of the section we pass to the powers of Surrogates' referees:

§ 135. **Practice on references in Surrogate's Court.**—The order of reference should be exact in defining the extent of the referee's functions. It is customary to use the language of the Code, where the reference is to hear and determine. The person named as referee should of course be free from the disqualifications which would prevent the Surrogate himself from trying the cause or hearing the evidence. A referee to hear and determine must be sworn, although where there are no infants, or parties not represented, the omission to take the oath will be deemed a mere irregularity in case the hearing proceeds without objection. *Mason* v. *Luddington*, 56 How. Pr. 172. The referee has power to rule on all questions of the admissibility or exclusion of evidence. *Matter of Walker*, 43 Misc. 475. The general rules of practice cover references in Surrogates' Courts. *Matter of Russell*, 3 Dem. 377; *Matter of Leffingwell*, 30 Hun, 528. Reasonable notice of intention to proceed with the hearing is sufficient. The fourteen days' notice is not requisite. *Matter of Ferrigan*, 42 App. Div. 1, 4. The testimony, therefore, taken before such a referee must be signed by the witnesses, except where the reference is one for the trial of the issues; that is, a reference to hear and determine. As such a reference in a Surrogate's Court can only be had upon an accounting, under § 2546, it may be stated as the rule that the testimony of the witnesses before Surrogates' referees, except on accountings, must be signed by them. See Rule 30 of General Rules of Practice; *Matter of Russell*, 3 Dem. 377, Rollins, Surr. But this may be waived, by express stipulation or by failure to exact it. See *Matter of Hirsch*, 116 App. Div. 367, 373. If the referee, after final submission, delays over 60 days his determination, it was held that either party may, under § 1019, Code Civ. Proc., elect to terminate the reference. *Matter of Santos*, 31 Misc. 76, citing *Patterson* v. *Knapp*, 83 Hun, 492. If the party duly serve a notice of such election, and nevertheless the report is subsequently made and filed, his right to raise this objection of invalidity is not affected by his filing exceptions to such report. The two positions are supplementary to, and not inconsistent with, each other. *Ibid.* But, in a recent case, *Matter of Robinson*, 53 Misc. 171, Church, Surr., held § 1019 to be inapplicable, certainly not to a reference to hear and report. He cited *Matter of Bennett*, 21 Abb. N. C. 238; *Doyle* v. *Mayor*, 26 Misc. 61; *Bennett* v. *Pitman*, 48 Hun, 612; *Godding* v. *Porter*, 17 Abb. Pr. 374. These cases certainly apply only to such references, styled references "under the approval of the Surrogate." But under the language of § 2546, referring

to references in the Supreme Court the rule in the *Santos* case seems correct in regard to Surrogate's references to hear and determine.

The effect of § 1019 can be waived by formal stipulation or by conduct estopping a party from raising the objection. See *Gill* v. *Clark*, 31 Misc. 337.

The referee's power over the proceedings is similar to that of any referee; he may compel the parties to proceed promptly, and where vexatious or unreasonable delays are attempted by counsel, or frivolous objections interposed, it has been held that the referee should close the reference and report to the appointing Surrogate the exact facts, and if the Surrogate find the objection to be frivolous, idle or dilatory, he may charge the entire costs of the proceedings personally upon the offending parties. *Matter of Williams*, 17 N. Y. St. Rep. 839, Ransom, Surr. See also *Matter of Odell*, 1 Connoly, 94; *Matter of Niles*, 47 Hun, 348. So he has power to make an order extending the time to file briefs. *Matter of Santos*, 31 Misc. 76; *Morrison* v. *Lawrence*, 2 How. Pr. (N. S.) 72; *Matter of Robinson, supra.* He controls the examination of witnesses, and his rulings upon evidence will not be reviewed until the hearing upon his report. *Estate of F. W. Mertens*, N. Y. Law Jour., November 26, 1901. And the Surrogate's Court will enforce his mandates. *Ibid.*, citing § 856, C. C. P. and *Est. of Benj. Webb*, N. Y. Law Jour., May 18, 1901. As, e. g., by directing a warrant for commitment to issue if witness refuses to obey direction of referee. *Ibid.* So, where a referee is appointed to take the account of executors he has power to allow them to file a supplemental account and doubtless to amend the account already filed where all the parties are before him. *Matter of Frank*, 1 App. Div. 39. The dubious language of the Court of Appeals in the *Matter of Clark*, 119 N. Y. 427, "that section 2546 seems to open everything and settle nothing," is quite immaterial in view of the fact that in that case these powers of referees were not directly under discussion. In *Matter of Schneider* also (*sub nom. Matter of Frank*), 1 App. Div. 39, Bartlett, J., passes directly on the question of the power of a referee to allow executors to file a supplemental account, showing payments made *subsequent* to the time when they were compelled to file their account. It is to be noted that in this case all the parties were before the court and the disposal of any objections to the supplemental account could thus be had in the same reference, thus economizing both time and money to the estate. The other point as to the power to allow an amendment of an account has been sustained in the *Matter of Munzor*, 4 Misc. 374, Ransom, Surr., where, when a contested account was pending before a referee, and counsel for the accountant moved before the Surrogate for leave to file an amended account, the learned Surrogate denied the motion on the ground that it should be made before the referee who was the proper one to fix the terms upon which the application should be granted, if at all, and in his opinion the Surrogate said: "There can be no question as to the power of the referee to grant such an amendment as the Surrogate himself might grant upon a trial," citing *Estate of Odell, supra; Estate of Williams,*

supra. . . . " In an accounting before a Surrogate the accounting itself is the subject-matter of the proceeding and any amendment may be allowed which does not include a transaction subsequent to the return day of the citation," citing *Price* v. *Brown*, 112 N. Y. 677. From this opinion, which is carefully reasoned, it may be stated first that a Surrogate or his referee may allow an amendment of such an account provided no items are included of a date subsequent to the original return day of the citation; second, that if it is desired to include such subsequent items a supplemental account must be filed which may be done if all the parties are before the court; third, it would seem, if the subsequent item is of such a character as to involve the right of some one not before the referee, who would, if a party, be entitled to object, that in such event a supplemental citation would have to issue.

§ 136. **Requests to find.**—With regard to findings of fact and conclusions of law, the same rules applicable to trials by Surrogates apply to references in Surrogates' Courts (see discussion under § 2544, *ante*, and the referee when requested to make such findings must do so. *Matter of Mellen*, 56 Hun, 553. It was, however, held that where a referee neglected to respond to requests to find, although they were properly submitted to him, a judgment based upon his report would not be for that reason reversed unless his refusal was clearly prejudicial to the appellant. *Matter of Hicks*, 14 N. Y. St. Rep. 320.

In giving the Surrogate power to refer questions of fact or account, the plain intent of the legislature was to cast upon the referee judicial powers and responsibilities, and thus relieve the Surrogate from any duty in the proceeding except to review his conclusions of law from facts established by the evidence. It was not contemplated that the referee should be an assistant to the Surrogate acting simply ministerially. The referee's findings of fact should be regarded as the verdict of a jury, and, unless clearly against the weight of evidence, so as to amount to a finding without evidence, they should be sustained. *Matter of Odell*, 1 Connoly, 94.

§ 137. **The report, filing.**—The report of the referee must be filed together with the testimony, and the practice in regard thereto is covered by the general rules in the absence of special rules in the particular counties. In New York County, Rule 8 is as follows: " When a referee's report shall be filed, together with the testimony taken before him, said report shall be confirmed as of course, unless exceptions thereto shall be filed by any party interested in the accounting or proceeding within 8 days after a written notice of such filing and a copy of such report shall have been served upon the opposing party; and in case exceptions shall be so filed, any party may bring on the hearing of said exceptions on 8 days' notice on any stated motion day of said Surrogate's Court." This rule needs no particular interpretation. It is concise and clear. See *post*, § 140, as to time within which the Surrogate must act on the report under § 2546, Code Civ. Proc., as amended by L. 1899, ch. 607, and *Matter of Clark*, 168 N. Y. 427.

§ 138. **Confirmation or modification of the report.**—The Surrogate may confirm or modify the referee's report. The term "modification," of course, includes the refusal to confirm, confirmation with modification, or a remitting of the report to the referee with directions to proceed anew. *Matter of Post*, 19 N. Y. Supp. 18; *Ex parte Pollock*, 3 Redf. 100; *Matter of Bayer*, 54 Hun, 189. When the report comes up before the Surrogate and exceptions have been filed, the Surrogate is bound to consider such exceptions and the questions thereby raised. *Matter of Bedford*, 30 Hun, 551. Should he confirm the report in such case without passing on these exceptions it will be held error, but where no exceptions are filed, then by operation of the rules of practice, the Surrogate has power as would a supreme court justice to direct an order for confirmation to be entered (*Matter of Leffingwell*, 30 Hun, 528, 530); and exceptions filed after the Surrogate has so acted upon the report are unavailing, provided of course the eight days, within which exceptions may be filed, shall have expired before the making of the decree. The Surrogate must consider the referee's findings of fact which, as has been already observed, he should sustain, unless they be clearly against the weight of evidence (*Matter of Odell*, 1 Connoly, 94), or without any evidence to support them. *Estate of Brady*, 17 N. Y. St. Rep. 836.

§ 139. **The Surrogate's duty regarding the report.**—However, what has been said in regard to the confirmation of a referee's report as of course, "unless exceptions thereto are filed and served within 8 days after a written notice of its filing and a copy of the report shall have been served upon the opposing party" is not to be taken as depriving the Surrogate of his discretionary power over the referee's report; for example, he is not limited to the conclusions of law drawn by the referee from his findings of fact. In two recent cases the Court of Appeals has so held. *Matter of Clark*, 168 N. Y. 427, and *Matter of Barefield*, 177 N. Y. 387, 391. In the latter case the Surrogate drew absolutely contrary conclusions of law from the referee's findings of fact. The Court of Appeals held the last clause of § 2546 was not, explicit as it is, self-executing. The Surrogate has the right, and it is even his duty to act upon it, *even if the specified period has expired. Ibid.* And see *Matter of Shaefer*, 65 App. Div. 378, 382, so, although no exceptions be filed, and the findings of fact remain undisturbed, a Surrogate may modify the report in regard to the relief suggested and as modified confirm it; so, also, in the absence of exceptions where the report is not accompanied by the testimony as required by the Code, the Surrogate may set aside the report of his own motion as he certainly would upon motion of an objecting party. It was so held where the referee only returned imperfect notes of the testimony with his report (*Matter of Azzeli's Estate*, 4 N. Y. Supp. 462), where Ransom, Surr., used the following language: "The requisites of the statute and the rules of practice have not been regarded by the referee in any substantial respect. There is no testimony returned; simply notes here and there of something sworn to. The attorneys on both sides should have requested the referee

to take all the testimony and caused it to be signed by each witness. If he neglected or refused to do this, application should have been made to the court for his removal."

§ 140. **Time within which report must be acted on.**—Where exceptions are filed to the referee's report in time, it must be acted upon, that is, confirmed, approved, modified, sent back or rejected within ninety days after it has been submitted to the Surrogate. If this be not done, then under § 2546 (*ante*, § 133) "it shall be deemed to have been confirmed as of course, and a decree to that effect may be entered by any party interested in the proceeding upon two days' notice." But, as just noted, in spite of the intent of those who framed this amendment, the Court of Appeals has held, four to three, that there is no confirmation by operation of the statute, until and unless a party interested notices a decree thereunder for entry, and in the meantime the Surrogate is not ousted of jurisdiction, and may, even after the ninety days, act on the report, and set it aside providing he acts before any party moves. *Matter of Clark*, 168 N. Y. 427, rev'g 61 App. Div. 337. Unfortunately the party entitled to confirmation of the decree in this case was guilty of laches and acts amounting to acquiescence in the Surrogate's decree made after the ninety days.* The *Clark* case is followed and reasserted in *Matter of Barefield*, 177 N. Y. 387, 391. The effect of these decisions is that the report of a Surrogate's referee is *never final* of itself. *There must be a decision and decree by the Surrogate.* His decree is the "first binding adjudication," from which alone can an appeal be taken.

The Surrogate must consider the exceptions in detail (*Ex parte Bedford*, 30 Hun, 551), and if he is left in doubt as to the validity of the exceptions by a lack of evidence, he may reserve the exceptions and send the matter back for further testimony. *Ex parte Pollock*, 3 Redf. 100; *Matter of Bayer*, 54 Hun, 189.

The provision of § 1023 of the Code prohibiting a referee from making additional findings of fact or ruling on questions of law after he has rendered his decision, are not applicable to special proceedings, and therefore do not apply to Surrogates' Courts. *Matter of Bayer, supra*, Barker, P. J. But a matter will not be sent back to a referee for a rehearing for an immaterial cause or where no fraud or clerical error is claimed to exist, or where it is clear that no injustice has been done. *Matter of Kranz*, 41 Hun, 463. Nor will the report be sent back merely because there is a conflict of evidence in the testimony taken before the referee; in such a case the Surrogate will support the finding of the referee unless it clearly amounts to a finding unsupported by evidence. *Matter of Odell*, 1 Connoly, 94. A Surrogate may send a matter back for additional report where there has been some accidental omission rendering the report incomplete or unintelligible. *Abercrombie* v. *Holder*, 63 N. Y. 628.

* Parker, J., in his dissenting opinion correctly states the intent of this amendment, drawn by the author as counsel to the committee of the Assembly that investigated the Surrogate's Court in New York County.

§ 141. **Filing new objections to account before referee.**—It is to be noted that where a disputed account is referred, the issues raised before the referee are determined by the objections filed in the Surrogate's Court. Prior to the Code, when it was the practice to send such accounts to an auditor, it was held by the Court of Appeals (*Boughton* v. *Flint*, 74 N. Y. 476), that the auditor had no judicial powers but was employed simply to aid the Surrogate, and that it was not within his power to allow further objections to be filed before him, and that the proper practice in case additional objections are desired to be filed would be by application to the Surrogate, by whom they could then be referred to the auditor. It is submitted that the reasoning on which this decision was based is not applicable to referees under the Code in Surrogates' Courts in view of the decisions conceding judicial powers to such referees, and even holding that a referee has power to allow an objection to be amended, and even to allow new objections to be interposed (*Matter of Fithian*, 3 N. Y. Supp. 193, Ransom, Surr.), although in this case leave to file the new objection was in fact granted by the Surrogate. See part VIII, Accountings. See *Matter of Gearns*, 27 Misc. 76, and cases cited.

§ 142. **Compensation of referee.**—With regard to his fees a referee in a Surrogate's Court stands substantially upon the same basis as a referee in the Supreme Court. This is expressly provided by § 2566 of the Code, which is as follows:

> § **2566.** *Fees of other officers, and witnesses.*
> Each other officer, including a referee, and each witness, is entitled to the same fees, for his services and for traveling, as he is allowed for like services in the supreme court.
> 2 R. S. 69, § 19.

The statutory compensation of referees in the Supreme Court was increased by ch. 90 of the Laws of 1896, amending § 3296 of the Code to $10.00 a day. There is no question, however, but that the parties to a reference in the Surrogate's Court may stipulate that the referee shall not be limited to the statutory fees for his services; but, to make such stipulation valid, it must, first, be entered upon the minutes, and, second, it must fix the rate of compensation. *First National Bank* v. *Tamajo*, 77 N. Y. 476; *Griggs* v. *Guinn*, 29 Abb. N. C. 144; *Griggs* v. *Day*, 18 N. Y. Supp. 796, aff'd 135 N. Y. 469.

If the parties particularly agree at the commencement of the reference that the referee shall not be limited to the statutory fee, and also agree what he shall be entitled to charge, a subsequent entry upon the minutes of the terms of their agreement will be deemed to have been made in compliance with the statute, "*at or before the commencement of the trial.*" *Griggs* v. *Day*, 135 N. Y. 469; *Philbin* v. *Patrick*, 22 How. Pr. 1. A stipulation that the referee may charge such fees for his services as he deems proper is insufficient, and if such stipulation is subsequently repudiated, the court is limited to allowing only the statutory fees. *Matter of Hurd*,

6 Misc. 171. The referee is entitled to charge for every day occupied in the hearings, and also for the time spent in the investigation and consideration of the case after its submission. *Berg* v. *Rottek*, Daily Register, Dec. 28, 1889. This of course means a reasonable time and must be determined by the nature of the case or the character of the questions before him. *Fay* v. *Muhlker*, 13 Daly, 314. The amount of time spent, when the fees are to be taxed, should be proved by affidavit. Such affidavit should not only show the time actually used, but should also contain a specific allegation that the time used was *necessarily* required. But if the parties omit to require such proof of time occupied, and an allowance is incorporated in the decree and the executor directed to pay the referee a specific sum, an Appellate Court will not disturb the Surrogate's allowance; for no question as to its propriety is in such case presented. *Hancock* v *Meeker*, 95 N. Y. 528; *Kearney* v. *McKeon*, 85 N. Y. 136; *Brown* v. *Windmuller*, 4 J. & S. 75; *Shultz* v. *Whitney*, 17 How. Pr. 471.

In the absence of a stipulation, the statutory provision is mandatory upon the Surrogate in fixing the referee's compensation. *Matter of Willett*, 6 Dem. 435. So, also, if a stipulation be made upon the referee's minutes that the referee shall be paid such sum as shall be fixed by the Surrogate upon the coming in of his report, the Surrogate has no power to give him more than the statutory compensation. *Matter of Gillman*, 12 Civ. Proc. R. 179.

In New York County, under Rule 22, in view of the expenses of a reference being taxable on the entry of the decree, it is required that the referee's bill (and the stenographer's) be sustained "by their affidavits or detailed proof." It seems *infra dig.* for a referee who is the *alter ego* of the Surrogate to have to swear to the amount of his service in hours or days, but it is quite proper his bill should be fully itemized as to every element of his charge particularly if the parties stipulate to pay "for each and every hour."

§ 143. **Same subject.**—The cases discussed, *ante*, under stenographers' fees are germane to those of referees. See *Bottome* v. *Neeley*, 124 App. Div. 600; *Austin* v. *Monro*, 47 N. Y. 360; *O'Brien* v. *Jackson*, 167 N. Y. 31; *Shaffer* v. *Bacon*, 35 App. Div. 248.

§ 144. **How to collect referee's fees.**—Before the Code it was held that an auditor could not withhold his report until his fees were paid, but that it was proper that the fixing of his compensation should be deferred until the confirmation of his report, at which time the Surrogate should fix it. *Ex parte Foster*, 3 Redf. 532. Since the Code, however, it appears that a referee may refuse to file his report until his fees are paid, although he runs a risk of the termination of the reference in case he fails to file or deliver his report within sixty days, as prescribed by § 1019 of the Code. See *Matter of Santos*, 31 Misc. 76. Nevertheless even though he have not filed his report within the sixty days, he will not be precluded from recovering his compensation in the absence of proof that either party actually elected to terminate the reference. *Nealis* v. *Meyer*, 21 Misc. 344.

See *Hierman* v. *Hapgood*, 1 Den. 188; *O'Neil* v. *Howe*, 16 Daly, 181. To avoid the termination of the reference the requirement of § 1019 must be literally complied with. *Phipps* v. *Carman*, 84 N. Y. 650. For if not, the right to fees may be forfeited. *Bottome* v. *Neeley, supra.* And if the referee, by his own fault, forfeits his fees under a stipulation which includes his and the stenographer's he may become personally liable to the stenographer himself, since he has destroyed his right against the parties. *Ibid.* Where within the sixty days, a referee, having completed his report, gave written notice to the attorney for the prevailing party that his report was ready for delivery upon payment of his fees, but it was not filed or delivered until after the sixty days, and after a notice of termination had been served, the tender of the report was held not to be a delivery within the intent of the Code. *Little* v. *Lynch*, 99 N. Y. 112. There is a peculiarity regarding references in the Surrogates' Courts, due to the fact, that on the one hand the Surrogate is powerless to direct the referee to file his report in advance of receiving his fees, and on the other hand powerless to direct any one of the parties to the proceeding to pay the referee before the report is filed. *Geib* v. *Topping*, 83 N. Y. 46; *Perkins* v. *Taylor*, 19 Abb. Pr. 146; *Matter of Kraus*, 4 Dem. 217. In the case last cited Surrogate Rollins used the following language: "If the referee shall see fit to file his report without exacting his fees, provision can be made, in the final decree or order that may hereafter be entered in this proceeding, for the payment of those fees by such of the parties hereto as may be found justly chargeable therefor. And if any one of the parties shall pay the referee, and it shall, at the termination of the proceeding, appear that such party ought not, under all the circumstances, to be charged with the expenses of the reference, a direction may be given for his reimbursement, and for payment of costs of reference, either out of the assets of the estate or by some one of the parties hereto as may seem just and proper." Originally, a referee must look for his fees to the party who takes up the report. *Attorney General* v. *Continental Life Ins. Co.*, 93 N. Y. 45, 47. But the Court of Appeals held that while ordinarily, the court could not direct the parties to action to pay the fees and take up a report, yet, where the party was a receiver appointed by the court, whose legal expenses are properly payable out of the fund involved, the court has power to order the referee's fees to be paid out of the fund. So it has been held by analogy, that where a reference in a Surrogate's Court is necessary, as for example, upon the accounting of an executor or administrator who is an officer of the court over whom it has general supervision and control in directing the distribution of the estate or fund, the Surrogate's Court will have power to direct the payment of the referee's fees in a proper case out of such fund. *Matter of Hurd*, 6 Misc. 171, Abbott, Surr. The Appellate Division recently held that the referee has the right to exact as a condition of the delivery of the report the payment of his fees, and the court will sustain the attorney of the successful party in paying the same in order to secure the report; and lays down the rule, that the attorney in the event

that the amount paid shall prove to be greater than the court will allow, is not personally to be chargeable with the excess paid; but the payment to the referee will be deemed to be made upon the implied condition that they shall be adjusted at the time of taxation of costs exactly as they might have been fixed by the court, if an application for that purpose had been made, and an understanding between the parties must be implied, that if, for any reason the amount paid to the referee shall prove to be greater than the court thinks is a proper allowance, the excess will be returned. *Duhrkop* v. *White*, 13 App. Div. 293, opinion by Rumsey, all concurred. See also *Matter of Kenny*, N. Y. Law Journal, October 24, 1890. Rule 22, of the Surrogate's Rules in the county of New York, provides explicitly, that where a party to a decree shall deem himself entitled to tax disbursements for referees' and stenographers' fees, such disbursements should be sustained by affidavit or detailed proof by the referee or stenographer. This is exclusive of the certificate required of such referee when services of counsel upon the reference is made the basis of a claim for an allowance.

If the case is not one where the Surrogate may properly direct the referee's fees to be paid out of the fund or estate, the referee is remitted, in case he be not paid his fees when the report is taken up, or filed, to a common-law action to recover them. *Little* v. *Lynch*, 99 N. Y. 112, 114.

§ 145. **Trial by jury.**—It has been stated that Surrogates have no jurisdiction over civil actions. See *ante*, part 2, ch. 1. Nevertheless provision is made by the Code under which the verdict of a jury can be had in certain specific cases on specific issues of fact arising in proceedings in the Surrogate's Court. The provisions of the Code are contained in § 2547, which is partly as follows:

> *Trial by jury; when ordered.*
>
> The surrogate may, in his discretion, make an order directing the trial by jury, at a trial term of the supreme court to be held within the county, or in the county court of the county, of any controverted question of fact arising in a special proceeding for the disposition of real property of a decedent, as prescribed in title fifth of this chapter. The order must state distinctly and plainly each question of fact to be tried, and it is the only authority needed for the trial. Either of the surrogates of the county of New York may, in his discretion, make an order transferring to the supreme court any special proceeding for the probate of a will pending before him, or in the court over which he presides, and thereupon the issues of fact arising in such proceeding shall be heard and determined by the supreme court. The order transferring such proceeding is the only authority necessary for the trial in the supreme court of such issues of fact. Such issues of fact shall be tried by jury. . . . If a motion to set aside the verdict be not made, or if at the termination of the proceedings for its review, the verdict is sustained, the supreme court shall certify to the surrogate's court the verdict, which shall be final and conclusive upon the parties to the litigation and their privies. Thereafter all proceedings relating to the will and to the estate of the decedent shall be had in the surrogate's court. The original will shall be returned to the surrogate's court at the time

the verdict is certified thereto. The costs shall be taxed in the surrogate's court, and shall be the same, and shall be awarded in the same manner as if the proceedings had been heard by the surrogate. **§ 2547, Code Civil Proc.,** in part.

(It will be noted that a portion of § 2547 has been omitted above; it relates entirely to appeals from the verdict of such a jury and will be included and discussed in ch. VI, *post*, under Appeals.)

From the section just quoted it appears that there are only two proceedings in which the Surrogate may direct a trial by jury of specific issues. The one a special proceeding for the disposition of real property of a decedent, the other a special proceeding for the probate of a will. Any controverted question of fact arising in the first proceeding may be so dealt with by any Surrogate in the State. But issues of fact arising in a probate proceeding can only be transferred by either of the Surrogates of the county of New York. A further distinction is to be noted, that in the first case, that is, of a proceeding for the disposition of a decedent's real property, the proceeding itself is not transferred to the Supreme Court but the Surrogate's order specifies the controverted question or questions of fact, which in his discretion he determines should be tried by a jury and only those issues (which must be plainly and distinctly stated) will be so tried. But the second case, that is a special proceeding for the probate of a will pending in the county of New York, it is provided shall be transferred *as a proceeding* to the Supreme Court and thereupon the issues of fact arising in such proceeding shall be heard and determined by the Supreme Court. Various puzzling questions have arisen as to the Surrogate's power in the premises when the order directing the trial of a specific issue or transferring a probate proceeding has once been made and while the proceedings or issues are before the Supreme Court. The intent of the Code is, in the first place, very clear that when the Surrogate has directed such a trial by jury and the verdict has been certified back to him (whether immediately in case of no appeal, or finally after appeal and affirmation or otherwise as the case may be), the verdict shall be final and conclusive upon the parties to the litigation and their privies. By reason of this explicit language confusion is likely to be caused, if the distinction is not kept in mind between this trial by jury which the Surrogate may direct and the trial by jury herein below discussed which the Appellate Court may award where a decree admitting a will to probate, or revoking the probate of a will is reversed or modified by such Appellate Court. In the latter case the Surrogate's Court has no jurisdiction to grant a new trial, for until the final judgment is entered upon the verdict of the jury and finally certified to the Surrogate's Court, the matter is deemed to be still pending in the Supreme Court. *Matter of Patterson*, 63 Hun, 529; *Matter of Clark*, 40 Hun, 233. The reason for this is that the probate proceeding in case of an appeal from the Surrogate's decree is removed into the Supreme Court, which becomes a court of original jurisdiction and as such, has power to decide any question of fact which the Surrogate could have

decided and may even in its discretion receive further or documentary evidence, or appoint a referee. Code Civil Proc. § 2586. But in regard to a case where the trial by jury is ordered by the Surrogate, a motion for a new trial may be entertained either by the Surrogate or the Supreme Court. Code Civ. Proc. § 2548. See *Matter of Booth*, 24 N. Y. St. Rep. 647. Where the whole proceeding is removed into the Supreme Court it would doubtless be improper for the Surrogate to make any order in the premises. Thus, before the abolition of the Court of Common Pleas in the city of New York, when the Surrogate had transferred a proceeding to that court, it appeared that a witness was about to leave the State, who was a necessary and important witness, the petitioner for probate at once moved in the Court of Common Pleas for an order for the examination of the witness before trial, but this order was vacated on the ground that the Code provisions upon which it was founded had no application to special proceedings but only to actions, and consequently could not refer to any matter removed from the Surrogate's Court. The proponents promptly moved in the Surrogate's Court for an order vacating the order for transfer so as to vest the Surrogate again with jurisdiction over the proceeding, with a view to his granting an order for the examination of the witness. Surrogate Rollins held, that he had no power to vacate the order of transfer, but intimated that as he was about to leave the county and as until his return the powers and jurisdiction of his court were to be exercised by the Court of Common Pleas, the application could be renewed in that court during the time it was possessed of his powers, although under the mere order of transfer it had no such power. *Matter of Delaplaine*, 6 Dem. 269.

It is submitted that if the Court of Common Pleas had power to make this order for examination in the proceeding pending before it, only by virtue of its temporary exercise of the powers and jurisdiction of the Surrogate's Court, it is clear that the Surrogate could, in the exercise of the same power, have made the order for the examination of the witness, himself, and if such power should be exercised in a given case it would doubtless be sustained in the absence of any other provision by law, as otherwise a party might be materially prejudiced. And it has been expressly held (*Matter of Blair*, 60 Hun, 523, 525), that where a Surrogate transferred certain probate proceedings to the Court of Common Pleas he was not divested thereby of any of the powers conferred upon him by the statute, except the specific powers expressly conferred upon the Court of Common Pleas by force of the transfer. The General Term, Bartlett, J., held that, "he could doubtless no longer try the issues of fact arising in the special proceeding for the probate of a will; that power by force of this transfer at once became vested in the Court of Common Pleas. But *that power alone* was transferred and that power alone became so vested. The transfer of such other powers as are vested by law in the Surrogate's Court, and are not necessary to the due execution of the power transferred cannot be implied." So it was held in that case that an application to

the Surrogate's Court while the probate proceedings were still in the Court of Common Pleas, for the appointment of a temporary administrator was proper and should be granted. And it was moreover held that the provision in § 2547, "Thereafter all proceedings relating to the will and to the estate of the decedent shall be had in the Surrogate's Court," were not to be taken as meaning, that during the transfer, jurisdiction over such proceedings was in the court to which the specific matter was transferred, but that the words were inserted in the section plainly for abundant caution.

§ 146. **Precedents.**

Surrogate's Court
Caption.

Present:
Hon.
Surrogate.

Order directing trial of issues by jury.

In the matter of the disposition of the real estate of deceased, for the payment of his debts.

By virtue of the authority vested in this court and in the Surrogate of this county by section 2547 of the Code of Civil Procedure, it is hereby

Ordered, that the below specified controverted questions of fact arising in the above entitled proceeding be tried by jury at a trial term of the Supreme Court, to be held within this county (or in the County Court of this county).

Statement of issues to be tried:

[Here specify the issues distinctly and plainly, such as the title of the testator or the validity of the creditor's claim. (*Note.*) State each issue interrogatively.]

And it is further Ordered, that the verdict of said jury be certified back to this court according to law.

(Signature.)

Note. As to which it seems the Surrogate may direct the framing of an issue. See *Mead* v. *Jenkins*, 4 Redf. 369; reversed on another point, 27 Hun, 570.

Surrogate's Court
Caption.

Present:
Hon.
Surrogate.

Order by New York Surrogate for trial by jury under section 2547 of the Code. *Note.*

In the matter of the probate of a paper propounded as the last will and testament of deceased.

By virtue of the authority vested in the Surrogates of the County of New York by section 2547 of the Code of Civil Procedure, it is hereby, on motion of the above Surrogate

Ordered, that the above entitled proceeding now pending

Note. This order is the only authority necessary for the

trial in the Supreme Court of the issues of fact which must be tried by jury, the subsequent proceedings being fully indicated in section 2547.

in this court for the probate of the alleged last will and testament of late of the county of New York, deceased, be and the same hereby is transferred to the Supreme Court in and for the county of New York for the trial of the issues of fact in said proceeding by a jury.

(Signature.)

Note. It seems to be the practice for the calendar clerk to notify the parties of the removal of the proceedings by virtue of this order. It should be further noted that the verdict of the jury is certified back to the Surrogate's Court by the Supreme Court and that no order retransferring the proceedings to the Surrogate's Court is necessary, as after the said verdict is certified back all proceedings relating to the will and to the estate of the decedent must be had in the Surrogate's Court by operation of law. See section 2547.

An order, a form for which has already been given, remitting proceedings to the Surrogate's Court, is necessary only where proceedings have been transferred to the Supreme Court by reason of some vacancy or disability of the Surrogate discussed under that head.

10

CHAPTER IV

DECREES AND ORDERS

§ 147. **Surrogates' decrees.**—Section 2550 is as follows: "The final determination of the rights of a party to a special proceeding in the Surrogate's Court is styled indifferently a final order, or a decree."

Such determination of course presupposes a proceeding before the Surrogate initiated by petition and citation. This final order or decree contains the adjudication which the Surrogate is required to make fixing the rights of the parties before him. The validity of the decree hinges on, first, the power of the Surrogate to make it, which of course involves the regularity of the proceeding with regard to the jurisdictional facts. Secondly, it hinges upon its formal regularity. With regard to the first question it is merely necessary to restate the proposition that one claiming under a decree of the Surrogate must show affirmatively his authority to make it. *Matter of Hawley*, 104 N. Y. 250, 262; *Farmers' L. & T. Co.* v. *Hill*, 4 Dem. 41. As to its formal character the decree must be signed by the Surrogate. *Roderigas* v. *E. R. Sav. Inst.*, 76 N. Y. 316. Should an unsigned decree be filed by the clerk, it can have no validity from the mere fact of filing, and can be disregarded without liability to proceedings for contempt. *McNaughton* v. *Chave*, 5 Abb. N. C. 225. One of the tests of whether an order made by a Surrogate is a final order, that is, a decree within the meaning of § 2550, is whether a party can be punished, as for contempt for disregarding it or disobeying it. See discussion under § 2555.

The best rule for determining, however, is the ordinary test of common sense as to whether the order in question is a final determination of a special proceeding or not.

Thus, where, after proceedings by a judgment creditor against an executor in the Surrogate's Court, petition is made that the executor be punished for contempt for failure to pay the judgment claim, and upon such petition the Surrogate makes an order directing the executor to pay, such an order is a final order within the meaning of the section. There is no further order in the premises which the Surrogate need make in the proceeding. It is a final determination as between the judgment creditor and the legal representative of the estate; it is in effect a decree for the payment of the money. See *Matter of McMaster*, 14 Civ. Proc. 195.

§ 148. **Effect of Surrogate's decree.**—There are certain specific statutory provisions. See section *infra*, defining the conclusiveness of certain decrees of a Surrogate. Of course a party obtaining a decree is estopped thereby from attacking it. This conclusiveness is irrespective of any

Code provision. *Chester* v. *Buffalo Car Mfg. Co.*, 183 N. Y. 425. This does not mean he may not move to resettle it, or to open it, but that so long as it stands it is binding on him. Generally speaking, however, the conclusiveness of a decree depends upon the regularity of the proceedings before the Surrogate, the citation of all necessary parties upon such proceeding, and its jurisdictional validity. No consent of parties as has been already noted can give validity to the decree if he has not jurisdiction to make it, but his decree upon a question within his jurisdiction is, generally speaking, conclusive upon the parties to the proceeding. *Frethey* v. *Durant*, 24 App. Div. 58, 62; *Graham* v. *Linden*, 50 N. Y. 547. Except as to particular decrees, the effect of which is limited by the statute, a Surrogate's decree is a decree *in rem* and, therefore, is conclusive upon the question covered by it. Thus, where a Surrogate has jurisdiction to pass upon a claim, and decides adversely, his decree bars a subsequent suit upon such claim. *Baldwin* v. *Smith*, 91 Hun, 230. The right to appeal from a decree is always to be taken into account, but apart from this the cases are uniform with reference to the conclusiveness of the Surrogate's decrees. See *Stiles* v. *Burch*, 5 Paige, 132, where the Court of Chancery expressly declared in its own decree that the decree of the Surrogate involved in the case at bar was binding and conclusive between the parties to the proceeding as to the facts upon which the Surrogate had power to adjudicate. See also *Wright* v. *M. E. Church*, Hoff. Ch. 202, holding that the Surrogate's decree, his jurisdiction being conceded, was final as to all who were legally competent and were cited; that it was pleadable in every court and the only remedy was by appeal. See *Ball* v. *Miller*, 17 How. Pr. 300, holding that a Surrogate's decree upon a final accounting is conclusive as to balance therein stated to be due the representative of the estate. See opinion in *Kirk* v. *McCann*, 117 App. Div. 56, discussing binding effect of unreversed decrees, whether the decision was right or wrong, or the parties adult or infant. In that case the decree had directed an erroneous disposition of surplus income. It was held to conclude the parties to its date, though not to prevent a subsequent decree on a correct theory disposing of subsequently accruing income. Such a decree is also conclusive upon the sureties in the administration bond; and this regardless of their being cited. See Official Bonds, *post.* See also *Johnson* v. *Smith*, 25 Hun, 171. Such a decree has been held wholly conclusive against one of the parties interested in the fund, duly cited upon the accounting. *Bushnell* v. *Drinker*, 5 Redf. 581; *Brown* v. *Wheeler*, 53 App. Div. 6, 8, citing *Garlock* v. *Vandevort*, 128 N. Y. 374; *Riggs* v. *Cragg*, 89 N. Y. 480; *Matter of Verplanck*, 91 N. Y. 439; *Purdy* v. *Hayt*, 92 N. Y. 446. One not thus a party may, however, move in a proper case to reopen the decree and proceeding. It was held in *Matter of Killan*, 66 App. Div. 312, that this is the proper remedy, and if he tries to compel an account *de novo*, his application may be denied, and costs imposed on him personally. *Ibid.* But this ruling was reversed, 172 N. Y. 547, holding the applicant's right to an accounting was a substantial right, not so to

be divested except as provided in the Code, whereunder the one accounting could have secured a citation to *unknown* parties. (But see dissenting opinion, the reasoning of which is persuasive.) And in a later case, *Matter of Gill*, 183 N. Y. 347, a creditor was held absolutely entitled to petition for an accounting, although he had omitted to present his claim pursuant to the published notice.

And in *Matter of Gall*, 182 N. Y. 270, a creditor was allowed to move to open and modify a decree eight years after its entry, having presented his claim, which was ignored, and the decree made without citing him, settling an account in which his claim was not specified.

These decisions are somewhat puzzling in view of the explicit language of the Code as to opening decrees where appeal is not an available remedy. But they certainly hold that a creditor not a party to an accounting can either move to reopen the proceeding or petition for a new accounting. Of course this does not revive his rights if they have been barred under the short statute, or increase them if by his laches his action is taken after distribution, and the representative has as such no further assets.

§ 149. **Same subject.**—However, every decree must be viewed in the light of the subject-matter with which it has to deal. Its conclusiveness is determined thereby. For example: A decree made by the Surrogate in the final settlement of an executor's accounts is an adjudication merely as to amounts received and paid out by him, and, therefore, as to the balance due to or from such executor. *Johnson* v. *Richards*, 3 Hun, 454. But it conclusively establishes the propriety of his acts up to that time (*Matter of Union Trust Co.*, 65 App. Div. 449), in the capacity in which he accounts. For it has been held (*Matter of Doheny*, 70 App. Div. 370), that where A and B accounted as temporary administrators, the decree was inconclusive when later they accounted for the same estate as trustees. See § 2742, C. C. P., discussed, *post*. But where the Surrogate has jurisdiction of the parties and of the subject-matter, his decree has the same force and effect as the judgment of any other competent court. *Garlock* v. *Vandevort*, 128 N. Y. 374; *Shimmel* v. *Morse*, 57 App. Div. 434; *Mutual Life* v. *Schwaner*, 36 Hun, 373, aff'd 101 N. Y. 681; *Baldwin* v. *Smith*, 91 Hun, 230. As to infant parties, the court, having *duly* appointed a guardian *ad litem*, has full jurisdiction of the person, and its decree binds the infant. *Matter of Hawley*, 100 N. Y. 206; *Matter of Wood*, 70 App. Div. 321, 324. So future remainder-men, not in being, may be bound. *Rhodes* v. *Caswell*, 41 App. Div. 229. But the decree cannot have any conclusive effect or operate as a bar as to property not involved in it. *Frethey* v. *Durant*, 24 App. Div. 58.

§ 150. **Collateral conclusiveness.**—With regard to the collateral conclusiveness of such a decree it is to be borne in mind that as the court is one of special and limited jurisdiction those claiming collaterally under such a decree must prove the jurisdictional facts from which it derives its validity. *Corwin* v. *Merrit*, 3 Barb. 341. But see *People* v. *Harman*, 2 Sw. 576. It follows from the general rules of estoppel, that the proceed-

ings of a Surrogate having jurisdiction cannot be questioned collaterally. *Jenkins* v. *Robinson*, 4 Wend. 436; *Bensen* v. *Manhattan R. Co.*, 14 App. Div. 442. In this case the Appellate Division of the First Department (opinions by O'Brien and Ingraham, JJ.) passed upon the power of the Surrogate of New York County in probate proceedings to determine in certain cases the validity of testamentary dispositions affecting real estate, as defined by § 11 of ch. 359 of the Laws of 1870. The question before the court was whether under a fair construction of that act the Surrogate had jurisdiction to make a binding decree in reference to such testamentary dispositions. It appeared that the Surrogate under the act was requested by the heirs-at-law to determine the validity of certain devises or bequests under the will of the testatrix. The court held first, that the language of the act was broad enough to show a legislative intent to confer upon the Surrogate jurisdiction upon the probate of the will to determine the validity of the devises or bequests which were assailed by the heirs-at-law. Second, that by submitting to the Surrogate the determination of these questions the heirs-at-law should be held to have waived their constitutional right to have the question of title tried by a jury. And in the third place, although it might appear, that had the decree of the Surrogate been appealed from it might have been modified or reversed, nevertheless having been made in a proceeding to which the heirs-at-law were parties, it was binding and could not be collaterally attacked. To same effect *Brown* v. *Landen*, 30 Hun, 57, affirmed in 98 N. Y. 634; *Roderigas* v. *E. R. Sav. Inst.*, 63 N. Y. 460; *Same* v. *Same*, 76 N. Y. 316; *Parhan* v. *Moran*, 4 Hun, 717. The general rule in this regard was stated by Marcy, J., in *Johnson* v. *Robinson*, 4 Wend. 437, 441. "However extraordinary or erroneous be the determination and proceedings of a court of limited authority, if it acts within its proper jurisdiction as to the subject-matter, place and person, its judgment or decree cannot be impeached or invalidated in a collateral action." So also if a decree be acquiesced in by the parties for a long time (as four years) it will not be disturbed in the absence of fraud. *Matter* v. *Waack*, 5 N. Y. Supp. 522.

§ 151. **The statutory provisions.**—The rule is now defined by statute.

> Where the jurisdiction of a surrogate's court to make, in a case specified in the last section, a decree or other determination, is drawn in question collaterally, and the necessary parties were duly cited or appeared, the jurisdiction is presumptively, and, in the absence of fraud or collusion, conclusively, established, by an allegation of the jurisdictional facts, contained in a written petition or answer, duly verified, used in the surrogate's court. The fact that the parties were duly cited is presumptively proved, by a recital to that effect in the decree. **§ 2473, Code Civil Proc.**

(*People* v. *Harman*, 2 Sw. 576, holding that recital of jurisdictional facts in the decree raised no presumption was before the enactment of this section.) Attack in collateral proceedings is limited to the jurisdiction of the Surrogate to make the decree. See *Dakin* v. *Hudson*, 6 Cowen, 221.

Statutory changes in the power of the Surrogate have no *ex post facto* operation; so, where a Surrogate in New York County prior to 1880 adjudicated in his decree admitting a will to probate upon the validity of a disposition of real estate in said will, acting under authority of § 11 of ch. 359 of the Laws of 1870, the Appellate Division held that such a decree could not be attacked collaterally. *Bensen* v. *Manhattan R. Co.*, 14 App. Div. 442. See also as to conclusiveness of a decree, *People* v. *Townsend*, 37 Barb. 520; *Curtis* v. *Williams*, 3 Dem. 63; *Matter of Kranz*, 41 Hun, 463; *Newcome* v. *St. Peters Church*, 2 Sand. Ch. 636; *Scoffield* v. *Churchill*, 72 N. Y. 565; *Gerould* v. *Wilson*, 81 N. Y. 573; *Wetmore* v. *Parker*, 52 N. Y. 450; *Matter of Harvey*, 3 Redf. 214; *Leonard* v. *Columbia S. N. Co.*, 84 N. Y. 48, 55. In *Shaw* v. *N. Y. Central*, 101 App. Div. 246, the administrator's right to sue was attacked on the ground that his petition for letters was verified before a New York notary under a Columbia County venue. Held, the effect was merely to make the petition an unverified one; but the letters having been issued were *prima facie* sufficient proof of his representative status. The court cited *Belden* v. *Meeker*, 2 Lans. 473, 47 N. Y. 307; *Farley* v. *McConnell*, 52 N. Y. 630; *Welch* v. *N. Y. Central*, 53 N. Y. 610.

In *O'Connor* v. *Huggins*, 113 N. Y. 511, the Court of Appeals summarizes the rule as to the conclusiveness of Surrogates' decrees in the following language:

"The record shows that the necessary facts were alleged upon which the Surrogate acted in granting them. His determination upon the proof cannot be disturbed by an attack upon its correctness, in a collateral proceeding. Surrogates' Courts, though established as courts of special and limited jurisdiction, have possessed the general and exclusive jurisdiction to order the administration upon the estates of deceased persons, and, where jurisdiction to act exists, their orders and decrees are made conclusive until they are revoked, or reversed on appeal. 2 R. S. 80, § 56. That conclusiveness attaches in a case where a jurisdictional fact is in question, and it then appears that there was proof with respect to its existence, upon which the Surrogate decided. His adjudication, in the exercise of his general and conclusive jurisdiction, where jurisdictional facts, necessary to the possession of that jurisdiction, appear to have been alleged, and when the necessary parties have been duly cited to appear before him, is not thereafter open to collateral attack. Power to affect the adjudication resides in the court which made it, and in the court to which it may be appealed; but otherwise it is not open for question. This principle, of course, in its application to other parties affected, *implies the absence of fraud, or collusion.* (See *Fulton* v. *Whitney*, 66 N. Y. 548.) It is not material how the decision was reached, provided the facts, which confer power to act, were alleged. The Surrogate was not confined to any form of procedure, or to any mode of proof, in acting upon an application for letters. The defect in the allegations of the petition was supplied by allegations in a subsequent deposition, and we are bound to presume that,

prior to issuing the letters, the Surrogate deliberated and decided upon the right of the petitioner."

The plea, when urged collaterally, that the decision was erroneous, must always be unavailing. For its errors the remedy is by a direct proceeding for their correction, and subsequent proceedings which rest upon the decree, will not be affected, however erroneous the adjudication may be urged to have been. *Porter* v. *Purdy*, 29 N. Y. 106. The *dictum* in the foregoing opinion, with regard to the absence of fraud or collusion is in conflict with a decision in *Stillwell* v. *Carpenter*, 2 Abb. N. C. 238, which held that not even fraud in securing a decree would be sufficient grounds for attack; for that the party prejudiced had his remedy by an action in equity to be relieved against the fraud. But see *Hoes* v. *N. Y., N. H. & H. R. R.*, 173 N. Y. 435, rev'g 73 App. Div. 363, which settles the point. In this case the right of the public administrator to sue for damages for death of intestate was attacked because of the manner in which his letters were issued. It appeared that legal fraud had been committed in that the only assets here on which jurisdiction to grant letters could be based were a watch and chain brought into the State solely for that purpose. Held the status of the plaintiff under such letters could be attacked collaterally. (See opinion.) The cause of action, negligently causing death, it must be noted, did not arise here, but in the State from which the "assets" were imported.

If it appears, however, that the Surrogate had no jurisdiction to make the decree in question it will have no conclusiveness. *Ziemer* v. *Crucible Steel Co.*, 99 App. Div. 169. So, where the decree purports to adjudicate upon a contested claim of a creditor over which the Surrogate has no jurisdiction (*Matter of Walker*, 136 N. Y. 20, 27), the decree is not binding (*Tucker* v. *Tucker*, 4 Keyes, 136), although it would be otherwise if it passed upon the claim of an executor against the estate. *Kyle* v. *Kyle*, 67 N. Y. 400; *Shakespeare V. Markham*, 72 N. Y. 400; *Boughton* v. *Flint*, 74 N. Y. 476. See also *Mott* v. *Fort Edward &c. Co.*, 79 App. Div. 179, where recital, in decree for sale of decedent's realty, of *due service* of citation was held to prove presumptively the fact of due service, as against collateral attack.

In *Matter of Welch*, 61 Misc. 5, Ketcham, Surr., held conclusive on accounting, a former decree, in a proceeding to remove an executor for improper dealings with bonds, and holding they belonged to him; it being claimed again on the accounting that they should be accounted for as of the estate, citing *Shearer* v. *Field*, 6 Misc. 189, and *Matter of McGoughran*, 124 App. Div. 312.

§ 152. **Conclusiveness specially.**—The effect of certain specific decrees has been defined by the Code, and the various sections are here collated to avoid confusion. First, as to decrees on probate, § 2626 provides as follows:

a. Probate; how far conclusive as to personalty.

A decree admitting to probate a will of personal property, made as pre-

scribed in this article, is conclusive, as an adjudication, upon all the questions determined by the surrogate pursuant to this article, until it is reversed upon appeal, or revoked by the surrogate, except in an action brought under section twenty-six hundred and fifty-three-a of this act to determine the validity or invalidity of such will; and except that a determination, made under section twenty-six hundred and twenty-four of this act, is conclusive, only upon the petitioner, and each party who was duly cited or appeared, and every person claiming from, through, or under either of them. **§ 2626, Code Civil Proc.**

And § 2627 relates to the conclusiveness of a probate decree as to real property.

b. Probate how far conclusive as to realty.

A decree, admitting to probate a will of real property, made as prescribed in this article, establishes, presumptively only, all the matters determined by the surrogate, pursuant to this article, as against a party who was duly cited, or a person claiming from, through, or under him; or upon the trial of an action, or hearing of a special proceeding, in which controversy arises concerning the will, or where the decree is produced in evidence, in favor of or against a person, or in a case, specified in this section, the testimony taken in the special proceeding, wherein it was made, may be read in evidence, with the same force and effect, as if it was taken upon the trial of the action, or the hearing of the special proceeding, wherein the decree is so produced. **§ 2627, Code Civil Proc.**

The primary distinction between the two sections, is that as to the personal estate the decree is conclusive and as to real estate it is merely presumptive. *Smith* v. *Hilton*, 19 N. Y. S. R. 340. It is also provided, in respect to a decree for payment and distribution, where an account is judicially settled:

c. With respect to the matters enumerated in this section the decree is conclusive as a judgment upon each party to the special proceeding who was duly cited, or appeared, and upon every person deriving title from such party. **§ 2743, Code Civil Proc.**, in part.

See Accounting for the Estate, *post*, and discussion by Thomas, Surr., in *Matter of Halstead*, 41 Misc. 606.

§ 153. **Same.**—Under § 2626 we note first, that if the decree contains an adjudication construing any disposition of personal property, that adjudication is binding only upon the limited class defined in the section, *q. v.* We note, second, that whatever the character of the decree, it is conclusive only as to the questions properly coming before the Surrogate or in the language of the section "determined by the Surrogate pursuant to this article." That is to say, if he adjudicates upon some disposition of the will, this determination is only conclusive so far as it relates to the personal estate. If the will is one of real and personal property, his decree will not be conclusive in an action to construe the will, so far as it relates to real estate thereby devised. *Corse* v. *Chapman*, 153 N. Y. 466, 475. But the mere fact that the will relates both to real and personal property as has

been pointed out, does not affect its conclusiveness as to the personal property. *Post* v. *Mason*, 26 Hun, 187, affirmed, 91 N. Y. 539. In this case the court used the following language:

"Since the enactment of these provisions of the statute, it has been held that the decree of the Surrogate cannot be impeached collaterally in respect to a will which relates to personal property. *Vanderpoel* v. *Van Valkenburgh*, 6 N. Y. (2 Seld.) 190. These provisions apply to a will so far as it relates to personal property, even though it be a will relating, as the one before us, to both real and personal property. *Matter of Last Will of John Kellum*, 50 N. Y. 298. So far as it affects the disposition of the personal property of the testator, the probate of one year becomes conclusive, and equity has not jurisdiction in a collateral action to set aside the probate in the absence of fraud in respect to the probate;" citing *Collier* v. *Idley's Executors*, 1 Bradf. 94, and cases cited; *Burger* v. *Hill*, 4 Bradf. Sur. 360; *Brady* v. *McCosker*, 1 Comst. 217; Dayton's Surr. 168; *Pemberton* v. *Pemberton*, 13 Vesey, 290; 1 Story's Eq. Jur., § 184; *Gould* v. *Gould*, 3 Story, 537; *Tarver* v. *Tarver*, 9 Pet. 180; *Gaines* v. *Chew*, 2 How. (U. S.) 245, and cases cited; *Armstrong* v. *Lear*, 12 Wheat. 175, Story, J.; *Colton* v. *Ross*, 2 Paige, 398; *Bogardus* v. *Clark*, 4 Paige, 623; *Muir* v. *Trustees of Leaks and Watts Orphan House*, 3 Barb. Ch. 480.

We note further that if there is no determination as to the validity of the will but the decree simply admits the will to probate, it is conclusive only as to the sufficiency of its execution, that is to say, its formal validity. *Matter of Gillman*, 38 Barb. 364.

Thus while we have seen that among the incidental powers of a Surrogate he has a right to determine upon a probate whether a person is an heir or belongs to any class designated in the will (see ch. I), nevertheless the decree admitting to probate is not conclusive as to this incidental inquiry. Nor would it be conclusive as to *any* incidental question, or by reason of mere *obiter dicta*. *Washbon* v. *Cope*, 144 N. Y. 287. Thus, where a will offered for probate was contested on the ground, that after its execution the testatrix gave birth to an illegitimate child whose rights were sought to be asserted and the Surrogate's decree merely admitted the will to probate, it was held (Patterson, J.) that the decree was not conclusive nor would the proceeding constitute an estoppel against the child when subsequently asserting its rights against the estate of the testatrix. *Bunce* v. *Bunce*, 20 Civ. Proc. Rep. 332.

Where probate was denied, held (*semble*), a person not a party to the proceeding could again present the instrument for probate and have the question of its proper execution and validity determined. *Matter of Tilden*, 56 App. Div. 277, rev'g 32 Misc. 118.

§ 154. **Same.**—We note further as to the formal validity of the decree, the statute makes it conclusive without limitation, that is to say, against all the world, as opposed to the determination in the decree of the validity of any particular testamentary disposition which is made conclusive only upon the petitioner and each party who was duly cited, or appeared, and

every person claiming from, through, or under either of them (*Matter of Dates*, 35 N. Y. S. R. 338. See as to parties *not* cited, *Matter of Patterson*, 146 N. Y. 327); or as the court says in *Hoyt* v. *Hoyt*, 112 N. Y. 493, 504, "as to the personal property if the person interested is not under disability or the Surrogate's discretion is not invoked for a sufficient cause under subdivision six of § 2481, the probate concludes all mankind after the lapse of one year; in such event the disposition and distribution of the personalty by the executor are beyond question or recall and a finality. The proceeding for the probate is in the nature of a proceeding *in rem* which is binding upon all parties who are entitled to participate and are brought in by due process of law."

We note further that the section limits the rule as to conclusiveness thereby defined to a decree *admitting* a will to probate; consequently decrees *refusing* probate have been distinguished under this section, and the conclusiveness of such a decree is determined by the general rules hereinabove laid down. Thus, in *Matter of Goldsticker*, 192 N. Y. 35 (disting. *Corley* v. *McEmeel*, *infra*) the court held that a decree refusing probate for improper execution and for lack of capacity was *in those respects* conclusive on the parties in subsequent controversies as to the personal estate. Section 2625 provides for the decision to be made by the Surrogate refusing probate of a will, and is as follows:

> Where the surrogate decides against the sufficiency of the proof, or against the validity of a will, or upon the construction, validity, or legal effect of any provision thereof, he must make a decree accordingly; and, if required by either party, he must enter in the minutes the grounds of his decision. **§ 2625, Code Civil Proc.**

Where a will related to real property, and the Surrogate decided adversely to its sufficiency, his decree refusing probate was held not to be conclusive upon the devisees in a subsequent action. But it was also held that such decree was admissible in evidence in an action brought to establish the will under § 1866 of the Code, and further that so far as the right to have it probated was concerned it was *res adjudicata*. *Corley* v. *McEmeel*, 31 Abb. N. C. 113. But see *Matter of Tilden*, 56 App. Div. 277, as to parties not cited.

This discussion amounts, therefore, to this: that in Surrogate's Courts, as in any court of record the principle of *res judicata* will be applied. The same issue is not to be settled between the same parties on the same grounds, once it has been properly litigated and decided. See *Matter of McGoughron*, 124 App. Div. 312. Section 1866 provides for an action in the Supreme Court brought to determine the validity, construction or effect of a testamentary disposition of real property situated within the State, but the section provides that it "does not apply to a case where the question in controversy is determined by the decree of a Surrogate's Court, duly rendered upon allegations for that purpose as described in article first, of title third, of chapter eighteenth of this act, where the

plaintiff was duly cited in the special proceeding in the Surrogate's Court before the commencement of the action."

§ 155. **Same.**—With regard to the conclusiveness of a decree admitting to probate a will of real property, we have already distinguished it as being presumptive only, against parties who were duly cited, or parties claiming from, through or under such parties. The manner in which probate of a will covering real property can come up in other courts or in proceedings other than for probate, is either in the form of the decree itself, which under § 2627 may be produced in evidence, in which case the testimony taken in the probate proceeding, may be read in evidence, subject to all the objections or rebuttal which would be available if it had been taken upon the trial or hearing in which it is sought to be used.

Secondly, the certified will or record thereof may be read in evidence as provided in § 2629, which is as follows:

> The Surrogate must cause to be endorsed upon, or annexed to, the original will admitted to probate, or the exemplified copy, or statement of the tenor of a will, which was admitted without production of an original written will, a certificate, under his hand, or the hand of the clerk of his court, and his seal of office, stating that it has, upon due proof, been admitted to probate, as a will valid to pass real or personal property, or both, as the case may be. The will, or the copy or statement, so authenticated, the record thereof, or an exemplified copy of the record, may be read in evidence, as proof of the original will, or of the contents or tenor thereof, without further evidence, and with the effect specified in the last three sections. **§ 2629, Code Civil Proc.**

The record of the will is thus presumptive evidence only of its due execution and of the mental competency and freedom from restraint of the testator and not of the validity of the devises contained in it, in any tribunal where the title to the real property of the testator may be in issue. *Matter of Merriam*, 136 N. Y. 58, 61; *Hoyt* v. *Hoyt*, 112 N. Y. 493, 504. So it is held that under the statutory provisions, the probate of a will is never conclusive as to real property, and amounts upon the trial of an action, or in a special proceeding in which a controversy arises concerning the will, only to presumptive evidence.

§ 156 **Same.**—The distinction between the conclusiveness of decrees admitting to probate wills of real or personal property, is carefully drawn by Judge Rapallo, in *Matter of Kellum*, 50 N. Y. 298, where he construes that section of the Revised Statutes, which gave conclusive effect to the probate of a will of personal property. 2 R. S. 61, § 29. His reasoning is still applicable, because the section of the present Code in question is the re-enactment of former provisions of the Revised Statutes on the subject, and was in effect a legislative recognition of the pre-existing law. See *Matter of Gouraud*, 95 N. Y. 256. The subsequent provisions, which were adopted, by which the next of kin were permitted, within one year after probate, to contest the same by filing allegations against the validity of the will or the competency of the proof thereof, were "an important safeguard against imposition or mistake and afford the next of kin a whole year

after the probate to investigate the circumstances attending the execution of the will." But no such provisions are necessary as to wills of real estate, as the probate thereof may be repelled at any time by contrary proof.

A will may be a will of real and personal property, but if offered for probate merely as a will of personal property, the decree admitting it to probate is utterly without validity as regards the real estate and would have no presumptive or evidential force whatever. The will would have to be proved and recorded anew as a will of real property. *Smith's Estate*, 1 Tucker, 108. Therefore the proof of the will as a will of real estate simply relieves a claimant under the will, of the burden of establishing it in a subsequent action or proceeding. *Corley* v. *McEmeel*, 31 Abb. N. C. 113. See also *Baxter* v. *Baxter*, 76 Hun, 98, as to the conclusiveness of decree of Surrogate.

The peculiar situation may exist, however, of a will being valid as to realty, so that the decree admitting it to probate has the presumptive and evidential force above specified, while as a will of personalty it may turn out to be invalid. This is due to the rule of law that the question of testacy or intestacy as to personalty is governed by the law of domicile of the testator, whereas its validity as to real estate may be governed by the *lex loci*. Thus where a will was proved as a will of real and personal property in the county of New York and letters testamentary issued, it developed on the final accounting that the domicile of the testator at the time of his death was in the State of Connecticut. It also appeared that a court of competent jurisdiction in Connecticut had adjudged the will revoked by the subsequent birth of a child to the testator. The New York Surrogate's Court held the will invalid as to personalty, but as to realty in regard to which the will contained a direction for sale and distribution of proceeds, the Surrogate asserted his jurisdiction to order distribution as to all real estate situated in New York. *Bloomer* v. *Bloomer*, 2 Bradf. 339. In conclusion it may be stated that the object of the statute, by which is meant both the original provisions of the Revised Statutes as well as the present section of the Code, was to make the certificate of the Surrogate or the record of the will or exemplification thereof so far as real estate was concerned, *prima facie* evidence only. See *Vanderpoel* v. *Van Valkenburgh*, 6 N. Y. 190, 199; *Carroll* v. *Carroll*, 60 N. Y. 121, 123, citing 2 Greenleaf's Evidence, § 239. This was a case where in an action of ejectment brought by a widow to recover her dower, the Code held that the probate of the will and the proceedings thereon were not competent evidence to prove the fact of the testator's death. This fact being the very basis and the foundation of the widow's action, without proof of which it could not be maintained, it was held that as the probate of the will could not in any respect affect the widow's right of dower, nor the final adjudication by the Surrogate in any way strengthen or injure her claim, the probate decree and the proceedings on which it was based were incompetent and entirely immaterial.

§ 157. **Preservation of decrees of Surrogates' Courts.**—Originally Surro-

gates' decrees were merely entered in the office of the Surrogate and recorded by the clerk in one of the books required to be kept by him. These books were covered by §§ 2498 and 2499 of the Code, which are as follows:

§ **2498.** *Books to be kept by surrogate.*

Each surrogate must provide and keep the following books:

1. A record-book of wills, in which must be recorded, at length, every will, required by law to be recorded in his office, with the decree admitting it to probate, and also, if the probate is not contested, the proof taken thereupon.

2. A record-book of letters testamentary and letters of administration, in which must be recorded all such letters, issued out of his court.

3. A record-book, in which must be recorded every decree, whereby the account of an executor, administrator, trustee, or guardian is settled.

4. A book, containing a minute of every paper filed, or other proceeding taken, relating to the disposition of the real property of a decedent, and a record of every order or decree, made thereupon; with a memorandum of every report made, and other proceeding taken, founded upon a decree for such a disposition.

5. A book, containing a record of every decree or order, the record of which is not required by this section to be kept elsewhere; together with a memorandum of each execution issued, and of the satisfaction of each decree recorded therein.

6. A book, in which must be recorded all letters of guardianship, issued out of his court.

7. A book of fees and disbursements, in which must be entered, by items, all fees charged or received by him for services or expenses, and all disbursements made or incurred by him, which are chargeable against those fees, or the county.

The expense of providing the books specified in this section is a county charge.

To this should be added the book in which must be recorded assignments of legacies or beneficial interests under L. 1904, ch. 692.

§ **2499.** *Books to be kept by Surrogate.*

To each of the books, kept as prescribed in the last section, must be attached an alphabetical index, referring to the page of the book, where each subject may be found. The surrogate may keep two or more books, for a further division of the subjects specified in either subdivision of the last section; in which case, he must keep a separate index to each set of books. Each decree, revoking the probate of a will, or revoking or otherwise affecting letters testamentary, letters of administration, or letters of guardianship, or suspending or removing a testamentary trustee, or modifying or otherwise affecting any other decree, must be plainly noted at the end or in the margin of the record of the will, letters, or original decree, with a reference to the book and page where the subsequent decree is recorded. The books, kept as prescribed in the last section, appertain to the surrogate's office, and must be open, at all reasonable times, to the inspection of any person.

§ 158. **Surrogate's duty to preserve papers.**—And by § 2500 it is provided that:

> The surrogate must carefully file and preserve in his office, every deposition, affidavit, petition, report, account, voucher, or other paper relating to any proceeding in his court; and deliver to his successor all the papers and books kept by him. All bonds required to be filed with the surrogate or in his office must be proved or acknowledged as deeds are required by law to be proved or acknowledged.

Papers which have not been copied, such as exhibits consisting of books and writings, cannot be removed from the files of the court. *Matter of Smith*, 15 N. Y. St. Rep. 734.

§ 159. **Docketing decrees.**—Although the entry and record of a decree is sufficient for all purposes of its conclusiveness and indeed of its enforcement, yet, in order to give a Surrogate's decree the force and effect of a judgment of the Supreme Court (which it is provided can be done where a Surrogate makes a decree directing the payment of money), it may be docketed as provided for in § 2553.

> § **2553.** *Decree for money; how docketed.*
>
> Where a decree directs the payment of a sum of money into court, or to one or more persons therein designated, the surrogate, or the clerk of the surrogate's court, must, upon payment of his fees, furnish to any person applying therefor, one or more transcripts, duly attested, stating all the particulars, with respect to the decree, which are required by law to be entered in the clerk's docket-book, where a judgment for a sum of money is rendered in the supreme court, so far as the provisions of law, directing such entries, are applicable to such a decree. Each county clerk, to whom such a transcript is presented, must, upon payment of his fees, immediately file it, and docket the decree in the appropriate docket-book, kept in his office, as prescribed by law for docketing a judgment of the supreme court. The docketing of such a decree has the same force and effect, the lien thereof may be suspended or discharged, and the decree may be assigned or satisfied as if it was such a judgment.

The Court of Appeals held (*Townsend* v. *Whitney*, 75 N. Y. 425) that the docketing of a surrogate's decree (as provided for by ch. 460 of the Laws of 1837, as amended by ch. 104 of the Laws of 1844, the provisions of which Laws were replaced by § 2553 of the Code) did not *merge* the decree. That is to say, the docketing did not make it a judgment, but simply gave it the force and effect of a judgment, so that after a decree is thus docketed the person or persons in whose favor it is docketed have two remedies to enforce payment of the money due them. The one upon the Surrogate's decree in the Surrogate's Court; the other by issuing an execution to enforce the docketed decree just as any judgment recovered in the Supreme Court. The two remedies are not inconsistent but concurrent or cumulative, and they may both be pursued until the decree has been complied with. See opinion of Earl, J., at p. 428. Where a decree directs payment of money by one or more persons, the decree may be docketed separately as against each or any of such persons, and separate executions issued with respect to each person. *Bramley* v. *Forman*, 15 Hun, 144. The lien of such a decree is the same as if the judgment,

to which, by docketing, the decree is assimilated, had been entered against the person directed by the decree to make payment. It in no sense constitutes a lien against the property of the decedent, and, if execution is issued thereunder (to enforce payment of money) against the executor, it issues against *his* property and not that of the estate. *Matter of Waring*, 7 Misc. 502; *Bennett* v. *Crain*, 41 Hun, 185. The provision of § 2553 that the lien thereof may be suspended or discharged as if it were a judgment of the Supreme Court distinctly divests the Surrogate of personal jurisdiction to suspend or discharge the docketed decree; whatever action he may take in regard to the proceedings in his own court. It can only be suspended or discharged by a judge of the court in whose office it is docketed. *Underhill's Estate*, 9 N. Y. Supp. 457, Coffin, Surr. In *Sackett* v. *Woodbury*, 70 App. Div. 416, it was held, however, that the Surrogate, or his clerk, alone has power to enforce the decree though docketed.

§ 160. **Enforcement of decrees.**—Under the Code, Surrogates' Courts are given greater power to enforce their decrees than is vested in other courts of records. See Code Civ. Proc. §§ 14, 1241, 2481, 2554, 2555, 3347. Generally speaking the Code provides for enforcement of a decree, either by execution or by punishment for contempt. The following sections define the power of the Surrogate:

Enforcement of decree by execution.

A decree directing the payment of a sum of money into court, or to one or more parties, may be enforced by an execution against the property of the party directed to make the payment. The execution must be issued by the surrogate, or the clerk of the surrogate's court, under the seal of the court, and must be made returnable to the court. In all other respects, the provisions of this act, relating to an execution against the property of a judgment-debtor, issued upon a judgment of the supreme court, and the proceedings to collect it, apply to an execution issued from the surrogate's court and the collection thereof, the decree being, for that purpose, regarded as a judgment; except that the proceedings prescribed in title twelfth of chapter seventeenth of this act if founded upon such a decree must be taken, as if the decree was a judgment of the county court, or, in the city of New York of the supreme court. **§ 2554, Code Civil Proc.**

Enforcement of decree by punishment for contempt.

In either of the following cases, a decree of a surrogate's court, directing the payment of money, or requiring the performance of any other act, may be enforced, by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or wilfully neglects to obey it, by punishing him for a contempt of court:

1. Where it cannot be enforced by execution, as prescribed in the last section.

2. Where part of it cannot be so enforced by execution; in which case, the part or parts, which cannot be so enforced, may be enforced as prescribed in this section.

3. Where an execution, issued as prescribed in the last section, to the

sheriff of the surrogate's county, has been returned by him wholly or partly unsatisfied.

4. Where the delinquent is an executor, administrator, guardian, or testamentary trustee, and the decree relates to the fund or estate, in which case the surrogate may enforce the decree as prescribed in this section, either without issuing an execution, or after the return of an execution, as he thinks proper.

If the delinquent has given an official bond, his imprisonment, by virtue of proceedings to punish him for a contempt, as prescribed in this section, or a levy upon his property by virtue of an execution, issued as prescribed in the last section, does not bar, suspend, or otherwise affect an action against the sureties in his official bond. **§ 2555, Code Civil Proc.**

§ 161. **Discussion of sections 2554 and 2555.**—The distinction between these two sections just quoted is, first, that an execution is the proper remedy to be resorted to where a decree merely directs the payment of a sum of money into court, or to one or more parties; but second, that where such a decree directing the payment of money cannot be enforced wholly or in part by execution, or where execution has been issued and returned unsatisfied in whole or in part, or where the decree relates to a fund or estate of which the delinquent is an executor, administrator, guardian, or testamentary trustee, in such case a decree for the payment of money can be enforced by contempt proceedings under § 2555; and in the third place, where the decree does not direct the payment of money but the performance of some other specific act, it must be enforced by contempt proceedings under § 2555.

In *Koenig* v. *Wagenen*, 126 App. Div. 772 (1st Dept., 2 dissents) it was held competent for the *representative* of one to whom a share had been decreed payable to sue on the Surrogate's decree in the Supreme Court without using the remedial procedure of the Surrogate's Court.

§ 162. **And first then as to enforcing decrees for the payment of money by an execution against the property.**—The execution under § 2554 is issued by the Surrogate or the clerk of his court, under the seal of that court, and is made returnable to that court. If the decree directs A, as executor, to pay a certain sum of money, the execution under § 2554 must run against A's property. *Matter of Quackenbos*, 38 Misc. 66. Section 1825 of the Code as to obtaining leave to issue execution against an executor or administrator in his representative capacity is not applicable. Section 1371 of the Code applies, *q. v.* The execution issues as of course (*Joel* v. *Ritterman*, 2 Dem. 242). It was held no notice need be given to the executor as under § 1826, *Peyser* v. *Wendt*, 2 Dem. 221. But in *Matter of Quackenbos* it was held the notice required by §§ 1825–26 was necessary. See *Felt* v. *Dorr*, 29 Hun, 14; *Olmsted* v. *Vredenburgh*, 10 How. Pr. 215. But the Surrogate may, under proper circumstances, require that such notice be given, irrespective of any statutory authority. *People* v. *Woodbury*, 70 App. Div. 416. This case held also that §§ 1377 and 1378, which provide that notice of an application to the court for leave to issue execution on a

final judgment, after the lapse of five years from its entry, must be served personally upon the adverse party, if a resident, apply to a Surrogate's decree; and that the five years run from the entry of the decree *in the Surrogate's Court.* It has been held where a Surrogate's decree was docketed in the office of the clerk of the county, and the execution issued upon said decree so docketed, was tested in the name of one of the justices of the court and not by the Surrogate, that the execution was invalid. *Bingham* v. *Burlingame,* 33 Hun, 211. This seems to be in conflict with the decision of the Court of Appeals in *Townsend* v. *Whitney,* 75 N. Y. 425, where Judge Earl held after the docketing of the decree the party in whose favor it was docketed had two remedies, one by an execution based upon the docket and one by attachment or contempt proceedings in the Surrogate's Court. But in view of the language of the court in another case (*Power* v. *Speckman,* 126 N. Y. 354), where the court remarks, that all such decrees for the payment of money may be docketed and become a general lien and be enforced by execution, the apparent conflict is reconciled and the practice may be said to be, that upon the entry of such a decree in the Surrogate's Court, if it be intended to enforce it by execution, the party in whose favor it is made should apply for a transcript under § 2553, duly attested, stating all the particulars with respect to the decree which are required by law to be entered in the clerk's docket-book, and to present such transcript to the county clerk so that his decree may be docketed; this decree so docketed can then be enforced as if it were a judgment of record, but the execution enforcing that decree, although by the docketing it has the same force and effect as if it were a judgment of the Supreme Court, must nevertheless be issued by the Surrogate as provided by § 2554, and not by a judge of the court in the office of which the judgment has been docketed. See *Matter of Dissosway,* 91 N. Y. 235; *Wilcox's Estate,* 1 Misc. 55; *Union Trust Co.* v. *Gage,* 6 Dem. 358; *Estate of Kellinger,* 2 McCarty, 68. The decree remains a decree of the Surrogate's Court (*Townsend* v. *Whitney, supra*), and the five years after which execution can issue only by consent of court runs from time of its entry, and not from time the transcript is docketed. *People* v. *Woodbury,* 70 App. Div. 416.

§ 163. **Disobeying the decree**—A decree may be reversible on appeal and yet be enforceable by execution until reversed. Such a decree cannot safely be disregarded or disobeyed. *Ferguson* v. *Cummings,* 1 Dem. 433; *People* v. *Bergen,* 53 N. Y. 404; *Matter of Humfreville,* 19 App. Div. 381, 384; *Erie R. Co.* v. *Ramsey,* 45 N. Y. 644. But if the decree is fatally defective so that a motion to vacate it could properly be made, disobedience of the decree will not render one liable to punishment for contempt, nor can it be enforced by execution. *Eisner* v. *Avery,* 2 Dem. 466, where Judge Rollins held, that a decree directing all the executors of a certain estate to pay a certain sum as costs to one of their number was unenforceable, and an execution issued under such a decree must be vacated, although if the decree had ordered two of them to pay costs to the third, it would have been enforceable. So an order directing an administrator to pay

costs to a special guardian in excess of statutory amount, and not out of the infant's estate cannot be enforced in contempt proceedings. *Matter of Monell*, 28 Misc. 308. So a sheriff was excused from contempt in disregarding an order of commitment "void upon its face." *Matter of Leggatt*, 47 App. Div. 381; *Roderigas* v. *East R. S. I.*, 63 N. Y. 460, 474; *Porter* v. *Purdy*, 29 N. Y. 106, 113; *Bovee* v. *King*, 11 Hun, 250; *Chegaray* v. *Jenkins*, 5 N. Y. 376; *Field* v. *Parker*, 4 Hun, 342.

§ 164. **Enforcement of decrees by punishment for contempt.**—Section 2555 gives the Surrogate what have well been termed extraordinary powers. These powers, however, should not be intolerantly used but should be exercised in conformity to the liberal spirit of our legislation. *Ferguson* v. *Cummings*, 1 Dem. 433, citing *Doran* v. *Dempsey*, 1 Bradf. 490; *Matter of Latson*, 1 Duer, 696; *Hosack* v. *Rogers*, 11 Paige, 603; *Matter of Callahan*, 1 Tucker, 62. In *Matter of Holmes*, No. 2, 79 App. Div. 267, a decree ordered an executrix to pay certain legacies. She appealed, but failed to file the second undertaking under § 2578 to stay execution. The Surrogate, in proceedings under § 2555 fined her the amount of the legacies ordered to be paid. Held, a proper exercise of his power, citing *Matter of Snyder*, 103 N.Y. 178. See also *Matter of Ryer*, 120 App. Div. 154.

Analyzing § 2555, it appears that the punishment of a person refusing to obey a Surrogate's decree whether it direct the payment of money or requires the performance of some specific act, is carefully defined. In the first place the spirit of the whole section appears from subd. 1. The legislature evidently contemplated, that the first resort of the practitioner should be to enforce the decree by execution as prescribed in § 2554. And if the decree cannot be enforced as a whole, that is to say, so as to realize the full amount directed thereby to be paid, it is contemplated that the practitioner shall if possible realize partially under his decree before resorting to the remedy provided by § 2554. Where, however, the execution has been returned unsatisfied, proceedings for contempt may be at once instituted, or when it has been satisfied only in part, proceedings to punish for contempt for failure to pay the residue may be instituted. Subdivision 4, however, gives the Surrogate discretion to proceed directly by proceedings for contempt without the delay incident to docketing the judgment and the issuance and return of the execution, where the party disobeying the decree directing him to make a payment or do a particular act is an executor, administrator, guardian, or testamentary trustee directed to pay from the fund in his hand or do some particular act in regard to the estate held or represented by him. Nevertheless, Surrogates will not use this extraordinary power unless it is made to appear to their satisfaction that there is some necessity or propriety in resorting in the first instance to this severe measure of punishing the representative for contempt of court; therefore when the practitioner moves under § 2555 against an executor, administrator, guardian, or testamentary trustee, it is well that the moving papers should indicate that the rights of the applicant would be prejudiced by the delay incident to execution, or that the per-

son sought to be punished has no property out of which an execution if issued could be satisfied. *Ferguson* v. *Cummings*, 1 Dem. 433.

§ 165. **What judgment may be so enforced.**—It is obvious the Surrogate's power relates to the enforcement of his mandates. But his power may be invoked though the original judgment obligation arose in another court. Thus, in *Matter of Mahoney*, 88 App. Div. 140, the original judgment was a Supreme Court judgment against an administratrix. Application was made to the Surrogate for leave to issue execution. In the "inquiry" thereupon had, and accounting, he held she was in possession of a certain sum applicable to the judgment and to that extent execution might issue.

It was issued and returned unsatisfied. Thereupon, the Surrogate, treating this as a wrongful or fraudulent concealment of estate assets made a decree directing her to pay the sum already found in default of which she was to be punished as for contempt.

§ 166. **Limitation on the Surrogate's power.**—The Surrogate's Court can only enforce obedience by attachment to its *lawful* orders and decrees, that is, to such orders and decrees as it is empowered by statute to make; so, where an order had been made upon consent of all parties directing the deposit of the property of an estate in a trust company, but not under the circumstances contemplated by § 2602 of the Code, and the executor deposited only a part of the funds of the estate and refused to deposit the balance, Surrogate Coffin held that he was without power to enforce the order. *Guion* v. *Underhill*, 1 Dem. 302. But where the court has power to make the order or decree, which is disregarded or disobeyed, all that is preliminarily requisite to the exercise of the Surrogate's jurisdiction to punish, is proof of compliance with the provisions of the section that is, of the following facts:

(*a*) The making of a decree directing the payment of money or the performance of some particular act.

(*b*) That a certified copy thereof has been served upon the party against whom it is rendered, or upon the person or officer who is required thereby, or by law, to obey it. *Sudlow* v. *Pinckney*, 1 Dem. 158; *Woodhouse* v. *Woodhouse*, 5 Redf. 131.

(*c*) That said party, officer, or person has refused or wilfully neglected to obey it. *Dunford* v. *Weaver*, 84 N. Y. 445.

There is no necessity for a preliminary citation to show cause why the party, officer, or person should not be punished for contempt. *Guion* v. *Underhill, supra.*

The refusal to obey the decree must be clearly shown. Thus where a decree directed the payment of a balance to A, and A alleged a demand for such balance *and costs*, the executor's failure to comply with such demand was held not to lay foundation for a proceeding to punish him for contempt. *Matter of Feehan*, 36 Misc. 614. See also *Matter of Humfreville*, 154 N. Y. 115; *Estate of Lenihan*, Surr. Decs. 1901, 470; *Estate of E. Broderick, id.* 1899, 189.

§ 167. **Costs, as well as estate funds, are covered, and payment may be**

enforced.—It is also to be remarked that while the language of the Code, "A decree directing the payment of money," has no limitation as to the kind or nature of the money to be paid, and seems to include, therefore, not only moneys held in trust in a representative or trust capacity, but also costs or disbursements, or any sum of money which in a final decree is directed to be paid, nevertheless, where the decree directs payment of costs only, it cannot be enforced by imprisonment for nonpayment. *Matter of Banning*, 108 App. Div. 12. In such case § 15 of the Code controls. *Matter of Humfreville*, 154 N. Y. 115, rev'g on this point, *Matter of Humfreville*, 19 App. Div. 381, 383. See *Matter of Kurtzman*, 2 N. Y. St. Rep. 655; *Richardson* v. *Van Voorhis*, 3 N. Y. Supp. 396.

So much of a decree as charges an executor personally with costs is a money judgment and enforceable by execution only. *Matter of Feehan*, 36 Misc. 614.

By final decree is meant one that determines the particular matter in controversy, and which is therefore appealable. *Matter of Van Houten*, 18 App. Div. 301.

Where the jurisdictional facts above enumerated appear in the record, the discretion of the Surrogate will not usually be interfered with by the Appellate Court. If it appear that the decree has been made, properly certified, duly served, and disobeyed, the power of the Surrogate to punish is clear; it is only in the cases above hinted at where that power may have been abused that his order in the premises will be interfered with; for example, where an executor was required by a final decree to pay the balance adjudged to be in his hands upon the judicial settlement of his account to the parties beneficially interested, and he failed to do so, and opposed proceedings to punish him for contempt by affidavits showing insolvency on his part, and consequent inability to comply with the decree, which affidavits the Surrogate held insufficient, the Court of Appeals declined to review his decision. *Matter of Snyder*, 103 N. Y. 178, 181, citing *Cochrane's Exr.* v. *Ingersoll*, 73 N. Y. 613.

§ 168. **Distinction between nonpayment of debt and refusal to pay estate moneys.**—The courts have drawn a distinction in the cases where it is an executor or administrator who is directed to pay, between mere debts due by such executor or administrator personally to the estate, and refusals to pay money which by an accounting or otherwise they are adjudged to distribute or pay over. The Code cannot be said to have contemplated the punishment by the extreme measures provided for in § 2555 of a mere inability to pay a contract debt. In such latter case, where by some misfortune the debtor is unable to pay his debt to the next of kin or the legatees of his creditor, the bare fact of his assumption of the duties of executor will not make him amenable to the harsh and drastic contempt process. *Rugg* v. *Jenks*, 4 Dem. 105; *Baucus* v. *Stover*, 89 N. Y. 1; *Matter of Snyder*, 34 Hun, 302, 308, 309; *Watson* v. *Nelson*, 69 N. Y. 537. See *Matter of David*, 44 Misc. 337; *Matter of Ockerhausen*, 59 Hun, 200; *Joel* v. *Ritterman*, 5 Redf. 136.

In *Matter of Strong*, 111 App. Div. 281, it is said that the decree, treating the debt as an asset, is *prima facie* conclusive. But the representative may allege insolvency, which he must affirmatively prove. If the Surrogate is satisfied he cannot pay he may decline to punish him, unless as in the *David* case, *supra*, its appears he was solvent at or since decedent's death. In the *Strong* case the court hints that the order punishing him may be entered and then relieved against under § 2286 which empowers a court to release an offender imprisoned for contempt.

And so where an executor has been adjudged to pay a specified sum to a person named, as costs or disbursements in a proceeding, it is quite competent for the executor to set up want of assets as a reason why he should not be punished for disobeying the decree. *Matter of Davidson*, 5 Dem. 224.

§ 169. **The practice.**—It has already been pointed out that an order to show cause is not necessary, and it has been stated that it is unnecessary to give notice of an application to enforce a decree by execution which remedy issues as of course; but it is the customary practice to initiate proceedings to punish for contempt for disobedience of an order or decree by service of an order to show cause based upon affidavits reciting substantially the jurisdictional facts. It is not necessary that all the facts and proceedings should be set forth at length, but if on the face of the process of attachment subsequently issued it appears to have been issued in a proceeding of which the Surrogate had jurisdiction and the disobedience complained of is set out with substantial particularity it will be sufficient. *Dunford* v. *Weaver*, 84 N. Y. 445. The order to show cause is intended to give notice to the party whom it is intended to punish, first, of the application, and second, of the act of disobedience charged. If such an order contains some erroneous statement of fact, it may be amended, provided the respondent is not misled or prejudiced thereby; or where the mistake is quite immaterial the Surrogate may disregard it and proceed on the original order. *Gillies* v. *Kreuder*, 1 Dem. 349. But while it is the better practice to begin the proceedings with an order to show cause it is not imperative so to do. Surr. Coffin held (*Guion* v. *Underhill*, 1 Dem. 302), that no citation to show cause why an attachment should not issue is necessary. The proper way in which to show disobedience to the decree or order directing the payment of a sum of money is by allegation showing a personal demand upon the person directed by the decree or order to pay, made by or on behalf of the person to whom the money is directed to be paid. *Estate of Gillman*, 15 N. Y. St. Rep. 718. The order of commitment should be definite and should distinctly fix the sum necessary to be paid by the delinquent to secure his release and purge him from contempt. *Matter of McMaster*, 16 N. Y. St. Rep. 240.

The general provisions as to punishment for contempt are contained in § 14 of the Code relating to courts of record.

The general provisions governing procedure in contempt proceedings are contained in title 3 of chap. 17, being §§ 2266 to 2292. Without de-

tailed reference to these sections it may be stated, by way of summary, that the practice indicated therein is, first, that the courts of record may inflict summary punishment for contempt, where the offense is committed in the immediate view and presence of the court. See § 2267.

Second, that where the offense consists of a neglect or refusal to obey an order of the court requiring the payment of costs or of a specified sum of money, and the court is satisfied by proof, by affidavit, that personal demand thereof has been made and payment thereof has been refused or neglected, it may issue *without notice* a warrant to commit the offender to prison, "until the costs or other sum of money and the costs and expenses of the proceeding are paid, or until he is discharged according to law." § 2268, Code of Civil Procedure.

Third, the cases in which notice of the proposed punishment must be given by the offender are given in § 2269, which is as follows:

> § **2269.** *Order to show cause, or warrant to attach offender.*
>
> The court or judge, authorized to punish for the offence, *may, in its or his discretion*, where the case is one of those specified in either of the last two sections, and in every other case, *must*, upon being satisfied, by affidavit, of the commission of the offence, either
>
> 1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offence; or
>
> 2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offence.

The practice under the order to show cause, in regard to its service, etc., is indicated by §§ 2273 to 2276, *q. v.* The following forms are intended to indicate this procedure. An affidavit such as is first indicated is intended to bring the contempt to the notice of the court. If the order is one directing the performance of a given act, the Surrogate should proceed by order to show cause. If the order disobeyed was one directing the payment of a sum of money, the Surrogate may in his discretion proceed by order to show cause; such order is indicated in the precedents below.

But if the order is one for the payment of a sum of money, the Surrogate may, in his discretion upon the affidavit, make an order for a warrant of commitment, which order and warrant are below indicated by suitable precedents. An order is also indicated of commitment upon the return of the order to show cause.

Affidavit on application for enforcement of decree by punishment for contempt.

Surrogate's Court,
County of

Title.

State of New York } ss.:
County of }

being duly sworn deposes and says: that he is (give status of party upon the proceeding) (*note*); and that on the day of 19 a decree was made and entered in the office of the Surrogate of the county of by which decree one (*give designation such as* executor *or* administrator with the will annexed, etc.) was directed to pay the sum of dollars to (*state whether the money was directed to be paid into court or to be paid to one or more of the parties, and if to a party in a representative capacity designate such capacity*); (*or if the decree was one directing the performance of some particular act designate the same concisely using preferably the language of the decree*).

Note. Or the affidavit may be made by the attorney.

And deponent further says: that a copy of the said decree duly certified was personally served upon said the officer (*or* the person) required thereby or by law to obey it; that days have expired since the service of said decree upon said

That simultaneously with the service of said decree (*or* on the day of) demand was made upon said personally by on behalf of (*here designate the person to whom the money was directed to be paid or the person in whose behalf the act was to be performed*); and deponent further says: that the said nevertheless refuses or wilfully neglects to obey the said decree and has not paid said moneys or any part thereof as by said decree directed to said within the time limited by said decree (*or where the decree was for the payment of money and was duly docketed under section* 2553 *and execution issued thereon, add,* that an execution duly issued as prescribed in section 2554 of the Code of Civil Procedure to the sheriff of the said county of and has been returned wholly unsatisfied; *or if it is satisfied in part, state to what degree*).

Note. The practice by order to show cause is customarily resorted to though not absolutely essential. The Surrogate has a right to punish upon proof of the contempt. Where the deponent desires an order to show cause, the usual allegations should be added.

(*Where decree is one that cannot be enforced by execution, add paragraph,* and deponent further says that said decree is one that cannot be enforced by execution under section 2554; *where the decree can be in part enforced by execution state the facts in this respect concisely.*)

(*If proceedings under the decree sought to be enforced have been stayed by an appeal properly perfected and action has been had thereon by the Appellate Court affirming the same, state the facts of such affirmance and the entry of the order of the Appellate Court and the service of a certified copy thereof with notice of entry thereof upon the person sought to be punished.*)

Note. Annex to

And deponent is advised and verily believes that the said

this affidavit, affidavit showing personal service of decree which is sought to be enforced.

decree which the said refuses or wilfully neglects to obey should be enforced by punishing the said for contempt of this court.

(Jurat.) (Signature.)

(*Note.*)

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Order to show cause why should not be punished for contempt.

Title.

On the annexed affidavit of verified the day of showing personal service upon of a certified copy of the decree (*or* order) made in the above entitled proceedings on the day of which said decree (*or* order) directed the said to (*here specify the payment or act directed by the order*) and also the affidavit of verified the day of showing that simultaneously with the service of said certified copy (*or* on the day of) demand was made of the said that he should pay to the moneys directed by said order to be paid;

And, it appearing to the satisfaction of the Surrogate that the said refuses or wilfully neglects to obey said order and has not made the payment directed by said order and duly demanded, and it appearing that five days have elapsed since the service upon him of such order (*and where the order disobeyed has been appealed from and affirmed, recite the order of the Appellate Court with the date of its entry*);

Now let the said show cause at a special term of this court to be held on the day of at why he should not be punished for contempt of this court, for his refusal or wilful neglect to obey said decree of the day of 19 and why such further proceedings to that end should not be had, as to the court may seem just.

(Signature.)

At a Surrogate's Court, etc.

Present:

Hon.

Surrogate.

Order for warrant of commitment, where notice is not given to disobedient party.

Title.

On reading and filing the affidavit of and the affidavit of showing due personal service on of a certified copy of an order (or decree) made herein, on the day of 19 and that more than five days have elapsed since such service; and also showing that a demand for the payment of the moneys mentioned in said order

(or decree) of said was duly made personally on the day of 19 also showing that said refuses and wilfully neglects to obey said order, or to pay said moneys or any part thereof, which said order directed said to pay to the said (as administrator, etc.), within five days from the service upon him of a copy of said order, the sum of dollars (*and where appeal has been had and determined add*, on reading also the order of the appellate division of the Supreme Court in the department, dated the day of 19 affirming said order of 19) and the costs of this proceeding to compel such payment being now fixed at dollars *Note.*

Note. The Surrogate has power to impose costs on the disobedient party, practically in the nature of a penalty for his disobedience.

Now, on motion of attorneys, for said

It is ordered, that a precept (or warrant) be issued out of, and under the seal of this court, directed to the sheriff of the county of commanding him to take the body of the said if he shall be found within his county, and commit him to the common jail of said county of and to keep and detain him therein, under his custody, until he shall pay the sum of dollars, as required by said order, and also the further sum of dollars, for the costs and expenses of the proceeding to compel such payment, together with the sheriff's fees on *such precept.*

At a Surrogate's Court, etc.

Present:

Hon.

Surrogate.

Order of commitment upon return of order to show cause.

Title. }
}

Upon the return of the order to show cause herein, dated 19 (*here state substance of order*) and on reading and filing the affidavits of on which the same was based, and the due proof of the due service thereof on and on reading and filing the affidavit of submitted in opposition to said motion. Now, after hearing for the motion and in opposition thereto (*or* no one appearing on behalf of said to oppose),

It is Ordered, that the said motion be, and the same hereby is, granted; and it is

Further Ordered, that a warrant be issued (here follows form, *supra*).

Warrant of commitment.

Surrogate's Court,
County of

THE PEOPLE OF THE STATE OF NEW YORK,
To the Sheriff of the County of New York,

GREETING:

Whereas, on the day of 19 by a certain order

made in our Surrogate's Court for the county of in a certain proceeding pending therein, entitled "In the matter of " it was ordered that (*note*) pay to or to his attorneys, the sum of dollars, within five days from the service upon him of a certified copy of said order;

Note. Give representative designation if necessary.

And Whereas, a certified copy of said order has been duly served upon said more than five days since, and personal demand has been made on the said for the payment of the said sum of dollars, by (or on behalf of) the said as aforesaid, and by (or on behalf of) his attorneys;

And Whereas, the said has hitherto refused and wilfully neglected, and still refuses and wilfully neglects to pay the same;

And Whereas, an order was made herein on the day of 19 directing a warrant to issue to commit the said to the common jail of the said county, there to be kept and detained until he shall pay the said sum of money, together with the costs fixed by said last order and the sheriff's fees herein:

Now, Therefore, we command you, that you take the body of the said if he shall be found within your county, and commit him to the common jail of the county of and keep and detain him therein, under your custody, until he shall have fully paid the sum of dollars, as required by the said order, and the costs aforesaid, and also your fees hereon, or until the said be discharged according to law.

And you are to return this writ and mandate on the day of 19 to this court, together with a certificate, under your hand, of the manner in which you shall have executed the same.

Witness, Surrogate of the county of at the county courthouse, in the day of 19

(Seal.) (Signature of Surrogate.)

Where the act for which the offender is sought to be punished is failure to do some particular act, or disobedience to a citation or other mandate of the court, the Surrogate may upon proof of such disobedience proceed by attachment. This practice is customary, where the offender is one acting in a representative capacity, such as executor, administrator, trustee, or guardian, subject to the jurisdiction of the Surrogate's Court; if such a person in such capacity is, for example, cited to render an account of his proceedings and fails to do it within a reasonable time, or if he has been directed to do it within a given time and fails to do it within that time, the Surrogate may issue an attachment substantially in the following form:

THE PEOPLE OF THE STATE OF NEW YORK,
To the Sheriff of the County of

The attachment.

GREETING:

We command you, that you attach the (describe, as executor or administrator, etc.) of the of deceased, under letters of duly issued to him on the day of 19 by the Surrogate of the county of if he shall be found in your bailiwick, and bring him personally before our Surrogate of the county of at the Surrogate's office in the county of on the day of 19 to answer unto us for certain trespasses and contempts against us in not complying with the exigency of a citation heretofore duly issued by our Surrogate of the county directed to him, requiring him to appear before said Surrogate on a certain day, now past, and (describe purport of citation, as, for example, render an account of his proceedings as such as aforesaid), or show cause why an attachment should not be issued against him, which said citation was duly and personally served on the said more than days before the return day thereof, as appears by satisfactory proof of such service duly taken and had before our said Surrogate, and for disobedience to which citation this attachment is issued. And you are to make and return to our said Surrogate, in the Surrogate's Court of the county of on the day of 19 at the Surrogate's office in aforesaid, a certificate under your hand, of the manner in which you shall have executed this writ; and have you then and there this writ.

In testimony whereof, we have caused the seal of office of our said Surrogate to be hereunto affixed.

(L. S.) Witness, etc.

(Signature of Surrogate.)

(*Indorsement.*) Let the administrator within named give a bond for his appearance to answer on the return day of the within writ, in the penalty of dollars, with two sufficient sureties. (See text, *supra.*)

(Signature of Surrogate.)

When such an attachment has been issued and the person charged with contempt denies the contempt or seeks to justify or excuse his disobedience to the citation, which he may do on the ground that it was not duly served upon him, or that he was prevented by circumstances beyond his control from compliance, or for any other reason appealing to the discretion of the Surrogate, it is proper that an order be made directing certain interrogatories to be addressed to the offender and to which he must make categorical reply, precedents for which forms are here indicated.

Order directing interrogatories.

Surrogate's Court,
County of

Matter of Accounting, etc.

It appearing to the court that (the administrator or executor, etc.), being in contempt for not appearing, personally or otherwise, and rendering an account of his proceedings as such administrator (or state act required to be done), pursuant to a citation for that purpose duly issued and served upon him, a writ of attachment was duly issued against him, directed to the sheriff of county, returnable this day, whereupon the sheriff made return that he had attached the said (and had let him at large on bail, according to a bond returned with such attachment), (*or*, had taken his body, and that, for want of bail, he had him in custody before the court); and the said denying that he is guilty of the disobedience and contempt alleged against him;

It is Ordered, that interrogatories addressed to the said touching the said citation, and his acts or omissions in the premises complained of, be forthwith filed in this office, and that a copy thereof be served on the said and that he put in, immediately after the service upon him of such copy, written answers to such interrogatories, upon oath, and file the same in this office.

And it is further Ordered, that the said sheriff detain the said in his custody until further order of this court.

Interrogatories.

Surrogate's Court,
County of

Title.

Interrogatories for the examination of (the administrator or executor, etc.), pursuant to an order made in this matter on the day of 19

First Interrogatory. e. g.: Were you, or were you not, on or about the day of last, served with a citation to appear personally before the Surrogate of county, on the day of inst., at ten o'clock A. M., at the courthouse in and (state act required by the citation)?

Second Interrogatory. If you were served state the time and by whom such service was made.

Third Interrogatory. Is the citation now shown and read to you the one then served, and a copy whereof was there left with you?

Fourth Interrogatory. Did you personally or otherwise, appear (here state act required by citation), pursuant to said citation?

Fifth Interrogatory. If you did not so appear and (*describe*

act required by citation), did you, on that day, show cause why an attachment should not be issued against you?

Sixth Interrogatory. State, if you did not so appear and (*state act required by citation*), what valid excuse or reason you have to allege why you should not now be punished for contempt of this court.

(Signature of Surrogate.)

Answers to interrogatories.

Surrogate's Court,
County of

Title.

Answers to interrogatories exhibited and filed in the above matter, under the oath of the of deceased.

To the first interrogatory: If defective service is claimed state the facts concisely; if not describe the manner of service.

To the second interrogatory reply fully.

To the third interrogatory answer yes or no.

To the fourth interrogatory answer yes or no.

To the fifth interrogatory answer yes or no.

To the sixth interrogatory the party may answer stating concisely his reason for noncompliance, such as illness or some act of God, or any other valid reason. *Note.*

(*Jurat.*)

Note. The excuse is addressed entirely to the discretion of the Surrogate, unless defect in jurisdiction or process is shown.

It is proper for the respondent, if new facts excusing his disobedience can be shown to move to vacate the contempt proceedings. But if he do so, and his motion is denied, and he takes no appeal nor asks for a reargument a subsequent similar motion to vacate is properly denied. *Matter of Hayward*, 44 App. Div. 265.

If by his answers to the interrogatories, the offender satisfies the court, that his refusal to disobey was justified, or that his neglect to obey was not wilful, the Surrogate may discharge him from custody, or make an order vacating the order for his attachment and discharging the sureties if he has given bail, forms for which orders it is unnecessary to indicate. If, however, the offender admits the contempt or he is unable to satisfy the Surrogate as to his innocence, the Surrogate may thereupon commit him, by an order of commitment, in which a provision may be included stating the amount of the fine which the Surrogate has discretion to impose by way of penalty.

Order for commitment.

Surrogate's Court,
County of

Title.

A writ of attachment having been heretofore issued, out of and under the seal of this court, against the of deceased, for his contempt in not appearing and

(here state act required by citation) as duly cited and ordered to do, directed to the sheriff of county, and returnable the day of instant, and the said sheriff having returned that he had attached said and taken his body, and that, for want of bail, he had him in custody before the court (*or* and had let him at large on bail according to a bond returned with such attachment); and the said having been, by virtue of such attachment, personally before the court, on said day, and denying the alleged contempt, it was thereupon ordered that interrogatories addressed to the said touching the said citation, and his acts or omissions in the premises complained of should be forthwith filed in this office, and that a copy thereof should be served on him, and that the said should put in, immediately after the service of such interrogatories upon him, written answers to such interrogatories, upon oath, and file the same in this office. And it now appearing, from said interrogatories and answers thereto (and if the Surrogate has directed a reference to take further testimony or has examined the party in person, state the fact) that the said has committed the contempt with which he is charged, and this court now adjudging him to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or did, actually defeat, impair, impede or prejudice the rights of (describe parties prejudiced) in the above entitled proceedings;

It is Ordered, that a fine of $ be, and the same is, hereby imposed upon the said for his said misconduct. *Note.*

Note. E. g., sum specified in the decree he disobeyed. *Matter of Ryer*, 120 App. Div. 154.

And it is further ordered, that the said do pay the charges and fees for serving the citation in this matter, amounting to $ and also do pay to the sheriff of the county of his legal charges and fees for executing said warrant of attachment.

And it is further ordered, that the said be, and he is hereby, directed to stand committed to the common jail of the county of there to remain charged upon his contempt, until he shall have (describe act required by citation), and shall have paid the said fine, charges, and costs; unless the court shall see fit sooner to discharge him.

And it is further Ordered, that a warrant issue for that purpose.

(Signature of Surrogate.)

170. **Relief from undue punishment.**—If the offender is punished by imprisonment and it develops, either that he cannot physically endure confinement, or pay the sum named as the fine, or actually do the thing directed, then the Surrogate has power under § 2286 to discharge him. *Matter of Strong*, 111 App. Div. 281.

But he will exact "satisfactory proof" of the inability. For example,

merely going through bankruptcy is not of itself proof of inability to pay estate moneys. *Matter of Collins*, 39 Misc. 753.

§ 171. **Enforcement of order.**—Orders have been differentiated from decrees above. Orders are defined by § 2556, which is as follows:

> *Definition of "order"; how enforced.*
> A direction of a surrogate's court, made or entered in writing, and not included in a decree, is styled an order. It may be enforced in like manner as a similar order, made by the supreme court in an action; and the costs are the same as upon such an order, and may be collected in like manner. **§ 2556, Code Civil Proc.**

An order thus is an interlocutory direction of the court, while a final order or decree is an adjudication which brings some particular proceeding to a determination. *Matter of Bernhardt*, 16 N. Y. St. Rep. 240. Where a party applies to have a decree opened the denial or granting of his application must be by order, and not by decree. An order is to be enforced just as any Supreme Court order would be; and it carries only the costs which such an order would carry, that is, the usual motion costs. *Pease* v. *Egan*, 3 Dem. 320; *Estate of Stokes*, 1 Dem. 260.

It is unnecessary to discuss in detail the rules applicable to the enforcement of orders as the general principles above laid down, as to a reasonable exercise of discretion and a substantial compliance with the Code apply to orders as well as decrees. Where a party, however, is sought to be punished for contempt for disobedience to an order, it must clearly appear that the act which he has refused to do, was distinctly required to be done by the order; thus, where a reference was ordered of the final account of certain testamentary trustees, and the referee directed to hear and determine all issues by the objections of the account; and the said trustees declined to answer certain inquiries put by the contestant's counsel although directed so to do by the referee, Surrogate Rollins held that it was material, upon proceedings to punish them for contempt for such refusal, to inquire whether the questions they had declined to answer were material or in any wise involved in the issues raised by the objections which had been filed, and if it appeared that they were not so material or relevant, the motion to punish for contempt would be denied. *Robert* v. *Morgan*, 4 Dem. 148, 152.

Where an order directed an executor to file an account, and he filed a printed blank with the word "nothing" written in on each schedule, held, a contempt, and punishable. *Matter of People's Trust Co.*, 37 Misc. 392.

§ 172. **Power to open decree.**—Section 2481, subd. 6, confers the authority now had by Surrogates' Court to open, vacate, modify or set aside decrees or orders, or to enter them *nunc pro tunc*. This section is as follows:

> *A surrogate, in court or out of court, as the case requires, has power. . . .*
> 6. To open, vacate, modify, or set aside, or to enter, as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause.

> The powers, conferred by his subdivision, must be exercised only in a like case and in the same manner, as a court of record and of general jurisdiction exercises the same powers. Upon an appeal from a determination of the surrogate, made upon an application pursuant to this subdivision, the appellate division * of the supreme court has the same power as the surrogate; and his determination must be reviewed, as if an original application was made to that term. **§ 2481, Code Civil Proc.**

It is to be observed in the first place that error of substance or of law must be corrected on appeal. *Matter of Tilden*, 98 N. Y. 434; *Matter of Hawley*, 100 N. Y. 206; *Matter of Seaman*, 63 App. Div. 49, 53, and cases cited. Hence § 2481 does not cover an attempt to attack the probate of a will, two years old, and otherwise unattacked. *Matter of Gaffney*, 116 App. Div. 583. But see *Matter of Wohlgemuth*, 110 App. Div. 645.

Where a decree has been made final upon appeal it is held the Surrogate cannot then open it. *Matter of Westerfield*, 61 App. Div. 413; *Hood* v. *Hood*, 5 Dem. 50, see opinion.

The Surrogate's discretion is appealed to by a motion to open his decree, and he may properly refuse to open on motion of one who was not a party to the proceeding where it appears he could readily have intervened. *Matter of Tilden*, 56 App. Div. 277. If he denies such an application his order is appealable to Appellate Division. *Ibid.* (as a *semble*). See *Matter of Gall*, 182 N. Y. 270 where a creditor not a party came in after 8 years, and moved to open an accounting decree.

This power of the Surrogate is very broad and general. The Court of Appeals has held (*Matter of Regan*, 167 N. Y. 338, 343), "The Surrogate's Court has power, independently of any statute, to exercise control over its own records, and to vacate its own decrees for mistake, fraud, or clerical error," citing *Matter of Henderson*, 157 N. Y. 423; *Hyland* v. *Baxter*, 98 N. Y. 610; *Sipperley* v. *Baucus*, 24 N. Y. 46; *Heermans* v. *Hill*, 2 Hun, 409; Code, §§ 1269, 2481; *Matter of Flynn*, 136 N. Y. 287. He may exercise this power in aid of one in default if the default be excusable. *Matter of Doig*, 125 App. Div. 746.

The Surrogate thus has the power of a court of general jurisdiction to vacate his decrees and may grant relief as in the Supreme Court "upon the application of any one for sufficient reason in furtherance of justice." *Ladd* v. *Stevenson*, 122 N. Y. 325; *Matter of Salisbury*, 24 N. Y. St. Rep. 413. Thus, where a creditor filed his claim, and thereafter the administrator, without notice to him, accounted and a decree was made, it was held the creditor was not concluded thereby and could move to reopen the decree. *Matter of Gall*, 40 App. Div. 114.

When such decree is opened he may establish any proper claim against the estate, *S. C.*, 42 App. Div. 255, and he need not make the beneficiaries under the decree parties to the controversy with the administrator. *S. C.*, 47 App. Div. 490.

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* The section inadvertently still reads "general term."

If distribution has been actually made under the decree, the creditor is not bound to follow the distributees, but may, if he establishes his claim, hold the administrator or his surety. *Ibid.* at p. 494, citing *Deobold* v. *Oppermann*, 111 N. Y. 531; *Matter of Hodgman*, 140 N. Y. 421; *Matter of Lang*, 144 N. Y. 275.

§ 173. **Time within which application may be made.**—Section 2481 above quoted provides that the powers conferred thereby "must be exercised only in a like case and in the same manner as a court of record and of general jurisdiction exercises the same powers." Accordingly, it was repeatedly held that §§ 1282 and 1290 governing the Supreme Court in setting aside judgments for irregularity and limiting the time within which applications to that end may be made were applicable to and controlled similar applications in the Surrogate's Court. See *Corbin* v. *Westcott*, 2 Dem. 559; *Matter of Hesdra*, 4 Misc. 37. The Court of Appeals in *Matter of Hawley*, 100 N. Y. 206, expressly held that relief from an erroneous or irregular decree, except upon the ground of fraud, clerical mistake, newly discovered evidence or other like causes, must be applied for within the period prescribed by § 1291 of the Code. And in *Matter of Tilden*, 98 N. Y. 434, it was held that the causes for which Surrogates' decrees may be vacated under § 2481 are analogous to those enumerated in §§ 1282 and 1283, and are governed by limitations imposed in §§ 1282 and 1290, except where fraud and collusion are made the ground of the application. And so in the latter case the court held that a motion on behalf of one who was a minor when the decree was entered must be made within one year after attaining his majority, if the two-year limit had previously expired. See also *Cline* v. *Sherman*, 78 Hun, 298. But in *Matter of Henderson*, 157 N. Y. 423, these cases were qualified (see opinion at page 429), and the court held that this provision of § 2481 was not intended to assimilate, *in all respects*, the power of the Surrogates' Courts over their records to that possessed by the Supreme Court; and that §§ 1282 and 1290 were not applicable in the way of limiting the time within which the Surrogate may act; and that while the gereral powers of the Surrogates' Courts are wholly statutory, it certainly must possess such incidental powers as are necessary to the proper exercise of its expressly conferred authority. But most of the powers mentioned in § 2481 were exercised by the Surrogate before the enactment of the Code, and so far the statute is merely declaratory of the law as it previously existed. The court passed upon the contention that "since the Surrogate must exercise his powers to open and correct the record only in a *like case* and *in the same manner* as the Supreme Court, he must necessarily act within the *same time*." In overruling this contention, the court observes at page 428:

"The statute, in speaking of a *like case*, means that the party making the motion must show the existence of the error or mistake in the same way as if the record was in the other court, and, in providing for the exercise of the power in the *same manner*, all that is meant is that the Surrogate shall proceed in the same way to hear the application. Proof must be made,

notice given and a judicial hearing of the parties had, but there is no more limit as to the time within which the application may be entertained since the enactment of the statute than there was before."

And the court continues:

"There is no force in the suggestion that the legislature must have intended to assimilate, in all respects, the power of the Surrogate's Court over its own records to that possessed by the Supreme Court. If it did, it is quite sufficient to say that it has not expressed such intention. But there is no reason to suppose that it had any such intention in mind. The functions of the two courts are so radically different that the reason for a limitation in the one has but little if any application to the other. Litigants in courts of common law confront each other upon equal terms and upon well-defined issues. They are represented by counsel who are watchful of their interests and who have every opportunity to know the contents and scope of every order or judgment entered in the case. Under such circumstances, it is reasonable to suppose that any error or mistake of fact that has crept into the record, such as is involved in the case at bar, will be detected within two years. Not so with proceedings in Probate Courts. They are quite informal, conducted in many cases without the aid of counsel, frequently *ex parte*, by the representatives of deceased persons under such circumstances that a material error may lurk in the papers for many years without discovery. A court charged with such powers and duties should have ample authority over its own records for the correction of such mistakes as appear in this case, and, until the legislature shall limit the power by some language, clearer and more explicit than it has, it may entertain such an application as was made by this executor. (*In re Flynn*, 136 N. Y. 287.) I am aware that what has here been said may seem to be in conflict with the decision in *In re Tilden* (98 N. Y. 423) and *In re Hawley* (100 N. Y. 206), but the conflict, if any, is with the reasoning and not with the decision in those cases. The decision in both of them was doubtless correct, whatever may be said with respect to some of the reasons given.

"In both cases the ground for opening the decree was not a clerical error such as is involved in the case at bar, nor indeed any error such as is contemplated by § 2481, regulating proceedings for opening and correcting manifest mistakes, but errors of substance made at the hearing which should have been corrected by appeal and not by motion. It was claimed that the Surrogate decided certain questions of fact or law erroneously, and that the decree was affected by such error to the prejudice of the party applying for a rehearing. The other provisions of the Code covering regular appeals afforded the aggrieved party the true remedy. The questions that were involved and decided in those cases are not like the one now before us. They were not to correct a record so as to make it conform to what every one intended, but to review the decision upon the merits. In other words, it was an attempt to appeal by motion from an erroneous decision. In the case at bar the application was to correct a clerical error

in the record. It was always a part of the inherent power of a court to supervise its own records, and we think that this particular power, at least, has not been limited or restricted by any statute." See also *Matter of Mather*, 41 Misc. 414.

§ 174. **Same subject.**—Where a motion is made on the ground of newly discovered evidence, the Surrogate will proceed to apply the same rules that the Supreme Court would; that is to say, such a motion will be granted only where such evidence

(*a*) Is likely to change the result,

(*b*) Is material,

(*c*) Is not cumulative,

(*d*) Could not have been obtained on the original hearing by reasonable diligence. *Matter of McManus*, 35 Misc. 678. This was reversed, 66 App. Div. 53, on the ground that sufficient reason was not shown on the record why the alleged new evidence could not have been originally adduced by reasonable diligence. In *Matter of Banks*, 108 App. Div. 181, the rule is stated thus: In order to a new trial upon the ground of newly discovered evidence, he must show that the existence of the alleged new evidence was (*a*) *unknown* to him at the time of the trial and could not have been discovered by him in the exercise of proper diligence; or (*b*) that he was misled and induced to refrain from making certain proof because of excusable mistake, or by some act or admission of his adversary on which he had a right to rely.

§ 175. **Same subject.**—The power to amend a decree when opened will be exercised in respect of material error or mistake due to inadvertence (see § 179). So in *Campbell* v. *Thatcher*, 54 Barb. 382, a Surrogate's power to open a decree settling an executor's account and insert a credit of $500, inadvertently omitted, was upheld. In *Matter of Robertson*, 51 App. Div. 117, the power to amend was upheld in inserting a provision as to the payment of a distributive share. See *Matter of Hoes*, 119 App. Div. 288. Appeal may be taken from the decree as amended. *Ibid.* See also *Matter of Douglas*, 52 App. Div. 303; *Matter of White*, 52 App. Div. 225.

So in a transfer tax case the proceeding was opened on motion of a legatee who did not receive the notice of the hearing required by the act. *Matter of Daly*, 34 Misc. 148, 152, citing *Matter of Flynn*, 136 N. Y. 287, 291; *Matter of Salisbury*, 24 N. Y. St. Rep. 413. And where one of the decedent's debts was overlooked the Surrogate opened and modified his decree by deducting the account and directing a refund of the amount erroneously assessed and paid. *Matter of Campbell*, 50 Misc. 485.

But if the tax is based on an overvaluation it is an "error of fact arising upon the trial" under § 1283 and not remediable in this way. *Matter of Lowry*, 89 App. Div. 226.

§ 176. **Same subject.**—The power to open decrees given by the present Code merely gives Surrogates' Courts expressly a power which they had previously exercised as incidental to powers expressly conferred by statute. *Matter of Henderson*, 157 N. Y. 423; *Farmers' L. & T. Co.* v.

Hill, 4 Dem. 41; *Matter of Clark*, 5 Redf. 466. Thus in *Pew* v. *Hastings*, 1 Barb. Ch. 452, Chancellor Walworth held that the power to open a decree was absolutely essential to the due administration of justice by a Surrogate. Similarly it was held, in *Butler* v. *Emmett*, 8 Paige, 12, 21, that a Surrogate had power to enter an order *nunc pro tunc*, provided that at the time to which it was made to relate back, he would have had power to make it. Similarly a Surrogate was held to have power to vacate and set aside a decree or order which he had no jurisdiction to make. *Vreedenburg* v. *Calf*, 9 Paige, 128. So also to modify a decree by the correction of mistakes and clerical errors, the result of oversight or accident (*Sipperly* v. *Baucus*, 24 N. Y. 46; *Campbell* v. *Thatcher*, 54 Barb. 382); or to revoke a decree for fraud (*Yale* v. *Baker*, 2 Hun, 468), and see *Strong* v. *Strong*, 3 Redf. 477, citing *Brick's Estate*, 15 Abb. Pr. 12.

§ 177. **Same subject.**—From this brief review of the power possessed by Surrogates before § 2481 was enacted, it will be seen that the Surrogate's Court had prior power to open, vacate, modify, or set aside a decree for fraud, clerical error, or other sufficient cause, such as a want of jurisdiction or an excusable default. *Olmstead* v. *Long*, 4 Dem. 44, 48; *Matter of Filley*, 47 N. Y. St. Rep. 428, Coffin, Surr. It would, seem, therefore, from an examination of § 2481, that the only really new power conferred thereby, is to grant a new trial or new hearing for newly discovered evidence which means a retrial of the issues made by the pleadings. *Matter of Hawley*, 100 N. Y. 206, aff'g *Estate of Singer*, 3 Dem. 571; *Matter of Douglas*, 52 App. Div. 303. But this power to grant a new trial or hearing must be limited to the cases specified in subd. 6, which are fraud, clerical errors, or "other sufficient cause;" this does not include errors of law which ought to be reviewed upon appeal (*Matter of Walrath*, 37 Misc. 696; *Matter of Wallace*, 28 Misc. 603, 605), for the Code has expressly regulated the methods by which a review of the errors occurring upon a trial before a Surrogate can be secured, and expressly provided for a loss of this right to review unless such methods are regularly pursued. This furnishes the strongest implication that such errors are not remediable by any other proceeding; certainly not under § 2481 of the Code. *Matter of Hawley*, 100 N. Y. 206, 211, opinion of Ruger, Ch. J. Also *Matter of Beach*, 3 Misc. 393; *Matter of Carr* v. *Tompkins*, 46 N. Y. St. Rep. 585. The character of the amendment must be such as could have been inserted in the decree when it was made. So, when it was sought to amend a decree settling an account by inserting allowance of payments made since the account was filed, the application was denied. *Matter of Arkenburgh*, 38 App. Div. 473.

178. **Same subject.**—The words, "other sufficient cause," are intended to cover only those cases where relief cannot be had by appeal or action to set aside the decree. *Matter of Tilden*, 98 N. Y. 434; *Matter of Soule*, 72 Hun, 594; *Matter of Humfreville*, 8 App. Div. 312. And so where a Surrogate refused to remove an executor and proceeded with the judicial settlement of his account and allowed him commissions, and, in the meantime, an appeal from the order refusing to remove the executor had been had

and his decision reversed, it was held, that the remedy was not by motion to vacate his decree settling the executor's account, but by appeal from said decree. *Matter of Humfreville, supra.* In the headnote it is stated: "Even were the power of the Surrogate under § 2481 of the Code of Civil Procedure analogous to that of a court of record under § 1283 of the Code of Civil Procedure permitting the court to vacate or modify in the case of 'error in fact not arising upon the trial,' it would not cover the case, as here, the error in question did arise upon the trial on which the Surrogate must have decided that the executor had not been guilty of any misconduct forfeiting his commissions." It may be stated as the general rule that the power of a Surrogate to open his decree on the ground of clear mistake, accident, or fraud is undoubted. But the power should be cautiously exercised and it should never be used for the mere purpose of enabling the Surrogate to review his own decision. The only appropriate method of review is by appeal. *Story* v. *Dayton,* 22 Hun, 450.

§ 179. **Cases where the power has been upheld.**—The courts have upheld the power of the Surrogate to open, vacate, etc., decrees in such cases as the following:

Where a party though served with citation was sick at the time of the hearing, and probably had no knowledge thereof. *Matter of Traver,* 9 Misc. 621.

Where a Surrogate failed to file findings of fact and conclusions of law. *Matter of Hesdra,* 4 Misc. 37.

Where the accounting executor appears to have been guilty of fraud. *Matter of Flynn,* 20 N. Y. Supp. 919, aff'd 136 N. Y. 287.

Where the law under which he acted is later held to be unconstitutional, as in transfer tax cases. *Matter of Scrimgeour,* 80 App. Div. 388.

Where an heir-at-law was not brought before the court by a proper service of citation, and was not a party to the probate proceedings. *Matter of Harlow,* 73 Hun, 433; *Matter of Odell,* 1 Misc. 390; *Bailey* v. *Stewart,* 2 Redf. 212; *Bailey* v. *Hilton,* 14 Hun, 3; *Matter of Lyon's Will,* 26 N. Y. Supp. 469.

So a decree settling a judicial account may be opened on application of a party interested who had no notice of the accounting. *Wells* v. *Wallace,* 2 Redf. 58; *Matter of Gall,* 182 N. Y. 270 (opinion of Werner, J.).

Where matters in the nature of fraud have actually misled or prejudiced parties to the proceeding, although they may not actually amount to legal fraud. *Matter of Hodgman,* 82 Hun, 419.

Where the name of a distributee has been unintentionally omitted in a decree for distribution, the decree may not be vacated, but may be amended in that respect so as to include the omitted name. *Matter of Grant,* 16 N. Y. Supp. 716.

Where citation was properly served but the person served was *non compos,* and was not represented on the proceeding by any next friend or representative. *Matter of Donlon,* 66 Hun, 199.

It is also within the discretion of the Surrogate to open proceedings

and admit claimants to a hearing who have not presented their claims until after the Surrogate has announced the principle of his decision; that is to say, if a Surrogate decides that persons belonging to a certain class are entitled to distribution, persons claiming to belong to that class should be admitted to the proceeding upon equitable terms, and the proceeding should be opened for the purpose and the parties heard. *Matter of Pierson*, 19 App. Div. 478, 489.

The mere fact that the decree was made by the predecessor of the Surrogate to whom the application to open it is made, is quite immaterial. *Matter of Smith*, 89 Hun, 606; *Cohen's Estate*, 58 How. Pr. 496.

He has power to open or modify such a decree equally with one made by himself.

So where an executor had been credited with the full amount of a note claimed to have been paid by him, and it subsequently appeared that he had settled the debt for less than the face of the note, the decree settling the account was opened, and a rehearing granted. *Matter of Beach*, 3 Misc. 393.

So where an executor has charged himself with property of the testator, which it subsequently appears had been sold before the testator's death, and suit was brought on such bill of sale against the estate after a decree had been made settling the executor's account, held that it was a proper case for opening the decree under subd. 6 of § 2481. *Matter of McGorray*, 20 N. Y. Supp. 366.

So, where it appeared that an heir had been forcibly detained, and so prevented from appearing in probate proceeding, a decree admitting the will to probate should be opened, and such heir allowed to contest. *Hoyt* v. *Hoyt*, 112 N. Y. 493.

It has even been held that a decree admitting a will to probate may be opened for the purpose of allowing a former contestant to obtain a construction of one of the provisions of the will. *Matter of Keeler*, 5 Dem. 218, Rollins, Surr.

So a Surrogate may vacate a decree which he signed through fraud or by reason of a mistaken supposition of jurisdiction on his part, or of death or intestacy on the part of the alleged decedent. *Dobke* v. *McClaran*, 41 Barb. 491; *Brick's Estate*, 15 Abb. 12; *Matter of Patterson*, 79 Hun, 371.

So where an order for the payment of money is vacated after the payments therein directed to be made have been made, the Surrogate has power to direct the repayment of said moneys by the recipients. *Matter of Gillman*, 7 St. Rep. 321.

So where it is brought to the attention of a Surrogate that the Court of Appeals has sustained the validity of a codicil to a will, which codicil removes an executor, to whom, upon probate of the will, he has issued letters testamentary, the Surrogate may revoke such letters. *Estate of Wood*, 29 St. Rep. 298.

§ 180. **When power will be denied.**—However, granting or refusing an

application to open a decree is a matter of discretion with the Surrogate. *Boughton* v. *Flint*, 74 N. Y. 476.

And while under § 2481 his determination may be reviewed by the Appellate Division (*Matter of Tilden*, 56 App. Div. 277), the exercise of his discretion is not reviewable in the Court of Appeals. *Boughton* v. *Flint*, *supra*. If the Appellate Division hold his discretion to have been wrongly exercised it can itself make the appropriate order. *Matter of Hoes*, 119 App. Div. 288. (But read dissenting opinion.)

A decree will not be opened except on application of a party entitled thereto. So a creditor cannot move to vacate a decree admitting to probate as he is not a proper party to the probate proceedings. *Heilman* v. *Jones*, 5 Redf. 398.

Nor of course will it be opened where the party applying is guilty of laches. *Matter of Kranz*, 41 Hun, 463; *Matter of Becker*, 28 Hun, 207; *Matter of Deyo*, 36 Hun, 512, aff'd 102 N. Y. 724. *Matter of Bodine*, 119 App. Div. 493, holding that "other sufficient cause" means a cause "*ejusdem generis*." Nor will it be opened to correct an immaterial or inconsequential error or mistake. *Matter of Deyo*, 102 N. Y. 724, amount involved, $280.02. Nor unless the errors suggested are distinctly and conclusively alleged. *Yale* v. *Baker*, 2 Hun, 468; *Matter of Deyo*, *supra*. Nor on the ground of a mere mistake in law. *Matter of Tilden*, 5 Dem. 230; *Matter of Carr*, 19 N. Y. Supp. 647; *Brick's Estate*, 15 Abb. Pr. 12; *Matter of Beach*, 3 Misc. 393; *Matter of Monteith*, 27 Misc. 163; *Matter of Mount*, 27 Misc. 411. A decree was opened on motion of a judgment creditor. Subsequently his judgment was reversed. The order opening the decree was thereupon vacated on the ground that he was then merely a creditor having a disputed claim, but without prejudice to his applying again if he got a new judgment on the new trial. *Matter of O'Brien*, 33 Misc. 17.

Nor has he power to open a decree, which has been affirmed on appeal and remitted for further proceedings, on the ground of an alleged error at law. *Reed* v. *Reed*, 52 N. Y. 651.

Nor where it appears that all the parties were represented upon the proceeding will it be reopened for an error in law. *Brick's Estate*, *supra*; *Matter of Underhill*, 117 N. Y. 471, 479.

Nor should a decree of a Surrogate's Court be set aside for fraud unless the fraud is clearly established. *Matter of Salisbury*, 6 N. Y. Supp. 932.

Nor unless the facts are such as would be sufficient to justify the Supreme Court in setting aside a judgment of its own. *Matter of Richardson*, 81 Hun, 425.

Nor where the petitioner has been guilty of laches. *Matter of Salisbury*, *supra*.

Nor has the Surrogate right to open a decree merely on the ground that it was not made in conformity with the understanding of the parties by reason of an attorney's inadvertence. *Matter of Soule*, 72 Hun, 594.

Nor has he power to open or vacate a decree judicially settling the accounts of an executor or administrator, merely because an allowance of

commission to such executor or administrator was inadvertently omitted, unless sufficient cause is shown for such omission. *Matter of O'Neil*, 46 Hun, 500.

Nor will a decree be opened merely because it was entered while an infant party was unrepresented by guardian; the Surrogate should be satisfied that the opening of such decree would be advantageous to the infant interested; and if the decree as entered sufficiently covers the interest of the infant, the omission will be deemed a mere irregularity and the decree allowed to stand. *Benedict* v. *Cooper*, 3 Dem. 362.

It is competent in such a case for the Surrogate to order a reference to determine whether or not it will be advantageous for the infant to set aside the proceedings. *S. C.*, Rollins, Surr.

§ 181. **Making orders or decrees nunc pro tunc.**—Where, owing to some act or omission of the court, the making of an order or even the entry of a decree has been omitted, to the making or entry of which a party was entitled at a given time or stage in the proceedings, the Surrogate's Court has power to make the order or enter the decree as of such former time, that is, *nunc pro tunc*, upon the facts being properly presented to the attention of the court. But there are well known limitations upon the authority of the court to enter a decree *nunc pro tunc*. So, where a party had filed proofs of a will, thinking there would be no contest and that a decree would be entered as of course, persuaded the clerk to issue letters of administration with the will annexed without waiting for the formal entry of the decree; and the administrator proceeded to administer the estate without knowing that subsequent notice of an intention to contest the validity of the will was filed in the Surrogate's office and a memorandum of that fact was made upon the papers, and the decree accordingly withheld, Surrogate Rollins (*Stapler* v. *Hoffman*, 1 Dem. 63) held, upon an application for the entry of the decree *nunc pro tunc*, that the party must not only show that he was absolutely entitled to the decree at the earlier date, but that the delay in entering it had not been due to his own negligence, carelessness, or misapprehension, but to some act or omission of the court. See cases cited. In this case Surrogate Rollins defined as the proper practice that the proofs should be presented *de novo* and a probate of the instrument sought.

Where a Surrogate intended to refer an account for hearing and determination, but the order entered merely directed the referee to hear and report, he may amend the order *nunc pro tunc*. *Matter of May*, 53 Hun, 127.

So also where an order entered omits a recital of the papers on which it was granted, it may be amended *nunc pro tunc*. *Matter of Post*, 38 N. Y. St. Rep. 1.

CHAPTER V

APPEALS FROM DECREES AND ORDERS

§ 182. **General provisions made applicable in Surrogates' Courts.**—Section 1, art. 4, title 2, of ch. 18, provides a complete system covering appeals in Surrogates' Courts, both to the Appellate Division and to the Court of Appeals. By § 2575:

> The provisions of the following sections of this act, to wit: sections 1295, 1297, 1298, 1299, 1303, and 1305 to 1309, both inclusive, apply to an appeal taken as prescribed in this article. **§ 2575, Code Civil Proc.**

These sections made so applicable are purely formal. Section 1295 refers to the designation of parties to an appeal as appellants and respondents, and the change of the title of the cause by substituting the name of the Appellate Court. Section 1297 provides for an appeal when an adverse party has died, by substituting the heir, devisee, executor, or administrator of the deceased party as the case requires. Section 1299 (*q. v.*) provides for proceedings when a party dies pending an appeal. Section 1303 covers the remedying of defects in proceedings on appeal. Sections 1305 to 1309, both inclusive (*q. v.*), provide for the waiver of security; for the making of a deposit in lieu of undertaking on appeal; for the filing of the undertaking; and for the giving of a new undertaking when the sureties become insolvent, and finally as to when an action may not be brought upon the undertaking on appeal. It is unnecessary to quote these sections in full further than to say, except as they are expressly made applicable by reference, appeals from orders or decrees of the Surrogate are provided for by art. 4 of ch. 18. It is unnecessary to refer to the statute providing for the taking of appeals after September 1, 1880, from decrees or orders made before that date; as the lapse of time since the adoption of the Code gives to such enactment merely a historic interest.

§ 183. **Who may appeal.**—The first distinction drawn by art. 4, is between appeals by parties and persons who are not parties. As to parties they are prohibited from appealing in any case where the decree or order appealed from was entered upon the default of such party. See *Delmar* v. *Delmar*, 65 App. Div. 582. In this case the parties appeared at the trial but declined to proceed.

> *When party may appeal.*
>
> Any party aggrieved may appeal from a decree or an order of a surrogate's court, in a case prescribed in this article, except where the decree or order of which he complains was rendered or made upon his default. **§ 2568, Code Civil Proc.**

The section contemplates by the word party, one who is a party at the time the appeal is intended to be taken, consequently, where a person has had the status of a party to a proceeding, and the interest by reason of which he became a party has ceased, his right to appeal also ceases. *Reid* v. *Vanderheyden*, 5 Cow. 719. This was a case where the party appealing was at the commencement of the proceedings in the Surrogate's Court a distributee, but this interest was defeated by the birth of a posthumous child just before the decree of the Surrogate was pronounced; this divested his rights as distributee and was held to have taken away all possibility of interest on his part and when his interest ceased, his right further to litigate ceased with it. All power of appeal was therefore gone. A mere interest in the costs, it was also held, gave no right to appeal in respect of any other matter. So it has been held that where an executor had not paid a claim or become personally liable to pay it, and the Surrogate refused to allow said claim, the executor was not a proper person to appeal from the Surrogate's decision but only the party in interest. *Kellett* v. *Rathburn*, 4 Paige, 102. Similarly it was held that where an appeal was taken from certain provisions of a decree settling the accounts of an executor and directing distribution, and it appeared that the appellant had no interest in the question arising on certain of the provisions specified in the notice of appeal, the Appellate Court would confine its deliberations to that portion of the decree alone in which the appellant had an interest on which to base the appeal. *Matter of Allen*, 81 Hun, 91. See also *Matter of Hodgman*, 140 N. Y. 421, 430; *Bryant* v. *Thompson*, 128 N. Y. 426. Only one failing to appear is "in default" within the meaning of § 2568 of the Code, permitting appeals except by one in default. *People ex rel. Patrick* v. *Fitzgerald*, N. Y. Law Journal, June 12, 1902.

§ 184. **Only party aggrieved may appeal.**—A party aggrieved is one whose rights are denied or prejudiced by the order or decree to be appealed from, and whose rights can be protected by appropriate action by the Appellate Court. Thus an executor nominated in a will is a "party aggrieved," within the intent of §§ 1294 and 2568 of the Code, by a decree refusing to admit to probate a codicil attached to the will. *Matter of Stapleton*, 71 App. Div. 1 (but see dissenting opinion at p. 8); *Matter of Blair*, 28 Misc. 611; *Bryant* v. *Thompson*, 128 N. Y. 435; *Matter of Rayner*, 93 App. Div. 114; *Matter of Eckler*, 126 App. Div. 199. See also *Bliss* v. *Fosdick*, 76 Hun, 508. But trustees under a will are not aggrieved by a construction of the will as to rights of the beneficiaries, and have no interest which is injuriously affected. *Bryant* v. *Thompson*, citing *People* v. *Lawrence*, 107 N. Y. 607; *Hyatt* v. *Dusenbury*, 106 N. Y. 663. So on a submission of an "agreed statement" to the Appellate Division by executors and trustees on the one hand and the "persons interested" on the other to determine from what fund to pay a transfer tax, held, the representatives had no standing to appeal to the Court of Appeals where none of the "persons interested" desired or joined in such appeal. *Isham* v. *N. Y. Assn. for Poor*, 177 N. Y. 218, 222, citing *Bryant* v. *Thompson*,

supra, Matter of Hodgman, 140 N. Y. 421; *McLouth* v. *Hunt,* 154 N. Y. 179; *Matter of Richmond,* 63 App. Div. 488.

So where an order was made directing an executor to pay a legacy to A, and he appealed, claiming the legacy was invalid, and the money should go to the residuary legatees, he was held not to be a party aggrieved, and not to represent the residuary legatees. *Matter of Coe,* 55 App. Div. 270, citing *Matter of Hodgman,* 69 Hun, 487, aff'd 140 N.Y. 421; *Matter of Mayer,* 84 Hun, 539. Where, however, an allowance is made to a special guardian, the trustees directed to pay it represent the infant sufficiently to review the Surrogate's discretion by an appeal. *Matter of Stevens,* 114 App. Div. 607. The Code has changed the rule as it formerly obtained with regard to the character of the interest to sustain the right of appeal. Thus, where formerly it was held that a petitioner for probate could nevertheless appeal from a decree admitting to probate (*Vandemark* v. *Vandemark,* 26 Barb. 416; *Delafield* v. *Parish,* 42 Barb. 274), nevertheless the language of § 2568, "a party aggrieved may appeal," limits the right of appeal to those who have proper reason to complain of the decree or order in question. Thus § 1294 which provides for appeals generally (ch. 12 of the Code of Civil Procedure), is almost in identical terms and reads as follows: "A party aggrieved may appeal in a case prescribed in this chapter except where the judgment or order of which he complains was rendered or made upon his default." The Court of Appeals construing this section held (*Bryant* v. *Thompson,* 128 N. Y. 426, 434), that the right to appeal was limited to a party aggrieved and that accordingly questions of however great interest and importance could not be passed upon by that court until brought there by some party having an actual and practical, as distinguished from a mere theoretical, interest in the controversy. See opinion of O'Brien, J., at page 435, citing *People ex rel. Breslin* v. *Lawrence,* 107 N. Y. 607; *Hyatt* v. *Dusenbury,* 106 N. Y. 663. Consequently now, a party in whose favor a decree or order is given cannot be said to be aggrieved by it. *Hooper* v. *Beecher,* 109 N. Y. 609; *Fairbanks* v. *Corlies,* 1 Abb. 150. But the words are held to include the representatives of a deceased party who was himself a party aggrieved. See *Campbell* v. *Gallagher,* 18 Civ. Proc. 90. So also a person upon whom the interest of a party has devolved or to whom it has been set over. *McLauchlin* v. *Brett,* 2 Civ. Proc. 194. A stranger to the proceeding has no standing upon the appeal; that is to say, a person who does not bring himself within the definition of the interest prescribed by the section quoted may not appeal. See *Matter of Bristol,* 16 Abb. 397. Where a stranger to a proceeding applied for relief against the proceeding and his application being denied sought to appeal from such order, held that he could not do so.

§ 185. **When person not a party may appeal.**—It is expressly provided that certain persons although not parties shall have the right to obtain a review of a Surrogate's determination; they are specified in § 2569, which is as follows:

A creditor of, or person interested in, the estate or fund affected by the

> decree or order, who was not a party to the special proceeding, but was entitled by law to be heard therein, upon his application; or who has acquired, since the decree or order was made, a right or interest which would have entitled him to be heard, if it had been previously acquired; may intervene and appeal, as prescribed in this article. The facts, which entitled such a person to appeal, must be shown by an affidavit, which must be filed, and a copy thereof served with the notice of appeal. **§ 2569, Code Civil Proc.**

These persons, not parties, are thus differentiated from "parties" who defaulted.

It has been held that this section does not give an attorney status to appeal from an order withdrawing, against his objection, his client's objection to an account. *Matter of Evans*, 33 Misc. 671.

This section does not require the obtaining the leave of the court in order that such a person may appeal. *Lewis* v. *Jones*, 50 Barb. 645. The intervention is informal, not based on petition and order. The notice of appeal, and affidavit required by § 2569 is enough See *Matter of Sullivan*, 84 App. Div. 51. This case also held such intervening appellant need not file exceptions. The appeal was taken by a municipal corporation "aggrieved" by a failure in the decree on accounting to direct the payment of a valid tax assessed against the administrator as such. Held it was a creditor within the intent of § 2569.

It has been held that unless legatees who may not have been cited upon the probate proceedings do intervene and become parties they cannot appeal from the decree of probate. Section 2569, however, may be said to require that such a person interested in the estate or fund affected by the decree or order may intervene as therein provided and when he has become a party he may then appeal, as prescribed in art. 4. *Foster* v. *Foster*, 7 Paige, 48.

In order to determine the precise meaning of this section it should be considered in connection with § 2573, which is as follows:

§ 186. **Who must be made parties.**

> Each party to the special proceeding in the surrogate's court, and each person not a party, who has, or claims to have, in the subject-matter of the decree or order, a right or interest, which is directly affected thereby, and which appears upon the face of the papers presented in the surrogate's court, or has become manifest in the course of the proceedings taken therein, must be made a party to the appeal. A person not a party, but who must be made a party, as prescribed in this section, may be brought in by an order of the appellate court, made after the appeal is taken; or the appeal may be dismissed on account of his absence. The appellate court may prescribe the mode of bringing in such a person, by publication, by personal service, or otherwise. But this section does not require a person interested, but not a party, to be brought in, if he was legally represented, or was duly cited in the court below. **§ 2573, Code Civil Proc.**

This section distinctly provides that upon the appeal, persons who are not already parties to the proceedings must be brought in by an order of

the Appellate Court made after the appeal is taken. See *Marvin* v. *Marvin*, 11 Abb. N. S. 97; *Matter of Dunn*, 1 Dem. 294. So in *Matter of Hunt*, 120 App. Div. 883, the court held the appeal pending the bringing in of omitted necessary parties on its own order.

It would appear, therefore, from these two sections and the cases already cited, that as the Surrogate's Court has no power to grant an order of intervention after the decree is entered, that the purpose of § 2569 is that a person such as is described therein may, by filing an affidavit showing that he has the interest therein required and by filing and serving his notice of appeal, with a copy of such affidavit, become an original appellant and be thereafter a party to the proceedings in the Appellate Court. This construction of the section would obviate the risk which such a party might run of having the time within which he must appeal (which is brief at best) further shortened by the delay incident to action by the Surrogate on a formal application for leave to intervene which, Surrogate Coffin held in the *Dunn* case, *supra*, he had no power to grant.

§ 187. **Parties to appeal—Guardian ad litem.**—Section 2573 defines who must be made parties.

It has been held by the Appellate Division that a special guardian appointed in a Surrogate's Court does not become *functus officio* by the rendition of the decree; but that under § 2573 he is a party to the special proceeding and has to be served with a copy of the decree with notice of entry, and that his duties and office should continue until the final determination of the appeal from the Surrogate's decree. *Matter of Stewart*, 23 App. Div. 17, opinion of Goodrich, P. J.

In such a case not only is the guardian *ad litem* a necessary party, but the infant whom he represents should also be made a party to the appeal, although it is not necessary that the appeal be taken in the name of the infant. *Underhill* v. *Dennis*, 9 Paige, 202. The acceptance of costs and allowance in the court below does not preclude a guardian *ad litem*, however, from appealing. *Matter of Edwards*, 110 App. Div. 623.

Among the persons who have been held entitled to be made parties as aforesaid are heirs-at-law, next of kin, legatees and executors (*Gilman* v. *Gilman*, 1 Redf. 354; *Pruyn* v. *Brinkerhoff*, 57 Barb. 176); persons to whom money is directed to be paid by the decree (*Jauncey* v. *Rudderford*, 9 Paige, 273; *Matter of Thompson*, 11 Paige, 453), also any persons who are interested in sustaining the order or decree appealed from. *Kellett* v. *Rathburn*, 4 Paige, 102; *Gardner* v. *Gardner*, 5 Paige, 170; *Gilchrist* v. *Rea*, 9 Paige, 66. As, for example, where allowance is made to counsel for the contestants of a will and the executor appeals from the decree, such counsel have been held to be properly made parties upon the appeal. *Peck* v. *Peck*, 23 Hun, 312.

A motion made under § 2573 to bring in as parties to the appeal persons, not parties below, but interested in the subject-matter, should be made in the Appellate Court, *after* the appeal is duly perfected as to those already parties. *Matter of Marks*, 128 App. Div. 775

§ 188. **Appellate Division, first appellate tribunal.**—An appeal from a Surrogate's order or decree must be taken in the first instance to the Appellate Division of the Supreme Court, under § 2570, which is as follows:

> An appeal to the appellate division of the supreme court may be taken from a decree of a surrogate's court, or from an order affecting a substantial right, made by a surrogate or by a surrogate's court in a special proceeding. **§ 2570, Code Civil Proc.**

By this section parties aggrieved or persons entitled under § 2569 may appeal from any decree of a Surrogate's Court, except of course a decree rendered upon the default of such party (see § 2568), but as to orders, the section is explicit that they must be orders affecting a substantial right in order to be appealable. *Matter of Burnett*, 15 N. Y. St. Rep. 116. As for example, an order directing the executor to pay a legacy. *Matter of Halsey*, 17 Weekly Digest, 241. An order adjudging that an executor or administrator has funds in his hands for which he is therefore directed to account, affects a substantial right, and appeal may be taken to the Appellate Division as also an order which permits an administrator after his account has been passed upon by a referee, to file a supplemental account. *Matter of Gilbert*, 104 N. Y. 200; *Stephen* v. *Lott*, 42 Hun, 408. So also a decree fixing the fees of an appraiser is appealable. *Matter of Harriot*, 145 N. Y. 540. But where the order is *ex parte* (*Matter of Johnson*, 17 Hun, 538; *Skidmore* v. *Davies*, 10 Paige, 611), no appeal lies. The proper practice is to move on notice to vacate an *ex parte* order; if this motion is refused an appeal may lie. So an order denying a motion to dismiss a petition does not affect a substantial right. *Matter of Soule*, 46 Hun, 661; *Matter of Phalen*, 51 Hun, 208. So orders merely affecting the procedure on the hearing before the Surrogate do not affect substantial rights and are not appealable (*Henry* v. *Henry*, 3 How. N. S. 386), as where a Surrogate denies a motion for the simultaneous trial of several issues in a proceeding pending before him. See 4 Dem. 253. So the exercise by the Surrogate of his discretion to appoint a referee is not reviewable by the General Term. *Matter of Post*, 64 Hun, 635; *Matter of Pearsall*, 21 N. Y. St. Rep. 305. An appeal to the Surrogate's discretion, as for example, an application to reopen probate proceedings to admit extrinsic evidence is not reviewable (*Boughton* v. *Flint*, 74 N. Y. 476), unless the exercise of the discretion has been abused. So also in a case where the Surrogate granted a motion to issue a commission. *Matter of Plumb*, 64 Hun, 317. So where a motion was made before the citation was served or was returnable to vacate the citation upon the ground that the petition was insufficient, an order denying such motion was held not to affect any substantial right, and was therefore held not to be appealable. *Matter of Westurn*, 5 App. Div. 595, citing *Tracy* v. *Reynolds*, 7 How. Pr. 327; *Matter of Burnett*, 15 N. Y. St. Rep. 116, and other cases cited above. So an order overruling objections to the jurisdiction of the Surrogate to make an order, e. g., to fix value of an attorney's services, is not appealable. The person aggrieved

should wait until he exercises the asserted jurisdiction and then appeal from such determination. *Matter of Loewenguth*, 114 App. Div. 754, and cases cited. In this case the Appellate Court of its own motion dismissed the appeal, but without costs. So an order setting aside a referee's report and referring the matter back is not appealable. *Matter of Post*, 64 Hun, 635. Where a Surrogate, however, improperly refused to decree distribution of an estate ready for distribution, it was held that the parties aggrieved ought not to appeal but to proceed by mandamus. *Matter of Nottingham*, 88 Hun, 443.

§ 189. **Intermediate order reviewable.**—It is next to be noted that,

> An appeal, taken from a decree, brings up for review each intermediate order, which is specified in the notice of appeal, and necessarily affected the decree, and which has not already been reviewed by the appellate court, upon a separate appeal taken from that order. **§ 2571, Code Civil Proc.**

See *Kearney* v. *McKeon*, 85 N. Y. 136. An intermediate order may be said to be one forming a part of the history of the case involving the legal proposition which it is sought to bring before the court; but an order is not intermediate merely because made in the same matter and at a time prior to the order made directly the subject of appeal. Thus, where a will was admitted to probate and on appeal the General Term reversed the Surrogate's decree on a question of fact, and granted a new trial to be had before a jury upon certain questions, first, whether the testator was of unsound mind when the will was executed, and second, whether the will was procured by undue influence; such trial having been had and the result certified to the Surrogate, the Surrogate entered a decree adjudging that the will was invalid and revoking the former record and probate of the instrument. On appeal this decree was affirmed by the General Term. In the Court of Appeals, it was held that upon appeal from this last order of the General Term affirming the Surrogate's decree refusing probate, the prior order reversing his decree granting probate was not an intermediate order necessarily affecting the decree within the meaning of § 2571. *Matter of Bartholic*, 141 N. Y. 166, 171, citing *Matter of Budlong*, 126 N. Y. 423.

§ 190. **Same subject; limit to right.**—The last clause of § 2571 may make it an important question whether to appeal directly in the first instance from an "intermediate order." The question, of course, will be determined by the further question of an ultimate intention to appeal to the Court of Appeals. To illustrate this I give a case unreported in this particular. A accounted as administrator. B filed objections claiming the whole estate as widow. A moved to strike out the objections on the ground that by a former adjudication the Surrogate had held that B was not the widow, her marriage to decedent having been annulled, and his determination having been affirmed by the Appellate Division. The motion to strike out the objections having been granted, B decided to appeal directly from this order. The order was affirmed. She appealed to the Court of Appeals and there her appeal was dismissed. In the meantime,

the matter proceeded under the affirmance by the Appellate Division before the Surrogate to a decree settling the account. B appealed from the final decree and stated in the notice of appeal that she intended to bring up for review the "intermediate order" striking out her objections.

Now, it is manifest on this appeal from the decree the Appellate Division could not review such order, because it had already been reviewed upon a separate appeal. The Appellate Division, further, having affirmed the decree, B then appealed to the Court of Appeals making a similar statement in her notice of appeal as to the "intermediate order" of the Surrogate. *Quære,* could the Court of Appeals, which can only entertain appeals from the Appellate Division, review anything which was not before the Appellate Division, under § 2571; *quære,* further, whether the difficulty could have been obviated in the appeal to the Court of Appeals by specifying as an intermediate order, not the order of a Surrogate, but the first order of the Appellate Division affirming the order of the Surrogate?

The question will doubtless in most cases turn in deciding as to the propriety of an appeal in the first instance from an order called intermediate as to whether it would come within the somewhat elastic definition of final order found in the decisions of the Court of Appeals. We have already noted, in *Matter of Loewenguth,* 114 App. Div. 754, that an order overruling objections to the jurisdiction of the Surrogate to make an order is not appealable until he has exercised his jurisdiction and made an order. But, in the case just outlined it might well have been claimed that the order striking out the objections on the ground that the objectant had no status was final, in that it effectually put her out of court (see further below, Appeals to Court of Appeals).

§ 191. **Time to appeal.**

> An appeal by a party must be taken within thirty days after the service, upon the appellant, or upon the attorney, if any, who appeared for him in the surrogate's court, of a copy of the decree or order from which the appeal is taken, and a written notice of the entry thereof. An appeal by a person who was not a party, taken as prescribed in this article, must be taken within three months after the entry of the decree or order, unless the appellant's title was acquired by means of an assignment or conveyance from a party; in which case, the appeal must be taken within the time limited for the taking thereof by the assignor or grantor. **§ 2572, Code Civil Proc.**

This section preserves the distinction between appeals by parties and persons who were not parties, it being expressly provided that where the person not a party acquired his interest or title by assignment or conveyance from one who was a party, his appeal must be taken within the thirty days limited by the first part of the section. Otherwise a person not a party has ninety days in which to appeal. Thus, in transfer tax proceedings, to which the state comptroller was not a party, he was allowed to come in within three months and take an appeal. *Matter of Dingman,* 66 App. Div. 228. The time for a party to appeal is limited or set running

not by the filing of the decree or order but by the service of a copy thereof with written notice of its entry. By the *entry* of a decree or order is meant its record in the proper book required by the Code to be kept by the Surrogate under §§ 2498 and 2499, so that the service of a copy of the decree with notice of its *filing* does not start the time within which to appeal running. *Matter of Armstrong*, 32 N. Y. St. Rep. 441.

§ 192. **Making and settling case.**—Where the appeal is by a party, that is, where the time to appeal is limited to thirty days, the case on appeal must be made and a copy served on the opposite party within thirty days after a service of a copy of the decree or order with notice of the entry thereof. The party so served may within ten days thereafter propose amendments thereto and serve a copy on the party proposing a case or exceptions, who may then within four days thereafter serve the opposite party with a notice that the case or exceptions with the proposed amendments will be submitted for settlement at a time and place specified to the Surrogate before whom the case was tried. The time for settling the case, which must be specified in such notice, shall not be less than four days nor more than ten days after the service of the notice. Rule 32, General Rules of Practice. But it is expressly provided that the Surrogate, on appeals from his court, may *by order* allow further time for the doing of any of the acts above provided to be done on such appeal. That is to relieve him from the consequences of his omission to do any of the acts relating to the preparation, service, or settlement of the case, within the time limited. See *Matter of Williams*, 6 Misc. 512, 515, which holds the purpose to be to give the Surrogate power, on seasonable application, and for good reason shown for the delay. Hence the power may be exercised after the time has expired. This of course does not extend to the matter of taking an appeal in the first instance. See § 1303, Code Civ. Proc., and *Matter of Sheldon*, 117 App. Div. 357. This covers the case where the appeal is by one not a party. No order extending the time to serve a case, or a case containing exceptions, or the time in which amendments thereto may be served, shall be made unless the party applying for such order, served a notice of at least two days upon the adverse parties of his intention to apply therefor, stating the time and place for making such application. The practice is assimilated to that in the Supreme Court by the latter part of § 2576, which is as follows:

> If the appeal is taken "from a decree rendered upon the trial, by the surrogate, of an issue of fact, it must be heard upon a case, to be made and settled by the surrogate, as prescribed by law, for the making and settling of a case upon an appeal in an action." **§ 2576, Code Civil Proc.**, in part.

The recitals in the order appealed from determine the papers to be printed. *Matter of Gowdey*, 101 App. Div. 275. The appellant may first move to amend it; if he does not his appeal *may* be dismissed. *Ibid.*, citing *Whipple* v. *Ripson*, 29 App. Div. 70. However, the Appellate Division has power to remit a cause to the Surrogate to be "resettled in conformity

with the facts," when it *clearly appears* either that a paper actually used was not recited in the decree, in that the decree recites a paper not actually used. *Matter of Richardson*, 120 App. Div. 406.

§ 193. **Same.**—It has been held that § 2576 was not intended to regulate the practice in bringing appeals, except to require that when the appeal is from a decree rendered upon a trial of an issue of fact, a case must be made and settled as on an appeal in an action. *Matter of Stewart*, 135 N. Y. 413, 416; *Matter of Walrath*, 69 Hun, 403, opinion of Mayham, P. J., citing *Spence* v. *Chambers*, 39 Hun, 193; *Angevine* v. *Jackson*, 103 N. Y. 470; *Burger* v. *Burger*, 111 N. Y. 523; *Matter of Falls*, 29 N. Y. St. Rep. 759; *Matter of Marsh*, 45 Hun, 109. Where no case on appeal is presented, the Appellate Court will have nothing to consider. *Matter of Clark*, 34 N. Y. St. Rep. 523. So in *Matter of Goldsticker*, 54 Misc. 175, Thomas, Surr., held that the only way he could settle a case involving his determination of the sanity of testator on a probate proceeding was by including all the evidence "which any party may claim to be material to the determination of the questions to be passed upon by the Appellate Court," citing *Perkins* v. *Hill*, 56 N. Y. 87, 91. Otherwise, he pointed out, it would be impossible for that court to decide under § 2545 whether the receiving by him of evidence objected to under §§ 829 and 834 of the Code was prejudicial to appellant and warranted reversal. So where the case on appeal does not contain all the evidence or does not have the usual certificate that the case contains all the evidence or contains a certificate which expressly states that part of the evidence has been excluded, the Appellate Court may decline to review the decree upon the merits. The case or papers on appeal must be certified or stipulated to be correct copies. The latter is now proper under amendment of 1904, ch. 137, to § 2567. If certified the Surrogate must charge one cent a folio "when printed copies are presented." The section now provides:

> Where in a proceeding in the surrogate's court the attorneys for all the adult parties interested and special guardians, or general guardians, appearing for all infant parties interested, other than parties in default, or against whom a final order has been taken and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provision of this act, the stipulation takes the place of a certificate as to the parties so stipulating, and the surrogate or his clerk is not required to certify the same or entitled to any fee therefor. And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts, and shall be used or filed with the same force and effect as if certified by the surrogate or his clerk. **§ 2567, Code Civil Proc.**, in part.

§ 194. **Contents of case on appeal.**—In *Matter of Sprathoff*, 50 Misc. 109, Church, Surr., reviews this matter at length. (See opinion.) The next section deals with the matter of findings and exceptions. The whole matter turns on the nature of the determination appealed from. If the Surrogate make an order on moving affidavits and opposing affidavits the appeal is brought on upon a record containing the order and the

papers on which it was based. *Ibid.*, and cases cited. But if to make that order he had to pass on an issue of fact his decision will have included findings of fact and conclusions of law. The words "trial by the Surrogate of an issue of fact" means inquiry into and determination of such an issue, personally or by a referee whose report, however modified, he has made his own.

§ 195. **Appeal may be on facts and on law.**—"An appeal from an order or decree of the Surrogate may be taken upon questions of law, or upon facts, or upon both." Code of Civil Procedure, § 2576, in part. The rule has already been stated that under § 2545, the Surrogate must make findings of fact and conclusions of law, and that exception must be taken to his refusals to find, or to his decision. See *ante*. This provision is mandatory. See cases cited, *ante; Matter of Falls*, 29 N. Y. St. Rep. 759; *Matter of Sprague*, 125 N. Y. 732; *Matter of Peck*, 39 N. Y. St. Rep. 234; *Matter of Kaufman, id.* 236. It has been held that without the necessary exceptions no question in such case is presented for the Appellate Court to determine. *Matter of Bolton*, 141 N. Y. 554; *Burger* v. *Burger*, 111 N. Y. 523, limiting *Angevine* v. *Jackson*, 103 N. Y. 470. The decision in *Angevine* v. *Jackson* merely settled the principle that there must be an exception in order to raise a question of law in the Appellate Court. Judge Finch there held that an exception "to the Surrogate's decree and each and every part of it," is useless, citing *Ward* v. *Craig*, 87 N. Y. 550; *Hepburn* v. *Montgomery*, 97 N. Y. 617. For such an exception indicates no specific error and directs attention to no finding, and leaves the court in the dark as to what is the precise cause of complaint. In *Burger* v. *Burger*, Judge Andrews, writing the opinion of the court, distinguishes between review of the facts and a review of the law, and uses the following language: "An exception to facts found or to a refusal to find upon a question of fact is only important to entitle the appellant to a review, first, in the Supreme Court, and afterward in this court, of the strictly legal question which it is the office of an exception to present. But in the Supreme Court the facts are open for review without any exception." This refers to § 2586, providing that: "Where an appeal is taken upon the facts, the Appellate Court has the same power to decide the questions of fact which the Surrogate had, and it may in its discretion receive further testimony or documentary evidence, and appoint a referee." See *Matter of Wilcox*, 37 N. Y. St. Rep. 462; *Matter of Patterson*, 63 Hun, 529. By virtue of this section then it is manifest that no exceptions to findings of fact are necessary in order to secure a review of said facts by the Appellate Court. Exceptions, however, should be taken duly to every ruling of the Surrogate, in order to raise the questions of law which it is sought to have reviewed in the Appellate Court. Nor is it necessary in order to a review of the facts in the Supreme Court that the notice of appeal should specify the exact findings complained of; this is neither expressly required by the statute nor is it necessarily to be implied from the language of § 2576. Section 2574, which prescribes how an appeal may be taken (see *infra*), de-

clares that it must be by written notice to be served referring to the decree or order appealed from and stating that the appellant appeals from the same or from a specified part thereof. It is nowhere required that the grounds of the appeal shall be stated in the notice. *Matter of Stewart*, 135 N. Y. 413, 416. Except in transfer tax appeals, *q. v. post.*

§ 196. **Extent of power of Appellate Division.**—The power of the Appellate Division in the review of a decision of the Surrogate is not limited to a determination of whether there exists evidence upon which his decree may be supported by virtue of § 2586 quoted in § 223 below, *q. v.* Not only has the court the same power in regard to the facts that the Surrogate himself had, *Matter of Laudy*, 148 N. Y. 403; *Matter of Purdy*, 46 App. Div. 33; *Matter of Rossell*, 121 App. Div. 381, but it must determine for itself upon the facts whether the case was correctly decided when such question is presented by the appeal. *Matter of Rogers*, 10 App. Div. 593, 594, citing *Gilman* v. *Gilman*, 3 Hun, 22; *Matter of Hardenburg*, 85 Hun, 580; *Kingsland* v. *Murray*, 133 N. Y. 170; *Burger* v. *Burger*, 111 N. Y. 523. This is well illustrated in *Matter of McGarren*, 112 App. Div. 503. The Surrogate refused to recognize as widow one whose marriage had been annulled by a Supreme Court judgment, holding that such judgment bound him so long as it stood, and that he had no power to examine whether it was based on personal service of process. The Appellate Division held he had such power, examined the facts as to service for itself, held service had been duly made and affirmed the Surrogate's denial of her status as widow, but on this further and stronger ground, which afterwards was given the force of *res adjudicata*. *Matter of McGoughran*, 124 App. Div. 312.

When an appeal from a Surrogate's decree is taken on the facts, the Appellate Court, while the proceedings are before it, has power to decide any questions of fact which the Surrogate could decide, and in its inquiry into such facts it may take further testimony or documentary evidence, and also direct a reference for the purpose of taking such testimony.

> Where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact, which the surrogate had; and it may, in its discretion, receive further testimony or documentary evidence, and appoint a referee. **§ 2586, Code Civil Proc.**

We referred above to the "semble" in *Matter of Gilman*, 92 App. Div. 462 as to the propriety of stating in the notice of appeal that such power would be invoked. (See §§ 197, 198).

Section 2586 means what it says: the Appellate Division has and may exercise the trial powers of the Surrogate. *Matter of Tyndall*, 117 App. Div. 294, and cases cited at p. 299; *Matter of Hall*, 61 App. Div. 266; *Matter of Stapleton*, 71 App. Div. 1.

This power, however, will only be exercised in necessary cases and where a clear reason therefor is shown. So in the *Gaines Will* case, where the decree appealed from had been made several years before the appeal came

on, and application was made to the General Term to direct the taking of further evidence, the General Term refused to exercise its power under § 2586. *Matter of Gaines*, 74 Hun, 94. But in *Matter of Burr*, 116 App. Div. 518, where the appellant executor was removed for failing to inventory a demand note he had given decedent and complained on appeal that Surrogate had refused to allow him to prove payment, the Appellate Division appointed its own referee to take such proof. The Appellate Court must be satisfied that the evidence sought to be secured is important enough to justify a rehearing. *Matter of Hannah*, 45 Hun, 561. Newly discovered evidence may be received by the Appellate Division. *Caujolle's Appeal*, 9 Abb. 393; *Matter of Drake*, 45 App. Div. 206, 211. *In Matter of Snedeker*, 95 App. Div. 149, the court even assumed to *supply an essential finding of fact* omitted by the Surrogate, as well as by his referee.

The duty of the Appellate Division is not merely to determine whether there was sufficient evidence to support the decision, but it is expected to determine for itself whether the Surrogate correctly determined the facts. *Matter of Rogers*, 10 App. Div. 593; *Matter of Warner*, 53 App. Div. 565, 567.

When the remittitur of the Appellate Division is sent down, an order must be entered in the Surrogate's Court making the order of the Appellate Division the order of that court. Until that be done, no decree or further proceeding can be made or had. *Estate of George Geissler*, N. Y. Law Jour., June 19, 1902.

This power prior to the adoption of the Code was possessed by the Court of Appeals as well. *Robinson* v. *Raynor*, 28 N. Y. 494, 496, opinion of Selden, J., citing *Schenck* v. *Dart*, 22 N. Y. 420; *Caujolle* v. *Ferrie*, 23 N. Y. 90; *Moore* v. *Moore*, 21 How. Pr. 211. See also *Howland* v. *Taylor*, 53 N. Y. 627; *Kyle* v. *Kyle*, 67 N. Y. 400, 408; *Hewlett* v. *Elmer*, 103 N. Y. 156, 163. But under the present limitations of the jurisdiction of the Court of Appeals this is no longer so. Section 190, Code Civ. Proc. The Appellate Division may review discretionary orders of the Surrogate, but will not disturb his determinations unless there be an abuse of his discretion. *Matter of Goundry's Estate*, 57 App. Div. 232. Discretionary orders are not appealable to the Court of Appeals. *Matter of Baldwin*, 158 N. Y. 713.

§ 197. **Appeals, how taken.**—Section 2574 provides:

> An appeal must be taken by the service, within the state, upon each party to the special proceeding, other than the appellant, and upon the surrogate, or the clerk of the surrogate's court, of a written notice, referring to the decree or order appealed from, and stating that the appellant appeals from the same, or from a specified part thereof. Where a party to the special proceeding in the court below appeared in person, the notice of appeal must be personally served upon him; where he appeared by an attorney, it must be served personally, either upon him or upon his attorney. When a party, who was duly cited, did not appear in the surrogate's court, notice of appeal must be served upon him personally, if he can, with due diligence, be found within

the county; otherwise it may be served by depositing it, indorsed with a direction to the party, with the surrogate, or the clerk of the surrogate's court. Where a person to be served cannot, with due diligence, be found, to make personal service upon him, as prescribed in this section, the surrogate, or a justice of the supreme court, may, by order, prescribe such a mode of service as he thinks proper; and service in that mode has the same effect as personal service. **§ 2574, Code Civil Proc.**

The notice is thus to be served within the State. This section is clear and explicit. The only point to comment on is that when the Appellate Division has sent its remittitur down, and its determination has been made that of the Surrogate's Court, and an appeal is taken to the Court of Appeals, the notice of appeal, so far as service on the clerk is concerned, is served on the clerk of the Surrogate's Court, not of the Appellate Division.

The notice of appeal, as has been already noted in another connection, need not be as specific as exceptions are required to be; it need not state the grounds of appeal (*Matter of Stewart*, 135 N. Y. 413); but need only refer to the decree or order appealed from, that is to say, to describe it with sufficient particularity as to its date of entry, title and effect. It is only requisite that the notice of appeal should contain a definite statement that the appellant appeals from a specific order or decree or a specific part thereof. So it has been held that notices of appeal from Surrogate's orders and decrees will be liberally construed (*Matter of Lawson*, 42 App. Div. 377, 382), calling attention to the fact that §§ 2571 and 2545 are not so exacting as § 1301. But see *Matter of Gilman*, 92 App. Div. 462, which intimates by a "semble," that when the appeal is taken upon the facts, the power given the Appellate Division by § 2586 to independently decide the facts, receive further testimony or documentary evidence, or appoint a referee should be invoked in the notice of appeal. While this case was unanimously decided, yet in later cases the same court has exercised the power irrespective of the notice of appeal.

§ 198. **Form of notice.**

Notice of appeal.

Surrogate's Court,
County of

Title. }

Please take notice that (*specifying status of appellant in proceeding in which the order or decree appealed from was made*) appeals to the Appellate Division of the Supreme Court in the department, from the decree (*or* from the order) made by the Surrogate of the county of and entered in his office on the day of 19 and from each and every part thereof. (*If only part of the decree is appealed from specify the purport of that part of the order or decree which is intended to be appealed from.*) (If *Gilman* case, *supra*, is deemed good law, add: and appellant intends to bring up the facts for review under § 2586 of the Code.)

If intermediate order is to be reviewed identify it by its date and date of its entry.

(Date.) (Signature.)
Attorney for
(Add address.)

To:

(Here insert name of Surrogate of the county and name or names of attorneys for *all the parties* to the proceeding.)

§ 199. What is brought up by appeal.

An appeal from a decree or order of the Surrogate's Court brings up for review by each court to which the appeal is carried, each decision to which an exception is duly taken by the appellant. **§ 2545, Code Civil Proc.**

This implies, however, that there shall be a case containing the evidence incorporating the findings of fact and conclusions of law with the exceptions thereto. So, where there was no case made and settled and no record of any exceptions, it was held that an appeal brought up nothing for review. *Matter of Potter*, 32 Hun, 599. And where there had been findings of fact and exceptions but no case on appeal had been made and settled, it was held that the mere fact that these findings and exceptions were mentioned in the notice of appeal would not entitle the appellant to a review thereof in the Appellate Court. *Matter of Clark*, 34 N. Y. St. Rep. 523. See also *Waldo* v. *Waldo*, 32 Hun, 251; *Burger* v. *Burger*, 111 N. Y. 523, limiting *Angevine* v. *Jackson*, 103 N. Y. 470; *Matter of Kellogg*, 104 N. Y. 648. So the Court of Appeals held (*Matter of Sprague*, 125 N. Y. 732), that where no findings had been made and the case on appeal contained no exceptions, neither the General Term nor the Court of Appeals, had any power to review the Surrogate's decision on the facts. But in a case where the respondent having omitted findings of fact in the entry of his decree argued an appeal upon the merits, it was held he could not set up such omission and demand a reargument on the ground that no findings were made. *Matter of Patterson*, 16 N. Y. Supp. 146; *Matter of Bradway*, 74 Hun, 630; *Matter of Falls*, 29 N. Y. St. Rep. 759; *Matter of Kaufman*, 39 N. Y. St. Rep. 236. See *Matter of Widmayer*, 52 App. Div. 301. In this last case it was found that the Surrogate had not made any decision under § 2545, and accordingly the case was sent back to the Surrogate for compliance with the statute, following *Matter of Peck*, 60 Hun, 583.

§ 200. **Reversal.**—Generally where the Surrogate's decree is a determination upon a disputed question of fact and upon conflicting evidence, the Appellate Division will decline to disturb his decision upon appeal. See *Matter of Clark*, 82 Hun, 344. But under the power which the court has to decide all questions of fact which the Surrogate had under § 2586 (see *Matter of Rogers*, 10 App. Div. 593, 594, and cases cited), if they are satisfied that the evidence contained in the case on appeal is not merely conflicting, but is such as would warrant a jury in arriving at a verdict contrary to the decision of the Surrogate, the Appellate Division will reverse the decree of the Surrogate and order a trial of the issues of the

specific questions of fact involved. *Matter of Brunor*, 21 App. Div. 259, 263, 265; *Matter of Van Houten*, 11 App. Div. 208; *Howland* v. *Taylor*, 53 N. Y. 627.

§ 201. **Same subject.**—A decree or order of the Surrogate's Court, "shall not be reversed for an error in admitting or rejecting evidence, unless it appear to the Appellate Court that the exceptant was necessarily prejudiced thereby" (§ 2545 of the Code of Civil Procedure); therefore, where the Appellate Court is satisfied that while the evidence admitted or rejected was improperly admitted or rejected, yet the court could independently of such evidence have justly arrived at the conclusion that it did, the error may be disregarded. *Matter of Watson*, 101 App. Div. 550. The effect of the section is to leave the Appellate Court at liberty to disregard the error if it could have had no influence on the determination of the case. *Matter of Miner*, 146 N. Y. 121, 136; *Matter of Crane*, 68 App. Div. 355, 357, citing *Matter of Rogers*, 10 App. Div. 593; *Matter of Welling*, 51 App. Div. 355. If the judgment is clearly right notwithstanding the error, it is no ground for reversal. *Loder* v. *Whelpley*, 111 N. Y. 239, 246. The courts in applying this rule under § 2545 have held that to justify a reversal it must appear, either, that had the evidence which was rejected been received, the appellant's case would not have failed, or that without the improper evidence which was received, the respondent's case was deficient. *Matter of Seagrist*, 1 App. Div. 615, opinion of Rumsey, J., citing *Snyder* v. *Sherman*, 88 N. Y. 656; *Matter of Miner, supra.*

§ 202. **Same subject.**—It is, however, the duty of the Appellate Court to determine whether or not the error was prejudicial; this inquiry is necessarily affected by the question whether the specific evidence was admitted improperly or rejected improperly.

Where a Surrogate, on the trial of an issue of fact, receives incompetent evidence, the case is different from an error of the Surrogate in rejecting competent testimony. In the former case the evidence improperly received is before the court, and it may appear that, although the Surrogate has erred in admitting it, yet the error did no harm, because the fact to which such incompetent testimony related was clearly proved by other competent evidence. Thus in the case of *Loder* v. *Whelpley et al.*, 111 N. Y. 239, incompetent evidence was received. The Court of Appeals determined that this error afforded no ground for a reversal of the decree, because the Surrogate, in his opinion, which was incorporated in and formed a part of his decision, stated that he had disregarded the incompetent evidence, and also because the decision of the Surrogate's Court was justified "by testimony which leaves no doubt of its correctness, and leaving out all the evidence objected to by the contestant, the same result, and that only, could be reached." The court in the case cited determined that if a decree of the Surrogate *was clearly right*, notwithstanding an error in receiving incompetent testimony, such error is no ground for a reversal. See *Matter of Benton*, 71 App. Div. 522, 524; and *Matter of Hopkins*, 73 App. Div. 559.

But the case is different where a Surrogate errs in rejecting competent and material testimony. It is impossible to determine what effect such testimony, if received, would have had on the decision of the question of fact before the Surrogate. A party offering competent and material testimony is necessarily prejudiced by its exclusion; he is entited to have such evidence considered by the Surrogate; if received it might affect the result; he is injured by its exclusion. This is true of a refusal to permit cross-examination. *Matter of Steenwerth*, 97 App. Div. 116. The true rule as to the construction that should be given to § 2545 of the Code of Civil Procedure is stated by Andrews, J., in *The Matter of the Will of Smith*, 95 N. Y. 516, 527, 528, as follows: "Under this section, when the court of review finds that incompetent evidence has been received, or competent evidence rejected, it then becomes its duty to determine whether the error prejudiced the party against whom it was committed. If it appears to the court that it did not, then its duty is plain. If, on the other hand, the evidence erroneously admitted or rejected was important and material, and the court cannot say that, notwithstanding the error, the judgment is right, or if it entertains a reasonable doubt upon the subject, then we conceive a case is presented where the party excepting was necessarily prejudiced within this section." *Matter of Potter*, 17 App. Div. 267; *Copland* v. *Van Alst*, 9 Weekly Digest, 407; *Horn* v. *Pullman*, 72 N. Y. 269; *Matter of Morgan*, 104 N. Y. 74, 86; *Brick* v. *Brick*, 66 N. Y. 144.

§ 203. **Same subject.**—Where, on the probate of a will, persons whose testimony is made inadmissible by § 829 of the Code are allowed to testify, of course not meaning subscribing witnesses, unless the Appellate Court is able to say with certainty that the evidence was without influence upon the result (as, for example, where other witnesses testify independently, substantially and conclusively to the same facts), it will be proper ground for reversal. *Schoonmaker* v. *Wolford*, 20 Hun, 166, 168, citing *Foote* v. *Beecher*, 78 N. Y. 155. By conclusive evidence, however, is meant in this connection such evidence as is capable of but one construction and incapable of being answered. In this sense if the incompetent evidence was slight or irrelevant, or if, without it, the fact is conclusively established by other evidence, the Appellate Court will disregard it because it could not have injured the other party (*Foote* v. *Beecher*, Church, Ch. J.), or could not legitimately affect the result. *Hobart* v. *Hobart*, 62 N. Y. 84; *Matter of Torkington*, 79 Hun, 118; *Matter of Degen*, 89 Hun, 143; *Petrie* v. *Petrie*, 126 N. Y. 683. But if evidence be improperly excluded in the erroneous belief that § 829 is applicable, it is reversible error. In such case it is not necessary that the appellant should have made an "offer" of the testimony sought to be introduced. *Matter of Potter*, 161 N. Y. 84, 88.

§ 204. **Perfecting appeal.**

To render a notice of appeal effectual for any purpose, except in a case specified in the next section, or where it is specially prescribed by law, that

security is not necessary to perfect the appeal, the appellant must give a written undertaking, with at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him upon the appeal, not exceeding two hundred and fifty dollars. **§ 2577, Code Civil Proc.**

Since § 2575 makes §§ 1305–09 applicable as already noted, it is merely hinted that by written consent security can be waived under § 1305, or a deposit of money made with the clerk and notice of the fact served under § 1306.

Undertaking on appeal.

Surrogate's Court,
County of

Title. }

Whereas, on the day of 19 a decree was made in the above entitled proceeding by the Surrogate of the county of adjudging or decreeing (here state purport of decree concisely);

Whereas, (here state status of party in proceeding) feeling aggrieved thereby, intends to appeal therefrom to the appellate division of the Supreme Court, in the department;

Now therefore, we, A. B. of by occupation (a merchant), and C. D. of by occupation (a banker), do hereby jointly and severally undertake that the appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding $250. (*Note.*)

Note. A proper surety company is equivalent to two sureties.

Where undertaking is on appeal from a decree directing payment of money, substitute for the foregoing paragraph, after the names and residences and occupations of the sureties, hereby jointly and severally undertake, to and with the People of the State of New York, in the sum of dollars, that if the said decree is affirmed in whole or in part, or the appeal is dismissed, the said appellant will pay (*or*, deposit), (*or*, distribute) the sum of money directed to be paid (*or* deposited, *or* distributed) by said decree, or such part thereof as the said decree if affirmed may direct (*or, in a proper case, say,* will deliver the property directed to be delivered by said decree), and that the appellant will pay all the costs and damages which may be awarded against him on such appeal.

(Date.) (Signature.)
(*Note.*)

Note. The undertaking must be acknowledged by each surety.

Add also affidavit of sufficiency, as follows:

State of New York }
County of } ss.:

being duly sworn deposes and says: that he is one of the sureties named in the foregoing undertaking; that he resides in county of State of New York; that he is a holder; and that he owns property consisting of in the county of and State of

that the same is of the net value of not less than dollars and unincumbered except as follows:

Note. The affidavit of sufficiency, is required only when it is intended by the undertaking to stay the execution of a decree, in which case the undertaking should also be indorsed with the approval of the Surrogate, the date of such approval being indicated.

that he is not upon any bond, undertaking or written obligations whatever, except as follows:

that he is worth in good property in the State of New York not less than dollars over and above all debts, liabilities and lawful claims against him and all liens and incumbrances and lawful claims upon his property.

Sworn to before me this }
day of 19 }

Surety.

(*Note.*)

§ 205. **How stay effected.**—Section 2577 is general in its operation, and fixes the character of the security which must be given to perfect any appeal, except such as are expressly provided for. The stay which it is desired to secure pending any appeal is given, not by virtue of this section, but by virtue of § 2584, which is as follows:

> Except as otherwise expressly prescribed in this article, a perfected appeal has the effect, as a stay of the proceedings to enforce the decree or order appealed from, prescribed in section 1310 of this act, with respect to a perfected appeal from a judgment. **§ 2584, Code Civil Proc.**

This assumes that the appeal is by one entitled to appeal. An appeal improperly taken cannot so operate. *Matter of Evans*, 33 Misc. 671.

The sections referred to in § 2584 are 2578, 2579 and 2583, which will be discussed separately. The effect, therefore, of perfected appeals generally under §§ 2577 and 2584 is the same as the effect of a perfected appeal under § 1310 which provides that where an appeal is perfected as prescribed in ch. 12, "the appeal stays all proceedings to enforce the judgment or order appealed from, except that the court or judge from whose determination the appeal is taken may proceed in any matter included in the action or special proceeding, and not affected by the judgment or order appealed from or not embraced within the appeal."

Consequently where a Surrogate in probate proceedings denies a motion for a commission, an appeal from his order does not stay the probate proceedings. *Estate of Henry*, 4 Dem. 253. Nor would an appeal from an order denying a union of issues previously directed to be separately tried stay the probate proceedings. Such orders merely affect modes of procedure that are entirely within the control of the trial court. *Matter of Henry, supra*, citing *Arthur* v. *Griswold*, 60 N. Y. 143; *Whitney* v. *Townsend*, 67 N. Y. 40; *Miller* v. *Porter*, 17 How. Pr. 526.

On the other hand, if a Surrogate makes an order granting an application for the issuance of a commission to take testimony without the State, a perfected appeal from such order would stay the issuance of such commission. *Matter of Henry*, opinion of Rollins, Surr., at page 264.

§ 206. **When second undertaking necessary to effect stay.**—There is no provision for any other undertaking upon appeal except that required by § 2578, where some appointee of the Surrogate's Court, such as an executor, administrator, testamentary trustee or guardian, appeals from a decree requiring him to pay, distribute or deposit money, or to deliver property, or where an executor or administrator appeals from an order granting leave to issue execution against him; in such cases, in addition to the undertaking for costs and damages, there must be a further undertaking as required by the section which follows:

> Notice of appeal by an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court, from a decree, directing him to pay or distribute money, or to deposit money in a bank or trust company, or to deliver property; or by an executor or administrator from an order granting leave to issue an execution against him, as prescribed in section 1825 of this act, does not stay the execution of the decree appealed from, unless the appellant gives an undertaking, with at least two sureties, in a sum therein specified, to the effect that, if the decree or order, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay all costs and damages, which may be awarded against him upon the appeal, and will pay the sum so directed to be paid or collected, or, as the case requires, will deposit or distribute the money, or deliver the property so directed to be deposited, distributed, or delivered, or the part thereof as to which the decree or order is affirmed. **§ 2578, Code Civil Proc.**

§ 207. **Section 2578 requires two undertakings to effect a stay.**—It must be distinctly borne in mind that the undertaking specified in § 2578 that the appellant will pay the sum directed to be paid or collected, or deposit or distribute the money, or deliver the property, is not sufficient of itself to stay the decree unless the undertaking to pay all costs and damages required by § 2577 is also given. *Matter of Whitmark*, 15 N. Y. St. Rep. 745. Where an executor, however, is mentioned in the will as a legatee and he takes an appeal from the decree of the Surrogate which declares his legacy void, the fact that he is an executor does not require the double undertaking contemplated by § 2578, for his appeal is an individual appeal, and the single undertaking under § 2577 will be deemed sufficient. *Du Bois* v. *Brown*, 1 Dem. 317, 334, Coffin, Surr. Unless, then, the appeal is by an executor, administrator, testatmentary trustee, guardian, or other person appointed by the Surrogate's Court, as such no undertaking can be required except the one for $250 required by § 2577, and the giving of that undertaking perfects the appeal. *Matter of Arkenburgh*, 17 Misc. 543, Tompkins, Surr., affirmed on Surrogate's opinion in 11 App. Div. 44, 45. The danger of failing to give both undertakings in the proper case is illustrated in *Matter of Holmes*, 79 App. Div. 267. The Surrogate by decree ordered the executrix to pay certain legacies. She filed only the undertaking required by § 2577. The decree not being stayed she was proceeded against for contempt, and fined the amount directed to be paid. The Surrogate's action was sustained on appeal.

If there are two proceedings between the same parties for the same object and one ripens into judgment, it bars the later proceeding even though stayed by perfected appeals. *Matter of Moran*, 59 Misc. 133.

§ 208. **Contempt cases; different undertaking.**

Security to stay proceedings in case of commitment.

An appeal from a decree or an order, directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court, or an attorney or counsel employed therein, for disobedience to a direction of the surrogate, or for neglect of duty; or directing the commitment of a person refusing to obey a subpœna, or to testify, when required according to law; does not stay the execution of the decree or order appealed from, unless the appellant gives an undertaking, with at least two sureties, in a sum therein specified, to the effect that, if the decree or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will, within twenty days after the affirmance or dismissal, surrender himself, in obedience to the decree or order, to the custody of the sheriff of the county, wherein he was directed to be committed. If the undertaking is broken, it may be prosecuted in the same manner, and with the same effect, as an administrator's official bond; and the proceeds of the action must be paid or distributed, as directed by the surrogate, to or among the persons aggrieved, to the extent of the pecuniary injuries sustained by them; and the balance, if any, must be paid into the county treasury. § **2579, Code Civil Proc.**

Where an undertaking is required under section 2579 *to stay proceedings pending appeal in case of commitment, follow the foregoing from up to and including the names, residences and occupations of the sureties, and then continue:* hereby jointly and severally undertake that if the decree (or order) appealed from or any part thereof is affirmed or the appeal is dismissed, the appellant will within twenty days after such affirmance or dismissal surrender himself in obedience to such decree (or order) to the custody of the sheriff of the county of whereto by such decree he is directed to be committed.

(*Note.*)

Note. Follow same rules as to signature, acknowledgment, affidavit of sufficiency and approval by the court.

The language of this section may be confusing because it contains no explicit provision for an undertaking for costs. It has been held, however, that when an appeal is taken from an order of commitment by the Surrogate for disobedience to a direction of such Surrogate, or for neglect of duty by an executor, administrator, testamentary trustee, guardian or other person appointed by the Surrogate's Court or by some attorney or counsel employed therein, a stay of the execution of such an order will be effected by giving the security provided by § 2579. *Matter of Pye*, 21 App. Div. 266, Hatch, J. But it was further held that, if the appeal was prosecuted to the Court of Appeals, in order to secure a stay, such second appeal must be perfected under § 1326. But when the appeal to the Court of

Appeals is perfected by the giving of an undertaking to the effect that the appellant will pay all costs and damages not exceeding $500, which may be awarded against him on the appeal, then under § 1310, *q. v.*, the appeal operates as a stay. And it was held in the case just cited that the Supreme Court had power to grant a stay of proceedings upon an appeal from an order made in a Surrogate's Court; the order in such case being conditioned on the giving by the appellant of the security required by § 1326. It was further held that the undertaking given under § 2579 remained in force unaffected by the appeal to the Court of Appeals and was a continuing security for compliance with the decree of the Surrogate, and that no further security was required to be given so long as it remained in force. Judge Hatch added: "It is quite evident therefore that the appellant had complied with all the provisions of law necessary to perfect his appeal except the giving of the undertaking for security for costs; when this was done, it, together with the appeal, operated as a stay of proceedings upon the decree appealed from until disposition was made by the Court of Appeals. No order was therefore necessary except for leave to file the security to stay proceedings upon the decree upon filing the required undertaking for costs. See page 268. See also *Matter of Gihon*, 29 Misc. 273, where Surrogate Silkman summarizes the practice, and holds that a duly perfected appeal by a contestant of a will stays issuance of letters testamentary, unless the Surrogate deems it necessary to issue them under § 2582 (see § 211, *post*) for the preservation of the estate. (Affirmed 48 App. Div. 598, on opinion below).

§ 209. **Appeal by one of several parties, not necessarily a stay as to all.**—Where there are a number of parties in interest and they do not all appeal, an appeal by one will not necessarily stay the execution of the decree where the appellant's rights are clearly separable from those of the other parties to the proceeding and can be protected, as by a deposit of money covering his interest pending the appeal. So where one of several residuary legatees under a will, that has been declared invalid, appeals from the decree directing distribution to the next of kin, the perfected appeal will only operate to prevent the execution of the decree so far as is necessary to protect his interests. *Kavanagh's Estate*, 9 N. Y. Supp. 443, Ransom, Surr. In this case the court made the following direction: "The executor should set aside a sum sufficient to provide for a possible reversal on appeal and then proceed to carry out the directions of the decree so far as the same will not be affected by the success of the appellant."

§ 210. **Certain appeals not to stay execution of order or decree appealed from.**—It is expressly provided by § 2583 that,

> An appeal from a decree revoking the probate of a will, or revoking letters testamentary, letters of administration, or letters of guardianship; or from a decree or an order, suspending an executor, administrator, or guardian, or removing or suspending a testamentary trustee, or a freeholder, appointed to execute a decree, as prescribed in title fifth of this chapter, or appointing a

temporary administrator, or an appraiser of personal property, does not stay the execution of the decree or order appealed from. § 2583, **Code Civil Proc.**

It has been held that no stay can be secured under the decrees specified in this section, although the security provided by § 2577 has been given. In such cases while the undertaking for $250 must be given in order to perfect the appeal it does not operate as a stay as contemplated by § 2584, which commences "except as otherwise expressly prescribed in this article." See *Fernbacher* v. *Fernbacher*, 4 Dem. 227, Rollins, Surr. In the case last cited the learned Surrogate held as follows: "Upon careful examination of the various provisions of art. 4, tit. 2, ch. 18 of the Code of Civil Procedure, I am convinced that the operation of the decree removing the executors and trustees cannot be prevented by appeal; and that to make an appeal *otherwise effectual*, it is only necessary to give an undertaking, under § 2577, in the sum of $250. Section 2584 provides that a perfected appeal shall operate as a stay, '*except as otherwise* expressly prescribed in this article.'

"Now, it *is*, among other things, *expressly prescribed*, in § 2583, that an appeal from a decree suspending an executor, or removing or suspending a testamentary trustee, 'does *not* stay the execution of the decree or order appealed from.' "

Sections 2578 and 2579 make special provision for the exacting of extraordinary security in the cases in such sections referred to, and § 2580 indicates the mode of ascertaining the amount of the security to be exacted in *those* cases, and in those cases only. In the third paragraph of that section, which begins with the words, "In every other case it must be fixed by the Surrogate," the word *it* refers, not *generally* to "the sum specified in an undertaking," but *particularly* to "the sum specified in an undertaking executed as prescribed in either of the last two sections" (§§ 2578, 2579).

"In the cases provided for in §§ 2578 and 2579, the appeal is perfected by giving the special security, and thereupon proceedings are stayed by the operation of § 2584. In the cases for which § 2583 makes provision though the appeal is not effectual for any purpose until the $250 undertaking has been given, there is no provision for exacting or accepting any *other* undertaking than that, and the giving of *that* does not effectuate a stay." A distinction has, however, been drawn between cases where there is a final order or decree revoking letters and the cases where by an intermediate order an executor or administrator is directed to do some particular act within a given time in default of which the order provides that the letters shall be revoked and annulled. If within the time limited by the order the executor or administrator appeals and perfects his appeal by filing the undertaking required by § 2577, no decree having actually been made revoking his letters, and the order appealed from being incapable of operating to revoke them, at any rate until the time therein limited shall have expired, such appeal stays the operation of the order, in which case a decree revoking the letters cannot be entered. *Halsey* v. *Halsey*, 3

Dem. 196, Rollins, Surr. In the case just cited the learned Surrogate, upon an application made to him after the twenty days had expired (the executor having failed to comply with the order but having perfected his appeal to the Supreme Court), asking that a decree absolute be made revoking the letters of the disobedient executor, held that he could not in any event make such a decree because either the order already entered operated as a decree, in which case no further decree was necessary, or the perfecting of the appeal by the executor stayed all the proceedings and prevented the entry of the decree sought to be entered.

§ 211. **Appeal from probate decree—Limited effect.**—In order that the administration of an estate may not be injuriously affected by litigation, it is expressly provided by statute that, where a decree grants probate, or directs the issuance of letters testamentary, or letters of administration, the perfecting of an appeal from such a decree shall have only a limited effect. The section is carefully devised and contemplates merely the safeguarding of the property by the executor or administrator and is as follows:

> An appeal from a decree of a surrogate, admitting a will to probate, or granting letters testamentary, or letters of administration (or from an order or judgment of the appellate division of the supreme court affirming a decree of the surrogate admitting a will to probate, or granting letters testamentary, or letters of administration), does not stay the issuing of letters, where, in the opinion of the surrogate, manifested by an order, the preservation of the estate requires that the letters should issue. Letters so issued confer upon the person named therein all the powers and authority, and subject him to all the duties and liabilities of an executor or administrator in an ordinary case, except that they do not confer power to sell real property by virtue of a provision in the will, or to pay or satisfy a legacy, or to distribute the unbequeathed property of the decedent, until after the final determination of the appeal. And in case letters shall have been issued before such appeal, the executor or administrator, on a like order of the surrogate, may exercise the power and authority, subject to the duties, liabilities, and exceptions above provided. **§ 2582, Code Civil Proc.**
>
> (Clause in brackets is an amendment of 1900, after decision in *Matter of Gihon*, 48 App. Div. 598, affirming Surrogate Silkman's decision that section 2582 applied to appeals to the court of appeals as well as to appeals to the appellate division, 29 Misc. 273.)

While the object of this section is to preserve the estate for the benefit of the persons legally entitled thereto, there is no power in the Surrogate to authorize the executor or administrator to make expenditures, other than such as are necessary to conserve the estate; and so he cannot authorize the executors to disburse moneys in defense of the proceedings in the Appellate Court. *Swenarton* v. *Hancock*, 22 Hun, 43, 46; *Matter of Hopkins*, 95 App. Div. 57. However, reasonable expenses incurred by such administrator in sustaining the decree may be paid, and if the decree is sustained upon appeal will doubtless be eventually allowed upon the accounting. In the absence, however, of an order by the Surrogate directing letters to issue upon the ground that the preservation of the estate

requires this to be done, the appeal does operate as a stay. *Matter of Place*, 5 Dem. 228, Rollins, Surr.; *Matter of Choate*, 105 App. Div. 356. And although letters issued before such appeal, the appeal will operate as a stay until the making of an order by the Surrogate manifesting his opinion that the preservation of the estate demands the exercise by the executor or administrator of the limited authority provided by § 2582. If he refuse such an order, it will be on the ground that the preservation of the estate does not *at the time* require it. *Matter of Gihon*, 48 App. Div. 598. In this case such an application was at first refused, but later it was granted in order to ensure the sale of securities of fluctuating value, and the *investment* of the proceeds. It was held that such investment could not well be done by a temporary administrator, as the executors under the will were given such discretion. This limited power will continue until a final determination of the issue raised by the appeal, that is to say, until the Surrogate shall revoke the probate or letters and the decree of revocation is served upon the executor or administrator with notice of entry. See *Thompson* v. *Tracy*, 60 N. Y. 174; *Matter of Voorhis*, 1 N. Y. St. Rep. 306; *Bible Society* v. *Oakley*, 4 Dem. 450.

§ 212. **Limitations of executor's power specified.**—It is further to be noted that the executor or administrator is limited in his powers under his letters only by the express exceptions noted in § 2582 which are three: (*a*) he may not sell real property by virtue of a provision in the will, (*b*) he may not pay or satisfy a legacy, (*c*) he may not distribute unbequeathed property of the decedent.

These limits are the same as those fixed by ch. 603 of the Laws of 1871, which was in operation prior to the Code, which act was construed by the Court of Appeals in *Thompson* v. *Tracy*, 60 Hun, 174, 177, Rapallo, J., where the court uses the following language:

"It will be observed that the only limitations upon the powers of executors to whom letters are issued under this act are, that they shall not pay legacies, sell real estate or distribute the effects of the testator. It is for the Surrogate to determine whether, in his opinion, the protection and preservation of the estate require the issuing of such letters. His determination of that question is a necessary preliminary. It is a consideration to guide him in deciding whether or not to issue the letters, but not a limitation upon the powers of the executors. When the letters are granted they possess all the powers and are subject to all the duties and liabilities of executors, except as expressly restricted in the then specified particulars."

It was accordingly held, the contention having been made that the prohibition of the statute was against distributing the effects of the testator even to creditors, that there was nothing in the act preventing creditors from establishing their claims by prosecuting them to judgment against the executor during the pendency of the litigation. And moreover the court held that it was not the intention of the act to interfere with the payment of debts during the litigation for the reason that the

rights of a creditor could not be affected by the determination of the controversy as to the will one way or the other; their rights being independent of the will, and superior to those of persons claiming under or contesting it. If the appeal ends in a reversal of the probate decree, the executor is *functus* pending further probate or other proceedings unless under § 2582 an order be made continuing his powers to preserve the estate. *Matter of Hopkins*, 95 App. Div. 57.

§ 213. **Formalities of undertaking.**—Sections 2580 and 2581 relate to the form and the amount of the undertaking required to be given on appeal from a Surrogate's decree. Section 2580 is as follows:

> *Amount of undertaking; how fixed.*
>
> The sum specified in an undertaking, executed as described in either of the last two sections, must, where the appeal is taken from a decree directing the payment, depositing, or distribution of money, be not less than twice the sum directed to be paid, deposited or distributed. Where the appeal is taken from an order granting leave to issue an execution, it must be not less than twice the sum, to collect which the execution may issue. In every other case, it must be fixed by the surrogate, or by a judge of the appellate court, who may require proof, by affidavit, of the value of any property, or of such other facts as he deems proper. The respondent may apply to the appellate court, upon notice, for an order requiring the appellant to increase the sum so fixed. If such an order is granted, and the appellant makes default in giving the new undertaking, the appeal may be dismissed or the stay dissolved, as the case requires. **§ 2580, Code Civil Proc.**

But § 2580 refers only to appeals taken by the persons described in the two sections preceding, that is to say, an executor, administrator, testamentary trustee, guardian, or some other person appointed by the Surrogate's Court (or, in contempt cases, including attorney or counsel). In all cases other than those covered by §§ 2578 and 2579, the security to perfect the appeal is only required to be an undertaking for $250. *Matter of Arkenburg, No.* 1, 11 App. Div. 44, affirming 17 Misc. 543, on opinion of Tompkins, Surr. This was a case where a decree had been made settling the account of certain executors; some of the legatees appealed, the executor although a legatee under the will did not appeal, the appellants gave an undertaking for $250 to perfect their appeal. Thereafter the executor moved for distribution under the decree unless a proper undertaking should be given to stay the execution and enforcement of the decree. The learned Surrogate, whose opinion was adopted by the Appellate Division in deciding the case, says:

The question is: "Does the undertaking already given effect a stay?

"Section 2577 of the Code provides for the undertaking which has been given and which is necessary to render the appeal effectual.

"The only other undertaking provided for on an appeal from a decree of the Surrogate's Court is in cases of appeals by executors, administrators, trustees, guardians or other persons appointed by the Surrogate's Court.

Then to stay the enforcement of the decree there must be an additional undertaking.

"Counsel for the executor and the motion insists that § 2580 gives the Surrogate discretion to require an additional undertaking and fix the amount thereof; these are the words relied upon: 'In every other case, it (the amount) must be fixed by the Surrogate, or by a judge of the Appellate Court, who may require proof,' etc.

"These words, however, clearly refer to undertakings required of executors, administrators, etc., and not to any other appellant.

"The case of *Steinback* v. *Diepenbrock*, 5 App. Div. 208, cited in support of the motion, is not applicable; there the appeal was from a judgment of the Supreme Court.

"There is authority for requiring an undertaking to indemnify a respondent against loss and damage, in such a case, that is not found in the provisions in reference to appeals from Surrogates' Courts.

"My conclusion is that unless the appeal is by the executor, administrator, etc., no undertaking can be required except the one for $250 required by § 2577, and that the giving of that undertaking on his appeal perfects the appeal, and hence under § 2584 operates as a stay of proceedings to enforce the decree."

§ 214. **Same.**—The Surrogate must fix the amount of the additional undertaking. If the party himself undertake to determine what is the amount in controversy his bond may on motion be vacated. *Matter of Dittrich*, 52 Misc. 277. In this case the Surrogate directed the removal of A and ordered her to account. The costs were $70. She gave one bond for $250 and one to secure the $70 costs as being the "amount in controversy." Held on motion to vacate it as inadequate and based on false recital of fact, that it must be vacated and that the amount of the new bond would be determined on formal application upon notice.

§ 215. **Requisites of undertaking.**

> An undertaking, given as prescribed in the last four sections, must be to the people of the state; must contain the name and residence of each of the sureties thereto; must be approved by the surrogate or a judge of the appellate court; and must be filed in the surrogate's office. Except as otherwise specially prescribed, the filing of a proper undertaking, and service of the notice of appeal, perfect the appeal. The surrogate may, at any time, in his discretion, make an order, authorizing any person aggrieved to bring an action upon the undertaking, in his own name, or in the name of the people. Where it is brought in the name of the people, the damages collected must be paid over to the surrogate, and distributed by him, as justice requires. **§ 2581, Code Civil Proc.**

A precedent for the undertaking is given in § 204, *ante*.

§ 216. **Effect of perfecting appeal on jurisdiction.**—The Surrogate's Court as soon as the appeal has been perfected no longer has jurisdiction over the matter involved in the appeal, *Matter of Murphy*, 79 App. Div. 541, consequently proceedings relating to the appeal must be had in the

Appellate Court, for example, the bringing in of a person not a party who is required to be a party by § 2573 (*q. v.*) must be done by an order of the Appellate Court, if such action is had after the appeal is taken; in which case the Appellate Court prescribes the mode of bringing in such persons by publication, by personal service or otherwise. So a motion to dismiss the appeal either for the absence of necessary parties or for any other sufficient reason must be made in the Appellate Division. *Patterson* v. *Hamilton*, 26 Hun, 665. The Surrogate's Court has no power to entertain the application for an order allowing the intervention of new parties on appeal; nor, where the appeal involves the whole proceeding (as an appeal upon a contested will) can he do anything in regard to the litigation except to conserve the estate as provided for in § 2582. *Matter of Dunn*, 1 Dem. 294. In the *Murphy* case, *supra*, the Surrogate, pending an appeal from his probate decree, assumed to open the decree and grant a new hearing. Held he had no jurisdiction to do so. But, if the appeal does not involve the whole proceeding or subject the whole estate to the Appellate Court he may act, as by appointing a temporary administrator. See *Matter of Blair*, 60 Hun, 523, quoted in § 218 below, *Matter of Patterson*, 63 Hun, 529, 531. So, by § 2580, any application for an increase of the security given upon the appeal must be made to the Appellate Court upon notice. So, if the undertaking filed by the appellant appears to be insufficient, the Surrogate has no jurisdiction, but the proper remedy is either for the respondent to move the Appellate Court for a dismissal of the appeal, or for the appellant to apply to the Appellate Court for leave under § 1303 (which is made applicable to the Surrogate's Court by § 2575), to file an amended undertaking. *Du Bois* v. *Brown*, 1 Dem. 317, 334, Coffin, Surr.

§ 217. **Justification.**—In the absence of local rules as XVI and XVII in New York County the only authority for justification of sureties is in the language of § 2580 which gives the Surrogate power when he fixes the amount of the bond to take proof by affidavit, "of the value of any property, or of such other facts as he deems proper."

If sureties become insolvent, the remedy is to move for a new or additional bond. *Matter of Sheldon*, 117 App. Div. 357. This is under § 1308 made applicable hereto by § 2575 above quoted. The court also held that § 2597 applies to any surety on any bond taken under ch. 18 of the Code. Section 2580 also gives the Appellate Court power on notice to order the increase of the undertaking, and gives a judge of the Appellate Court the same power as the Surrogate to fix it at the outset. The following are the local rules in New York County.

> XVI. The respondent, on any appeal from a decree or order of this court, may, within 10 days after the filing of the undertaking required on such appeal, serve upon the attorney for the appellant a written notice that he excepts to the sufficiency of the sureties therein; whereupon, and within ten days thereafter, such sureties, or other sureties in a new undertaking to the same effect, must justify before the Surrogate or the chief clerk on five days' notice of such justification, to be served upon the respondent's attorney, by

each surety appearing in person before said Surrogate or chief clerk and submitting to an examination, on oath, on the part of the appellant, touching his sufficiency. If such sureties shall be found sufficient, said Surrogate or chief clerk will endorse an allowance thereof upon the undertaking or a copy thereof, and a notice of such allowance shall be served upon the attorney for the exceptant; and the effect of any failure to so justify and procure such allowance shall be to avoid the undertaking.

XVII. Wherever a bond with sureties shall be executed by an executor, administrator, guardian or other trustee, any person interested in the estate, or in behalf of such guardian may apply to the Surrogate for an order requiring the sureties in said bond to appear before him, or his chief clerk, and submit to an examination under oath as to their sufficiency as such sureties. If it shall appear to the satisfaction of the Surrogate that such examination was necessary he will make an order, prescribing the time and place where such examination shall take place, a copy of which order shall be served upon such executor, administrator, guardian or trustee at least five days before the time fixed for such examination. If on such examination the Surrogate shall be satisfied of the sufficiency of such surety he will endorse his approval upon the bond or a copy thereof; and in case such surety or such examination shall not, in the opinion of the surrogate, be sufficient, the Surrogate will make an order requiring the substitution of new sureties, within five days after the service of a copy of said order from the executor, administrator, guardian or other trustee, or his attorney if he shall have appeared by attorney on such examination.

§ 218. **Appeal from verdict after trial by jury in probate cases.**—Where either of the Surrogates of New York County has made an order transferring to the Supreme Court any special proceeding for the probate of a will pending before him, under § 2547, the Code makes particular provision for the manner in which such verdict is to be reviewed. Such verdict it is provided by § 2547 (in part)

can be reviewed only by a motion for a new trial upon the minutes of the judge. Such motion must be made within ten days after the verdict is rendered. A new trial may be granted upon exceptions, or because the verdict was rendered upon insufficient evidence or is against the evidence or the weight of evidence. An appeal lies to the appellate division of the supreme court from the order granting or refusing a new trial. An appeal must be taken by serving written notice of appeal upon the clerk of the court, and upon the attorney for the respondent, within ten days after the service upon the attorney for the appellant of the order appealed from, and of written notice of the entry thereof. The appeal shall be heard upon a case containing all the evidence; and an error in the admission or exclusion of evidence, or in any other ruling or direction of the judge upon the trial may, in the discretion of the court, be disregarded if substantial justice does not require that there should be a new trial.

It is to be noted in this connection that while the matter transferred is pending in the court to which it is transferred or in the court to which it may be appealed, the Surrogate is only deprived of the power to try the

issues referred. His jurisdiction over the estate continues. *Matter of Blair*, 60 Hun, 523, Barrett, J. In the case just cited where a Surrogate had transferred a probate proceeding to the Court of Common Pleas and an appeal had been taken from the verdict of the jury, and pending the appeal an application was made to the Surrogate for the appointment of a temporary administrator, the General Term held as follows:

"We think the Surrogate was not, by the transfer in question, divested of any of the powers conferred upon him by statute except such powers as by force of the transfer were expressly conferred upon the Court of Common Pleas. He could doubtless no longer try the issues of fact arising in the special proceeding for the probate of the will. That power, by force of his order of transfer, at once became vested in the Court of Common Pleas. But that power alone was transferred, and that power alone became so vested. The transfer of such other powers as are vested by law in the Surrogate's Court, and are not necessary to the due execution of the power transferred, cannot be implied. Thus the authority of the Court of Common Pleas, by force of the order of transfer, is limited to the trial of the issues of fact, and to certain appellate proceedings which may follow. The only implied power is that which is necessary to secure a proper and adequate trial of the issues of fact, and a proper and adequate hearing thereafter of the appellate proceedings provided for. The authority of the Court of Common Pleas under the order of transfer ends when it finally certifies to the Surrogate's Court the verdict upon the issues of fact. If the verdict sustains the will, the latter court may then admit it to probate. The Court of Common Pleas is nowhere authorized by § 2547 to perform that function. Under this transfer, standing alone, the Court of Common Pleas acquires none of the general statutory jurisdiction of a Surrogate's Court any more than would the Superior Court if § 2547 of the Code had specified that tribunal as the transferee. The application for the appointment of a temporary administrator is no part of the proceeding for the probate of the will. It is an independent proceeding for the preservation of the estate (pending litigation) authorized by § 2668 of the Code of Civil Procedure, and resting in the discretion of the Surrogate. That discretion may be exercised where delay necessarily occurs in the granting of letters testamentary or letters of administration, not only in consequence of a contest with regard to the probate of a will, but *for any cause whatever*. This would seem to be decisive of the present question."

It was also held in the same case that the provisions in § 2547 to the effect that after the proceedings have been certified back to the Surrogate's Court, "thereafter all proceedings relating to the will and to the estate of the decedent shall be had in the Surrogate's Court," was not to be taken as meaning that prior to such certification of the verdict, proceedings relating to the estate of the decedent had been transferred to the Supreme or County Court, but that the expression, "the estate of the decedent," was plainly inserted for abundant caution.

"It simply affirms the natural status effected by the return of the ver-

dict to the Surrogate's Court, and places that court in precisely the same position as though the Surrogate himself had decided the contest for probate."

§ 219. **Review of verdict after trial by jury in proceedings for sale of decedent's real estate.**—Where any Surrogate in the State has made an order directing the trial by jury at a trial term of the Supreme Court to be held within his county or the County Court of the county, of any controverted question of fact arising in a special proceeding for the disposition of real property of a decedent under § 2547, the method of review differs slightly from that noted in the previous section for the review of the verdict had upon the transfer of a probate proceeding to the Supreme Court, by either of the Surrogates of New York County. The practice is covered by § 2548, which is as follows:

> *Trial by jury; how reviewed.*
>
> A trial by jury pursuant to an order made in a proceeding for the disposition of the real property of a decedent, made as prescribed in the last section, can be reviewed in the first instance, only upon a motion for a new trial. A new trial may be granted by the surrogate of the court in which the trial took place, or, if it took place at a trial term of the supreme court by the supreme court, in a case where a new trial of specific questions of fact, tried by a jury pursuant to an order for such trial made in an action, would be granted. The verdict of the jury must be certified to the surrogate's court by the clerk of the court in which the trial took place. **§ 2548, Code Civil Proc.**

It is to be noted in the first place that in proceedings of this character, the order for a new trial may be granted by the Surrogate as well as by the court empaneling the jury; the grounds for such new trial are the same as those upon which a new trial would be granted in an action in the Supreme Court. The Surrogate of the county of New York has no authority under the prior § 2547 to entertain a motion for a new trial upon a verdict in a special proceeding for the probate of a will transferred to the Supreme Court. *Matter of Patterson,* 63 Hun, 529. The practitioner should bear in mind the distinction between a trial by jury ordered by a Surrogate, and a trial by jury of issues directed by an Appellate Tribunal on an appeal from the Surrogate's decree; and for this reason, that the motion for a new trial must be made in the court in which the proceeding is pending, that is of course, unless there is express statutory authority for making the application to any other judge or court. So in the case mentioned in § 2548, where the power to grant new trials is conferred upon the Surrogate, the Surrogate retains jurisdiction of the proceedings, the direction for the trial of the issues proceeds from the Surrogate, the clerk of the court in which the trial took place is required to certify the verdict of the jury to the Surrogate's Court for further proceedings thereon, whether the trial was had in a County Court or a Circuit Court. On the other hand, where the Appellate Division directs a new trial or a trial by jury of specific issues it would be an anomaly, if, although the Surrogate had lost all jurisdiction of the particular proceeding by the appeal to the

Supreme Court, he could nevertheless entertain a motion for a new trial. *Matter of Patterson,* 63 Hun, 1st Dep. 529, 532. The distinction, therefore, is that the only occasion upon which a Surrogate can entertain a motion for a new trial, is after the verdict of a jury upon a controverted question of fact arising in a special proceeding for the disposition of the real property of the decedent, or upon a probate case in New York County under § 2547, and even in such a case the motion for a new trial may also be made before the court in which the trial took place or the Supreme Court. In all other cases where a trial by jury has been ordered, the motion for a new trial should now be made in the Supreme Court. See discussion below. By § 2549 it is provided that

> An appeal may be taken from an order, made upon a motion for a new trial, as prescribed in the last section, as if the order had been made in an action, and with like effect. Costs of such an appeal may be awarded by the appellate court, as if the appeal was from an order or decree of the surrogate's court.

§ 220. **Award of jury trial upon reversal in probate cases.**—Section 2588 provides:

> *Award of jury trial upon reversal in probate cases.*
> Where the reversal or modification of a decree by the appellate court is founded upon a question of fact, the appellate court must, if the appeal was taken from a decree made upon a petition to admit a will to probate, or to revoke the probate of a will, make an order, directing the trial, by a jury, of the material questions of fact, arising upon the issues between the parties. Such an order must state, distinctly and plainly, the questions of fact to be tried; and must direct the trial to take place, either at a trial term of the supreme court specified in the order; or in the county court of the county of the surrogate. After the trial, a new trial may be granted, as prescribed in section two thousand five hundred and forty-eight of this act. **§ 2588, Code Civil Proc.**

The duty of the Appellate Division to direct a jury trial under this section, has been clearly adjudicated. It arises, *first,* where the appeal was taken from a decree made upon a petition, (*a*) to admit a will to probate, or (*b*) to revoke the probate of a will. It arises, *second,* where an Appellate Division reverses or modifies such decree. It arises, *third,* where such action is founded upon a question of fact. Hence, where the General Term reversed a Surrogate's decree refusing probate, and the reversal was based upon the facts, it was held (*Matter of Laudy,* 148 N. Y. 403, 409), that the court below could not on such reversal direct the Surrogate to admit the will to probate, but must direct "that a trial by jury be had at a trial term of the Supreme Court in the county of New York" of the specific questions of fact as to which they doubted the correctness of the Surrogate's findings.

It held further that the exception to the rule was where the evidence disclosed by the record is such that in case of a trial before a jury the

court could properly take the facts from the jury and determine the question as one of law. (See history of the practice in this case stated at p. 431 of 161 N. Y. same name.)

§ 221. **Test of necessity for jury trial.**—The test is stated to be (*a*) the existence of a question of fact; (*b*) presented by evidence not free from doubt; (*c*) result reached by Surrogate not entirely satisfactory. See *Matter of Burtis*, 107 App. Div. 51. See for cases where trial by jury was ordered: *Matter of Coe*, 47 App. Div. 177, 181, where court was in doubt whether will was the "free act of a competent testatrix;" *Matter of Drake*, where court was in doubt as to testamentary capacity, and where the court framed the issues to be tried. See also *Matter of Iredale*, 53 App. Div. 45, 51; *Burger* v. *Burger*, 111 N. Y. 523, 526; *Matter of Pike*, 83 Hun, 327, 331; *Matter of Van Houten*, 11 App. Div. 208; *Matter of Dixon*, 42 App. Div. 481; *Matter of Tompkins*, 69 App. Div. 474, citing *Matter of Will of Ellick*, 19 Wkly. Dig. 231; *Matter of Hannah*, 11 N. Y. St. Rep. 327, 331, citing in turn, *Howland* v. *Taylor*, 53 N. Y. 627; *Matter of Lansing*, 17 N. Y. St. Rep. 440; *Van Orman* v. *Van Orman*, 34 N. Y. St. Rep. 824; *Sutton* v. *Ray*, 72 N. Y. 482, 484. The order of the Appellate Court is the origin and test of the questions the jury must try and should specify them. *Matter of Tompkins, supra; Matter of Rayner*, 93 App. Div. 114; *Matter of Shannon, Ibid.*, 373; *Matter of Warnock*, 103 App. Div. 61; *Matter of Finck*, 115 App. Div. 871.

§ 222. **The new trial.**—The closing provision of § 2588 has been construed by the Appellate Division. *Matter of Patterson*, 63 Hun, 529; *Matter of Laudy*, 14 App. Div. 160. In the case first cited it was held that the Surrogate had no power to entertain the motion for a new trial by reason of the reference to § 2548 in § 2588. The court held as follows:

"Section 2588 relates to the practice which shall be followed upon a reversal or modification of a decree of the Surrogate, by the Supreme Court, upon a question of fact in a probate proceeding. It is provided that the court *must*, in such a case, direct a trial by a jury of the material questions of fact arising upon the issues between the parties; and that it must direct the trial to take place either at a Circuit Court specified in the order, or in the Country Court of the county of the Surrogate, or in the City of New York in the Court of Common Pleas.

"The question is now presented as to how, after such a trial, the results of that trial are to be reviewed. And it is provided for explicitly by the last clause of § 2588, which provides that a new trial may be granted as prescribed in § 2548. And it is upon the construction which is to be placed upon this clause that the question here presented, as to the proper practice, must be determined.

"In determining this question it is necessary, in the first place, to bear in mind the effect of an appeal to the Supreme Court from the Surrogate's Court. A probate proceeding by such appeal is removed into the Supreme Court. The Supreme Court becomes a court of original jurisdiction, and has the same power to decide questions of fact which the Surrogate had,

and may, in its discretion, receive further or documentary evidence and appoint a referee. (Section 2586.) By § 2587 the Supreme Court may reverse, affirm or modify the decree or order appealed from, and each intermediate order specified in the notice of appeal, which it is authorized by law to review as to any or all of the parties, and it may, if necessary or proper, grant a new trial or hearing. And by § 2585 it is provided that the judgment roll containing the judgment of the Appellate Court shall be filed in the office of the clerk of the county of the Surrogate from whom the appeal is taken. And the sole authority which the Surrogate has for his subsequent action in the case is derived from the judgment roll so filed. It is thus apparent that when once an appeal of this kind is taken the whole proceeding is in the Supreme Court, and remains in such court until formerly remitted back to the Surrogate; and until it is so remitted the orders and decrees in the proceeding must be orders and decrees of the Supreme Court. We think, therefore, that the only portion of § 2548 which was intended to be referred to in § 2588 was the case in which a new trial might be granted, and not the tribunal which should ascertain the application therefor, the particular practice relating to such motions being governed by the other provisions of the Code in reference to actions or proceedings pending in the Supreme Court. And this view is supported by the fact that § 2548, where it speaks of the tribunals which are to entertain the motion, expressly refers to the cases provided for in § 2547. In those cases the proceedings are all in the Surrogate's Court, and the direction for the trial of the issues proceeds from the Surrogate's Court; and even where they are sent to a Circuit Court the motion for a new trial may be made before the Surrogate or in the Supreme Court; in the Supreme Court, because the Circuit Court has no power to entertain motions for new trials except upon the judge's minutes, and such motions are not appropriate in a case where issues have been framed in another court and sent by such court to the Circuit Court for trial. In a probate case, where issues have been framed by the Supreme Court and sent to a Circuit Court for trial, it never has been claimed that the Surrogate had any further jurisdiction of the case except to proceed in accordance with the final judgment in the case."

In *Matter of Laudy, supra*, the Appellate Division of the First Department held, that the motion for a new trial after a trial by jury under § 2548, incorporated by reference, should be made precisely as is required where a new trial of specific questions of fact tried by a jury pursuant to an order for such trial made in an *action* would be granted. The court held that § 1003 and § 999 were applicable, and that consequently a motion for a new trial could be made upon the minutes of the court at the same term at which the verdict is rendered. But that under § 1003, "where the judge who presided at the trial neither entertains a motion for a new trial nor directs exceptions taken at the trial, to be heard at a term of the Appellate Division of the Supreme Court, a motion for a new trial can be made only at the term where the motion for final judgment is made or

the remaining issues of fact are tried as the case requires." *Matter of Laudy*, 14 App. Div. 160, 162. See also *Matter of Clark*, 40 Hun, 233; *Webster* v. *Cole*, 17 Hun, 507; *Matter of Drake*, 45 App. Div. 206, 215; *Matter of Dixon*, 42 App. Div. 481.

§ 223. **Practice upon the appeal.**—The practice after the Appellate Court has decided the appeal is covered by § 2585, which is as follows:

> *Appeal; proceedings thereupon.*
> In the appellate division of the supreme court the order made upon an appeal from a decree or an order of a surrogate's court must be entered with the clerk of the appellate division, and a certified copy thereof annexed to the papers transmitted from the court below upon which the appeal was heard, must be transmitted to the court from which the appeal was taken, and the court below shall enter the judgment or order necessary to carry the determination of the appellate division into effect. **§ 2585, Code Civil Proc.**

It is only to be noted in this connection, that the certification of the papers to the court below, or the entry by such court of the judgment or order necessary to carry the determination of the Appellate Division into effect, is not required to be done before the party aggrieved by the determination of the Appellate Court can appeal to the Court of Appeals; the appeal can be taken from the order of the Appellate Division as soon as it has been entered and served with notice of entry. *Libby* v. *Mason*, 112 N. Y. 528. But where the proceedings are remitted by the Appellate Court to the Surrogate for a rehearing or for further action, this rehearing or action by the Surrogate cannot be had until the papers have been certified back to the Surrogate's Court; and so, where an appeal has been had to the Court of Appeals, which directs a rehearing by the Surrogate, the rehearing cannot proceed until the remittitur of the Court of Appeals has been filed and the Supreme Court has entered a formal decree thereon. *Wright* v. *Wright*, 3 Redf. 325, 327, Coffin, Surr. (See below Appeals to Court of Appeals).

§ 224. **Judgment or order upon appeal.**—The form of the determination of the Appellate Court is prescribed by § 2587, which is as follows:

> The appellate court may reverse, affirm, or modify the decree or order appealed from, and each intermediate order, specified in the notice of appeal, which it is authorized by law to review, and as to any or all of the parties; and it may, if necessary or proper, grant a new trial or hearing. The decree or order appealed from may be enforced, or restitution may be awarded, as the case requires, as prescribed in title first of chapter twelfth of this act, with respect to an appeal from a judgment. **§ 2587, Code Civil Proc.**

The sections of ch. 12 which are made applicable are §§ 1319 and 1320, which provide the mode of enforcing a judgment or order, either modified or affirmed. These sections are as follows:

> *Mode of enforcing affirmed or modified judgment.*
> Where a judgment from which an appeal has been taken, from one court to another, is wholly or partly affirmed, or is modified, upon the appeal, it

must be enforced, by the court in which it was rendered, or to the exten permitted by the determination of the appellate court, as if the appeal there from had not been taken. § **1319, Code Civil Proc.**

See *Matter of Cook*, 125 App. Div. 114, holding that after the Court of Ap peals has directed the modification of a Surrogate's decree he has no powe to change the decision formerly made by him except in conformity with th superior tribunal's direction.

Mode of enforcing affirmed or modified order.

Where a final order, from which an appeal has been taken, from one cour to another, as prescribed in title fifth of this chapter, is wholly or partly affirmed, or is modified, upon the appeal, the appellate court may enforce its order, or may direct the proceedings to be remitted, for the purpose to the court below, or to the judge who made the order appealed from. § **1320 Code Civil Proc.**

§ 225. **Partial reversal and partial affirmance.**— It has been questioned whether, when there are several defendants, the Appellate Court has authority to reverse a decree in part and to affirm it in part. The rule seems to be well settled that upon an appeal from a judgment which is entire and against several defendants, the Appellate Court must either totally affirm or reverse, both as to the recovery and as to all the parties. But in cases where there are separate and distinct judgments, or where an error exists as to a separate claim or defense, which relates only to a transaction between the plaintiff and one of the defendants, the judgment may be reversed as to such a claim or defense, and only as to the parties interested therein, and affirmed as to the remainder. The taking of "piecemeal" appeals will not be tolerated. See *Matter of Cook*, 125 App. Div. 114, aff'd 194 N. Y. 400. These rules are not of recent origin. They existed and were practically the same at common law, under the Revised Statutes and the Code of Civil Procedure. *Altman* v. *Hofeller*, 152 N. Y. 498, 504, citing *Richards* v. *Walton*, 12 Johns. 434; *Arnold* v. *Sanford*, 14 Johns. 417, 425; *Van Bokkelin* v. *Ingersoll*, 5 Wend. 315; *Shelden* v. *Quinlan*, 5 Hill, 441; *Farrell* v. *Calkins*, 10 Barb. 348; *Story* v. *N. Y. & Harlem R. R. Co.*, 6 N. Y. 85, 89; *Wolstenholme* v. *Wolstenholme File Mfg. Co.*, 64 N. Y. 272; *Goodsell* v. *Western Union Tel. Co.*, 109 N. Y. 147; *Board of Underwriters* v. *Nat. Bank*, 146 N. Y. 64. See discussion of cases cited, at pages 504 to 506.

§ 226. **Appeals to the Court of Appeals.**—There is in art. 4, of ch. 18, no provision as to appeals to the Court of Appeals; they are regulated by § 190 of the Code, *q. v.* Hence the Court of Appeals only reviews the action of the Appellate Divisions, and that on appeals from decrees or final orders.

§ 227. **Final orders.**—Under this section the following decisions have been made as to what is or is not a final order of a Surrogate. An order settling an intermediate account of executor, and awarding commissions, and determining the rights of the parties to the extent that it actually adjudged them, is an order finally determining a special proceeding, and

an appeal will lie to the Court of Appeals as of right from an order of the Appellate Division affirming the same. *Matter of Prentice*, 160 N. Y. 568. So is an order which effectually puts out of court an attorney asserting his lien in the Surrogate's Court. *Matter of Fitzsimmons*, 174 N. Y. 15. See also *Matter of Regan*, 167 N. Y. 338. An order of a Surrogate directing an executor or administrator to make and file an account is not a final order. *Matter of Callahan*, 139 N. Y. 51. Nor is his order denying a motion to open a decree and require a further accounting. *Matter of Small*, 158 N. Y. 128, citing *Van Arsdale* v. *King*, 155 N. Y. 325; *City of Johnstown* v. *Wade*, 157 N. Y. 50. The order of the Surrogate fixing appraiser's fees is a final order. *Matter of Harriot*, 145 N. Y. 540. An order of a Surrogate denying a motion to direct an executor to institute legal proceedings is not a final order but is merely the exercise of his discretion, and cannot be reviewed in the Court of Appeals. *Sherman* v. *Page*, 85 N. Y. 123. So also a Surrogate's order vacating a stay on probate, denying an application for issuance of letters testamentary, and relief from a stipulation of renunciation by an executor, and granting letters of administration c. t. a. is a discretionary order and not reviewable in the Court of Appeals. *Matter of Baldwin*, 158 N. Y. 713. An order fixing the amount of a creditor's claim is a final order. *Mead* v. *Jenkins*, 4 Dem. 85. So where a Surrogate made an order denying a motion to vacate certain decrees made upon executor's accountings and the General Term reversed his decree and vacated the decree which he had refused to vacate, held that it was a final order and reviewable in the Court of Appeals. *Matter of Tilden*, 98 N. Y. 434. But where a Surrogate's order denies an application that an executrix be required to account and on appeal the General Term reversed such order, and remitted the proceedings to the Surrogate for the purpose of accounting prayed for, held that this was not such a final order as to be reviewable in the Court of Appeals. *Matter of Latz*, 110 N. Y. 661.

§ 228. **Practice on such appeals.**—When appeal is taken to the Court of Appeals from judgment of the Appellate Division affirming or reversing a Surrogate's decree, the appeal may be noticed on the calendar for appeals from orders and heard as a motion.

While the Court of Appeals reviews the act of the court immediately below, and no appeal lies directly from the Surrogate's Court to the Court of Appeals, *Matter of Union Trust Co.*, 172 N. Y. 494, yet the clerical practice is just as if it could so lie. For, after the remittitur is sent by the Appellate Division to the Surrogate, the return to the Court of Appeals is certified by the Surrogate's Clerk, the notice of appeal is served on him,* and the remittitur of the Court of Appeals is sent back to him so that the clerk of the Appellate Division has no further relation to the matter, except in the one case when the appeal is on questions certified to the Court of Appeals.

It must be borne in mind that the Court of Appeals will apply to appeals coming up from the Surrogate's Court the same rules it does to other

*See § 1300, Code Civ. Proc., amended 1909.

appeals. Thus an order of the Appellate Division reversing a Surrogate's decree revoking probate of a will *which does not state that the reversal was upon the facts* must be reversed if the record discloses no error of law. *Matter of Keefe*, 164 N. Y. 352, rev'g 47 App. Div. 214, applying §§ 1338, 1361, and citing *Matter of Chapman*, 162 N. Y. 456; *Wetmore* v. *Wetmore*, 162 N. Y. 503; *People* v. *Barker*, 152 N. Y. 417. See also *Matter of Hall*, 164 N. Y. 196; *Matter of Barefield*, 177 N. Y. 387.

In such a case the Court of Appeals can examine the record only to ascertain if any of the findings of fact are unsupported by evidence, thereby disclosing legal error. *Matter of Keefe, supra*, and cases cited at p. 354.

In *Nat'l Harrow Co.* v. *Bement & Sons*, 163 N. Y. 505, 508, the court laid down the rule, "When the Appellate Division reverses on the law we have but three questions open to us here, viz.: 1. The correctness of the rulings as to the admission or rejection of evidence; 2. Whether any material finding of fact is without evidence to support it; 3. Whether the conclusions of law are supported by the facts found." Where the Appellate Division reverses a Surrogate's decree upon questions of law only, an appeal may be taken to the Court of Appeals from its decision. *Kingsland* v. *Murray*, 133 N. Y. 170, 177. Where the evidence is conflicting, or where it is of such a nature that diverse inferences may be drawn therefrom, the decisions of the Appellate Division upon questions of fact cannot be reviewed in the Court of Appeals. *Matter of Ross*, 87 N. Y. 514. Section 1337 of the Code provides that a question of fact arising upon conflicting evidence cannot be determined upon an appeal to the Court of Appeals, unless where special provision for the determination thereof is made by law. No special provision is found in the Code authorizing a review in the Court of Appeals of a question of fact in any special proceeding or upon any appeal from the Surrogate's Court. *Kingsland* v. *Murray, supra*, opinion of Earl, Ch. J., at page 178.

Where the Appellate Division reverses on both facts and law the Court of Appeals has no jurisdiction. *Matter of Totten*, 179 N. Y. 112. But in this case the court asserted jurisdiction, holding that the Appellate Division "cannot create a question of fact" by its mere say-so. So they examined the record, held the inferences from uncontradicted evidence so pointed to one conclusion and the only one a reasonable mind could reach, hence there was no question of fact!

§ 229. **Findings below.**—In the *Barefield* case, above cited, there were no findings of facts. The order of reversal by the Appellate Division did not state it was on the facts. The Court of Appeals held it must be presumed that all facts warranted by the evidence, and necessary to support the determination of the trial court were duly found, citing, *People* v. *Adirondack Ry. Co.*, 160 N. Y. 225; *Gannon* v. *McGuire*, 160 N. Y. 476.

If exceptions are made to the Surrogate's conclusions of law underlying a decree, which is affirmed by the Appellate Division, questions of law are thereby raised which the Court of Appeals can review. *Matter of Killan*, 172 N. Y. 547.

§ 230. **Appeal must be direct from Appellate Division.**—It is not possible, after action by the Appellate Division modifying a Surrogate's decree, to appeal directly to the Court of Appeals from that decree duly modified; nor can such an appeal be regularized by stating in the notice that the modifying action of the Appellate Division will be brought up for review, for it is not an "intermediate order" in the sense of the Code. Either an appeal must be taken directly from the order of the Appellate Division; or the device resorted to of modifying the Surrogate's decree, taking a second appeal to the Appellate Division which will affirm *pro forma*, and thus appealing to the Court of Appeals from this "final" judgment of the Appellate Division. So held in *Matter of Union Trust Co.*, 172 N. Y. 494, citing *Ansonia Brass & Copper Co.* v. *Conner*, 98 N. Y. 574.

§ 231. **Remittitur from Court of Appeals.**—When the Court of Appeals has decided the appeal its remittitur is sent down. It should be filed in the Surrogate's court, *Matter of Hopkins*, 41 Misc. 83, aff'd 95 App. Div. 57, when the usual order is then made making the determination of the Court of Appeals that of the Surrogate. This is made on notice. Baylies, New Trials & Appeals, 2d Ed., p. 368. Perplexing questions may arise. For this last order of the Surrogate must *conform strictly to the remittitur*, which, if erroneous, can only be amended by the Court of Appeals on notice. *Zapf* v. *Carter*, 90 App. Div. 407. The court below cannot make any change. *Parish* v. *Parish*, 87 App. Div. 430. Yet, on the other hand, the Surrogate can make no order he could not originally have made. Thus in the *Hopkins* case above, Silkman, Surr., on the remittitur made his order accordingly "reversing the Appellate Division and ordering a jury trial." Held this was unauthorized and surplusage.

In the same case, the Surrogate queried whether a jury trial could be had under § 2588 under the decision of the Court of Appeals since its reversal is presumed to be on questions of law and that section only authorizes such trial upon a reversal on the facts. The Appellate Division does not pass on this point directly, but doubtless the Court of Appeals has power on such an appeal to make the determination which the Appellate Division *ought to have made.*

CHAPTER VI

COSTS AND ALLOWANCES

§ 232. **Costs in Surrogates' Courts.**—Costs in Surrogates' Courts are awarded either by order or by decree. An order is a mere direction of a Surrogate's Court made or entered in writing and not included in a decree. Code Civ. Proc. § 2556. A decree or final order as it may be called, is a final determination of the rights of a party to a special proceeding in a Surrogate's Court. Code Civ. Proc. § 2550. The costs allowed by an order are determined by the same rules, as to amount and method of collection, as in the case of an order made by the Supreme Court in an action (§ 2556). Thus, the costs which may be imposed upon the granting or denial of a motion being $10.00 in the Supreme Court, a party to a proceeding in a Surrogate's Court cannot be permitted to increase the amount of his costs, by framing his order as a decree. *Pease* v. *Egan*, 3 Dem. 320.

Where petitioner moved to open a decree and his application was denied, Rollins, Surr., held, that while the decree sought to be vacated was a final determination within the meaning of § 2550, the refusal to disturb it must be framed as, and incorporated in, an order (§ 2556). An application for an order is a motion. Code Civ. Proc. §§ 757, 768. Maximum costs upon a motion are $10.00 in the Supreme Court and must be limited to that sum in the Surrogate's Court (§ 3251). *Stokes* v. *Dale*, 1 Dem. 260, 264. The allowance of costs is regulated by the Code, and the Surrogate has no power to award costs or make an allowance for any purpose unless expressly authorized to do so by the Code. *Matter of Ingraham*, 35 Misc. 577; *Matter of Holden*, 126 N. Y. 589; *McMahon* v. *Smith*, 20 Misc. 305, 308; *Du Bois* v. *Brown*, 1 Dem. 317; *Matter of Bender*, 86 Hun, 570. This applies to costs, allowances and disbursements, including witness's and stenographer's fees. *Matter of Engelbrecht*, 15 App. Div. 541.

§ 233. **Collecting costs.**—As to the enforcement of either an order or a decree awarding costs, see ch. IV, *ante*, on Decrees and Orders. It is sufficient here to observe that motion costs must be collected in the manner provided by § 779, Code Civ. Proc., *q. v.* Surrogate Rollins in 1884, held explicitly (*Scofield* v. *Adriance*, 2 Dem. 486), that § 779 of the Code providing how costs of a motion are to be collected, does not apply to a Surrogate's Court. This was where petitioner asked that the Surrogate's Court should refuse to entertain a certain application on the ground that the party applying had omitted to pay certain costs, and that therefore all proceedings on his part should be deemed stayed until the payment of such costs. In 1886 the same Surrogate (*Matter of Lippincott*, 5 Dem. 299) held that the manner of collecting motion costs in the Surrogate's

Court is declared by § 2556 of the Code to be the same as collecting costs upon an order in a Supreme Court action. "The reference is to § 779 which provides that the collection of costs upon an order may be enforced by execution." These decisions are not to be deemed necessarily conflicting, for, while by subd. 6 of § 3347, it is manifest, that § 779 is not made applicable to Surrogates' Courts, yet it is equally clear from § 2556 or so much thereof as provides that costs upon an order of a Surrogate's Court are the same, and may be collected in like manner as upon an order of the Supreme Court, that part of § 779 which provides that the collection of motion costs directed by an order to be paid may, in case of nonpayment, be had by execution is inapplicable. As to the enforcement of decrees Surrogates' Courts are given greater power to enforce their decrees by contempt proceedings than appears to be vested in any other court of record. See Code Civ. Proc. §§ 14, 1241, 2481, 2555, 3347; *Matter of Humfreville*, 19 App. Div. 381, 382, O'Brien, J., citing *Matter of Kurtzman*, 2 N. Y. St. Rep. 655; *Matter of Dissosway*, 91 N. Y. 235. On appeal, *Matter of Humfreville* was reversed, 154 N. Y. 116, but merely to hold, as intimated *ante*, that where the only money payment directed by a Surrogate's decree is costs, it cannot be enforced by imprisonment.

§ 234. **Analysis of discussion.**—With this introductory statement we pass to the general costs in Surrogates' Courts. The subject will be discussed under the following subtopics:

(*a*) When costs are awarded as of right.

(*b*) When costs are in the discretion of the Surrogate.

(*c*) Allowances in Surrogates' Courts.

(*d*) Taxable disbursements in Surrogates' Courts.

§ 235. **Costs, how made payable.**—But it may be preliminarily observed that, since proceedings in the Surrogate's Court are proceedings *in rem*, the question has always been an important one as to whether the fund or estate over which the Surrogate has jurisdiction may be had recourse to for the payment of the costs which the Surrogate is authorized to award. This is expressly covered by § 2557, which is as follows:

> *Costs, how made payable.*
>
> Except where special provision is otherwise made by law, costs, awarded by a decree, may be made payable by the party personally, or out of the estate, or fund, as justice requires; but costs, other than actual expenses, cannot be paid out of an estate or fund, which is less than one thousand dollars in amount or value. **§ 2557, Code Civil Proc.**

This action gives the Surrogate not only power but discretion, as to making the costs payable by a party personally or out of an estate or fund. *Matter of Henry*, 5 Dem. 272. But the expression "as justice requires," undoubtedly makes his discretion reviewable at the Appellate Division. Costs will be charged upon parties personally in all cases where the Surrogate has reason to believe that the proceedings have been instituted by

such party either in bad faith or for any other reason unjustifiably. *Matter of Lowman*, 1 Misc. 43; *Matter of Whelan*, 6 Dem. 425. So, where an attorney or counsel has been guilty of palpable bad faith or fraud, the court has the power to compel him to pay the costs personally. *In re Tacke's Will*, 3 N. Y. Supp. 112, same case, 3 N. Y. Supp. 431, citing *Matter of Kelly*, 62 N. Y. 198, and § 2481, subd. 7. Where there are various parties to a proceeding before the Surrogate's Court, as in the case of contested wills, the Surrogate may allow costs against the petitioner personally to any or all of the several contestants. *Collyer* v. *Collyer*, 110 N. Y. 481–487; but see discussion under § 2558 below, at § 236 *et seq.*, prohibiting the allowance of costs to an unsuccessful contestant whether payable out of the estate or otherwise. No personal liability for costs attaches, however where a party to a proceeding is merely a formal party, that is to say, not a necessary party, unless he has needlessly intervened and compelled the litigation of unnecessary issues. *Matter of Davis*, 105 App. Div. 222, aff'd 182 N. Y. 468. When upon the application for the appointment of a guardian, the mother of the infant interested was cited to comply with the requirements of the Code, the Court of Appeals held that she was not a party within the meaning of the Code as to liability for costs. *Matter of Valentine*, 22 Weekly Dig. 175. But mere lack of success in proceedings in Surrogates' Courts is no reason for imposing personal costs. *In re Castles's Will*, 2 N. Y. Supp. 638. See also *Silling's Estate*, 2 N. Y. Supp. 637, where Surrogate Ransom enforced the payment of personal costs charged upon an objector to the probate of a will personally by deducting the amount from said objector's share of the estate in the hands of the executor. One who institutes a proceeding in good faith will not be subjected to the burden of paying costs personally. *Matter of Keeler*, 2 Connoly, 45. So on a contested accounting, where some of the objections prove to be well founded, contestant should not be charged with costs. *Matter of Corbin*, 101 App. Div. 25. So where a contestant unsuccessfully attacked the will, but the proceedings were not unreasonably delayed and no witnesses were examined except the subscribing witnesses to the will, Surrogate Rollins held that justice did not require that such contestant should be personally charged with the proponent's cost. But if it appears that the contestant has merely engaged in a fishing expedition, and blocks the expeditious probate of the paper propounded, or hinders and delays the proceeding for the purpose of forcing some recognition of fancied rights with a wavering hope that something may turn up which will be of advantage, in such cases the Surrogate is vested with power to impose personally costs by way of a deterrent from reckless litigation. *Matter of Whelan's Estate*, 2 N. Y. Supp. 635. Costs will not be awarded to a number of contestants separately if they are united in interest, but where they appear by various attorneys and have entirely distinct interests under the will, they will be allowed separate bills of costs. *Matter of Lasak*, 1 Connoly, 490; *Collyer* v. *Collyer*, 4 Dem. 53–64; *Hanselt* v. *Vilmar*, 76 N. Y. 630. See also *Matter of Fuller*, 16 Civ. Pro. Rep. 412. The

award of costs in a case is made by way of indemnity to the successful party. One who is entitled to share in an estate is not indemnified in that regard if he is compelled to give up part of the estate to pay himself for costs which other people have made in trying to take the estate away from him. Therefore when the person trying to get the estate fails to secure it, it is a proper case to require him to pay the costs personally of his unsuccessful attempt. *Matter of Seagrist*, 1 App. Div. 615–623, opinion of Rumsey, J. This of course does not cover cases where the person trying to get the estate sustains such a relationship to the decedent as to give him a *prima facie* case, as where the alleged will purports to disinherit a wife or child in favor of some stranger to the estate.

§ 236. **Costs against an executor or administrator personally.**—So also, costs may be imposed upon an executor or administrator personally, as where an executor or administrator was shown to have been dilatory in accounting proceedings referred to a referee, and to have manifested no disposition to proceed in good faith to exhibit the condition of the estate in his hands. *Estate of Goetschius*, 23 N. Y. Supp. 975; *Matter of Williams*, 17 St. Rep. 839; or where he interposed merely technical objections to being compelled to account. *Matter of Post*, 30 Misc. 551. So, also, where an executrix has wasted the estate in her hands. *Estate of Stanton*, 18 St. Rep. 807. Or when he denies assets, which are shown to exist. *Matter of Long Island L. & T. Co.*, 92 App. Div. 5. So where an executor unreasonably compels a litigation of a personal claim against the estate as in requiring a construing of the will to determine whether a particular fund belongs to the estate and the distributees, or to the executor personally. *Estate of Mull*, 16 St. Rep. 981. But if an executor resists a claim and succeeds in materially reducing it, he will not be subjected to costs (e. g., reduction of 75 per cent). *Matter of Ingraham*, 35 Misc. 577. Where executors unreasonably defend a proceeding to compel them to give a bond or furnish additional security, they will be adjudged to pay costs. *O'Brien's Estate*, 19 N. Y. Supp. 541; 25 N. Y. Supp. 704. So, if an executor or administrator refuses to comply with an order or decree directing him to do a particular thing or pay a particular sum, and a motion to compel him to comply with the order or decree is necessitated, the costs of such a motion will be personally imposed upon the executor. *Curry's Estate*, 19 N. Y. Supp. 728. So where a guardian filed an account containing improper items, and objections had to be interposed to protect his ward's interests, costs were imposed on the guardian personally. *Matter of Decker*, 37 Misc. 527. See also *Matter of Kopp*, 15 Civ. Pro. 282.

§ 237. **When costs are awarded as of right.**—Taking up the discussion as to costs generally we turn first to § 2558:

> *Costs; when awarded.*
>
> The award of costs in a decree is in the discretion of the surrogate, except in one of the following cases:
>
> 1. Where special directions, respecting the award of costs, are contained in a judgment or order, made upon an appeal from the surrogate's determina-

tion, or upon a motion for a new trial of questions of fact tried by a jury; in either of which cases, costs must be awarded according to those directions.

2. When a question of fact has been tried by a jury; in which case, unless it is within the foregoing subdivision, the decree must award costs to the successful party.

3. When the decree is made upon a contested application for probate or revocation of probate of a will, costs, payable out of the estate or otherwise, shall not be awarded to an unsuccessful contestant of the will, unless he is a special guardian for an infant, appointed by the surrogate, or is named as an executor in a paper propounded by him in good faith as the last will of the decedent; but the surrogate may order a copy of the stenographer's minutes to be furnished to the contestant's counsel, and charge the expense thereof to the estate, if he shall be satisfied that the contest is made in good faith. **§ 2558, Code Civil Proc.**

It is apparent from subd. 1, that where a Surrogate's decree has been appealed from, or the verdict of a jury on a trial of questions of fact had been appealed from and the order or judgment of the Appellate Court gives special directions respecting the award of costs, the Surrogate has no discretion but must follow such directions. But if the Appellate Court has directed that one of the parties shall have costs for his proceeding in the Surrogate's Court but none for his proceedings in the Appellate Court, the Surrogate is under the necessity of fixing the costs to be allowed in his own court (*Matter of Bull*, 1 Connoly, 395, 398), or if the Appellate Court gives no direction as to whether they shall be paid personally or out of the estate, then the Surrogate of course has discretion in regard to such details. *Schell* v. *Hewitt*, 1 Dem. 249, 255.

So, if the Appellate Division reverses an order of the Surrogate "with costs" only, he has no power to tax disbursements on appeal, for §§ 3251 and 3256 are held as not applying to Surrogates' Courts' orders but refer, to actions. *Matter of Steencken*, 58 App. Div. 85, citing *Cassidy* v. *McFalrand*, 139 N. Y. 209. In this case, however, leave was given to resettle the order in the Appellate Division, on notice. In a later case, *Matter of Babcock*, 86 App. Div. 563, it was held on an appeal from a final order, affirmed by the Appellate Division "with costs" that §§ 3240 and 3256 did apply and that the disbursements specified in the latter section were "awarded by implication" and should have been taxed by the Surrogate. Section 3240 refers to costs on appeal from a final order in a special proceeding. This case refers expressly to § 3256 as carrying certain disbursements with costs of an appeal. And it seems that both § 2556 as to costs of orders, and § 2559 as to costs awarded by a decree which "include all disbursements of the party . . . . which might be taxed in the Supreme Court" and § 2560 as to appeal costs put the rule of the *Babcock* case beyond dispute.

§ 238. **Same.**—But none the less the decision of the Appellate Court is what determines the power of the Surrogate as a taxing officer. This is manifest also from § 2589 which is as follows:

Costs of appeal.

The appellate court may award to the successful party the costs of the appeal; or it may direct that they abide the event of a new trial, or of the subsequent proceedings in the surrogate's court. In either case, the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court; or, if such a direction is not given, as directed by the surrogate. **§ 2589, Code Civil Proc.**

Section 2560 should be considered in this connection. It provides that:

Where a question of fact has been tried by a jury, the costs, awarded against the unsuccessful party, are the same as the taxable costs of an action in the supreme court. The costs of an appeal, where they are awarded in a surrogate's court, are the same as if they were awarded in the supreme court. **§ 2560, Code Civil Proc.**

It is clear from these three sections, i. e., §§ 2558 and 2560 (*q. v. ante*), as limited by § 2589, that the Surrogate, while he has the power to adjust in his final decree the costs in appeal proceedings, either according to the direction of the order or judgment of the Appellate Court, or in his discretion, in the particulars wherein the Appellate Court has failed to exercise its own, still he is not given by such section any power to *award* such costs; in other words, they do not aim to enlarge the scope of his authority so as to enable him to adjudge that costs be paid when the court above has refused to pay them or has given no direction whatever. They are simply designed to establish the mode whereby the Surrogate is enabled to exercise in respect to costs on appeal, such limited authority as is conferred upon him by other provisions of law. *Schell* v. *Hewitt*, *supra*, opinion of Rollins, Surr. So where the Appellate Court has refused to award costs the Surrogate has no power to award them. *Estate of Hatten*, 6 Dem. 444. Or, again, where there are several appellants and the Appellate Court reverses "with costs," the Surrogate in his order on the remittitur cannot enlarge the scope of the award by making it read "with costs to each appellant." *Isola* v. *Webber*, 12 App. Div. 267; *Matter of P. E. P. School*, 86 N. Y. 396; *Van Gelder* v. *Van Gelder*, 84 N. Y. 658. Same rule as to successful respondents. *Estate of Akers*, N. Y. L. J., March 19, 1903, citing *Estate of Oakley*, Surr. Dec. 1902, p. 76. See, as to costs in Appellate Court, *Matter of Baldwin*, 30 Misc. 169, 172, citing *Matter of W. Comm'rs of Amsterdam*, 104 N. Y. 677; *B. S. Inst.* v. *Pelham*, 148 N. Y. 737. But it has been held, where a Surrogate refused probate of a will and appeal was taken from his decree, which was reversed and the issues ordered to be tried under § 2588, and a verdict had upon these issues, that it would be irregular for the circuit judge before whom the trial was had, to make any order for costs or any direction as to how they should be paid; the practice in such case is that the verdict of the jury must be certified to the Surrogate who makes a decree accordingly; and in making his decree the matter of costs rests with the Surrogate, except as to the costs of appeal which

must be fixed by the Appellate Court. As to such appellate costs the Surrogate has no discretion, except to direct how they shall be paid, in case the Appellate Court has given no direction in that regard. *Matter of Campbell*, 48 Hun, 417. Nor can he modify the decree as fixed by the Appellate Division. *Matter of McEchron*, 55 App. Div. 147, 149, citing *Reed* v. *Reed*, 52 N. Y. 651; *Hone* v. *De Peyster*, 106 N. Y. 645, 649; *Sheridan* v. *Andrews*, 80 N. Y. 648. Surrogate Ransom held in *Matter of Hatten*, *supra*, that § 2558 contemplated in subd. 2 thereof, the jury trial mentioned in § 2560, and also the case where a Surrogate may grant a new trial, by a jury, of questions of fact upon a motion for the purpose, but, he added, "to authorize the Surrogate to award costs in either of these cases, there must, as required by subdivision 2 aforesaid, be an absence of the direction specified in subdivision 1." In every other case the Surrogate has the usual discretion as to awarding costs except as further limited by subd. 3, which provides explicitly that costs should not be awarded to unsuccessful contestants of a will, either upon a contested application for probate or revocation of probate. Where A contested a will, and while unsuccessful as to the *factum* of the will, was successful in getting the construction of it for which he contended he was held entitled to costs. *Matter of Bogart*, 46 App. Div. 240. However this rule is stated not to apply to a special guardian for an infant, who has been appointed by the Surrogate, who may contest the will, or where the contestant is a person named as executor in a paper propounded by him in good faith as the last will of the decedent. § 2558, subd. 3. These provisions are explicit, so where an infant party intervenes by counsel and not by special guardian, and contests the probate of a will unsuccessfully, the Surrogate cannot award him costs. *Matter of Lamb*, 22 N. Y. St. Rep. 350. But where an infant intervenes and has a special guardian appointed, and opposes the probate of a will and probate is granted, his special guardian is an unsuccessful contestant under subd. 3, and costs may be awarded him out of the estate or otherwise as the Surrogate may allow; only in such a case the court is of course limited by § 2561, *post*, as to amount of costs it can award. *Forster* v. *Kane*, 1 Dem. 67. Where an executor propounded a paper in good faith as the last will of a decedent, but being an attorney acted as his own counsel, Surrogate Coffin held that he was not entitled to costs. *Whelpley* v. *Loder*, 1 Dem. 368, 383. Although in such case he is not prevented from having a copy of the stenographer's minutes at the expense of the estate, under the last paragraph of subd. 3. Where an executor received letters under a will and opposed an application to revoke the probate thereof on the ground that another paper propounded was the decedent's last will, and said latter paper was admitted to probate, probate of the former will being revoked, it was held that it was nevertheless within the meaning of subd. 3 of § 2558, and the executor could have his costs. *Bertine* v. *Hubbell*, 1 Dem. 335. So where decedent's widow contested probate of a will made in favor of another woman, and presented a prior will in her own favor for probate, and the Surrogate admitted the latter will to pro-

bate, it was held that she was an unsuccessful contestant excepted within the meaning of subd. 3, but that the allowing of costs was wholly within the discretion of the Surrogate and his refusal to award them to her was not error. *Matter of Mondorf*, 110 N. Y. 450, 457. Therefore costs are awarded as of course under subds. 1 and 2 of § 2558; denied as of course under the first part of subd. 3; and discretionary in case of the classes of "unsuccessful contestants" excepted by the latter part of subd. 3.

§ 239. **Costs when discretionary.**—With the exceptions already noted, first, as to cases in which the Surrogate cannot award costs at all, and second, as to persons to whom he cannot allow costs, the allowance of costs by a Surrogate rests in his discretion within the limits as to amount to be hereinafter noted. He acts on affidavits, which should be specific in detailing the party's claims. *Matter of Richmond*, 63 App. Div. 488. Section 2559 of the Code provides how costs are to be awarded:

> Costs, when awarded by a decree, include all disbursements of a party to whom they are awarded, which might be taxed in the supreme court. The sum allowed for costs must be fixed by the surrogate, and inserted in the decree. **§ 2559, Code Civil Proc.**

Under this section it is to be noted that a Surrogate has no power to award costs to any but *parties* to the proceeding. It has been distinctly held that this does not mean attorneys for the parties. *Matter of Welling*, 51 App. Div. 357; *Matter of Wright*, 121 App. Div. 581. The power to award costs is derived wholly from statutory provisions. *Matter of Holden*, 126 N. Y. 589; *McMahon* v. *Smith*, 20 Misc. App. Term, 305, 308; *Du Bois* v. *Brown*, 1 Dem. 317. Previously to 1870 the statute (2 Rev. Stat. 223, § 10, Banks's 6th ed., vol. III, 330) was as follows: "In all cases of contest before a Surrogate's Court, such court may award costs *to the party* in the judgment of the court entitled thereto, to be paid either by the other party personally, or out of the estate which shall be the subject of such controversy." See *Western* v. *Romaine*, 1 Bradf. 37; *Wilcox* v. *Smith*, 26 Barb. 316; *Lee* v. *Lee*, 39 Barb. 172; *Devin* v. *Patchen*, 26 N. Y. 441; *Reed* v. *Reed*, 52 N. Y. 651. By the act of 1870 (ch. 359, § 9) the Surrogate of New York was authorized to make allowances in lieu of costs, directly to counsel. *Kearney* v. *McKeon*, 85 N. Y. 136; *Walton* v. *Howard*, 1 Dem. 103, Rollins, Surr. But the Code of Civil Procedure repealed this act, and under the Code there is no provision whereby the Surrogate of any county can lawfully award compensation out of a decedent's estate directly to the counsel of parties. *Noyes* v. *Children's Aid Society*, 70 N. Y. 483; *Estate of Withers*, 2 Civ. Proc. Rep. 162. Nor will the fact that numerous counsel were retained avail to increase the taxable costs. *Matter of Brown*, 65 How. 461; *Du Bois* v. *Brown*, 1 Dem. 317, 330. Their charges are against the executor personally or against the parties personally and may not be made payable out of a fund. *Seaman* v. *Whitehead*, 78 N. Y. 306; *Marsh* v. *Avery*, 81 N. Y. 29; *Matter of Seigler*, 49 Misc. 189.

§ 240. **Amount of costs.**—Section 2559 already quoted provides that the sum allowed for costs must be fixed by the Surrogate and inserted in the decree, and also provides that it shall include all disbursements which could be taxed in the Supreme Court. The Surrogate, therefore, is made the taxing officer instead of the clerk, and the authority for all costs taxed must be found in the statute. See § 3256 under disbursements, *infra*. *Matter of Bender*, 86 Hun, 570. Rule 22 of the New York County Surrogate's Court is carefully drawn and provides a reasonable practice in regard to taxation of costs in that court.

"Whenever a party to a decree shall deem himself entitled to costs, the same will be considered and determined by the Surrogate, on two days' notice of adjustment, to be served upon the opposing party, with the items of costs and disbursements to which the party may deem himself entitled at the time of the settlement of the decree, which disbursements shall be duly verified, both as to their amount and necessity, the disbursements for referee's and stenographer's fees being sustained by their affidavits or detailed proof; and at the same time, and on like notice, the Surrogate will pass upon any additional allowance to be made to any executor, administrator, guardian or testamentary trustee, upon a judicial settlement of his account; which notice of adjustment and allowance shall be accompanied by an affidavit, setting forth the number of days necessarily occupied in the hearing or trial, the number necessarily occupied in preparing the account for settlement, and in the preparation for the trial, the time occupied on each day in the rendition of the services, and their nature and extent in detail. In case such trial shall have been had before a referee, the time necessarily occupied in such trial before him may be shown by a certificate of such referee. The affidavit as to disbursements, time engaged in trial, and in preparing the account and for trial, may be controverted by affidavit."

But in the absence of such or a similar rule, the practice in the Supreme Court should be followed, a bill of costs, allowances and disbursements should be prepared and notice of taxation given in the case and manner required by that court. Where the stenographer's fees are taxable they should be paid by the proper party and the amount included as a disbursement in the bill of costs; the same regarding referees' fees and other disbursements. *Du Bois* v. *Brown*, 1 Dem. 317, 333; *Estate of Willett*, 6 Dem. 435.

§ 241. **Same subject.**—The amount of costs and allowances is limited by §§ 2560 and 2561, which are as follows:

> *Amount of costs on trial of fact and on appeal.* (As to costs on appeal, see *ante*, p. 228.)
>
> Where a question of fact has been tried by a jury, the costs, awarded against the unsuccessful party, are the same as the taxable costs of an action in the supreme court. The costs of an appeal, where they are awarded in a surrogate's court, are the same as if they were awarded in the supreme court. **§ 2560, Code Civil Proc.**

See *Matter of Bull*, 1 Connoly, 395, opinion of Ransom, Surr.

When surrogate to fix amount of costs.

In a case other than one of those specified in the last section, the surrogate, upon rendering a decree, may, in his discretion, fix such a sum, to be allowed as costs, in addition to the disbursements, as he deems reasonable, not exceeding, where there has not been a contest, twenty-five dollars, or where there has been a contest, seventy dollars; and, in addition thereto, where a trial or hearing upon the merits before the surrogate necessarily occupies more than two days, ten dollars for each additional day; and where a motion for a new trial is made before the surrogate, if it is granted, seventy dollars; if it is denied, forty dollars. **§ 2561, Code Civil Proc.**

The Surrogate has no power, therefore, to increase the costs fixed in the specific cases covered by these sections. *Matter of Dodge*, 40 Hun, 443; *Matter of Fernbacher*, 8 Civ. Pro. R. 349; *Matter of Withers*, 2 Civ. Pro. R. 162. For his power to award costs is derived wholly from statutory provisions. *Matter of Ingraham*, 35 Misc. 577, 579, citing *Matter of Holden*, 126 N. Y. 589; *McMahon* v. *Smith*, 20 Misc. 305, 308; *Du Bois* v. *Brown*, 1 Dem. 317. But his discretion within the statutory limit will not be interfered with by the Appellate Courts. *In re Miles*, 12 N. Y. Supp. 157; *Hannahs* v. *Hannahs*, 68 N. Y. 610. Yet as his discretion is limited by the words "as justice requires" it is reviewable. *Matter of Selleck*, 111 N. Y. 284. Section 2561 is very sweeping and covers every proceeding other than those specified in § 2560, that is to say, practically every proceeding which the Surrogate has tried. This of course includes a trial had before a referee. *Matter of Clark*, 36 Hun, 301. But in such case there can be no allowance for days on which adjournments are had without any actual hearing, and so also it has been held that time occupied in preparing pleadings, making briefs, appearing on adjournments, or settling a decree, cannot be relied upon to increase time contemplated by § 2561 by the Surrogate, "where a trial or hearing upon the merits before the Surrogate necessarily occupies more than 2 days," and no *per diem* allowance can be made under that section. However, a summing up or argument made to the court must be regarded as a hearing upon the merits. *Du Bois* v. *Brown*, 1 Dem. 317, 330. Where a disputed claim is referred by consent to the Surrogate and heard by him upon the judicial settlement, costs to the successful claimant are discretionary, the amount being limited by § 2561. *Matter of Ingraham*, 35 Misc. 577; *Matter of Coonley*, 38 Misc. 219. But in the exercise of this discretion the Surrogate should be guided by the principles and decisions relating to the question of costs against estates in case of actions. *Ibid.*, at p. 580, quoting §§ 1835 and 1836, Code Civ. Proc. So, where trustees contest and defeat an application made in behalf of an infant beneficiary to have the whole income of the trust applied to his support, they are successful contestants and entitled to $70.00 in addition to their disbursements. *Matter of McCormick*, 40 App. Div. 73, 78. In *Matter of Hogarty*, 62 App. Div. 79, 87, it was held that while the term "contest" in § 2561 clearly relates to the

trial of an *issue of fact*, yet, where the Surrogate passed on the issue, raised as to whether a trust had terminated, and had treated the case as a contest without objection, the costs allowed could not be objected to on appeal for the first time.

§ 242. **Costs to special guardians.**—A special guardian is appointed to look after and protect the interests of the infant; he has no duty in reference to the estate of the testator; so that, as to his compensation, there is no authority for its payment out of the estate, even though the guardian be appointed by the court on its own motion. *Matter of Robinson*, below, citing *Matter of Budlong*, below; *Matter of Holden*, 126 N. Y. 589. This does not apply to his costs; they may be awarded out of the estate within the limits of the provisions of the sections already quoted, i. e., §§ 2557–2561. See *Matter of Robinson*, 160 N. Y. 448, 452, aff'g 40 App. Div. 30; *Matter of Farmers' L. & T. Co.*, 49 App. Div. 1. *Matter of O'Keeffe*, 80 App. Div. 513. Such costs may not exceed $70.00 where the trial does not occupy more than two days, and $10.00 additional for each day necessarily occupied. This is, of course, in addition to his taxable disbursements. *Matter of Tracy*, 18 Abb. N. C. 242. The compensation of the special guardian, by which is meant an allowance, such an allowance as the Surrogate is authorized to award, must be had by him from the infants or their estate. *Matter of Budlong*, 100 N. Y. 203, 205; *Matter of Ruppaner*, 7 App. Div. 11; *N. Y. Life Ins. & Trust Co.* v. *Sands*, 26 Misc. 252; *Brinckerhoff* v. *Farias*, 52 App. Div. 256, 263. See also *Illensworth* v. *Illensworth*, 110 App. Div. 399. It is submitted that this rule should be modified so that in cases where a guardian *ad litem*, acting for the infant or infants, is successful in maintaining a will in which they are interested against a contest, or in setting a will aside which divested their interest in the estate, his costs and allowances should be payable out of the estate, whether his infants have a present estate therein or not. Thus, where a special guardian was appointed to protect the rights of certain infants to whom a whole estate was left after the life interest of testator's widow in the whole property should have determined, and the will was contested, and the whole burden of the contest assumed by the guardian *ad litem* and the contestants defeated, it was certainly a hardship that the special guardian should be limited to a $70.00 bill of costs. See *Stone's Will*, N. Y. Law Journal. Moreover, the representation of the infant by special guardian, even though an infant's interest be very small, is imperative in order to the regularity and conclusiveness of the proceeding, and his reasonable compensation in such a case would be a fair expense for the estate to bear.

An order allowing costs to a guardian *ad litem*, in excess of those allowed by the statute is therefore improper and may be disregarded. Such disobedience thereto cannot be punished as for contempt. *Matter of Monell*, 28 Misc. 308.

Another point must be noted arising out of the special guardian's peculiar relation. The Surrogate's discretion, as already stated, is review-

able. So if he directs a trustee to pay an allowance from the infant's fund to the special guardian, the trustee is a "person aggrieved," and can appeal from the decree on this point alone. See *Matter of Stevens*, 114 App. Div. 607 (and see opinion as to proper basis for such an allowance).

The fact that the special guardian retains counsel is wholly immaterial; a Surrogate has no power to award counsel fees to counsel. *Forster* v. *Kane*, 1 Dem. 67; *Matter of Johnston*, 6 Dem. 355. It was held in one case that where the appointment of a special guardian of infant heirs is necessary for the protection of an administrator, such special guardian may have an allowance out of the estate. *Ex parte Locklan*, 4 Abb. N. C. 173. It was formerly held that unless a special guardian is reappointed to protect the rights of the infant upon an appeal the Surrogate is without power to allow him costs in case the Appellate Court has awarded him none. *Schell* v. *Hewitt*, 1 Dem. 249; *Matter of Bull*, 6 N. Y. Supp. 565. The rule was if the interests of an infant needed protection in proceedings upon appeal from the Surrogate, it is the province of the Appellate Court to appoint for that purpose a guardian *ad litem*. *Schell* v. *Hewitt, supra*, Rollins, Surr., citing *Kellinger* v. *Roe*, 7 Paige, 362; *Underhill* v. *Dennis*, 9 Paige, 209; *Chaffee* v. *Baptist Miss. Con.*, 10 Paige, 85, 89; *Moody* v. *Gleason*, 7 Cowen, 482; *Fish* v. *Ferris*, 3 E. D. Smith, 567. But the better rule is that stated in the chapters on "Parties" and "Appeals," namely, that he is not *functus*, that he may himself appeal, that the notice of appeal must be served upon him. *Matter of Stewart*, 23 App. Div. 17. He should, however, on the settlement of the Appellate Court's order, see to it that his costs, if he is entitled to any, are explicitly mentioned. Otherwise the Surrogate is powerless.

§ 243. **Allowances in Surrogates' Courts.**—In addition to the provisions for costs, the Code provides for additional allowances upon the judicial settlement of an account, or upon an intermediate accounting required by a Surrogate, and also upon the sale of decedent's real property certain allowances which in the latter case are stated to be in lieu of commission. The sections are as follows:

Additional allowance in settling accounts.

In addition to the sums specified in the last two sections, the surrogate may, in his discretion, allow to an executor, administrator, guardian, or testamentary trustee, upon a judicial settlement of his account, or an intermediate accounting required by the surrogate, such a sum, as the surrogate deems reasonable, for his counsel fees and other expenses, not exceeding $10.00 for each day occupied in the trial, and necessarily occupied in preparing his account for settlement, and otherwise preparing for the trial. **§ 2562, Code Civil Proc.**

Allowance upon sale of real property.

Upon the disposition of real property of a decedent, as prescribed in title fifth of this chapter, the executor, administrator, or freeholder, disposing of the property, must be allowed by the surrogate, out of the proceeds of the sale brought into court, his expenses; and he may be allowed, out of the proceeds, a reasonable sum for his own services, not exceeding $5.00 for each day, actually and necessarily occupied by him in disposing of the property and

such a further sum as the surrogate thinks reasonable, for the necessary services of his attorney and counsel therein. **§ 2563, Code Civil Proc.**

Upon sale of real property, no commissions allowed.

The allowances, specified in the last section, are in lieu of commissions. **§ 2564, Code Civil Proc.**

The allowance provided for by § 2562 is expressly provided to be awarded to the executor, administrator, guardian or testamentary trustee who is accounting. It is not to be awarded to counsel directly (see *ante*, § 239). *Matter of Welling*, 51 App. Div. 355; *Matter of Crane*, 68 App. Div. 355; *Seaman* v. *Whitehead*, 78 N. Y. 306, 309. In this last case the court by Miller, J., uses the following language: "The Surrogate's Court is one of limited jurisdiction, and is confined to such proceedings and the exercise of such powers as are given by the express terms of statutes, and as are incidental thereto. *Bevan* v. *Cooper*, 72 N. Y. 317. The power of the Surrogate in respect to allowances upon the settlement of estates is conferred by chapter 362, section 8, Session Laws of 1863, which declare that: 'On the settlement of the account of an executor or administrator, the Surrogate shall allow to him for his services, and if there be more than one, shall apportion among them, according to the services rendered by them respectively, over and above his or their expenses. . . . And there shall also be allowed on each settlement such sum for counsel fee thereon and preparing therefor as to said Surrogate shall seem reasonable, not exceeding the sum of $10.00 for each day engaged therein.' It will be noticed that the allowance is to be made 'to him;' that is, to the executor or administrator, and not to his counsel, nor against the executor or administrator. There is no authority whatever which warrants a decree in favor of the executor's counsel against the estate which is represented by the executor or against the executor as such. Previous to the statute cited an executor could not charge the estate for a counsel fee, upon the final settlement of his accounts or for drawing up the same in proper and legal form upon such settlement. *Burtis* v. *Dodge*, 1 Barb. Ch. 77. Such charges for services to an executor are against him individually and not as executor. *Austin* v. *Monroe*, 47 N. Y. 360.

"The act of 1863 has not altered the rule and created a liability of the estate to counsel. It was evidently intended to enable the executor or administrator to charge the estate for such counsel fees as he was obligated to pay upon an accounting, at the rate prescribed by law. It has been adjudicated that the Surrogate, except in the city and county of New York, has no authority to award counsel fees. *Reid* v. *Vanderheyden*, 5 Cow. 719; *Burtis* v. *Dodge*, *supra*; *Devin* v. *Patchin*, 26 N. Y. 441. He can only award taxable costs, and it is error to allow a sum in gross. *Reed* v. *Reed*, 52 N. Y. 651."

§ 244. **Same subject.**—Section 2562 will be strictly construed and where an executor being an attorney himself does not retain counsel to assist in the preparation of his accounts, he is entitled to no allowance. *Estate of Valentine*, 9 Abb. N. C. 313. It is to be noted that upon the ac-

counting contemplated by § 2562, the costs of course cannot be included as they are to be fixed by the decree which is subsequent to the account, but actual disbursements for counsel fees may be inserted in the account provided they do not exceed the limits fixed by § 2562; the voucher for such a disbursement will take the form of an affidavit showing the number of days occupied in the trial or necessarily occupied in preparing the account for settlement or otherwise preparing for the trial. *Harward* v. *Hewlett*, 5 Redf. 330, 332; *Carroll* v. *Hughes*, 5 Redf. 337; *Du Bois* v. *Brown*, 1 Dem. 317. And in this connection it may be stated that time devoted to mere examination of the law, and drawing a decree or attending at the court, is not occupied in the manner contemplated by this section, and no allowance will be made therefor. *Matter of Miles*, 5 Redf. 110, Calvin, Surr. Such services are assumed to be covered by the $25.00 allowed by § 2561, where there is no contest, or such additional sum up to $70.00 where there is a contest; and the attendances upon the court are allowed for by the additional $10.00 *per diem*, where the trial or hearing necessarily occupies more than two days; the theory of the section is to provide for a means of enabling the accounting party to secure legal assistance and advice in preparing his account. *Matter of Peyser*, 5 Dem. 244. Nor can it be made to any one except the party accounting. *Matter of Weeks*, 5 Dem. 194; *Matter of Nockin*, 15 N. Y. St. Rep. 731.

§ 245. **Counsel fees.**—What has been stated in the previous section with regard to allowances, is of course independent of the ordinary counsel fees or compensation paid by executor, administrator, guardian or trustee to counsel retained by them to guide them in the administration of the estate. For such counsel fees executors are entitled to reimbursement from the estate. This is discussed more fully in the chapter on "Accountings." Some doubt was thrown upon this rule by various contradictory decisions based upon §§ 2561 and 2562, but which did not bear directly upon the point. Surrogate Rollins, in 1882, set forth at length his view with reference to the power of the Surrogate under §§ 2561 and 2562, in *Walton* v. *Howard*, 1 Dem. 103. After referring to those sections, and the restrictions imposed thereby, Judge Rollins says: "It need scarcely be said that the statute, which has thus regulated the authority of the Surrogate to award costs, does not preclude executors from employing counsel to give them necessary legal assistance in the management of their trusts, or from rewarding the services of such counsel according to their value, and without reference to the limitations of the Code of Civil Procedure. For payment so made, such an officer may, of course, present to the Surrogate his claim for reimbursement out of the funds of the estate. Such claim may justly form, as it often does form, one of the items with which he credits himself in his accounts, and, so presented, it is laid bare to the scrutiny of all persons interested in the estate, may be objected to, like all other items, by any party who chooses to contest it, and will be allowed, or disallowed, according as it is ascertained to have been a proper or an improper disbursement. *Gilman* v. *Gilman*, 6 Thomp. & C. 214,

affirmed 63 N. Y. 41." In passing on reasonableness of fees paid, it is proper for the Surrogate to consider the amount involved, and the size of the estate. *Matter of Jones*, 28 Misc. 599.

Surrogate Ransom in 1890 (*In re Smith's Estate*, 2 Connoly, 418), also passed upon this question, using the following language:

"The sole objection raised to the account under consideration is the item therein for services of counsel. The *gravamen* of the objection is that these services were rendered in a proceeding for an accounting, and that the personal representative is confined to §§ 2561, 2562 of the Code of Civil Procedure for remuneration of his counsel. In other words, that, without regard to the value of the services rendered, the character of the litigation, the size of the estate, the question of the amount involved, he can pay his counsel not exceeding $10.00 per day for the actual number of days spent upon the accounting, and that, if he does compensate him at a higher rate, he cannot be indemnified from the funds of the estate. In proceedings in the Surrogate's Court it is very frequently the case that the services rendered are amply compensated by the statutory allowance, and it may happen in some instances that an allowance up to the limit prescribed would be excessive, but the cases are numerous where the allowance which the Surrogate may make upon the entry of decree, by way of costs, is grossly inadequate. In 1 Conn. Surr. 564, the Surrogate, in his remarks to the bar, commenting on the impossibility in every instance of compensating counsel by an allowance made by way of costs on the entry of decree, said: 'It is the duty of the executor to employ and pay, as a matter of independent private contract between himself and the attorney, such compensation as the attorney fairly earns, and that amount of money should go in his account, and, when presented, would be allowed by the Surrogate out of the estate, if fair and reasonable. It is a mere misapprehension on the part of the bar to suppose that attorneys can get adequate compensation under what is known as "a *per diem* allowance, ..." They should have obtained their pay from their clients before, and put it in the account.' And it is the practice to require information upon this point upon the entry of the decree; for, in taxing costs, the Surrogate of this county requires information upon the question whether compensation has been paid out of the funds of the estate for or on account of the services specified in the bill, and the printed form of affidavit supplied in the court contains an averment on this point. *In re Bailey*, 47 Hun, 477, the General Term, Judge Parker, writing the opinion, says: 'While the authority of the Surrogate to award costs is thus limited by statute, executors or administrators are in nowise precluded from employing counsel to give them necessary legal assistance in the management of their trusts, or from compensating counsel according to the value of the services rendered. For payment so made, a claim may be made for reimbursement out of the funds of the estate.' In this case, the services were rendered by the attorney, not for the protection and benefit of the estate, but they were solely for the benefit of the executor in an action brought against him for misconduct in his office as executor, in

which contest he was successful." See balance of opinion at page 424, citing *Halsey* v. *Van Amringe*, 6 Paige, 18. See also *Matter of Decker*, 37 Misc. 527.

"This last case, it seems to me, recognizes the difference between allowances to be made to an executor for counsel fees as remuneration for services rendered, and the taxable costs which may be awarded against one party in favor of another. In other words, it recognizes the difference between costs, as such, and the sum included in the account for services rendered by counsel. While it would not be proper for the Surrogate to make an allowance of the character claimed in this case to be charged against a contestant, it would be proper for the executor to pay his counsel such amount, if justified by the proof of services performed. To present the idea in a different form, should the Surrogate determine that one or the other of the parties to the contest should be charged with costs of the proceeding, he could only charge him with the taxable costs at the rate specified in the sections of the Code, and it would be improper to charge him with whatever sum might be a suitable reward for the attorney's services. This is in analogy with the procedure in common-law courts. A successful plaintiff, for instance, does not recover from the defendant for costs the entire sum, which he, the plaintiff, may be required to pay his counsel, but only statutory costs. And it is elementary that costs are not intended as indemnity, but only partial reimbursement. In the case of *Wilcox* v. *Smith*, 26 Barb. 316, the court said: 'It seems to be well settled that an executor or administrator is not entitled to charge the estate he represents with a counsel fee paid by him upon the final settlement of his accounts before the Surrogate, or for drawing up his accounts in a proper and legal form on such a settlement; and also that the Surrogate has no authority to make an arbitrary allowance to him in lieu of the compensation directed by the statute to be paid to advocate and proctors in Surrogates' Courts, where the sum is to be paid as costs in the suits or proceeding, either by the adverse party or out of the fund in litigation. *Burtis* v. *Dodge*, 1 Barb. Ch. 77; *Halsey* v. *Van Amringe*, 6 Paige, 12; *Western* v. *Romaine*, 1 Bradf. 37; This rule does not conflict with the one, now statutory, which authorizes the Surrogate to allow executors and administrators "for their actual and necessary expenses," which are "just and reasonable," in the management of the estates committed to them (see 2 R. S. 93, § 58; Laws, 1849, ch. 160), such as expenses incurred by them in the employing agents and clerks, where their services are beneficial to such estates (*McWhorter* v. *Benson*, Hopk. Ch. 28; *Vanderheyden* v. *Vanderheyden*, 2 Paige, 287; *Matter of Livingston*, 9 Paige, 440; 2 Dem. 575; *Glover* v. *Holley*, 2 Bradf. 291, 294), and such cases as costs paid in actions brought by them in good faith to recover debts supposed to be due to their decedents, when the results show that different modes of proceedings would have been more beneficial to the parties interested in the estates. *Collins* v. *Hoxie*, 9 Paige, 81. The two rules already mentioned harmonize, and they are founded on solid reasons. It is not often that executors or administrators need the services of counsel

in making final settlements of their accounts before the Surrogate, if they have properly managed the estates in their hands, and are diligent in making such settlements; and where they are negligent, or permit their accounts to become confused, or suffer the estates under their control to decrease unnecessarily, they ought to pay counsel out of their own funds for assisting them in closing up their trusts. And the reasons are too obvious to be stated which uphold the rule that permits the Surrogate to allow them all actual and necessary expenses incurred by them, which appear reasonable and just, in bringing and defending actions, in good faith, and the expectation of benefiting the estates under their control, and in managing such estates solely for the benefit of those interested in them.' In *Burtis* v. *Dodge*, 1 Barb. Ch. 77, referred to by the court above, the executor charged in his account $50.00 as a fee for his counsel upon final settlement. The court held (page 91) : 'Neither was the executor entitled to charge the estate with a counsel fee upon the final settlement of his account before the Surrogate, nor for drawing up his accounts in a proper and legal form on such final settlement. The whole was a part of the proceeding for the settlement of the account of the executor; and the statute having fixed the allowances which were to be made to advocates and proctors in Surrogates' Courts, when they were to be paid as costs in the suit, either by the adverse party or out of the funds in litigation, the Surrogate is not authorized to make an arbitrary allowance to the executor in lieu thereof. Here, the Surrogate had the power to award costs to the executor, to be paid out of the estate of the testator, or by Burtis personally, if he thought this final accounting had been rendered necessary by his perverseness. He had not thought proper to do so in this case, except to the extent of his own fees, which he has awarded against Burtis personally, by deducting them from the balance found due to him upon the accounting. If it was a proper case to allow the executor for the expenses of his proctor and advocate upon the accounting, the Surrogate should have taxed their costs at the rates of allowance fixed by the act of 1837.' In *Osborne* v. *McAlpine*, 4 Redf. 6, Surrogate Calvin took occasion to condemn the practice theretofore prevailing of making an allowance to counsel for executor, etc., on final accounting, to cover the professional services rendered during the progress of administration, and prior to the proceeding initiating the final account. He said: 'If the representative of an estate shall employ counsel, which he clearly has the right to do, it is the duty of such counsel to present his account for payment before the final accounting, and for the representative to fix upon the amount which is reasonable to be paid, and pay it on his own responsibility, and credit himself with such payment in his final accounting. This will enable the executor in the first place to scrutinize the charges, and will give the parties in interest an opportunity to interpose objections, if it shall appear to be exorbitant.' In *Carroll* v. *Hughes*, 5 Redf. 337, an accounting party claimed credit for the sums paid for counsel fees, and the Surrogate held that so much of the charge for legal services as related to the accounting must be separately stated, so that the court

may judge whether it exceeds the limit fixed by § 2562 of the Code, and there should be proof by affidavit of the number of days necessarily occupied in preparing the account for settlement. In *Matter of Miles*, 5 Redf. 110, an account was had upon the application of a legatee. The petitioner and respondent were the only parties interested in the estate, and for that reason Surrogate Calvin held that it was a 'judicial settlement.' He held that the executors were entitled to $25.00 and three days for preparing account, but that they were not entitled to an allowance for attendance at court, examination of the law, and the drawing and settling of the decree, for the reason that they were not devoted to 'preparation for the trial.' He says: 'The theory of the codifiers seems to have been that the $25.00 should cover all the proceedings, except the preparation of the account, where no trial was had; unless, perhaps, where objections were filed, and reasonable preparation made, and, before the trial commenced, the objections were withdrawn.' *Chatfield* v. *Hewlett*, 2 Dem. 191, was a contest over the substitution of an attorney. No question whatever was made but that the retiring counsel was entitled to a lien for whatever his services might be worth, independent of the *per diem* allowance under the Code. None of the authorities cited by contestant seem to maintain his position, and independent investigation has not disclosed any reported decision in conflict with the opinion I have formed. Until I am differently instructed by the Appellate Courts, I shall hold that an accounting party is not confined to the sections of the Code (2561, 2562) in remunerating his counsel, but may expend such sums as he deems proper in that behalf, to be included in his accounts, and the correctness and propriety of which may be contested by the persons interested. I am supported in this conclusion by the clear distinction made by the legislature in its provisions with reference to the allowance to special guardians, and to the allowance made to an executor, administrator, or freeholder on the sale of real estate."

See also *Matter of Mitchell*, 39 Misc. 120. (See below.)

§ 246. **Taxable disbursements in Surrogates' Courts.**—Section 2559 already quoted in § 239, provides that costs when awarded by a decree include all disbursements of the party which might be taxed in the Supreme Court.

"Disbursements" usually means official fees, witness fees, and such expense for affidavits, postage or serving of papers as are customarily taxed. As just noted above counsel fees for a representative are an estate disbursement (within certain limits) but not as a rule taxable. "Disbursements" does not mean "all expenses incurred in the litigation." *Potter* v. *Richards*, 10 Wend. 607. But counsel fees other than the *per diem* $10.00 allowance above discussed are sometimes taxable. For example, on the execution of an open commission—particularly if a motion to limit it by interrogatories be denied—the amount *per diem* for necessary attendance may be determined on affidavits *pro* and *con* by the Surrogate. *Re Bull's Estate*, 1 Connoly, 395. Notice of taxation must be given as in the Supreme Court. *Du Bois* v. *Brown*, 1 Dem. 317. Where there is no stipulation

binding the parties stenographer's fees can only be taxed as in the Supreme Court. *Estate of Willett*, 6 Dem. 435. The party who pays them, may insert them in his bill of costs at the legal rate. *Du Bois* v. *Brown*, *supra*. See Rule 22 in New York County when disbursements for referee's or stenographer's fees are to be supported by *their* affidavits or detailed proof.

§ 246a. **Counsel fees as disbursements.**—Counsel fees are disbursements, but not in the sense of being taxable. It will have been seen from a preceding section that counsel fees as such are practically to be included in the executor's account as disbursements, or as Surrogate Ransom said in his speech to the New York Bar on the opening of his court, January 3, 1889, that it is a misapprehension on the part of the bar to suppose that attorneys can get adequate compensation under what is known as the *per diem* allowance. "They should have obtained pay from their clients before and put it in the account." Viewed, however, as disbursements they must be reasonable so that in the event of contest they will stand the scrutiny of the objecting parties in interest and of the Surrogate himself; for example, in the *Collyer* case, 1 Connoly, 546, Surrogate Coffin rejected as improper numerous disbursements made by an administrator as counsel fees. The headnote of the case reads as follows:

"The administrator of an estate will not be allowed the following expenses:

"Counsel fee paid to an attorney for consultations of the administrator, next of kin, before his appointment, as to the selection of an administrator, such appointment being without a contest.

"Payment to counsel for attendance and advice as to the making of an inventory. *Pullman* v. *Willetts*, 4 Dem. 536.

"Payment of retaining fee to an attorney. *Hanley* v. *Singer*, 3 Dem. 589; *Mygatt* v. *Wilcox*, 45 N. Y. 306.

"Payment of counsel fee in a proceeding for the revocation of the will, in which the administrator appeared in his representative capacity as well as next of kin, where he was a necessary party only as next of kin; especially where his attorney has received costs which he had not credited against the charges for services to the administrator.

"A large amount of money, $3,000, paid to a young attorney who was not retained by the administrator, but who, by his persistent attendance in the proceeding, was finally recognized by the administrator as one of the counsel, such expense not appearing to be necessary or reasonable.

"Searching for evidence by the administrator's attorney for the purpose of beginning actions. See also *Matter of Van Buren*, 19 Misc. 373.

"A sum paid as counsel fees for services upon furnishing a new bond on the release of one of the administrator's original bondsmen.

"Fees to an attorney for services rendered necessary by the attorney's remissness.

"A charge of $20.00 a day by the attorney of the administrator for attending sessions of a reference where nothing was done but to adjourn. (This charge was reduced to $10.00 for each of such sittings.)"

In *Matter of Caldwell*, 188 N. Y. 115, the testator assumed to nominate attorneys for the estate whom the executors, though not bound so to do, employed. They also, however, retained other counsel. Held that the extra fees paid to such additional counsel must be paid by the executors personally.

The preparation of an account is often a difficult matter, but it is well settled that it is the duty of the executor to prepare his account, unless he can show that such preparation would be impossible owing to the volume of the account, or that its nature required the employment of an accountant, but not because of his not having the leisure to devote to its preparation. *Matter of Quinn*, 1 Connoly, 381, 388. Nor where the complication of the preparation of the account is caused by the fact that the executor did not keep proper books of account. *O'Reilly* v. *Meyer*, 4 Dem. 161; *Estate of Wilcox*, 11 Civ. Proc. R. 115; *Matter of Woodward*, 13 N. Y. St. Rep. 161. But if an executor can satisfy the court that the account was such as to justify the employment of an accountant, a disbursement for that purpose will be sustained, but the burden of proof is upon the accounting party. *Underhill* v. *Newburger*, 4 Redf. 499, 506.

As a general rule clerk hire cannot be allowed as a disbursement (*Fowler* v. *Lockwood*, 3 Redf. 465), but where the estate is large and in a condition necessarily requiring some assistance from an agent or clerk, to give it proper attention, the expense of such agent or clerk is a proper charge upon the estate. *Bohde* v. *Bruner*, 2 Redf. 333, 339, citing *Vanderheyden* v. *Vanderheyden*, 2 Paige, 287; *Cairns* v. *Chaubert*, 9 *id.*, 160.

§ 247. **Precedent for bill of costs.**—The following will illustrate the customary items. It is the form prepared by Silkman, Surr.

Surrogate's Court,
County of Westchester.

Bill of costs.

In the Matter of the Judicial Settlement of the Account of

Deceased.

COSTS		DISBURSEMENTS	
Costs pursuant to section 2561 of the Code of Civil Procedure . . .		For serving citation on parties	$
Contest		For publication of citation pursuant to order dated the day of 19 . .	
No contest . . .		For referee's fees upon reference under order dated the day of 19 . . .	
Days occupied in the trial or hearing, less two, and less adjournments . .		For Appraiser's fees . .	
Motion for new trial . .		For Stenographer's fees . .	
Costs upon trial by jury .		For affidavits and acknowledgments	
Costs upon appeal . .		For postage	
Allowance to accounting party under section 2562, Code of Civil Procedure, viz.: . . . . . (*Note.*)		For certified copies orders .	
Days occupied in trial or hearing, less adjournments		For certified copy decree . .	
		For satisfaction of decree .	
		For certificate of filing satisfaction	

Note. Where the proceeding is one for the sale of a decedent's real estate,

an allowance may be made under § 2563 of the Code, which see.

Note. 2. If a commission was issued insert appropriate detail.

Days necessarily occupied in preparing account . .		For necessary copies of papers (*Note* 2.)	
Days necessarily occupied in otherwise preparing for trial			
TOTAL COSTS AND ALLOWANCE . . .	$	For attendance of witnesses: tabulate under name and mileage	
DISBURSEMENTS . .			
TOTAL . . .	$		$

State of New York, County of } ss.:

being duly sworn, says that he is the attorney and counsel for in the above entitled proceeding; that the foregoing disbursements have been actually made, or will be necessarily incurred therein, by or in behalf of the said

That such disbursements are correctly stated, and are for reasonable and necessary expenses in this proceeding.

Deponent further says that the time stated in the foregoing bill of costs as having been occupied as therein specified, was actually, substantially and necessarily so occupied and employed in this matter by deponent. *Note* 3.

That no compensation has been paid or given, out of the funds of the estate of the said deceased, for or on account of any of the services in the foregoing bill of costs specified.

Sworn to before me this day of 190 . }

Note. 3. In New York Co. add "that the items paid for referee's (or stenographer's) fees are substantiated under Rule 22 by the annexed affidavits of R. B., the said referee, and of X. Y., the said stenographer."

PART III

CHAPTER I

PROBATE PROCEEDINGS—PRELIMINARIES TO PROBATE

§ 248. **Deposit of wills.**—Provision has been made by law that any person who has made a will may deposit the same for safekeeping with any county clerk, or any Surrogate, or with the register of deeds in New York County. The formalities to be observed are set out in the statute. 8 R. S. part III, title 3, ch. VII, art. 7, §§ 67–70, 8th ed., p. 2663. (§ 30, Dec. Est. Law, ch. 13. Consol. Laws, art. 2.) The word "will" includes all codicils. § 2, Dec. Est. Law.

Such will shall be inclosed in a sealed wrapper, so that the contents thereof cannot be read, and shall have indorsed thereon: *the name of the testator, his place of residence,* and the *day, month and year when delivered,* and shall not, on any pretext whatever, be opened, read or examined, until delivered to a person entitled to the same, as provided in the statute. (§ 31, Dec. Est. Law).

Such a person is carefully defined by § 32, Dec. Est. Law. Such will shall be delivered only

1. To the testator in person; or
2. Upon his written order, duly proved by the oath of a subscribing witness; or
3. After his death, to the persons named in the indorsement on the wrapper of such will, if any such indorsement be made thereon; or
4. If there be no such indorsement, and if the same shall have been deposited with any other officer than a Surrogate, then to the Surrogate of the county.

Section 33, Dec. Est. Law. If such will shall have been deposited with a Surrogate, or shall have been delivered to him as above prescribed, such Surrogate, after the death of the testator, shall publicly open and examine the same, and make known the contents thereof, and shall file the same in his office, there to remain until it shall have been duly proved, if capable of proof, and then to be delivered to the person entitled to the custody thereof; or until required by the authority of some competent court to produce the same in such court.

If a testator files his will in the foregoing manner, for safekeeping he pays a nominal fee (six cents to a county clerk or register, nothing to a Surrogate).

§ 249. **Producing and filing the will.**—The will of a decedent should be filed by the person petitioning for its probate whenever possible. But where it is in the custody of a safe deposit company or of a person who for any reason declines to produce it, it has been held that the Surrogate has no power to compel the production thereof by order. *Matter of Foos*, 2 Dem. 600. The practice is to file the petition for probate, whereupon a subpœna *duces tecum* will be issued, directed to the proper persons, requiring them to produce the will in court upon the return day of the citation. *Id.*, p. 601. The Surrogate has the power, under § 2481, subd. 3, to enforce obedience to the requirements of such a subpœna.

Where, however, the will is that of a nonresident citizen dying in the British Empire, and cannot be produced, it may under certain restrictions, be substituted, for probate purposes, by a copy certified pursuant to the provisions of ch. 731 of the Laws of 1894, which is now section 2705 of the Code, and is as follows:

> The last will and testament of any person being a citizen of the United States, or, if female, whose father or husband previously shall have declared his intention to become such citizen, who shall have died, or hereafter shall die, while domiciled or resident within the United Kingdom of Great Britain and Ireland, or any of its dependencies, which shall affect property within this State, and which shall have been duly proven within such foreign jurisdiction, and there admitted to probate, shall be admitted to probate in any county of this State wherein shall be any property affected thereby, upon filing in the office of the Surrogate of such county, and there recording, a copy of such last will and testament, certified under the hand and seal of a consul-general of the United States resident within such foreign jurisdiction, together with the proofs of the said last will and testament made and accepted within such foreign jurisdiction, certified in like manner; and letters testamentary of such last will and testament shall be issued to the persons named therein to be the executors and trustees, or either, thereof, or to those of them who, prior to the issuance of such letters, by formal renunciation, duly acknowledged or proven in the manner prescribed by law, shall not have renounced the trust therein devolved upon them; provided, that before any such will shall be admitted to probate in any county of this State, the same proceedings shall be had in the Surrogate's Court of the proper county as are required by law upon the proof of the last will and testament of a resident of this State who shall have died therein; except that there need be cited upon such probate proceedings only the beneficiaries named in said will. **§ 2705, Code Civil Proc.**

Where such will is not in the custody of a court having jurisdiction, the production of the original cannot be dispensed with. So held, where it was shown to be held by a foreign notary. *Diez's Will*, 56 Barb. 591. But if the original be produced before a commissioner, duly appointed to take the testimony, it is held to be equivalent to production before the court appointing him. *Russell* v. *Hartt*, 87 N. Y. 18; *Matter of Delaplaine*, 45 Hun, 225; *Matter of Cameron*, 47 App. Div. 120, 125; aff'd 166 N. Y. 610; *Spratt* v. *Syms*, 104 App. Div. 232.

Again, a will may have been made here, by a resident, and before New York witnesses, and yet may have been filed and probated in a foreign court. If in such case its production is impossible, and it develops that the Surrogate could not secure the evidence of the witnesses because unable to compel their attendance before a foreign commissioner in the place where the will is, then, *semble*, the Surrogate is powerless and an action under § 1861, discussed in ch. IX, would afford the only remedy. *Matter of Law*, 80 App. Div. 73. A lost or destroyed will, also, may be proved in a proper case. See discussion below under § 2621, Code Civil Proc. A case of hardship is that of *Matter of Weston*, 60 Misc. 275. The opinion of Beckett, Surr., shows the difficulties presented: "He (the proponent) is, however, unable to produce or secure the production of the paper propounded as the will as distinguished from the codicil, in order to prove it in the customary way in open court, and he cannot prove it by commission because the subscribing witnesses reside one in this State and the other in the State of New Jersey, and the paper itself is deposited in a court in the District of Columbia, by which it has been admitted to probate. *Matter of Cameron*, 47 App. Div. 120, aff'd 166 N. Y. 610; *Matter of Law*, 80 App. Div. 73, 75, 76, aff'd 175 N. Y. 471. Nor can he prove it by an exemplified copy of the proceedings of the court which admitted it to probate, as it is incompetent and inadmissible as evidence for the purpose. Code Civ. Pro. §§ 2618, 2619, 2620; *Matter of Delaplaine*, 45 Hun, 225. It is proposed to probate or establish the will by proving the codicil which refers to it. This cannot be done without showing that the statutory requisites as to the execution of a will have been complied with, and this the petitioner is in no position to do in this case. *Matter of Andrews*, 43 App. Div. 401; *Matter of Conway*, 124 N. Y. 464; *Matter of O'Neil*, 91 *id.* 523; *Cook* v. *White*, 43 App. Div. 393, aff'd 167 N. Y. 588; *Matter of Carll*, 38 Misc. Rep. 474, 475; *Matter of Emmons*, 110 App. Div. 701. In *Brown* v. *Clark*, 77 N. Y. 369; *Matter of Campbell*, *id.* 84, and *Cook* v. *White*, *supra*, where it was held that a legally executed codicil revived or effected a ratification or establishment of the will, there was proof of compliance with the statutory requirements as to the will itself. The codicil cannot be admitted to probate as a separate and independent testamentary paper. It displaces one of three persons named as executors in the propounded paper, and appoints another as an executor thereof in his stead, and makes no disposition of property whatever. From the nature of this change it is obvious that the operation and efficacy of the codicil are necessarily dependent upon the establishment or proof of the paper to which it relates as an effective testamentary instrument. *Matter of Emmons*, 110 App. Div. 704, 705. Petition dismissed. As a consequence, the motions for commission and temporary administrator must be denied."

The object in directing the filing of the will is obvious. Moreover, in contested cases, the contestant is entitled to inspect, under proper safeguard, the instrument propounded. In New York County the practice now is to require a verified copy of the original to be filed with it. It is

verified by the joint affidavit of two persons to the effect that they have each

> "carefully compared the foregoing paper with the original thereof, dated the , about to be filed for probate, and that the same is in all respects a true and correct copy of said instrument, and of the whole thereof."

The blank is furnished by the probate clerk.

§ 250. **Duplicate wills.**—Where a will is executed in duplicate or triplicate the Surrogate may direct the filing of two or more of the copies. The object is to determine (*a*) that they are in fact duplicates; (*b*) that they are live instruments, since by the alteration or revocation of either the testamentary finality of either or both may be affected or destroyed. But if they are duplicates, it is idle to prove both or to admit both to probate. *Roche* v. *Nason*, 185 N. Y. 128, 135, citing *Crossman* v. *Crossman*, 95 N. Y. 145, 150.

§ 251. **Photographing and testing will.**—Contestants may desire to have the will photographed, particularly in cases where the signature is disputed, and claimed to have been forged. The Surrogate has power to allow this to be done (*Matter of Monroe*, 1 Connoly, 496, Ransom, Surr.), or even to have chemical tests made of the ink. *Ibid.*; *Matter of Wait*, 16 N. Y. St. Rep. 292, where test was made in court. Application should be made in compliance with the practice prescribed in §§ 803–809 of the Code. *Matter of Woodward*, 28 Misc. 602. But in *Matter of Gartland*, 60 Misc. 33, Beckett, Surr., refused to permit it on the original probate, in the face of future litigation in which it was of high importance that "the very paper itself, unchanged, in its exact original form and character" should be available.

§ 252. **Who may propound the will?**

> A person designated in a will as executor, devisee, or legatee, or any person interested in the estate, or a creditor of the decedent, or any party to an action brought or about to be brought, and interested in the subject thereof, in which action the decedent, if living, would be a proper party, may present to the surrogate's court having jurisdiction, a written petition, duly verified, describing the will, setting forth the facts, upon which the jurisdiction of the court to grant probate thereof depends, and praying that the will may be proved, and that the persons, specified in the next section, may be cited to attend the probate thereof. Upon the presentation of such a petition, the surrogate must issue a citation accordingly. **§ 2614, Code Civil Proc.**

But, once the will is offered for probate, the proceeding is beyond the control of the proponent (*Hoyt* v. *Jackson*, 2 Dem. 443, 456; *Greeley's Will*, 15 Abb. Pr. N. S. 393), in this sense that it becomes then the proceeding, not of such proponents only, but of all persons interested in the estate under the will, whose right it is that the instrument shall be proved, and neither the proponent nor the Surrogate can arbitrarily terminate the proceeding so as to deprive any party thereto of his right to support the probate, for the proceeding is one *in rem*. *Matter of Lasak*, 131 N. Y. 624; *Paxton* v. *Brogan*, 12 N. Y. Supp. 563. After the petition is filed, and the

proper parties are cited, the Surrogate has jurisdiction of both subject-matter and parties. If the proponent decides not to prove the will, any other party may become the actor and proceed to offer witnesses in support of the will. *Matter of Lasak, supra,* citing Code Civ. Pro. § 2617.

If all the parties are of full age and should join in asking that the proceedings be dismissed, it would be the duty of the Surrogate to dismiss the proceeding. But so long as any person cited is before the Surrogate in support of the will, he has no right, upon the motion of any other party, arbitrarily to arrest or dismiss the proceeding. It is a proceeding in behalf of all the parties interested to prove the will. If the proponent should die, the jurisdiction would not be divested (*Brick* v. *Brick,* 66 N. Y. 144), nor would the proceeding abate. *Lafferty* v. *Lafferty,* 5 Redf. 326. If he left successors to his interest they would have to be brought in and be made parties to the proceeding as persons interested in the estate. *Matter of Lasak,* 131 N. Y. 624, 627; *Matter of Govers,* 5 Dem. 40; *Van Alen* v. *Hewins,* 5 Hun, 44.

§ 253. **Persons interested.**—What is meant by "persons interested" in an estate has heretofore been discussed ("Parties," *ante.*). And the Surrogate has power to determine whether the petitioner is a person entitled to propound the will before going on with the proceeding. It may be added that it has been held by the Court of Appeals (*Russell* v. *Hartt,* 87 N. Y. 19, 21), that the right to present a will for probate may be by a person possessing it transferred to another who as attorney or agent may act for and in the stead of the party interested. In the case cited, one Janet Russell was named in the will as legatee, as devisee and as executrix—thus possessing a threefold right to ask for its probate. By a power of attorney duly and properly executed, reciting the circumstances which made it necessary, she appointed one Hartt, her agent and attorney in her name, place and stead, to present the will or duly authenticated copies thereof to the proper Surrogate for probate and to have the same duly proven as a will of real and personal estate, and to ask for and receive letters of administration, and take possession of and administer upon the estate of the deceased. Held that the Surrogate was justified in acting upon a petition filed by Hartt, and had full jurisdiction to entertain the proceeding.

If the person interested is a woman, whether married or single, she may petition for probate, and if married her husband need not join in the petition.

Where the petition for probate is filed by a creditor of the testator, it has been held that a mere allegation that the petitioner is a creditor would be sufficient unless put in issue. If denied, then he must be required to set forth facts showing that he is such creditor. *Gove* v. *Harris,* 4 Dem. 293, citing *Creamer* v. *Waller,* 2 Dem. 351.

§ 254. **Will must be propounded.**—It is the duty of an executor to propound his testator's will (Schouler on Ex'rs & Adm'rs, § 53; *Thorn* v. *Sheil,* 15 Abb. N. S. 81), and if probate be refused he may carry the matter to the Court of Appeals (see Appeals), and if successful is entitled to his

counsel fees and disbursements thus incurred (*Matter of Blair*, 28 Misc. 611), to be adjusted upon his accounting. *S. C.*, modified on appeal, 49 App. Div. 417. See also 34 Misc. 444. And any party finding a will, in which he is interested, should propound it. *Matter of Griswold*, 15 Abb. 299; *Boynton* v. *Laddy*, 20 N. Y. St. Rep. 148. But the executor cannot be compelled to take an active part in the probate. If he files the will and the petition for probate, he may decline to examine witnesses or to support the will in case of contest. He cannot cause the dismissal of the proceeding except all parties cited are of full age and consent. *Matter of Lasak*, 131 N. Y. 624. But if he takes such a negative stand any other party interested may undertake the burden of proving the will. And if none of the parties is willing so to do it is the duty of the Surrogate to do it under § 2618. *Matter of Lazak*, 1 Connoly, 486, 489. The executor is not *ex officio* beneficially interested under a will, and yet he cannot be permitted to deprive those who are of their rights by blocking the proceedings. If he is recalcitrant any other party may become an *actor*. *Matter of Lasak*, *supra*, Coffin, Surr. In *Matter of Scott*, 8 App. Div. 369, the court, however, says that where an executor propounds a will and codicil, he is thereupon bound to *procure and lay before* the Court the evidence necessary and appropriate to establish it, and that one interested in the probate cannot be penalized by terms when because of the omission of the executor to perform this "duty" he applies for a commission or other means of eliciting the proof.

Persons discovering a codicil to a will which is propounded for probate should, if interested thereunder, offer it for probate in the proceeding pending for the probate of the original will. *Carle* v. *Underhill*, 3 Bradf. 101. If several persons produce independent instruments and severally petition for their probate as the last will of the same decedent, the proceedings will be consolidated in one, and the Surrogate will determine whether they are in harmony with one another, so as, when taken together, to constitute one last will, or whether they are entirely independent so that only one can stand. *Van Wert* v. *Benedict*, 1 Bradf. 114, 119. Such an inquiry must establish one paper as *the* last will and the others either as codicils to it, or as invalid by being revoked or otherwise. *Ibid.*, Opinion of Bradford, Surr., and cases cited at p. 119.

§ 255. **Preliminary inquiries.**—Before filing the petition it is well to ascertain with accuracy the names and addresses of all persons interested, with their relationship—degree of kinship—to the decedent. The delays occasioned by bringing in, subsequently, necessary parties, who might readily have been ascertained in the first instance, is sufficient warrant for this suggestion. The drafting of a family tree on which all the next of kin and all infants, especially issue of deceased parents, entitled by representation, are shown, will be found of great service in the preliminary steps before the probate clerk or Surrogate in contested cases.

CHAPTER II

REVOCATION OF WILLS

§ 256. Revoked will not entitled to probate.—Before discussing the practice on probate it is important to determine whether the instrument, or any one of several, found among a decedent's papers is a live instrument or is one that he has revoked. For a distinctive feature of a will is its ambulatory nature. A will validly revoked (as below set forth) is no will, and cannot be proved as the decedent's last will and testament. But unless the proponent *knows* the circumstances to be such as to constitute valid revocation, as for example, that the date of the will is prior to the marriage of testatrix (*Brown* v. *Clark*, 77 N. Y. 369, 2 R. S. 64, § 44), which thus destroys the will, he should propound the paper and let the court determine. Of several papers, all purporting to be complete wills, the last in point of time should be offered. But if any doubt exists as to the character of papers of a testamentary character found as to whether they may or may not be codicils they should be offered.

The provisions of the Revised Statutes covering revocation of wills are still in force and are as follows:

"*Written wills, how revoked or canceled.*

"No will in writing except in the cases hereinafter mentioned, or any part thereof, shall be revoked or altered otherwise than by some other will in writing or some other writing of the testator declaring such revocation or alteration; and executed with the same formalities with which the will itself was required by law to be executed, or unless such will be burnt, torn, canceled, obliterated or destroyed with the intent and for the purpose of revoking the same by the testator himself, or by another person in his presence by his direction and consent, and when so done by another person, by the direction and consent of the testator, the fact of such injury or destruction shall be proved by at least two witnesses." 2 R. S., part II, ch. 6, title 1, art. III, p. 64, § 42 (§ 34, Dec. Est. Law, ch. 13, Cons. Law, art. 2).

"*Will, when revoked by marriage and birth of issue.* (See § 269 below.)

"If after the making of any will disposing of the whole estate of the testator, such testator shall marry and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked unless provision shall have been made for such issue by some settlement or unless such issue shall be provided for in the will or in such way mentioned therein as to show an intention not to make such provision and no other evidence to rebut the presumption of such revoca-

tion shall be received." *Id.* § 43 (§ 35, Dec. Est. Law); *Matter of Gall*, 32 N. Y. St. Rep. 695. This statute is derived not from the common but from the civil-law rule, which rests upon the "presumed oversight of the parent." See *Wormser* v. *Croce*, 120 App. Div. 287, citing *Brush* v. *Wilkins*, 4 Johns. Ch. 506; *Smith* v. *Robertson*, 24 Hun 210. See *Tavshanjian* v. *Abbott*, 59 Misc. 642. But the adoption of a child does not operate to revoke a prior made will. *Matter of Gregory*, 15 Misc. 407.

"*Will of unmarried woman, revoked by marriage.* (See § 267 below.)

"A will executed by an unmarried woman shall be declared revoked by her subsequent marriage." *Id.* § 44 (§ 36, Dec. Est. Law). These statutes are self-operative. It seems an extreme case, yet it is held that a will made by a woman in contemplation of her marriage, and providing for her intended husband, was revoked by the act of her marriage. *Matter of Mann*, 51 Misc. 315. (See cases cited.)

See also §§ 45, 46, 47 and 48 (§§ 37, 38, 39 and 40, Dec. Est. Law) as to effect on previous made will of bonds, agreements, covenants, charges, incumbrances, conveyances, settlements, deeds or other acts of the testator affecting the property devised in such will. (See § 270 below.)

§ 257. **Express words of revocation.**—Where by a conveyance, settlement, deed or other act of a testator by which his estate or interest in property previously devised or bequeathed by him, shall be altered but not wholly divested, and in the instrument by which such alteration is made, intention is declared that it shall operate as a revocation of such previous devise or bequest, it will so operate, but not otherwise. In the absence of such express intention the devise or bequest made prior to such conveyance or deed shall pass to the devisee or legatee, the actual estate or interest of the testator which would otherwise descend to his heirs, or pass to his next of kin. (See § 47, art. III of ch. 6, part II, Revised Statutes, Banks's 8th ed., p. 2549, § 39, Dec. Est. Law).

But, if the provisions of the instrument by which such alteration is made are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency and such condition be not performed, or such contingency do not happen. *Id.* § 48 (§ 40, Dec. Est. Law). If a testator shall duly make and execute a second will after the making of any will, the destruction, cancellation or revocation of such second will shall not revive the first, unless it appear by the terms of such revocation that it was his intention to revive and give effect to his first will, or unless after such destruction, cancellation or revocation, he shall duly republish his first will. *Id.* § 53 (§ 41, Dec. Est. Law).

In *Matter of Stickney*, 161 N. Y. 43, 45, aff'g 31 App. Div. 383, the court observes: "Obviously, the *first sentence* of § 53 relates only to the revocation in writing provided for by § 42, and, therefore, to revive a first will under that provision, a writing *executed with the same formalities*, as are required for the execution of a will, must exist in which the testator in express terms declares his intention to revive and give effect to such former

will. The *second sentence* of § 53 provides the *only other method* of reviving a prior will where it has been revoked by a second *which has been destroyed*, and requires that when the revocation of the second has been by its destruction the first will must be republished by the testator." Hence the court held that republication must be made to the very witnesses who attested the will thus sought to be republished. Of course it could be re-executed and published anew to new witnesses.

§ 258. **Necessity of revoking clause in later will.**—The mere execution of a later will has been held not to operate as a revocation of the prior will, unless it contains an explicit revoking clause or is wholly inconsistent with the prior will; thus, where a will purports to dispose of all the testator's property, it is in such case clearly inconsistent with the prior will, and will be deemed to revoke it. *Simmons* v. *Simmons*, 26 Barb. 68. See § 262 below. The reason for this rule is that a later will disposing of other property or only a portion of the decedent's property is to all intents and purposes nothing more than a codicil, and only operates to change *pro tanto* the dispositions made by the testator in the prior document; in other words, the inconsistency between the prior and later instrument must be complete. This necessarily leads to the further statement that as a codicil, in order to become operative, must be shown to have been executed with all the statutory formalities as if it were an independent will, so a subsequent will cannot operate to change or revoke a previous will, unless it is executed with the same formalities with which the will itself was required by law to be executed; thus where (*Nelson* v. *The Pub. Adm.*, 2 Bradf. 210) a testator selects the mode of revocation by writing, he will fail in accomplishing his purpose if he dispenses with any of the necessary formalities. In the case just cited, the testator made four unattested wills, three others apparently duly executed, and several papers of revocation. Three of the attested revocations were wills signed, but not attested; three were mere declarations of revocation subscribed by the testator, but without the names of subscribing witnesses. The court held that while they expressed as strongly as anything could a determination to rescind every instrument of a testamentary character ever executed by the testator, and while they expressed this repeatedly, showing a continued and earnest intention to revoke, nevertheless the law must govern. "The testator might have revoked by burning, tearing, canceling, obliterating or destroying, but he selected the mode of revocation by writing, in which he has failed to comply with the law and these formal acts have no validity." See also *Leaycraft* v. *Simmons*, 3 Bradf. 35, 43; *McLosky* v. *Reid*, 4 Bradf. 334, where the Surrogate admits a second will not executed with the formalities necessary in order to dispose of real property in the State of New York to be sufficient as a will of personal property admitting the prior will, which had been executed, as a will of real property. See, also, *Barry* v. *Brown*, 2 Dem. 309, and *Mairs* v. *Freeman*, 3 Redf. 181, holding that where a party offering a subsequent will to that propounded, which it was claimed operated as a revocation, the burden of proof is on such

party, and he is required to show the due execution of that instrument in order that it may constitute a revocation. Where a codicil was written at the foot of the will and made such dispositions as to blend the codicil and will into one testamentary disposition, a revocation of the codicil by erasure of the signature was held to revoke the will as well. *Matter of Brookman*, 11 Misc. 675. In *Matter of Barnes*, 70 App. Div. 523, it was held that probate of a will would be denied on the ground of its revocation when satisfactory proof was adduced that a will revoking the will offered for probate was duly executed, even though the revoking will was not and could not be produced, and was not in fact probated.

§ 259. **Reviving prior will.**—The provision of § 53, art. III, ch. 6, part 2, Revised Statutes, 8th ed., p. 2550 (§ 41, Dec. Est. Law) above quoted, that the destruction, cancellation or revocation of a second will shall not revive the first will, unless it appears by the terms of such revocation that it was the testator's intention to revive and give effect to his first will, or unless he shall duly republish his first will, must be taken to be limited in its application to the exact cases covered by the statute, and for this reason, that cases are not infrequent where the testator is known to have made a second will, which, however, cannot be found. In such a case if the prior will be propounded as the last will of the decedent, it will be admitted to probate in the absence of proof:

(*a*) That there was a later will;

(*b*) That it was properly executed (by which of course is meant that all elements of proper execution were present, including capacity, etc.);

(*c*) That the later will contained a revoking clause or,

(*d*) Such proof of the contents of the later will as show inconsistency with the provisions of the former will.

There is no doubt, however, as to the jurisdiction and power of the Surrogate to receive proof that the prior will was revoked by the subsequent will, and further to receive proof that the subsequent will had been fraudulently destroyed: or, that having been properly executed, it was destroyed by the testator when his mind had become so impaired that he was incompetent of performing a testamentary act, which incompetency of course taints with invalidity the act of revocation as well. *Matter of Waldron*, 19 Misc. 333. Therefore, while it may be perfectly clear that the second will was duly made and executed, and that it was destroyed, or canceled or revoked, or where there is an absence of proof as to the contents of a later will, the Surrogate is without power to say that the second will was in fact a revocation of the first and the prohibition of the statute against reviving the first will is not infringed; inasmuch as there is no proof that the first will was not continuous in its operation as a declaration of the testator's testamentary intention. *Nelson* v. *McGiffert*, 3 Barb. Ch. 158, 164. So in *Matter of Stickney*, 161 N. Y. 42, the court held that a will that has been revoked by a subsequent one which is destroyed by a second one, is not revived by his declaration of desire to revive the first one, *unless* such declaration be made to the original subscribing witnesses.

§ 260. **Codicil to earlier will.**—A curious complication may arise where a testator executes two wills, and after executing both, makes a codicil to the earlier will. The question then arises, what is the effect of such codicil upon the intermediate will, and can it revive the earlier will? The question will turn on whether the earlier will was destroyed or revoked.

The effect of a codicil to a will, revoked by a later will, is to revive and republish the earlier will; which speaks as of the date of the codicil, assuming it to be duly executed. *Knapp's Will*, 23 N. Y. Supp. 282. It also operates by implication to revoke the intermediate will. In other words, the codicil and the earlier will, read together, constitute the final testamentary disposition of the estate. *Matter of Campbell*, 170 N. Y. 84, aff'g 67 App. Div. 627. See also *Matter of Conway*, 124 N. Y. 455; *Caulfield* v. *Sullivan*, 85 N. Y. 153; *Matter of Miller*, 11 App. Div. 337; 1 Williams on Executors, 6th Am. ed., pp. 251, 252; 1 Jarman on Wills, 5th Am. ed., pp. 114–191; *Brown* v. *Clark*, 77 N. Y. 369.

In the case of the *Will of Pinckney*, 1 Tucker, 436, the learned Surrogate considers this question briefly, and states that it is not altogether without precedent. He refers to an English case (3 Vesey R., p. 402) where the testator executed a codicil in 1776, referring to a will of 1752. A devisee of real estate under a second and later will of 1756, filed a bill to sustain that will. The codicil was held to cancel the intermediate will (citing also *Crosbie* v. *McDonald*, 4 Vesey R., p. 616). He also cites another case (*Hall* v. *Tokeler*, 2 Robt., p. 318) where the decedent executed two wills, destroyed the earlier one *animo revocandi*, and then executed a codicil showing an intention to revive it; and it was held that the codicil was inoperative to revive the former will which had been *destroyed* but did operate to revoke the later will.

The facts before Surrogate Tucker were that the decedent had executed a will in June, 1861, and another March 16, 1863, and a codicil March 28, 1863, which in terms was expressed to be a codicil to the will of June, 1861; the will of June, 1861, was found with the seal and signature cut out; which constituted cancellation under the statute; due execution was proved of the other will and of the codicil; it was held that the codicil being expressly declared to be a codicil to the will of June 21, 1861, could not be attached to the later will, and the effect of the codicil was to revoke and abrogate the later will, because it republished the earlier will as testator's last will; and since the codicil could not operate to revive the earlier will, as it had been canceled, both wills were revoked and abrogated.

The Surrogate further held that inasmuch as the codicil propounded was not sufficient to stand alone as a testamentary disposition, intestacy must be decreed. Jarman in his work on Wills, says (at p. 188) that the law in England is that "if a testator makes a will in 1830, and at a subsequent period, say 1840, makes another will inconsistent with the former, but without *destroying* such former will, and afterwards makes a codicil which he declares to be a codicil to his will of 1830, this would set up the will so referred to in opposition to the posterior will."

If the codicil is properly executed, published, etc., the will revoked and revived needs no republication. *Matter of Emmons,* 110 App. Div. 701. The codicil and will are by the reference made one instrument, and though the original will was informally executed it would be cured and corrected by due execution of the codicil. *Storm's Will,* 3 Redf. 327, citing *Mooers* v. *White,* 6 Johns. Ch. 374, 375. Where a testator was improperly prevented from revoking a will, the ancient rule was that the one who so hindered the revocation was rendered thereby *unworthy,* i. e., he was excluded from participation. But it is very doubtful whether the prevention of the execution of a codicil by improper means can revoke a previous will. *Leaycraft* v. *Simmons,* 3 Bradf. 35, 43. Where a will is revoked by destruction it seems that it revokes a codicil thereto, even though it turns up later uninjured. *Cunningham* v. *Hewitt,* 84 App. Div. 114. This means, naturally, a codicil in existence when the destruction occurs.

§ 261. **Parol declarations inadmissible.**—Where questions of conflicting will and codicil come up, evidences of mistake in the testator's reference to one of two wills in a codicil dating subsequently to both, is inadmissible (see *Matter of Pinckney, supra*), nor are subsequent declarations by testator that he had revoked his will to be allowed in evidence. *Coe* v. *Kniffen,* 2 Johns. 31; *Dan* v. *Brown,* 4 Cow. 483. See also *Matter of Kennedy,* 167 N. Y. 163; *Matter of Burbank,* 104 App. Div. 312. For a will cannot be revoked by parol, or in any but the statutory manner, and a will certainly will not be deemed revoked by alleged declarations by testator that he did not understand its provisions, nor can such declarations be admitted. *Matter of Hammond,* 16 St. Rep. 977; *Shaw* v. *Shaw,* 1 Dem. 21. But where a trust deed, executed with the formalities of a will, purported to revoke a will, it was held duly revoked. (See *Matter of Backus,* 49 App. Div. 410), and the Surrogate's decree (29 Misc. 448), admitting the will to probate was reversed and probate denied.

§ 262. **Revoking act must be equally solemn with act revoked.**—To make a subsequent will or a codicil operate to revoke a will, such codicil or will must be an affirmative testamentary disposition in itself. In the *Backus* case just cited the trust deed effected a complete disposition of the grantor's property. But the court held that the writing effectual to revoke a will need not be charactized as a will by the person executing it. Of course due execution of the later will must be satisfactorily established. *Mairs* v. *Freeman,* 3 Redf. 181. If the later will be not produced it must be satisfactorily proved by affirmative evidence as to factum and contents. *Matter of Williams,* 34 Misc. 748; *Matter of Meyers,* 28 Misc. 359. Even though the paper claimed to have a revocatory effect clearly manifests an intention to revoke, that is not sufficient. The most satisfactory evidence that the testator had repeatedly and explicitly declared that it was his deliberate design to annul or destroy the will, would not authorize the court to reject the instrument (*Delafield* v. *Parish,* 1 Redf. 1, 104, aff'd 25 N. Y. 9, 30, 35), particularly if the testator was physically enfeebled when making the later will. Judge Davis writing the prevailing opinion

in the *Parish Will* case formulated this rule which is concise and clear. See 25 Abb. Pr. 35.

"When it is sought to establish a posterior will, to overthrow a prior one made by the testator in health, and under circumstances of deliberation and care, and which is free from all suspicion, and when the subsequent will was made in enfeebled health, and in hostility to the provisions of the first one, in such case the prior will is to prevail unless he who sets up the subsequent one can satisfy the conscience of the Court of Probate that he has established a will. And also the prior will is to prevail, unless the subsequent one is so proven to speak the testator's intentions, so as to leave no doubt that it does so speak them." The Court of Appeals in a much later case (*Newcomb* v. *Webster*, 113 N. Y. 191, 196), declared the rule in respect of the effect of a codicil claimed to have revocatory operation. Judge Danforth says: "It may be taken as a well-settled general rule that a will and codicil are to be construed together as parts of one and the same instrument, and that a codicil is no revocation of a will further than it is so expressed. *Westcott* v. *Cady*, 5 Johns. Ch. 343. But if, when regarded as one instrument, it is found to contain repugnant bequests in separate clauses, one or the other, or both, must fail, and therefore, the rule is that, of the two, the bequest contained in the later clause shall stand. The same principle applies with greater force where there are two distinct instruments relating to the same subject-matter. In such a case an inconsistent devise or bequest in the second or last instrument is a complete revocation of the former. But if part is inconsistent and part is consistent, the first will is deemed to be revoked only to the extent of the discordant dispositions, and so far as may be necessary to give effect to the one last made." Citing *Nelson* v. *McGiffert*, 3 Barb. Ch. 158. Consequently the Court of Appeals held that as the codicil made a new and complete disposition of the estate, but appointed no executors, both will and codicil should be admitted to probate, that the former was operative so far as to designate the executors, but revoked by the latter as to the disposition of the property. 113 N. Y. 197. Hence revocation by a writing means by an authenticated writing. A mere writing, unattested in "solemn form" though signed and dated and indorsed on the very will is a mere sign of an intention, but not an "equally solemn" or sufficient act. *Matter of Miller*, 50 Misc. 70. But if in addition the original signature is canceled, and produced, thus indorsed from decedent's safe, and there is no suspicion of any tampering, revocation, not by "equally solemn" act but by cancellation, may be declared. *Ibid.* See § 265 below.

§ 263. **Effect of duplicate wills.**—It seems that where a will has been executed in duplicate, revocation by the testator of one of such duplicate wills, by cancellation or destruction, will be held to operate to nullify the other, in the absence of proof that the other was within the control of the testator so as to be similarly destroyed. See *Asinari* v. *Bangs*, 3 Dem. 385.

This of course would not apply to a revocation by an instrument in writing. The duplicate will can in such case be treated only as one instrument, and a reference to a will of the given day, or a reference to it as a prior will need not specify that the will is a duplicate will, if the revocation be in conformity with the statute, and express in its items. *Biggs* v. *Angus*, 3 Dem. 93, 96. See *Roche* v. *Nason*, 185 N. Y. 128.

§ 264. **Mutual wills.**—Mutual wills, unless made in pursuance of a contract between the testators, may be revoked by either testator without notice to the other. *Edson* v. *Parsons*, 85 Hun, 263. And such a contract, effectual to prevent revocation, must be affirmatively proven by full and satisfactory evidence. *S. C.*, 155 N. Y. 555. See also *Herrick* v. *Snyder*, 27 Misc. 462. An agreement to make mutual wills can be enforced only at instance of a party thereto. Equity will not enforce it at a suit of a third party. *Everdell* v. *Hill*, 58 App. Div. 151.

§ 265. **Revocation by obliterating or canceling.**—It is the settled rule that the provisions of the statute in regard to proof of revocation of a will by cancellation or obliteration, contemplates the cancellation or obliteration of the whole will. The language of the statute is explicit. It says, "No will or any part thereof shall be revoked or altered unless such will" (not unless such will or such part) "be burnt, torn, canceled, obliterated or destroyed *animo revocandi*." See § 2, *ante*. The effect of the words in the statute are that not even a part of the will shall be deemed revoked unless the will itself is destroyed, and they forbid the possible inference that a part might be revoked by destroying such part. *Lovell* v. *Quitman*, 25 Hun, 537, aff'd 88 N. Y. 377. This, however, must not be taken to mean that a complete destruction of the instrument must be effected; thus, where a testator in infirm health, feeble in his physical powers, was yet of sufficient mental soundness to be capable of a testamentary act, calls for a will previously executed, tears the paper into fragments and then or thereafter declares that he has destroyed his will in the presence of witnesses, it will be held to be a sufficient destruction of the will, the act being clearly proved as well as the intent of revocation. See *Sweet* v. *Sweet*, 1 Redf. 451. See further on the point that the mere act of tearing or canceling is not sufficient, *Jackson* v. *Halloway*, 7 Johnson, 394; *Jackson* v. *Pattie*, 9 *id.* 312; *Smith* v. *Hart*, 4 Barb. 28; *Nelson* v. *McGiffert*, 3 Barb. Ch. 158; *Perrott* v. *Perrott*, 14 East. 423; Willard on Ex. 123.

It will be noted that the statute quoted above in § 256 contemplates a cancellation, either by the hand of the testator, or by the hand of another; and where, by the hand of another, by testator's direction and consent. But it must be actually *done*. So where testatrix told her brother to destroy her will and he falsely told her he had done so, at her death it was held not to have been revoked. *Matter of Evans*, 113 App. Div. 373. And it must be done by testator *or in his presence*. See *Matter of Hughes*, 61 Misc. 207, opinion by Ketcham, Surr. Moreover, such cancellation and the direction to cancel must be proved by at least two witnesses. The statute does not provide for any presumptions, but leaves the circum-

stances to be proven. A most instructive case is *Matter of Hopkins*, 35 Misc. 102, aff'd 73 App. Div. 559, rev'd 172 N. Y. 360. In this case the special guardian argued that where a will is found with the signature erased, there arises a presumption that it was done by the testator, and that to overcome such presumption there must be evidence that it was done by some other hand, and cited *Matter of Philp*, 46 N. Y. St. Rep. 356; *Matter of Clark*, 1 Tucker, 445, as authorities directly in point, and cited as analogous, *Hard* v. *Ashley*, 88 Hun, 103; *Collyer* v. *Collyer*, 110 N. Y. 481, where the question was that of an alleged lost will. The court observed: "No one questions but that these cases were correctly decided upon their own peculiar facts, and it is the facts of each case which control.

"The statute was enacted to prevent fraud and not to invite it, therefore such a broad presumption which would make the accomplishment of a fraudulent cancellation the easier would contravene the spirit of the act." And it was held below that as the signature was sought to be canceled by vertical marks, which were proved by expert testimony not to have been made by testator, the will was not duly canceled. The Court of Appeals reversed on the ground that testimony of expert that ||||| marks on signature were not made by testator was inadmissible as such marks are not *writing* for purposes of comparison under Laws 1880, ch. 36 and Laws 1888, ch. 555. (See cases discussed in opinion.) It was remitted for a jury trial. (See second appeal.) *Matter of Hopkins*, 97 App. Div. 126. Held that while it was shown the signature was canceled yet as neither party offered any evidence as to whether, when found in testator's custody the signature was in fact *then* canceled, the only presumption to be entertained was that the cancellation was subsequent to execution. On the next appeal it was held to have been canceled by another than testator. *Matter of Hopkins*, 109 App. Div. 861. See also *Matter of Brookman*, 11 Misc. 675. In this case the signature was erased by ink lines, and the word "void" in margin initialled by testator. Held, will was revoked.

In *Matter of Akers*, 173 N. Y. 620, aff'g 74 App. Div. 461, the testator wrote at head of, and also opposite signature to his will "This will and codicil is revoked. Jan'y 14, '96. Fred'k Akers." The New York Surrogate held this not sufficient cancellation and probated the will. This was affirmed.

In a recent case in Kings County, *Matter of Alger*, 38 Misc. 143, the testator had drawn across all the provisions of his first codicil, including the signature and attestation clause numerous cross marks in lead pencil and also wrote in on the place of the attestation clause, the word "canceled" and in another place the date, "April 19th, 1895."

The second codicil contained several cross marks in lead pencil in the first clause thereof, and at the foot of the attestation clause there was written:

"Brooklyn, April. The codicil in the within is this day 20th, 1895, canceled for personal abuse and ungratefulness on her part. Geo. Alger, 203 12th St., in the city of Brooklyn, N. Y."

The words "Geo. Alger" were also written a second time below this. It was proved that the word "canceled" and the date were all in the handwriting of the decedent. The Surrogate held both codicils to be canceled. He points out the derivation of the word canceled from *cancelli*, cross-bars or lattice work, and held that where it is apparent that the cross lines had been made by the testator with the evident intention of effecting a revocation, such act is sufficient to work a revocation of the will, citing *Matter of Brookman*, 11 Misc. 675.

So far as intention to cancel is concerned, there can be little doubt but that in the *Akers* case, the intention of the testator was clear beyond peradventure, and yet the court, as we think properly, held the revocation not to be according to the statute, and it may thus be doubted whether under *Lovell* v. *Quitman*, the decision in the *Alger* case will stand as to the second codicil. See opinion as to meaning of cancellation and cases discussed.

The recovered several fragments of a will so torn and supposed by the testator to have been destroyed, will be denied probate. When testator desires to revoke part of his will he must resort to the means provided for in the first part of § 42, quoted in § 256, *q. v.* above, that is, to some formal writing executed as therein prescribed. *Lovell* v. *Quitman*, 88 N. Y. 377, 380, Danforth, J.; *Gugel* v. *Vollmer*, 1 Dem. 484. So, if the will is found in draughtman's desk, cut in two, there is no presumption of revocation. *Matter of Ackels*, 23 Misc. 321.

So where a testator having, by will, devised property to his son, whose name was given, it was held that the erasure of the name leaving, however, the word "son" could not operate to revoke the devise. *Clark* v. *Smith*, 34 Barb. 140. So in *Matter of Kissam*, 59 Misc. 308, Millard, Surr., testatrix's will gave to R. and H. *each* the sum of $5,000. After execution he erased the name of H. and the word "each." Held this could not alter the will, nor was it a revocation. See cases reviewed at p. 309.

So in *Matter of Gartland*, 60 Misc. 31, the writing in by a third party of additional pecuniary bequests, after execution was held not to invalidate the will and were rejected by Beckett, Surr., in probating it. See, *contra*, *Dan* v. *Brown*, 4 Cow. 483, holding that so long as there exists *animo revocandi* the slightest decree of cancellation will revoke. Where one who had acquired property after making his will, interlined provisions therein and altered other provisions so as to cover such after-acquired property, it was held that such changes not being properly attested could have no testamentary effect, and yet not being done *animo revocandi* would not affect the will as it originally stood. *Howard* v. *Holloway*, 7 Johns. 394. Similarly where it appeared that the signature of the testatrix had been erased, first by drawing diagonal lines over the name, and then nearly erasing such lines and the name itself, after which the testatrix carefully rewrote her signature over the original place of signing, Surrogate Jenks held that there was no presumption of its having been done with the intention of revoking the will, and in the absence of affirmative

proof to that effect he admitted it to probate. *Matter of Wood*, 2 Connoly, 144.

§ 266. **Material alterations in will.**—Where a will is offered for probate having material alterations and erasures, the Surrogate must determine whether they were or were not made before execution. *Matter of Wilcox*, 131 N. Y. 610. When it clearly appears that the alteration was made before the will was executed, probate will be granted. But, in doubtful cases, where material provisions have been erased or altered, and the Surrogate cannot determine from the proof whether the alterations were made before or after execution, the whole instrument must be rejected, and probate refused. *Matter of Barber*, 92 Hun, 489, 497. When material alteration follows signature the whole will will be refused probate, "on the theory that testator would not desire his will to stand with a material part omitted." But if not material it may be disregarded and probate decreed. *Matter of Gibson*, 128 App. Div. 769. The burden of proof is on the proponent to show they were made before execution. For the presumption in regard to alteration in a will is in this State, that it was made after execution. *Matter of Dake*, 75 App. Div. 403, citing *Matter of Potter*, 33 N. Y. St. Rep. 936, and *Crossman* v. *Crossman*, 95 N. Y. 145. See, also *Matter of Carver*, 3 Misc. 567, Davie, Surr.; *Wetmore* v. *Carryl*, 5 Redf. 544, 547, Rollins, Surr., citing *Herrick* v. *Malin*, 22 Wend. 388; *Smith* v. *McGowan*, 3 Barb. 404; *Acker* v. *Ledyard*, 8 Barb. 514, and opinion of Lord Brougham in *Cooper* v. *Bockett*, 4 Moore's P. C. C. 419. See, also, *Van Buren* v. *Cockburn*, 14 Barb. 118; *McPherson* v. *Clark*, 3 Bradf. 93; *Estate of Prescott*, 4 Redf. 178. Those seeking to establish a will containing such apparent defects must overcome the usual presumption by proof direct or inferential. *Dyer* v. *Erving*, 2 Dem. 160, Rollins, Surr.; *Matter of Carver*, *supra*. If the interlineations are in body of holographic will in testator's handwriting there is a presumption they were made in preparing will and before execution. *Matter of Dake*, *supra*. Yet, once a will has been signed and published and attested, the testator though he may absolutely revoke it by destruction, or may amend or modify it by another writing executed with formalities such as attended its own execution, cannot otherwise, by one jot or tittle, vary its terms, either by additions, interlineations, obliterations, erasures or other changes upon its face, or by the after preparation of unattested papers, designed to supplement its provisions, or by the alteration of any such papers already in existence and engrafted by proper reference upon the will itself. *Dyer* v. *Erving*, *supra*, opinion of Rollins, p. 170. See interesting case, *Matter of Johnson*, 60 Misc. 277, where alterations were made at testatrix's request and witnessed, and she reidentified her original signature to them. Will admitted, but alterations ignored. The Court of Appeals (*Crossman* v. *Crossman*, 95 N. Y. 145, 152), intimated that there is no presumption where the interlineation is fair upon the face of the instrument and there are no circumstances to cast suspicion upon it that such interlineation though unexplained was fraudulently made after the execution of the instrument.

But in that case the court had before it duplicate wills. The interlineation was in one of the two, and the words interlined were necessary to make the will the duplicate of the other. Moreover, the interlineation was noted in the attestation clause. Judge Earl said (p. 153), "Taking all these circumstances there was sufficient to cast the burden upon the contestants to show that the interlineations were fraudulent and unauthorized." See *Matter of Dwyer*, 29 Misc. 382, 390. In determining whether the alterations were made before or after execution, the Surrogate will interrogate the witnesses or persons present as to their personal knowledge; and in the absence of any light from this source he should consider the handwriting, comparing it with that in the body of the instrument, the color of the ink, which he has authority to have chemically tested (*Matter of Monroe*, 5 N. Y. Supp. 552), the manner of the interlineation, and, particularly, whether reference is made to it in the attestation clause (*Crossman* v. *Crossman*, *supra*), for in case there is such reference, the interlineation is sufficiently accounted for. 1 Greenleaf, § 564. See also *Matter of Whitney*, 90 Hun, 138–143. If the will is in testator's writing and was in his custody till his death, any interlineation or erasure will be presumed to have been made before execution. *Matter of Potter*, 33 N. Y. St. Rep. 936. But pencil interlineations will not be deemed permanent parts of a will. *Will of Tighe*, N. Y. Law Journal, August 15, 1898. They show the deliberation of the testator, but are not sufficient as an embodiment of his determination. In *Matter of Stickney*, 41 Misc. 70, Church, Surr., admitted a will, validly executed, to probate, but enumerated in his decree each provision held to be annulled by interlineation or change proved to have been made *after* execution. In *Matter of Raisbeck*, 52 Misc. 279, pencil marks made in a lawyer's will (holographic) found in his private box were disregarded, being treated as mere indicia of a purpose to make a new will, but not sufficient to revoke the old until and unless the new testamentary act was actually complete.

Again, in *Matter of Westbrook*, 44 Misc. 339, a peculiar case was presented. Testatrix had cut out a paragraph and pasted the two remaining pieces of the will together, and put the paper into her box. She later wrote her executor telling him of the box and that it contained *her will*. Held there was no proof of intent to revoke. Thereupon the Surrogate took proof of the cut out missing portion of the will, and, incorporating the same into the existing paper, decreed probate.

§ 267. **Effect of marriage of a woman as a revocation.**—It was the rule of the common law that the marriage of a woman operates as an absolute revocation of her prior will. *Brown* v. *Clark*, 77 N. Y. 369, 373, and cases cited.

This rule of the common law was made a part of the law of this State by the Revised Statutes, which is the declaration of an absolute rule. (Now § 36, Dec. Est. Law.)

It has been held that the fact that the testamentary capacity conferred upon married women by the so-called married women's acts in this State,

takes away the reason of the prior rule, does not abrogate this rule (*Brown* v. *Clark, supra*), in spite of the maxim *cessante ratione legis, cessat lex ipse.* 3 Redf. 445, reversed.

The courts cannot dispose of a statutory rule because it may appear that the policy upon which it was established has ceased, but where a testatrix makes a will before her marriage and after her marriage makes a codicil referring to such will, the due execution and publication of such codicil is now, as it was prior to the Revised Statutes, a sufficient republication of the will to which it refers. *Van Cortlandt* v. *Kipp*, 1 Hill, 590; *Brown* v. *Clark*, 77 N. Y. 369, 377, and cases cited. See also 1 Jarman on Wills, p. 78. "A codicil duly attested communicates the efficacy of its attestation (even) to any unattested will or previous codicil so as to render effectual any devise of the freehold estate which may be contained in such prior unattested instrument."

The revocation accomplished by a marriage subsequent to the making of a will is absolute and operates *eo instanti*. *Lathrop* v. *Dunlap*, 63 N. Y. 610. See also *Matter of Gall*, 2 Connoly, 286, aff'd in 131 N. Y. 593, where testator married one to whom he had for a long time prior thereto sustained illicit relations; the marriage found by the court was nonceremonial, but was adjudged to have taken place by mutual consent at a time subsequent to the making of the will. Held that while the fixing of the period when the parties passed by mutual consent from a state of illicit intercourse into that of marriage was incapable of being positively fixed, that negatively it certainly had not taken place at the time of the making of the will, which therefore was revoked by the subsequent marriage and birth of issue.

A widow is deemed an unmarried woman under this rule, and a will made while she is a widow will be deemed revoked by her subsequent remarriage. *Matter of Kaufman*, 131 N. Y. 620, aff'g 61 Hun, 331.

But where a married woman makes a will and subsequently to its execution her marriage is dissolved by judicial decree, she is not deemed to have executed it as an unmarried woman, and in such a case the Court of Appeals held that the subsequent remarriage of such a woman would not operate to revoke the will. *Matter of McLarney*, 153 N. Y. 416, aff'g 90 Hun, 361. The word "unmarried" in the statute means a person not in a state of marriage. *Id.* See also *Matter of Union Trust Co.*, 179 N. Y. 261, "not being married at the time." The whole subject of a woman's will, as affected by the statutes is summarized in one of Surrogate Thomas' luminous and comprehensive opinions. *Matter of Yung*, N. Y. Law Journ., July 11, 1908, which is quoted in full:

"The propounded paper was duly executed by the decedent on July 2, 1895, at which time she was the wife of James Boyd Blake, and the mother of two infant children born of her marriage with him, only one of whom now survives, the other having predeceased her. Thereafter, her then husband, James Boyd Blake, died, and she married Charles Yung, one of the persons nominated in the testamentary instrument as executors, who

is the proponent in this proceeding, and by her marriage with him she became the mother of Charles Francis Yung, now an infant of the age of about 3 years. The only objection filed in the proceeding is made by the special guardian of the infant Charles Francis Yung, and the only issue raised thereby is as to whether, upon the facts already stated, the propounded paper was revoked. The statutes applicable are contained in chapter 6, title 1, of the Revised Statutes, enacted in 1830, with later amendments thereto. Section 1 provided that 'all persons except idiots, persons of unsound mind, married women and infants may devise their real estate by a last will and testament, duly executed according to the provisions of this title.' Section 21 also declared that 'every male person of the age of 18 years or upwards, and every female not being a married woman, of the age of 16 years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate by will in writing." In other words, a valid will could not be made by a married woman, and this rule was not a new one, the statute being, in this respect, a new statement of the law existing at the time of its enactment and for long prior thereto. Three sections in the title cover all cases in which a constructive revocation of a will thus authorized to be made could occur, and these sections are numbered 43, 44 and 49. By section 44 it was declared that 'a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage.' Section 43 provided for the revocation of the will of a man by his subsequent marriage and the birth of a child, if either wife or issue survived him. Section 49 provided for the partial revocation of the will of a man in favor of and to protect any child afterwards born, who was not mentioned or provided for in such will, or otherwise provided for by a settlement. The scheme thus presented was definite, complete and harmonious. By Laws 1849, chapter 375, it was provided that 'any married female may . . . . devise real and personal property and any interest or estate therein, and the rents, issues and profits thereof in the same manner and with like effect as if she were unmarried.' By Laws 1867, chapter 782, sections 1 and 21 of the Revised Statutes were amended so as to place women and men on precisely the same footing as to the making of wills. Thereafter, in 1869, in *Cotheal* v. *Cotheal* (40 N. Y. 405), a case of great hardship to a child born after the execution of a will by its mother, by which he was deprived of any interest in her estate or of any provision therefrom, was presented to the Court of Appeals, and an effort was made to procure a construction of section 49 of the Revised Statutes which would make it applicable to the will of a married woman. Notwithstanding the equities which might have influenced the court if the statute had been capable of two constructions, it was adjudged that it had no application and that the will of the mother was unrevoked, and that the afterborn child was without remedy. Shortly following this decision section 49 was by Laws 1869, chapter 22, amended so as to read as follows: 'Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such

testator, and shall die leaving such child so afterborn unprovided for by any settlement, and neither provided for nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate as would have descended or been distributed to such child if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised and bequeathed to them by such will.' This statute is conceded to have application to the present case, and without an adjudication that the will is in whole revoked and null the contesting infant will be entitled to the full share of his mother's estate which would pass to him in case she were intestate (*Matter of Murphy* 144 N. Y. 557). If any advantage will come to him by the rejection of the paper it will not be in the nature of an increase of his interest in the estate of the decedent, and nothing less will serve to give him a legal standing to contest and resist the probate of the paper (*Trustees* v. *Ritch*, 91 Hun, 509, 532; *Matter of Murphy*, 144 N. Y. 557; *Matter of Brown*, 47 Hun, 360, 361; *Matter of Rollwagen*, 48 Howard, 103). My further examination as to the propriety of admitting the will is therefore made in pursuance of my general duty to examine as to the validity of the paper, though not contested. No amendments have been made to sections 43 and 44 of the statute. Under section 44 the will would have been revoked if it had been executed either before the marriage of the decedent or after her first husband's death and while she was a widow (*Matter of Kaufman*, 131 N. Y. 620), for 'a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage,' but she was not 'an unmarried woman' when she executed the paper, and that provision of law has no application (*Matter of McLarney*, 153 N. Y. 416). Section 43 of the statute, which is claimed to have application here, is as follows: 'If after the making of any will disposing of the estate of the testator, such testator shall marry and have issue of such marriage, born either in his lifetime or after his death, and the wife or issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked unless provision shall be made for such issue by some settlement or unless such issue shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of such revocation shall be received.' It can scarcely be contended that this section of the statute was intended by the revisers or by the Legislature which enacted it to apply to the wills of women; it has never yet been held to apply to the wills of women, and I am of opinion that it does not apply to them. The 'testator' mentioned in it is one who can marry a 'wife,' which 'wife' can or may survive him. While in the construction of statutes the use of a masculine term will include the feminine, it has never been held that the use of a word applicable only to a female shall also include the male. The objections will be overruled and the will admitted to probate."

§ 268. **Illicit cohabitation, effect of.**—By marriage, in this connection,

is contemplated the solemn relation involving the mutual rights of the parties in a manner sufficient to entitle either to the aid of the court. A ceremonial marriage between parties competent to contract it is of course sufficient to revoke a prior will in any case covered by the statute. Doubts may arise when the marriage claimed is of that vague character known as a common-law, or nonceremonial marriage for the reason that it is often no easy judicial task to determine just when the alleged marital relation commenced. While the cohabitation of parties may continue for such a period and under such circumstances as to warrant a court in deciding that the parties are in law husband and wife, yet it may be impossible for the court to say just when illicit intercourse ended and the marital state commenced. The cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a presumption of more or less strength that they have been duly married. Such cohabitation does not constitute marriage. It only tends to prove that the parties have entered into a marriage contract. But where the cohabitation is illicit in its origin, there is a presumption that it so continues until a change in its character is shown by acts and circumstances strongly indicating that the connection has become matrimonial. *Gall* v. *Gall*, 114 N. Y. 109, 117, Vann, J., citing *Caujolle* v. *Ferrie*, 23 N. Y. 90; *O'Gara* v. *Eisenloher*, 38 N. Y. 296; *Badger* v. *Badger*, 88 N. Y. 546, 554; *Hynes* v. *McDermott*, 95 N. Y. 451, 457.

So when a testator living in illicit relations with a woman, made a will, and such relations continued to his death, and were subsequently by the Court of Appeals held to have grown into a matrimonial relation without fixing the time exactly, Surrogate Abbott applying the opinion of the Court of Appeals in *Gall* v. *Gall*, just quoted, held in the absence of affirmative proof that the illicit intercourse had changed into matrimonial relations before the execution of a codicil a year after the making of the will, he must hold that the subsequent marriage, adjudged by the Court of Appeals to have subsisted, and the birth of issue, must operate to revoke the will. *In re Gall's Will*, 9 N. Y. Supp. 466.

§ 269. **Revocation by marriage and birth of child.**—The language of the statute is express in this regard, and the rule must be borne in mind that when the statute defines such a revocation, all other cases are impliedly excluded; thus the statute making no provision for the revocation of a will by the discovery of the existence of a child, living at the time of the making of the will, a will made in ignorance of such existence, is not revoked. *Ortlish* v. *McDermott*, 2 Redf. 460. The *Yung* case quoted in § 267 shows that this statute refers only to a man. So the will of a married *woman* is not revoked by the subsequent birth of children although they are not provided for in the will. *Cotheal* v. *Cotheal*, 40 N. Y. 405. So it seems, the will of an unmarried woman will not be deemed revoked by the birth of an illegitimate child. *Matter of Bunce*, 6 Dem. 278; *Matter of Huiell*, 6 Dem. 352. But even where a child is born after a will has been executed in which no provision has been made for it, and the whole

of testator's estate is thereby disposed of, the fact that the child is under the statute entitled to the same share in the estate which would have been his or hers if the father had died intestate does not justify refusing probate to the will. That is proper only where the marriage, of which the child unprovided for is the issue, occurred *after* the testamentary act. *Matter of Gall*, Rollins, Surr., 5 Dem. 374. But even a contingent provision will prevent revocation, in view of the rule of the civil law that the statute aims at, namely, to prevent "omission by oversight." *Stachelberg* v. *Stachelberg*, 52 Misc. 22.

The statute (old § 43, now § 35, Dec. Est. Law) ends with the provision "and no other evidence to rebut the presumption of such revocation shall be received." Held to exclude proof that a legatee died before testator, ergo, his legacy lapsed, ergo, the will did not *dispose of the whole estate. Matter of Rossignot*, 50 Misc. 231.

§ 270. **Effect of agreement to convey.**—The statute (§ 45, now § 37, Dec. Est. Law) does not give to a bond or covenant to convey lands already devised by the grantor in his will subsequently probated the effect of revoking the devise. The devisee takes subject to the grantee's remedies as though testator were still living. The subject is covered in the opinions in *Van Tassel* v. *Burgen*, 119 App. Div. 509, *q. v.*; § 48, now § 40, Dec. Est. Law, provides when revocation results from such a contract or conveyance, while the preceding section provides for the same in case the intent is declared expressly in the instrument so to revoke.

§ 271. **Irrevocable wills.**—A will being ambulatory in its nature is, therefore, revocable at any time before the testator's death, the act of revocation being conducted pursuant to the requirements already pointed out; so far as the Surrogate's Court is concerned, there are, therefore, no irrevocable wills.

The agreement of the testator for a good and valid consideration to make an irrevocable will in favor of the person from whom such consideration is received, or of some person named by him, is an agreement unenforceable in the Surrogates' Courts, so that though the testator has made such a will and although it expressly states that it is an irrevocable will, it may be revoked by his later will provided the requirements above set forth are complied with; and the later will, if propounded before the Surrogate, and duly proved, must be admitted to probate as the *last* will and testament of the decedent. *Matter of Gloucester*, 11 N. Y. Supp. 899. The remedy of the beneficiary is not by excluding the later will from probate, for the Surrogate has no jurisdiction to deal with contracts, but by a suit in equity to enforce the agreement evidenced by the will purporting to be irrevocable. *Mutual Life Ins. Co.* v. *Holladay*, 13 Abb. N. C. 16. In *Matter of Goldsticker*, 123 App. Div. 474, aff'd 192 N. Y. 35, three brothers made *mutual* wills on condition they were to be operative so long as all remained unmarried. Two subsequently married. Held this could not operate to revoke will of third, who had died unmarried without revoking his will pursuant to statute.

In this case a later will had been refused probate for lack of capacity to make it. Held the later will so made could not revoke the original mutual will.

§ 272. **Effect of antenuptial agreement.**—Where an antenuptial agreement was made between decedent and his future wife to execute mutual wills after marriage and such wills were accordingly executed, nevertheless, it was held that such wills did not thereby become as wills irrevocable, nor operate to prevent the decedent from thereafter executing a testamentary paper varying from and repugnant to it. *Matter of Keep's Will*, 2 N. Y. Supp. 750, citing *Ex parte Day*, 1 Bradf. 476; *Schumacher* v. *Schmidt*, 4 Amer. Rep. 138 (Ala.); *Hopper* v. *Reed*, 32 Daily Reg., October 26, 1887. See *Edson* v. *Parsons*, 155 N. Y. 555.

So where A made an oral antenuptial agreement with B to make a will in her favor after marriage, it was held that marriage was a part of the agreement, and sole consideration therefor, but not a sufficient part performance to take the case out of the Statute of Frauds. *Hunt* v. *Hunt*, 171 N. Y. 396, aff'g 55 App. Div. 430. In this case B proved actual execution of a will by A, but it appeared that such will was destroyed, and the oral testimony in support of its contents did not show that it contained any recognition of the antenuptial agreement. Held insufficient to bar the statute, citing *Cooley* v. *Lobdell*, 153 N. Y. 596, 600; *Mentz* v. *Newwitter*, 122 N. Y. 491.

In *Phalen* v. *U. S. Trust Co.*, 186 N. Y. 178, the agreement was in writing. Held marriage was a valid consideration. See opinion of Werner, J., as to rule under which such contracts are favored and effectuated. But, in this case no revocation was involved. The plaintiff consented to the probate of the codicil which violated the agreement, but was nevertheless held entitled to specifically enforce the agreement to "make a will without discriminating among his children."

See also *Brown* v. *Brown*, 117 App. Div. 199, as to antenuptial agreement being in lieu of dower. Dower is favored, and if there be doubt widow should take both, citing *Matter of Gorden*, 172 N. Y. 25, 28.

Where an antenuptial agreement for a fixed sum in lieu of dower carried interest from death of husband, held that such interest would run on a larger sum given by the will and defined therein as the payment "as agreed upon between us." *Matter of Bostwick*, 119 App. Div. 455.

§ 273. **Effect of agreements to will.**—An agreement to make a will is perfectly valid, and after the death of either of the parties becomes irrevocable (*Ex parte Day*, 1 Bradf. 476, and cases cited); but as a will, an irrevocable instrument is unknown to the testamentary law of either this country or England. See *Hobson* v. *Bluckburn*, 1 Addams, 274, opinion of Sir John Nicholl. Once the notion of irrevocability is imported into a document, purporting to be a will, the circumstance changes its essence as a will and converts it into a contract; over such instruments Surrogates' Courts have no jurisdiction. *Everdell* v. *Hill*, 58 App. Div. 151, 159.

The distinction between an irrevocable will and a will that becomes

irrevocable as being one of two mutual wills, the testator of the other having died, is clear. Therefore between the mutual will, as a will, and its irrevocability as a will, and the will as an agreement, and its irrevocability as an agreement, there is an equally clear distinction (see *Ex parte Day, supra*) but while a will is held to be always revocable and the last will regardless of the nature and provisions and declarations in the first, must always be the testator's *last will and testament*, yet a man may so bind his assets by agreement that his estate shall be a trustee for the purpose of his agreement, and so a compact between the parties to a so-called irrevocable will will be operative in equity to the extent of making the devisees of the will trustees for performing the decedent's part of the contract. See *Ex parte Day, supra*, extracts from English decisions. This contract or agreement is said to attach to the estate of the decedent as an equitable lien or trust enforceable in a court of equity. See *In re Keep's Will*, 2 N. Y. Supp. 750, citing *Ex parte Day, supra; Schumacher* v. *Schmidt, supra; Parsell* v. *Stryker*, 41 N. Y. 480; *Giles* v. *De Talleyrand*, 1 Dem. 97. See also *Re Gloucester's Estate*, 11 N. Y. Supp. 899, opinion of Surrogate Abbott, who says, "Under the authorities, if a first will was made for a valuable consideration, its provisions may be enforceable against testator's estate as a binding contract in a court of equity. So far as it can be deemed to be a last will and testament, it has been revoked in express terms by the testator in his last will, and therefore has no longer any legal existence as a last will and testament. This court has no jurisdiction to deal with contracts; let decree enter admitting the last will to probate."

§ 274. **Same, enforcement.**—There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament, and if a testator agrees to devise property to another and receives a good and valuable consideration for such agreement, such agreement, a court of equity will hold, must be specifically performed. *Stevens* v. *Reynolds*, 6 N. Y. 458; *Parsell* v. *Stryker*, 41 N. Y. 480, 487, and cases cited.

Almost any "good" consideration will support such an agreement. For example:

"If you will get me up a cane." *Bush* v. *Whitaker*, 45 Misc. 74, citing note to *Johnson* v. *Hubbell*, 66 Am. Dec. 784.

For nursing and harboring decedent. *Yarwood* v. *The Trusts, etc., Co.*, 94 App. Div. 47.

For abstaining from tobacco until twenty-one years old. *Horner* v. *Sidway*, 124 N. Y. 538.

The rule is the *adequacy* of the consideration is for the *parties to consider* when the agreement is made, and not for the court when reviewing the transaction. *Godine* v. *Kidd*, 64 Hun, 585.

This agreement can be enforced by compelling a conveyance from heirs of the promisor, or from purchasers with notice from him in his lifetime. See also *Giles* v. *De Talleyrand, supra*, where the Surrogate held that he

had no authority to construe or pass upon such an agreement as affected the will propounded before him. The settlement of the executor's accounts and distribution of the estate was deferred until the question of the validity and effect of the instrument could be passed upon by a competent tribunal. See also *Mut. Life Ins. Co.* v. *Holladay*, 13 Abb. N. C. 16. But where mutual wills are made not in pursuance of agreement between the testators, either may revoke his will without giving notice of his intentions to the other. *Edson* v. *Parsons*, 85 Hun, 263, citing *Ex parte Day*, 1 Bradf. 476. And if it be claimed subsequently that the wills were made pursuant to a contract, that fact must be established by the most clear and satisfactory evidence. So, if it is recited in the wills that they were so made, or if it in any way appears on their face that they were executed pursuant to a contract, it is quite sufficient.

The will made in violation of the agreement must be probated by the Surrogate, and such probate is effective to transfer the legal title. *Kine* v. *Farrell*, 71 App. Div. 219. In a proper case, however, such legal title can be impressed with a trust in favor of a party having prior equities. In the case cited there was an agreement in writing between plaintiff and decedent, reciting a good consideration, free from ambiguity, and neither inequitable nor against public policy. No superior equities had intervened. The court decreed "that the legal title is impressed with a resulting trust in favor of the plaintiff for the performance of the testator's agreement," and that such agreement would be specifically enforced by requiring a conveyance of the legal title to the plaintiff in execution of such trust, and by enjoining the beneficiaries under the will from questioning such title. *Ibid.*, citing *Parsell* v. *Stryker*, 41 N. Y. 480; *Shakespeare* v. *Markham*, 10 Hun, 311, aff'd 72 N. Y. 400; *Godine* v. *Kidd*, 64 Hun, 585; *Brantingham* v. *Huff*, 43 App. Div. 414; *Gates* v. *Gates*, 34 App. Div. 608; *Winne* v. *Winne*, 166 N. Y. 263; *Edson* v. *Parsons*, 155 N. Y. 555; *Ellerson* v. *Westcott*, 148 N. Y. 149.

The party to the agreement with the decedent need not object to the probate of the will made in fraud of the agreement. *Phalen* v. *U. S. Trust Co.*, 186 N. Y. 178. The Surrogate would not deny probate on his objection, and his failure to so object works no estoppel. *Kine* v. *Farrell*, *supra*, at p. 220, citing *Matter of Gloucester's Estate*, 11 N. Y. Supp. 899; *Giles's Estate*, 1 Abb. N. C. 57; *Matter of Keep*, 17 N. Y. St. Rep. 812.

CHAPTER III

PROCEDURE OF PROBATE PROCEEDINGS

§ 275. **The petition.**—The *petition* is the first step in proceedings to prove a will. The distinction between proving a will in common form and in solemn form is practically no longer observed under the Code. Section 2614 provides for the presentation of the petition and is as follows:

> *Who may propound will.*
>
> A person designated in a will as executor, devisee, or legatee, or any person interested in the estate, or a creditor of the decedent, or any party to an action brought or about to be brought, and interested in the subject thereof, in which action the decedent, if living, would be a proper party, may present to the surrogate's court having jurisdiction, a written petition, duly verified, describing the will, setting forth the facts, upon which the jurisdiction of the court to grant probate thereof depends, and praying that the will may be proved, and that the persons, specified in the next section, may be cited to attend the probate thereof. Upon the presentation of such a petition, the surrogate must issue a citation accordingly. **§ 2614, Code Civil Proc.**

The petition accordingly is to be made to cover all necessary jurisdictional facts, and to include all persons entitled to be cited, so as to leave out none upon whom the decree admitting the will to probate ought to be binding under §§ 2626 and 2627, *post.*

The petition should substantially set forth the following facts:

Decedent's name;

Date of his death;

Place of his death;

That he left a will;

Date of the will;

Same as to codicils, if any;

Execution of will, and names of witnesses;

Residence of decedent at the time of his death;

If a nonresident, that he left personal property within the State; *or* that he left such property which since his death has come within the State and remains unadministered; *or* that he died seized of real property situated in the county, and to which the will offered relates; *or* which is subject to disposition to pay decedent's debts. And it is proper to add that no other application for probate or administration has been made to any other Surrogate in the State, whether the will relates to real or personal property or both;

Approximate value of personal property;

Names of necessary parties, which will be, in case the will relates to real

property, the husband or wife and all the heirs of testator or, in case it relates to personalty the husband, or wife and all the next of kin. If it relate to both all must be named. It is customary to add the residence of one so named, or the statement that it is unknown and cannot be ascertained;

Unknown persons must be approximately designated or included in a class;

Whether all are of full age, and if not which are infants and whether over or under fourteen years of age;

The character in which petitioner appears should be made clear, whether as executor named, or as party interested, and facts showing *prima facie* that he is entitled to propound the will;

Prayer for probate.

Petition for probate of a will.

Surrogate's Court,
County of New York.

In the matter of proving the last Will and Testament of Deceased, as a Will of Real and Personal Property.

To the Surrogate's Court of the County of New York:

The petition of residing at No. in the city of New York, respectfully showeth, that your Petitioner Execut named in the last Will and Testament of late of the County of New York, deceased;

That said last Will and Testament, herewith presented, relates to both real and personal property, and bears date the day of 19 and is signed at the end thereof by the said testat and by as subscribing witnesses.

That petitioner does not know of any codicil to said last Will and Testament, nor is there any to the best of h information and belief.

That the said deceased was, at the time of h death, a resident of the County of New York, and departed this life in said County, on the day of 190

Your petitioner further states that the husband, widow, all the heirs, and all the next of kin of said deceased testator, together with their residences, are as follows, to wit:

Your Petitioner a of deceased who resides at

a of deceased who resides at

a of deceased who resides at

a of deceased
who resides at

That all the above named are of full age and of sound mind, EXCEPT

a of deceased
who infant under the age of fourteen years, and reside with
and a of deceased
who infant over the age of fourteen years.

Note. Erase unnecessary matter.

Note. That said decedent left h surviving no husband, widow, child or children, adopted child or children; no issue of any deceased child or children; no issue of any deceased adopted child or children; no father or mother; no deceased child's husband or wife; no brother or sister of the half or the whole blood; no issue of any deceased brother or sister; no deceased brother's wife; no deceased sister's husband; no uncle, no aunt, and no cousin, except as above stated.

That your Petitioner prays for an order directing the service of the citation herein without the State or by publication, pursuant to section 2522 of the Code of Civil Procedure, upon such of the above named persons as are hereinbefore stated to be nonresidents of the State of New York.

That no petition for the probate of said Will, or for Letters of Administration on said estate, has been heretofore filed in this or any other Surrogate's Court of this State.

Your Petitioner further prays that a citation issue to the above named persons to attend the probate thereof, and that the said last Will and Testament may be proved as a will of real and personal property and that Letters Testamentary may be issued thereon to the Execut who may qualify thereunder

Dated, New York, 190 Petitioner.

State of New York, } ss.:
County of New York, }

the Petitioner named in the foregoing Petition, being duly sworn, deposes and says that h has read the foregoing Petition subscribed by h and knows the contents thereof; and that the same is true of h own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters h believes it to be true

Sworn to this day }
of A. D. 190 } Petitioner.
N. Y. Co.

ENDORSED MEMORANDUM FOR PROBATE CLERK IN NEW YORK COUNTY.

Proponents will please fill the following blanks before filing:
What is the value of the personal property?
$

What is the value of the real property?
$
Are any of the subscribing Witnesses dead? If so, give their names,

State Names and Residences of subscribing Witnesses you propose to call on the return day of citation,

State names of Executors who will qualify, with their residences, giving street and number,

Where was the Will executed?

Will a Commission be necessary?
Where did the deceased reside at the time of death?

§ 276. **Same.**—The petition must be in writing, and verified (Code Civ. Proc. § 2614) as pleadings are verified. Code Civ. Proc. § 2534. The decision in *Wright* v. *Fleming*, 19 Hun, 370, in 1879, where the General Term of the Second Department held it not to be strictly necessary "to have a petition in writing to set in motion proceedings to prove a will," must not be considered as controlling now in face of the express words of the Code, § 2614, and the universally accepted practice. Section 2534 of the Code provides that the provisions of §§ 523–526, *q. v.* (§ 523; when pleading must be verified. § 524; allegations on knowledge, and on information and belief. § 525; verification, how and by whom made. § 526; form of verification), apply to the verification of pleadings in Surrogate's Courts and to the petition or other papers so verified, where they can be applied in substance, without regard to the form of the proceedings.

§ 277. **To what Surrogate petition must be presented.**—It has been noted under the head of jurisdiction that "the Surrogate's Court obtains jurisdiction in every case, by the existence of the jurisdictional facts prescribed by statute, and by the citation or appearance of the necessary parties" (Code Civ. Proc. § 2474), but exclusive jurisdiction is conferred on certain Surrogates of the probate of wills under certain circumstances. See *ante*, §§ 27 *et seq.*

Section 2476 of the Code provides:

> The surrogate's court of each county has jurisdiction, exclusive of every other surrogate's court, to take the proof of a will, and to grant letters testamentary thereupon, or to grant letters of administration, as the case requires, in either of the following cases:
>
> 1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere.
>
> 2. Where the decedent, not being a resident of the state died within that county, leaving personal property within the state, or leaving personal property which has, since his death, come into the state, and remains unadministered.
>
> 3. Where the decedent, not being a resident of the state, died without the state, leaving personal property within that county, and no other; or leaving

personal property which has, since his death, come into that county, and no other, and remains unadministered.

4. Where the decedent was not, at the time of his death, a resident of the state, and a petition for probate of his will, or for a grant of letters of administration, under subdivision second or third of this section, has not been filed in any surrogate's court; but real property of the decedent, to which the will relates, or which is subject to disposition under title fifth of this chapter, is situated within that county, and no other. **§ 2476, Code Civil Proc.** See *ante*, §§ 33 and 34, for discussion.

§ 278. **Conflict of jurisdiction.**—Section 2477 (quoted in § 35, *ante*) declares that where a petition for probate or for letters of administration is once filed with either of two or more Surrogates' Courts having concurrent jurisdiction, the jurisdiction of the one with whom such petition is filed, becomes exclusive.

It seems, however, that the jurisdiction of the other Surrogate in such a case is merely held in abeyance and revives if the jurisdiction of the one so acquiring exclusive control terminates for any cause. So, when two petitions were filed, one with the Surrogate of Wayne County for letters of administration, and the other, a day later with the Surrogate of Monroe County for probate of the will, it is manifest that under § 2477 the jurisdiction of the Surrogate of Wayne County was exclusive. But when he denied the application before him, it was held the other Surrogate had thereupon jurisdiction to proceed with the probate of the will. *Matter of Gould*, 9 N. Y. Supp. 603, aff'd 131 N. Y. 630. See *Matter of Golden*, 40 Misc. 544, where there were two wills. The one, holographic, described testator as of Saratoga. There was proof he was intending to remove there to spend the rest of his life. The other, drawn by his attorney, recited his residence as at Troy, where he had lived 40 years.

§ 279. **Jurisdiction of wills of nonresidents.**—The jurisdiction given over wills of nonresidents by § 2476, subds, 2, 3 and 4, and conditioned (1) either by the nonresident's death within the Surrogate's County leaving property in the State or which comes into the State subsequently; or (2) by the nonresident's leaving personal or real property in that county and in no other in case he died out of the State, is preconditioned by the provisions of former § 2611 of the Code, now § 23, Dec. Est. Law, and of former ch. 731 of the Laws of 1894, which is now § 2705 of the Code, which prescribe what wills of nonresidents can be proved in this State. Both are quoted in § 27, *ante*, under "Jurisdiction," *q. v.*, with discussion.

§ 280. **Waiver of citation.**—Section 2528 of the Code was amended in 1896 (by ch. 570, Laws of 1896, which took effect September 1, 1896), so as to provide explicitly for the waiver of issuance and service of citation. The amendment provides: "The issuance and service of a citation may be waived by a party in any proceeding by an instrument in writing acknowledged and approved as a deed entitled to be recorded; or by personal appearance, or by his attorney with written authorization executed and acknowledged as a deed, and filed in the office of a Surrogate."

This amendment amounts practically only to a declaration of a rule already existing and practiced in the Surrogates' Courts. It must be borne in mind that the section refers to appearance of parties and the amendment is preceded by provisions for the prosecuting or defending of special proceedings in Surrogates' Courts by a party of full age, unless he has been judicially declared to be incompetent to manage his affairs; and while the language of the amendment is very broad, "may be waived by a party in any proceeding," it is believed that the intention of the legislature was that such waiver should be limited to persons of full age, and does not extend to give infants or incompetent persons the power to execute such waivers. In *Matter of Petersen*, 51 Misc. 367, the Surrogate recognized the right of a foreign consul to represent subjects of the power he represented in this State, under proof of the treaty with that power (Denmark) which contained a "most favored nation" clause, and of the treaty with the Argentine Republic which contained adequate provision for consular representation. But this power was limited to adult foreigners. As to infants "the only way in which a Surrogate's Court can obtain jurisdiction . . . . is by the issuance and service of a citation."

The decision of the Surrogate of Ostego County (*Matter of Gregory*, 13 Misc. 363), that waiver of *service* cannot be accepted in lieu of "*issuance and service*" of citation is not inconsistent with the practice. Where there are infants, issuance of service cannot be dispensed with nor the time shortened. But where all parties are of age and consent, the issuance and service of citation is in ordinary practice deemed unnecessary if formal waivers properly acknowledged, covering both *issuance* and service of the citation, are filed.

It is only necessary to add here that in addition to dispensing with the issuance and service of citation by waivers, where all the parties are of full age and competent, it can also be dispensed with when the petition sets forth and the Surrogate is satisfied that the decedent left no other heir, next of kin, or person interested except the petitioner only. *Bailey* v. *Stewart*, 2 Redf. 212, 222. The object of the citation is to give notice to all parties interested. If the Surrogate is satisfied there are none besides the petitioner, he may dispense with what would be a useless form. This seems to have been the procedure upon the probate of the will of Alexander T. Stewart. See *Bailey* v. *Stewart*, 2 Redf. 212, 221. The widow filed a petition that the "widow, only heirs and next of kin of said deceased" was the petitioner, and that the deceased left him surviving neither father, mother, brother, nor sister, nor descendants of any or either of them, nor any descendants of his, nor any relation nor next of kin of said deceased.

This was held to be "satisfactory evidence" to warrant the Surrogate in omitting to issue citations to "persons thus clearly proved not to exist." Same affirmed *sub nomine*, *Bailey* v. *Hilton*, 14 Hun, 3.

It has occasionally been claimed by practitioners that it is unnecessary to cite the next of kin of a decedent leaving personal estate alleged not to exceed $2,000 in value, where the widow or husband of the decedent is

the petitioner for probate in case there are no legacies bequeathed by the will, on the ground that in such cases the widow or husband would take the whole estate under the statute of distributions. 8 R. S. 2565, 2567, part. II, ch. VI, art. III, title 3, § 75, subd. 3.

But it would seem to be safer that citations should issue nevertheless in order that those cited may have opportunity to prove if possible that there is more than $2,000 in the estate, in which case they might be "persons interested." *Such is the custom in the New York Surrogate's Court.* See *ante*, §§ 76 *et seq.* as to *appearances*, their character and limits. Also § 80 as to *waivers* generally.

§ 281. **Persons entitled to citation.**—Section 2615 of the Code, which provides what persons are to be cited upon a petition presented for the probate of a will, has been frequently amended (in 1892, 1893, 1894 and 1905), and in examining into the regularity of probate proceedings with a view to ascertaining whether or not they are conclusive against a given person, the practitioner will do well to refer to the language of the statute as it may have been in force at the time of the probate. The language now is as follows:

> The following persons must be cited upon a petition presented as prescribed in the last section:
>
> 1. If the will relates exclusively to real property, the husband or wife, if any, and all the heirs of the testator.
>
> 2. If the will relates exclusively to personal property, the husband or wife, if any, and all the next of kin of the testator.
>
> 3. If the will relates to both real and personal property, the husband or wife, if any, and all the heirs, and all the next of kin of the testator. **§ 2615, Code Civil Proc.**
>
> 4. (Added in 1905.) Any person designated in the will as executor.

The word *all* is inclusive—alien heirs must be cited as well as those resident here. *Kilfoy* v. *Powers*, 3 Dem. 198. So, in *Matter of Healy*, 27 Misc. 354, it was held to include issue of deceased uncles and aunts, who by virtue of subd. 12 of § 2732 (see *post*, Distribution) were entitled by representation. But legatees are not required to be cited. *Walsh* v. *Ryan*, 1 Bradf. 433; *Dyer* v. *Erving*, 2 Dem. 160.

The provisions, for a time operative, whereby all persons in being who would take an interest in any disposition of the real or of the personal property, or of both, under the provisions of the will were also required to be cited, are now wisely left out.

This simplification of the statute is believed to be a step in the right direction. There is no provision made for citation of legatees or devisees who are not heirs or next of kin; yet they may properly be cited if it is desired to make the probate conclusive upon them, and as already elsewhere laid down, if not cited, they may petition to be brought in as parties in the probate. *Welsh* v. *Ryan*, 1 Bradf. 433. It is to be noted that this decree was in 1851 and before the amendment requiring legatees or devisees to be cited, the statute at that time provided only for the citation

of the widow, heirs and next of kin in probate cases; this was undoubtedly on the principle that these persons being the persons who would succeed to the estate in case of intestacy are all the persons interested against admitting the will, and therefore entitled at the outset to be cited, and this case expressly held that such a person in interest was not bound to rely upon the proper representation of his interests by the executor, but might intervene to protect his interests and oppose the probate of the will or a codicil thereof. The learned Surrogate cited the following cases: *Lewis* v. *Bulkley*, 1 Cas. Temp. §§ 513 and 190, notes; *Bittleston* v. *Clark*, 2 *id.* 250; *Hayle* v. *Hasted*, 1 Curt. 236; *Mansfield* v. *Shaw*, 3 Phill. 22; *Urquhart* v. *Fricker*, 3 Add. 58. See, also, *Lawrence* v. *Parsons*, 27 How. Pr. 26; *Foster* v. *Foster*, 7 Paige, 48.

Where a party becomes interested, while a probate proceeding is pending, as by the death of the person to whose interest he succeeds, the Surrogate has power to bring such person in as a party. *Russell* v. *Hartt*, 87 N. Y. 18. The exclusion of "creditors" from "persons interested," by subd. 11 of § 2514, of the Code of Civil Procedure, does not apply to a judgment creditor of a devisee named in a will. Thus where the interest of such a devisee would be defeated if an alleged codicil were proved, such a creditor has been held to be entitled to appear and oppose the probate of the codicil, as a "party interested." *Rafferty* v. *Scott*, 4 App. Div. 429. If the person so becoming interested be a minor, the Surrogate will appoint a special guardian for him upon bringing him in. *Russell* v. *Hartt*, *supra*. But if a guardian be not appointed at the proper time, the defect cannot be cured by an order *nunc pro tunc*. *Matter of Bowne*, 6 Dem. 51. For the defect is one which *ipso facto* gives the infant, if the decree is against him, the right to move to vacate it on attaining majority, and this right the Surrogate's Court cannot defeat.

And if a person entitled to be cited has been inadvertently omitted as a party, it has been held that the Surrogate may bring him in by a supplemental citation. *Matter of Crumb*, 6 Dem. 478; Code Civ. Proc. § 2481; *Matter of Bradley*, 70 Hun, 104, 110.

In the case first cited the Surrogate inserted in the citation a direction to attend and show cause why the evidence taken and the proceedings theretofore had to prove the will should not stand, and why the decree admitting said will to probate and adjudging the same to be a valid will, to pass real and personal estate should not be sustained, and why he should not be bound thereby with the same force and effect as if he had been previously cited to attend the original probate thereof.

The practice seems to be correct for the reason that the power to take the proof of wills being given generally, the mode of its exercise in a case not provided for by the statute, must be regulated by the court in the exercise of a sound discretion according to the peculiar circumstances of each particular case. *Campbell* v. *Logan*, 2 Bradf. 90.

§ 282. **Section 2615 is mandatory and explicit.**—The requirements of § 2615 must be specifically complied with. The omission of any who are

by this section made "necessary parties," is a serious defect. The *surviving* husband or wife, as the case may be, *must* always be cited. *Lusk* v. *Alburtis*, 1 Bradf. 456. But the husband of one of the heirs or next of kin, unless himself one of the heirs or next of kin, is not entitled to citation. *Keeney* v. *Whitemarsh*, 16 Barb. 141; *Beeker* v. *Lynch*, 1 Bradf. 458. Where, however, a wife has been divorced from the testator, a different rule prevails. If divorced for her own wrong she has no rights in his estate whether real or personal. If divorced, though blameless, she has no rights in his personal estate. Consequently a divorced wife need never be cited upon the probate of a will of personal property, and a wife divorced for her own wrong need not be cited upon the probate of a will of personal property or of real and personal property. *Matter of Estate of Ensign*, 103 N. Y. 284, 290.

The contents of citation must be as required by § 2616, which is as follows:

> The citation must set forth the name of the decedent, and of the person by whom the will is propounded; and it must state whether the will relates, or purports to relate, exclusively to real property, or personal property, or to both. Where the will propounded was nuncupative, that fact must be stated in the citation. Where the surrogate is unable to ascertain to his satisfaction, whether the decedent left, surviving him, any person, who would be entitled to the property affected by the will, if the decedent had died intestate, the citation must be directed, where the will relates to real property, to the attorney-general; where it relates to personal property, to the public administrator, who would have been entitled to administration, if the decedent had died intestate. **§ 2616, Code Civil Proc.**

The theory on which this latter provision is based is that in case the will can, for any reason, be shown to be invalid, and an intestacy be made out, the county or State, as the case may be, is interested, and must be given opportunity to show it, as in default of such heirs, or next of kin, or husband, or wife, the State would take the property as in case of an escheat. See *Gombault* v. *Public Administrator*, 4 Bradf. 226, which is considered as establishing the rule. In that case there appeared to be a reasonable chance of proving lack of testamentary capacity. But unless there seemed to be such a reasonable chance of preventing probate, the attorney general and public administrator will not be zealous to contest probate; and this provision is chiefly precautionary, though none the less to be observed.

§ 283. **Intervention of interested parties.**—The practice in the Surrogate's Court is peculiarly favorable to the admission of parties claiming or having any interest in the estate. *Lawrence* v. *Parsons*, 27 How. Pr. 26. The line is usually sharply drawn between those who must be cited and those who may become parties, the first class being necessary for jurisdictional purposes, and with a view to the finality of the decree to be entered, the second looking to the protection of any whose rights might

be prejudiced by the decree if they were not represented in the proceeding; thus the Code provides that:

> Any person although not cited who is named as a devisee or legatee in the will propounded, or as executor, trustee, devisee or legatee in any other paper purporting to be a will of the decedent, or who is otherwise interested in sustaining or defeating the will may appear and at his election support or oppose the application. A person so appearing becomes a party to the special proceeding. § **2617, Code Civil Proc.,** in part.

"Any person" is very general. It will include a foreign administrator. See *Matter of Davis*, 182 N. Y. 468.

"Otherwise interested in sustaining or defeating the will" means an actual, i. e., a pecuniary interest, to protect. Whether individual or representative. *Ibid.* See cases discussed in opinion at p. 474. In *Matter of Hoyt*, 55 Misc. 159, an application to intervene was denied when it appeared that the applicant was interested in an "other paper purporting to be a will of the decedent" which gave him a legacy less than that given him by the will propounded and which for some mysterious reason he asked leave to contest.

But § 2617 does not affect the right or interest of any such persons as are there described unless they become parties. In 1894 there was added to this section by amendment, the following provision:

> And in case the will propounded for probate is opposed, due and timely notice of the hearing of the objections to the will shall be given in such manner as the surrogate shall direct, to all persons in being who would take any interest in any property under the provisions of the will, and to the executor or executors, trustee or trustees named therein, if any, who have not appeared in the proceeding, and any decree in the proceeding shall not affect the right or interest of any such person unless he shall be so notified.

The first part of this section giving a person the right to ask to be allowed to intervene in a proceeding for the probate of a will for the purpose of protecting his own interests has been held not to lay down a new rule but only to be a formulation in this respect of the law as it existed before the Code went into effect. *Lafferty* v. *Lafferty*, 5 Redf. 356, citing *Booth* v. *Kitchen*, 7 Hun, 255; *Walsh* v. *Ryan*, 1 Bradf. 433; *Marvin* v. *Marvin*, 11 Abb. N. S. 97; *Children's Aid Society* v. *Loveridge*, 70 N. Y. 387; *Turhune* v. *Brookfield*, 1 Redf. 220.

In the case first cited Surrogate Livingstone showed that under the act of 1837 (ch. 460, § 4), "an executor, devisee or legatee named in any last will or any person interested in the estate might have such will proved."

As has already been said in another connection, a person claiming to be so interested must show to the satisfaction of the Surrogate that he comes within one of the classes described in the Code. If the person claiming to be interested claims under some testamentary document other than the will propounded, he must prove the provisions of the document un-

der which he claims, so as so show the Surrogate the nature and extent of his interest. *Matter of Hamersley*, 43 Hun, 639.

In 1863 Surrogate Gideon J. Tucker held that if parties claiming to be interested filed a verified claim of interest and appeared in open court on the return day, that the filing of the claim constituted the claimant a contestant and a party to the proceedings, and his appearance constituted a waiver of a service of citation. *Norton* v. *Lawrence*, 1 Redf. 473. He further held that should his interest be disputed he was bound to prove his interest and that where issue was taken on the allegation of interest the evidence in relation to that question and that which related to the proof of the will should proceed *pari passu*. This has not been changed. The case of *Jones* v. *Hamersley*, 4 Dem. 427, contains a careful discussion by Surrogate Rollins showing a correct limitation on the rights of intervenors to raise questions in the proceeding for the determination of the Surrogate.

The second part of § 2617 above quoted has for its object, not the protection of the rights of the next of kin, or heirs-at-law; for they are entitled to citation under § 2615. It aims to protect legatees and devisees under the will, who, but for the provisions of this section might have no knowledge of the pendency of a proceeding in which a decree might be made rejecting the will under which they are beneficiaries. *Cook* v. *White*, 43 App. Div. 388, 390.

But where one is not required to be cited on probate, and does not in fact intervene, a decree, denying probate to a codicil is, as to personalty, conclusive upon him, and § 2617 is not applicable. *Matter of Tilden*, 32 Misc. 118, 119, citing Code Civ. Proc. §§ 2626, 2627; *Vanderpoel* v. *Van Valkenburgh*, 6 N. Y. 190; *Marvin* v. *Marvin*, 2 Abb. N. S. 100, 101; *Hoyt* v. *Hoyt*, 112 N. Y. 493; *Post* v. *Mason*, 91 N. Y. 539; *Smith* v. *Hilton*, 19 N. Y. St. Rep. 340.

§ 284. **The petition must be filed.**—The practitioner having prepared his petition in the name of a person known to be qualified to propound the will, and having prayed for the citation of all necessary persons, and having exercised his discretion in regard to the citing of such other parties in interest upon whom he deems it necessary that the decree of probate when obtained should be conclusive, and having satisfied himself that the will is one of which the Surrogate of the county in which his application is made has jurisdiction will commence his proceeding by *filing* the petition; and it is good practice to file the will at the same time, it being required in New York County by Rule 4; whereupon the clerk of the Surrogate will prepare the citation and deliver copies thereof to the attorney for service. In the larger counties it is customary for the attorney to make the copies. The rules for the service of the citation have been carefully elaborated in ch. I, part II, *ante*, *q. v.*, as well as the rules governing the return day.

In New York County, Rule 4 provides: "The will shall be filed with petition for probate, unless upon good cause shown by affidavit the Surro-

gate dispenses therewith, in which case it must be filed at least two days before the return day of the citation. In all cases a copy of the will must be filed with the petition."

The practice in cases where new parties necessary to the proceeding are discovered after the filing of the original petition, is not by amending the petition, but by filing a supplemental petition under which the additional party is cited.

This can be done even after the decree admitting the will to probate has been made (*Matter of Odell*, 1 Misc. 390), upon an application of course to open the decree and give the petitioner an opportunity of being heard in opposition.

The modern practice is liberal as to permitting amendments, seasonably applied for, to the petition. E. g., where petition erroneously states facts of residence. *Matter of Rubens*, 117 App. Div. 523.

In view of the fact that the service of citation has a twofold object, first, to advise the party interested of the proceeding, second, and equally important, to give the court jurisdiction of the persons served, it follows that where it is necessary to file a supplementary petition and issue a supplementary citation, it is unnecessary again to serve those already cited.

Upon the discovery of the existence of an additional necessary party the proceeding is suspended until he is brought in the manner already specified. *In the Matter of Odell*, 1 Misc. 390.

The practitioner should in the calculation of a return day, fix it at a time which will allow for the time of the service on the newly discovered person in interest. Should the return day as fixed by the service of the original citation be overlapped, it will be necessary to adjourn the original return day in order that all the parties may be represented upon one return day.

In the absence of infants, practitioners are reminded of the great value in shortening proceedings in the Surrogates' Courts, by the use of waivers and consents; these waivers and consents should be carefully drawn and should cover the precise point contemplated, in which case they are conclusive upon the parties signing them, and are most efficient in expediting proceedings in this court. See Code Civ. Proc., § 2528, as amended by ch. 570, Laws, 1896, as to proper execution of waivers.

§ 285. Parties in interest under will other than that propounded.— The provisions of the Code (Code Civ. Proc. § 2617) in which it is provided that a person "named as an executor, trustee, devisee or legatee in any other paper purporting to be a will of the decedent" may intervene as a party, has already been referred to in a preceding section. The object of this section is to consolidate proceedings relating to the probate of the last will and testament of any decedent.

The idea of the statute is to enable the Surrogate to determine in admitting a paper to probate that it is in fact *the last will* of the decedent. It becomes therefore most important that the person claiming under some

paper other than the one propounded as a will should either produce the same, or offer satisfactory proof to the Surrogate that the other paper under which he claims was in existence when the decedent died, or that it had been previously lost, or, without his procurement, destroyed. *Hamersley* v. *Lochman*, 2 Dem. 524. See also *Matter of Hamersley*, 43 Hun, 639; *S. C.*, 7 N. Y. St. Rep. 592.

§ 286. **Return day.**—It is necessary to summarize, in this connection, some of the rules already elaborated elsewhere as to the fixing of the return day. Section 2520 of the Code requires a citation to be served within the county of the Surrogate, or an adjoining county, at least eight days before the return day thereof; if in any other county, at least fifteen days before the return day. This is quite irrespective of the question whether the person served is a resident or nonresident. A nonresident, if he is served within the State, is brought within the Surrogate's jurisdiction. *Matter of Washburn*, 12 Misc. 242, 244, Silkman, Surr. Where the service is required to be by publication, in a case allowed under § 2522, the service must be completed as required by § 2525, at least thirty days before the return day, if within the United States, and forty days if without.

But this does not mean that the return day *must* be fixed at a time to allow such thirty or forty days' service, where there are necessary parties known to be nonresidents, or where a foreign corporation is intended to be served. If service can be secured upon them within the State, or admissions of the service duly acknowledged are filed, or a duly executed and acknowledged waiver of the issuance and service of the citation is filed, it is not compulsory that nonresidents be served by publication, or that the longer period be regarded in fixing the return day. *Matter of Washburn, supra.* See *Matter of Porter*, 22 N. Y. Supp. 1063. The Code merely requires that the citation be made returnable upon a day certain, designated therein, not more than four months after the date thereof. Code Civ. Proc. § 2518. The citation must be served within sixty days after it issues. § 2517, Code Civ. Proc.; *In re Bradley*, 70 Hun, 104. And it is customary for the Surrogate to fix the return day, taking into consideration the time in which service may be made. *Merritt's Will*, 5 Dem. 544, 545. But if petitioner shows by affidavit that although there are nonresident parties, service may be made upon them within the State, the Surrogate has power to fix any day within the limits, eight days and four months, which may suit his convenience and that of the proponent. *Matter of Washburn, supra.*

§ 287. **The hearing.**—The hearing is usually begun upon the return day, but may be had on any subsequent day which may on the return day be designated. This is not inconsistent with § 2618, which provides that "upon the return of the citation the Surrogate must cause the witnesses to be examined before him."

The proofs of service of the citation or the proper waivers must be filed on or before the return day. And in New York County Rule 4 requires

that the probate clerk must have at least two days' notice in all probate cases where all parties in interest have waived the service of citation before the testimony of the subscribing witnesses will be taken.

§ 288. **Special guardians in probate cases.**—Infant parties must be represented by guardians *ad litem*. Where there is no application prior to the return day on behalf of such an infant party the Surrogate will appoint a special guardian to protect the interests of the infant. It is the practice to insert in citations to infants a clause advising them that in the event of their not appearing by general guardian and of their failure to ask for the appointment of a special guardian, such a special guardian will upon the return of the citation, be appointed by the Surrogate. *Price* v. *Fenn*, 3 Dem. 341, 345, Rollins, Surr. The Code regulates the power to appoint in § 2530, which is as follows:

> *Special guardian; when to be appointed.*
>
> Where a party, who is an infant, does not appear by his general guardian; or where a party, who is a lunatic, idiot, or habitual drunkard, does not appear by his committee, the surrogate must appoint a competent and responsible person, to appear as special guardian for that party. Where an infant appears by his general guardian, or where a lunatic, idiot, or habitual drunkard, appears by his committee, the surrogate must inquire into the facts, and must, in like manner, appoint a special guardian, if there is any ground to suppose that the interest of the general guardian or committee is adverse to that of the infant, or incompetent person; or that, for any other reason, the interests of the latter require the appointment of a special guardian. A person cannot be appointed such a special guardian, unless his written consent is filed, at or before the time of entering the order appointing him. **2530, Code Civil Proc.**

The New York Surrogate's Court regulates the appointment of special guardians as follows:

"Rule 10. No special guardian to represent the interests of an infant in any proceeding in said Surrogate's Court will be appointed on the nomination of a proponent or the accounting party, or his attorney, or upon the application of a person having an interest adverse to that of the infant. To authorize the appointment of a person as a special guardian on the application of an infant or otherwise in a proceeding in this court, or to entitle a general guardian of such infant to appear for him in such proceeding, it must appear that such person, or such general guardian, is competent to protect the rights of the infant, and that he has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of any party to the proceeding. Where the application for the appointment of a special guardian is made by another than the infant, or where the general guardian appears in behalf of the infant, it must appear that such applicant or general guardian has no interest adverse to that of the infant. *No party to a proceeding will be appointed special guardian of any other party thereto.* If such applicant or general guardian is entitled to share in the distribution of the estate or fund in which the infant is interested, the nature of the interest of such applicant

or general guardian must be disclosed. The application for the appointment of a special guardian as well as the appearance filed by a general guardian of a minor must, in every instance, disclose the name and residence and relationship to the infant of the person with whom the infant is residing, whether or not he has a parent living, and if a parent is living, whether or not such parent has knowledge of and approves such application or appearance; and such knowledge and approval must be shown by the affidavit of such parent. If the infant has no parent living, like knowledge and approval of such application or appearance by the person with whom the infant resides must be shown in like manner. Where such application is made by an infant over the age of fourteen years, his petition must show and be accompanied by the affidavit of the parent (in case the latter has an interest adverse to that of the infant), showing, in addition to such knowledge aforesaid, that such parent has not influenced the infant in the choice of the guardian." Rule XII also applies, "Whenever an infant interested in any proceeding in said Surrogate's Court has a general guardian, no decree will be entered without appointing a special guardian to represent said infant's interest therein *unless* such general guardian shall file his appearance *in writing*, and his *affidavit of no adverse interest*, as required by Rule X, with the Clerk of said Surrogate's Court. See also special rules in each Surrogate's Court.

§ 289. **Citation only need be served in probate cases in New York County.**—It is unnecessary in the New York Surrogate's office to serve the petition or other papers on which the citation may be issued with the citation to attend the probate. Rule 3, N. Y. Surrogate's Court.

§ 290. **The examination of witnesses.**—The Code provides, by § 2618, that,

> Upon the return of the citation, the surrogate must cause the witnesses to be examined before him. The proofs must be reduced to writing. Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the state, and competent and able to testify. Before a nuncupative will is admitted to probate, its execution and the tenor thereof must be proved by at least two witnesses. Any party, who contests the probate of the will, may, by a notice filed with the surrogate at any time before the proofs are closed, require the examination of all the subscribing witnesses to a written will, or of any other witness, whose testimony the surrogate is satisfied may be material; in which case, all such witnesses, who are within the state, and competent and able to testify, must be so examined. **§ 2618, Code Civil Proc.**

The provision that the Surrogate must cause the witnesses to be examined before him does not debar him from devolving this duty upon the clerk of the court in uncontested cases, or where all the parties entitled to be cited are before the court. This right he has under § 2510, which provides:

> The clerk of the surrogate's court, and, in the county of Kings, two other clerks to be designated by the surrogate, in addition to the powers enumerated

in section twenty-five hundred and nine, may exercise, concurrently with the surrogate of the county, the following powers of the surrogate: On the return of a citation issued from such surrogate's court on a petition for the probate of a will, where no objection to the same is filed; or, where all the persons entitled to be cited, sign and verify the petition, or personally, or by attorney, appear on the probate thereof, cause the witnesses to the will to be examined before him. Such examination must be reduced to writing, and for such purpose they are hereby authorized to administer and certify oaths and affirmations in such cases in the same manner and with the same effect as if administered and certified by the surrogate. **§ 2510, Code Civil Proc.** See also ch. 510, L. 1900.

This power is exercised in proper cases in the county of New York by the probate clerk. The power was originally not given in all the counties of the State, but in 1894 § 2510 was amended by leaving out the words of special designation, and it is now applicable to the clerks of all Surrogates' Courts, and by the amendment of 1887 (ch. 701) to § 2546 of the Code, the Surrogate in New York County was given power to direct an assistant to take and report the testimony in probate cases. This power is valid. The assistant is known as the probate clerk. He has no authority to pass upon the issues involved. Section 2546.

The object of the amendment, which was prepared by Judge Rollins, was stated by Surrogate Ransom (*Matter of Allemann*, 1 Connoly, 441), to be to enable the Surrogate to take such material, competent and relevant evidence, and such only, as pertained to the issues before the court, and thus afford the Surrogate some aid in disposing of the great and constantly increasing volume of business with which the court was being overburdened.

Consequently, the words in § 2546, that the assistant is without authority to pass upon the issues, do not prevent him from passing upon objections to the admissibility of evidence. *Matter of Allemann*, page 443. Nor do the words, "on the written consent of all the parties appearing," refer to the designation of the assistant but only to the appointment of a referee. *Ibid.*

§ 291. **What witnesses to be examined.**—*Two*, at least, of the subscribing witnesses must be produced and examined, if so many are within the State and competent to testify. Section 2618.

They must be produced by the proponents, not in pursuance of any mandatory requirement of law, but because there can be no probate until they are produced and examined, and the Surrogate is *satisfied* of the genuineness of the will, and of the validity thereof. Section 2622. And, as will be seen later in the discussion of contested probates, the duty of producing witnesses other than subscribing witnesses under the notice allowed by § 2618, also rests upon proponents for the same reason, indicated by Surrogate Rollins, that the contestants could, by filing such a notice, and by satisfying the Surrogate of the materiality of the witnesses specified therein, effectually block probate until such witnesses were pro-

duced and examined. *Hoyt* v. *Jackson*, 2 Dem. 443, 455; *Matter of McGovern*, 5 Dem. 424, 426. If the proponent cannot produce the necessary subscribing witnesses he must satisfy the Surrogate of the sickness, death, absence from the State, lunacy, or other incompetency of such witness in the manner required by § 2619. For, in the absence of such explanatory proof, probate will be refused. *Graber* v. *Haaz*, 2 Dem. 216, Rollins, Surr.

§ 292. **Incompetency of witness, how shown.**—The provisions of § 2619 are as follows:

> The death, absence from the state, lunacy, or other incompetency of a witness, required to be examined, as prescribed in this or the last section, or proof that such witness cannot, after due diligence, be found within the state or elsewhere, must be shown by affidavit or other competent evidence, to the satisfaction of the Surrogate, before dispensing with his testimony. Where a witness, being within the state, is disabled from attending, by reason of age, sickness, or infirmity, his disability must be shown in like manner; and in that case, the testimony of the witness, where it is required, and he is able to testify, must be taken in the manner prescribed by law, and produced before the Surrogate, as part of the proofs. **§ 2619, Code Civil Proc.**

§ 293. **The examination.**—It is not necessary that the Surrogate should make any order requiring the attendance of the subscribing witnesses. It is the proponent's duty to produce them. *Matter of McGovern*, 5 Dem. 424. But if such witnesses refuse to attend, the Surrogate has power to compel their attendance by subpœna, and to punish them for contempt in case of disregard of the subpœna when served. Section 2481. The requirement of § 2618 as to the producing of *two* witnesses is limited by the words "if so many are within the State." See *Swenarton* v. *Hancock*, 22 Hun, 38, construing similar provision before the Code, "if so many are living within this State." If they are, the testimony of neither can be dispensed with (*Chapman* v. *Rodgers*, 12 Hun, 342, 345) unless, it seems, by express waiver of all parties entitled to citation, being of full age (*Id.*), in which case the Surrogate would be bound to inquire more particularly into all the facts and circumstances in corroboration of the witness examined. And even though the subscribing witnesses are examined, there is no rule forbidding the introduction of other witnesses to the due execution of the will. *Reeve* v. *Crosby*, 3 Redf. 74, 77, citing *Trustees of the Theological Seminary* v. *Calhoun*, 25 N. Y. 422; *Peebles* v. *Case*, 2 Bradf. 226.

§ 294. **Competent subscribing witnesses.**—Section 2618 further limits the compulsory production of "two at least of the subscribing witnesses," by the words, "competent and able to testify." The courts have freely construed the word "competent." Thus, while an attorney is prohibited by §§ 835 and 836 of the Code from disclosing communications made by his client to him, or his advice thereon, unless the client waives his privilege, yet the Court of Appeals held in *Matter of Coleman*, 111 N. Y. 220, that the request to his attorney to sign as a subscribing witness was to

be deemed a waiver of the statute, and Surrogate Ransom held (*In re Lamb's Will*, 18 N. Y. Supp. 173), that such waiver extended "to all communications and transactions had between the testator and his attorney having reference to the paper under consideration." (See *post*, p. 293, under Lost Will.) But § 836 of the Code was amended to meet the rule laid down by the Court of Appeals (see L. 1893, ch. 295), by providing that "nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case the attorney is one of the subscribing witnesses thereto." § 836, Code Civ. Proc. See *In re Gagan's Will*, 20 N. Y. Supp. 426. This amendment was thus merely declarative of the law as it was stated to be in the *Coleman* case. But it was held (*Matter of Sears*, 33 Misc. 141), that unless an attorney who drew a will was such subscribing witness, he cannot testify to its execution by his client. See *Matter of O'Neil*, 26 N. Y. St. Rep. 242. And where he was not a witness, and seeks to testify to contents of a lost will the waiver as to execution does not extend to publication of contents, since they were not published, and his mouth is sealed, if objection be made. *Matter of Cameron*, 61 Misc. 546. "A person is not disqualified or excused, from testifying respecting the execution of a will, by a provision therein, whether it is beneficial to him or otherwise." Code Civ. Proc. § 2544. This section limits the testimony such a person is not disqualified from giving, to that relating to the *execution* of a will. Its terms clearly refer only to subscribing witnesses to a will (*Matter of Eysaman*, 113 N. Y. 62, 75), and was intended to make all such witnesses competent to testify in a Probate Court to the execution of the will, however their interest might arise. It was not intended, however, to operate as a repeal of § 829 (*Cadmus* v. *Oakley*, 3 Dem. 324, 328), prohibiting legatees or devisees from testifying concerning any personal transaction or communication between the witness and the decedent. Ruger, Ch. J., observed in *Matter of Eysaman, supra:* "The evidence authorized to be given by section 2544 refers to that given in Surrogates' Courts alone, and relates solely to the subject of the execution of the will," and he points out that the reason for exempting subscribing witnesses from the application of the general rule of exclusion, made by § 829, is obvious, as their testimony is made indispensable, if obtainable, to the probate of a will under §§ 2618 and 2619.

§ 295. **Same subject.**—While a legacy, devise, interest, or appointment of any real or personal estate made in a will to a person who is a subscribing witness thereto is void when the will cannot be proved without the testimony of such witness (2 R. S., ch. 6, title 1, § 50), such person is nevertheless a competent witness respecting the execution of the will and can be compelled to testify respecting its execution. *Ibid.; Matter of Eysaman*, 113 N. Y. 62, 76. So an executor who is a subscribing witness, is competent to prove the execution of the will. *Levy's Will*, 1 Tuck. 87; *Children's Aid Society* v. *Loveridge*, 70 N. Y. 387; *McDonough* v. *Lough-*

lin, 20 Barb. 238; *Rugg* v. *Rugg*, 83 N. Y. 592. And the commissions to which he is entitled do not constitute such a beneficial interest as to disqualify him. *Reeve* v. *Crosby*, 3 Redf. 74. Where he is a legatee, but only to the extent of a sum specified to be by way of compensation for his services as executor, although in addition to his lawful commissions, the same is true. *Pruyn* v. *Brinkerhoff*, 57 Barb. 176.

§ 296. **Dispensing with testimony of subscribing witness.**—Section 2619 above quoted permits the dispensing with the testimony of a subscribing witness who is proved, to the satisfaction of the Surrogate, to be dead, absent from the State, a lunatic, or incompetent under some provision of the law to testify or who, it is proved, cannot after due diligence be found within the State or elsewhere.

But when such a witness's testimony has been dispensed with the will need not fail of probate for lack thereof. His testimony, when he is merely absent from the State, may, if it appears it can be done, be taken by commission. But in all other cases the will is established by the methods provided by § 2620, discussed in § 299 below.

Section 2538 of the Code makes applicable, in Surrogates' Courts, the provisions of §§ 887–913, which relate to taking depositions without the State for use within the State, as well as §§ 870–886 which relate to depositions taken and to be used within the State.

Where, therefore, a necessity arises for taking testimony in this way for use in the Surrogate's Court the practitioner will resort to the ordinary practice. *Matter of Plumb*, 64 Hun, 317. The rule as to "due diligence" is expressly emphasized in § 2620. *Leslie* v. *Leslie*, 15 Week. Dig. 56. The applicant must offer an affidavit showing the necessity for the commission. It may be made by the party, or by his attorney, or his agent. *Eaton* v. *North*, 7 Barb. 631; *Ball* v. *Dey*, 7 Wend. 513; Rule 24, Hun's Rules. The Surrogate has discretionary power to grant a stay pending the execution of the commission, which he may revoke, if it is not diligently proceeded with. Notice of the application must be given to the other parties to the proceeding. § 889, Code Civ. Proc. After hearing the parties, or upon the stipulation, if it issue on consent, the Surrogate will make an order which will contain directions as to interrogatories if they be required. Or he may allow an open commission, upon oral questions. § 893, Code Civ. Proc. The proposed interrogatories and cross-interrogatories may be settled by consent, or by the court upon notice. The commission issues under this order, and indorsed upon it are the directions for executing the same directed to be annexed by §§ 901 and 902, Code Civ. Proc. The commission must be made under the seal of the court. *M. & H. O. Co.* v. *Pugsley*, 19 Hun, 282. But this can be waived. *Churchill* v. *Carter*, 15 Hun, 385.

§ 297. **Resident subscribing witness's testimony not to be dispensed with.**—But when a subscribing witness is within the State but is, by reason of age, sickness, or infirmity, disabled from attending, such disability must be proven to the satisfaction of the Surrogate by affidavit or other

competent evidence. Code Civ. Proc. § 2619. The testimony of such a witness where it is required, if he be able to testify, must be taken in the manner prescribed by law and produced before the Surrogate as part of the proofs. The manner of taking the testimony of such an aged, sick or infirm witness is expressly prescribed. Code Civ. Proc. §§ 2539, 2540.

Upon proof by affidavit to the satisfaction of the Surrogate that the testimony of the witness is material and necessary, and that he is so aged, sick or infirm as to be unable to attend and is a resident of the county, the Surrogate must *in a proceeding to probate a will* proceed to the place where the witness is, and there, as in open court, take his examination. Provision is expressly made that such notice of the time and place of this examination must be given as the Surrogate may prescribe to any parties who have appeared in the proceeding, or to any party to whom the Surrogate in his discretion requires notice to be given.

§ 298. **Same.**—Where all these facts are shown to the satisfaction of the Surrogate with the exception that it appears that the subscribing witness to the will is in another county, it is provided that if the Surrogate has good reason to believe that the witness cannot attend before him within a reasonable time to which the hearing may be adjourned, he may make an order directing that the witness be examined before the Surrogate of the county in which he is. Such order must specify a day on or before which a certified copy thereof must be delivered to the Surrogate designated, and should direct to whom, and the manner in which, the notice of the examination is to be given. The Surrogate must then transmit a copy of this order, attested by the seal of his court, to the Surrogate whom he has designated, together with the original will.

The Surrogate designated, upon the day specified in the order, or upon an adjourned day designated in his own discretion, must take the examination of the witness as if he possessed original jurisdiction of the probate proceeding. The examination must be reduced to writing and subscribed by the witness or otherwise duly authenticated, and must be certified by the Surrogate taking the examination, together with a statement of the proceedings upon the execution of the order designated; and these papers, attested by the seal of the Surrogate who took the examination, must be returned without delay, and with the original will, to the original Surrogate, by whom all the papers must be filed.

§ 299. **Section 2620.**

> If all the subscribing witnesses to a written will are, or if a subscribing witness, whose testimony is required, is dead, or incompetent by reason of lunacy or otherwise, to testify, or unable to testify; or if such a subscribing witness is absent from the state; or if such a subscribing witness has forgotten the occurrence, or testifies against the execution of the will; the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action. Where a subscribing witness is absent from the state, upon application of either party, the

surrogate shall cause the testimony of such witness to be taken by commission, when it is made to appear that by due diligence such testimony may be obtained. Where a written will is proved as prescribed in this section, it must be filed and remain in the surrogate's office. But where it shall be shown, by affidavit or otherwise, to the satisfaction of the Surrogate, that the decedent left real or personal property in another state or territory of the United States or in a foreign country, and that the laws of such state, territory or country require the production of the original will before provisions thereof become effective, the Surrogate may, at any time after probate, and upon such notice to the parties interested in the estate as he may think proper, cause any original will remaining on file in his office to be sent by post or otherwise to any court which, or to any officer of such state, territory or country who, under the laws thereof, is empowered to receive the same for probate, or may deliver such will to any person interested in the probate thereof in such state, territory or country, or to his representative, upon such terms as he shall think proper for the protection of other parties interested in the estate. Where in any matter before the surrogate or in a surrogate's court the testimony of any witness shall be taken by or on commission, the same, together with the commission on which it is taken, shall be duly filed in the office of the surrogate but need not be recorded. The testimony, or other proceeding duly taken to be used before the surrogate or surrogate's court, by a stenographer, shall be filed and need not be recorded. **§ 2620, Code Civil Proc.** (As amended L. 1902, c. 114.)

Beckett, Surr., has recently decided an interesting case of this kind, of a will over forty years old, no attestation clause, two of the witnesses dead, and the third leaving the State in 1868 and reported dead. See *Matter of Leaird*, 58 Misc. 477.

This section is substantially an embodiment of the pre-existing statutes (*Rolla* v. *Wright*, 2 Dem. 482), but differs in one material respect. The former statute provided for the proof of the handwriting of a necessary subscribing witness who "should be shown to reside out of the State." Under this statute it was held that mere absence from the State of such a witness of a resident of the State would not authorize the Surrogate to admit such proof. *Stow* v. *Stow*, 1 Redf. 305. But the inconvenience of such a rule led to the enactment of the law as it now stands. Where the necessary witness is absent from the State and the Surrogate is satisfied that his testimony cannot with due diligence be taken by commission, he may dispense with his testimony, and take proof of his handwriting with that of testator under § 2620. In determining this question the Surrogate will construe "due diligence" not only in reference to the efforts of the proponent to ascertain the whereabouts of the witness, but also in regard to whether the proceedings will be unreasonably delayed. The Surrogate may permit resort to the proof allowed by this section where it is shown to his satisfaction that the absence of the witness from the State has been procured by persons interested in delaying or defeating the probate of the will. *Matter of Dates*, 12 N. Y. Supp. 205. In *Matter of Briggs*, 47 App. Div. 47, the subscribing witnesses to the will were dead. It was

held that § 2620 gave the Surrogate the right to admit a will on less evidence than if both witnesses were living, by the words "of such other circumstances as would be sufficient to prove the will upon the trial of an action." The court says, at p. 50, "A will may be established upon the trial of an action by ordinary common-law evidence from which its execution may reasonably be inferred by the jury, although that evidence is given by but one witness," citing *Harris* v. *Harris*, 26 N. Y. 433; *Jackson* v. *Vickory*, 1 Wend. 406, 412. That is, the question will be whether, upon the whole evidence, the jury may fairly infer that the requirements of the statute have been complied with. *Upton* v. *Bernstein*, 27 N. Y. Supp. 1078. See also *Matter of Foley*, 55 Misc. 162. In the *Briggs* case the court held that declarations of the decedent as to the execution of the will, were competent in support of due execution, and afforded as strong an inference as to due execution as one derived from an attestation clause had there been one. In *Matter of Law*, 80 App. Div. 73, the court states the rule as to when an action under § 1861 is the only procedure to adopt.

§ 300. **The proof required to establish uncontested will.**—(See "Contested Probates" as to examination of witnesses in such cases.) Where there is no contest, the proof required to satisfy the Surrogate is to be addressed to two points,

(*a*) The genuineness of the will.

(*b*) The validity of its execution.

Section 2622 which prescribes this confers upon the Surrogate the power to require in his discretion further proof. It is as follows:

> Before admitting a will to probate, the surrogate must inquire particularly into all the facts and circumstances, and must be satisfied of the genuineness of the will, and the validity of its execution. Before admitting a written will to probate, the surrogate may, in his discretion, require proof of the circumstances attending the execution, the delivery, and the possession thereof, or any of them, to be made by the affidavit, or the testimony, at the hearing, of the person who received the will from the testator, if he can be produced, and, also, of the person presenting it for probate. **§ 2622, Code Civil Proc.**

The genuineness of the will propounded is usually established by the identification of the instrument by the witnesses when identifying their signatures as witnesses. But § 2622 enables the Surrogate, where that means of satisfying him fails by reason of failure of memory or of vagueness of the proof, or where one or both witnesses are dead, to fix the genuineness of the instrument not only by proof of the handwriting of the testator and the witness or witnesses under § 2620, but by tracing it back through the proponent and the person who obtained the will from the testator, as, for example, the attorney who drew the will, who would be quite competent to testify to the fact that the will propounded is the will he drew and the testator signed. See *Matter of Way*, 6 Misc. 484. In *Matter of Burbank*, 104 App. Div. 312, the court lays down the rules as to proving the signature.

1. By having seen the party write.

2. By familiarity with authenticated signatures.

3. By comparison, by a qualified expert.

See also discussion in dissenting opinion by Hiscock, J., in *Matter of Burtis*, 107 App. Div. 57, 70. The proof necessary to satisfy the Surrogate as to the validity of the execution of the will must of course be addressed to the various requirements of execution under the statute and is discussed in full in the next chapter under contested probates.

§ 301. **Proof of lost or destroyed will.**

> A lost or destroyed will can be admitted to probate in a surrogate's court; but only in a case where a judgment establishing the will could be rendered by the supreme court, as prescribed in section 1865 of this act. **§ 2621, Code Civil Proc.**

Section 1865 provides as follows:

> **§ 1865.** *Proof of lost will in certain cases.*
> But the plaintiff is not entitled to a judgment, establishing a lost or destroyed will, as prescribed in this article, unless the will was in existence at the time of the testator's death or was fraudulently destroyed in his lifetime; and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness.

The Surrogate's power to admit to probate a lost or destroyed will is purely statutory. *Hatch* v. *Sigman*, 1 Dem. 519. As are also the mode of procedure, the proof required and the restrictions imposed. Surrogate Spring summarized the rules governing such cases as follows (*Hatch* v. *Sigman, supra*, p. 521):

"*First.* Where a will, *duly executed*, has been lost or destroyed, by accident or design, before it was duly proved and recorded within this State, an action to establish it may be maintained. Code Civ. Proc. § 1861; *Voorhees* v. *Voorhees*, 39 N. Y. 463, affirming 50 Barb. 119.

"*Second.* Since the enactment of the Code of Civil Procedure, proceedings to establish lost or destroyed wills can be entertained in a Surrogate's Court. Code, § 2621.

"*Third.* Petitioner is not entitled to a decree establishing such will, unless 1st, the will was in existence at testator's death, or 2d, was fraudulently destroyed in his lifetime; and, in either case, its provisions must be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness. Code, § 1865; *Kerry* v. *Dimon*, 37 N. Y. Supp. 92.

"*Fourth.* The power of a court to admit to probate a lost or destroyed will exists only in the cases I have mentioned. *Timon* v. *Claffy*, 45 Barb. 438, 446; *Harris* v. *Harris*, 36 Barb. 88, 97.

In entertaining applications then under § 2621 to establish alleged lost or destroyed wills, Surrogates must not relax the rules by which they are governed in admitting wills that are actually producible before them. See *Matter of Reiffeld*, 36 Misc. 472. But, on the contrary, they will re-

quire unmistakable evidence of the existence of a properly executed will (*Matter of Purdy*, 46 App. Div. 33), and "clear and distinct" proof of its provisions. See *Sheridan* v. *Houghton*, 6 Abb. N. C. 234; *McNally* v. *Brown*, 5 Redf. 372. It is not necessary that the witnesses should remember the exact language used by the testator; but they must be able to testify at least to the substance of the whole will, so that it can be incorporated in the decree, should the will be admitted to probate. In *Matter of Purdy*, *supra*, probate was denied because there was no evidence that the signature was made in the presence of both witnesses, or that decedent acknowledged his signature, nor was there sufficient proof of the will's contents under § 1865.

Mere proof of the existence of the will is not alone sufficient. It must be shown to have been lost, or fraudulently destroyed. If a will cannot be found which is known to have existed, the only presumption is that it was destroyed by the testator *animo revocandi*. *Matter of Kennedy*, 167 N.Y. 163, aff'g 53 App. Div. 105, and 30 Misc. 1; *Matter of Nichols*, 40 Hun, 387, 389, citing *Idley* v. *Bowen*, 11 Wend. 227; *Holland* v. *Ferris*, 2 Bradf. 334; *Hatch* v. *Sigman*, 1 Dem. 519, 530, citing *Betts* v. *Jackson*, 6 Wend. 173; *Bulkley* v. *Redmond*, 2 Bradf. 281; *Schultz* v. *Schultz*, 35 N. Y. 653; *Hard* v. *Ashley*, 88 Hun, 103. See also *Collyer* v. *Collyer*, 110 N. Y. 481, 486; *Knapp* v. *Knapp*, 10 N. Y. 276. This presumption may be overcome by proof of the deposit of the will after execution with a custodian and that the testator had thereafter no access to it. In the *Kennedy* case, *supra*, it was held that it was incompetent to prove the existence of the will by declarations of the decedent (see opinion, reviewing cases). This is not at variance with *Matter of Cosgrove*, 31 Misc. 422. In that case there was evidence by disinterested witnesses that the will was, upon execution, handed to the executor named in it, and there was no evidence that it ever returned into the possession of testatrix. A week before her death it was proved she spoke of the will as in such executor's possession, and as satisfactory to her. Thomas, Surr., held that such declarations were competent to rebut any inference of revocation arising from the loss of the will, occurring while the executor had it, citing *Betts* v. *Jackson*, 6 Wend. 173, 187, 188; *Matter of Marsh*, 45 Hun, 107. But the proof as to its loss or destruction must be such as to counteract the presumption of lawful intent to revoke, if it occurred before the alleged testator's decease. In other words, "He who seeks to establish a lost or destroyed will assumes the burden of overcoming this presumption by adequate proof." *Collyer* v. *Collyer*, 110 N. Y. 481, 486. So if the evidence is conflicting and unsatisfactory, particularly as to its contents, the application must fail. But the rule is liberal to this extent, that if the witnesses recollect the substantial disposition of the property, and the names of the beneficiaries, the Surrogate is justified in decreeing it as proved.

So Surrogate Livingston held that § 1865 should receive a liberal construction, and the words "its provisions" must be "clearly and distinctly proved," should be deemed to refer to the disposing provisions of the will,

and not necessarily to the appointment of an executor. *Early* v. *Early*, 5 Redf. 375, 386. See *Matter of Purdy*, 46 App. Div. 33. But where no two witnesses prove all the provisions, or prove any of them with sufficient clearness to enable the court to more than surmise the nature of the will, probate must be denied. *McNally* v. *Brown*, 5 Redf. 372. It will not suffice to prove one provision by two or more witnesses, and another provision in the same way by others, but each of the witnesses must be able to testify to all the disposing parts of the will. *Collyer* v. *Collyer*, 4 Dem. 53; *Matter of Ruser*, 6 Dem. 31, 33.

Declarations of the testator as to its contents are not admissible (*id.*). So where the lawyer who drew the alleged lost will testified that "it either gave the whole estate to the wife absolutely, or it gave it to her for life with the remainder to the children," Surrogate Coffin observed that this testimony "lacks the elements of clearness and distinctness which the statute exacts." *Matter of Ruser, supra.* See *Grant* v. *Grant*, 1 Sand. Ch. 235. See discussion by Beekman, J., of credible evidence in such a case. *Kahn* v. *Hoes*, 14 Misc. 63.

§ 302. **Existence of will at testator's death.**—The Court of Appeals has held, that where a will has been lost or destroyed, under circumstances showing that it was not done with the knowledge or consent of the testator, it may be established as his will whether the loss or destruction took place before or after his decease. *Schultz* v. *Schultz*, 35 N. Y. 653. Section 1865 prescribes that such a will cannot be established "unless the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime." This, therefore, limits the case of fraudulent destruction as a ground for nonproduction of the will offered for probate to that taking place in testator's lifetime. It must also be a fraud as to the testator. *Matter of De Groot*, 9 N. Y. Supp. 471. A destruction without his knowledge or consent and in disregard of his intention, is such a fraud. *Early* v. *Early*, 5 Redf. 376. But mere proof of opportunity to destroy, or motive to destroy, is not enough to satisfy the statute, though it may have evidential weight in connection with other evidence. The burden of proof, of "clear and distinct" proof, is on the person claiming under the alleged will. *Collyer* v. *Collyer*, 110 N. Y. 481, 486; *Betts* v. *Jackson*, 6 Wend. 173; *Knapp* v. *Knapp*, 10 N. Y. 276.

§ 303. **Due execution must be proved.**—The Surrogate must require satisfactory proof that the will was executed as required by our statutes. In this regard there is no distinction between a lost will and one actually laid before the court, excepting that the court and the witnesses are deprived of the substantial aid to memory given by the sight of the will and of the recitals of an attestation clause. See *Early* v. *Early*, 5 Redf. 376, and cases discussed. Surrogate Rollins (*Matter of Paine*, 6 Dem. 361) outlined the issues to be determined in a given case, substantially as follows:

1. Did the decedent, on a given day, execute, in compliance with the requirements of law, a written instrument as and for his last will and testament?

2. If he did so execute such instrument, did he, at the time of such execution, possess the testamentary capacity requisite for making a valid will?

3. If he did so execute such instrument, was he induced so to do by undue influence or fraud?

4. If not, have the provisions of such instrument been clearly and distinctly proved, as required by § 1865 of the Code of Civil Procedure?

5. If such instrument was so executed, was it in existence at the time of the decedent's death?

6. If such instrument so executed was not in existence at the time of this decedent's death, had it been fraudulently destroyed in his lifetime?

The statement of these issues indicates in general terms the issues the proponent of a lost will or destroyed will must undertake to meet, and all of which he must meet by affirmative evidence. Counsel cannot stipulate the contents of a will, although it is proved that there was a will, and that it was duly executed. *Matter of Ruser*, 6 Dem. 31.

In this case the draughtsman of the will, an attorney, was doubtful whether the testator gave his estate to his wife absolutely or for life. Counsel for all parties entered into a stipulation that the testator left his estate to his widow for her life with a remainder to his children. Surrogate Coffin very properly held that the statute contemplated no such royal road to probate and refused to give force to the stipulation. Section 835 of the Code does not, in such a case, render the draughtsman of the will, an attorney, incompetent to testify as to what took place at the time of execution. *Matter of Barnes*, 70 App. Div. 525, 528, citing *Hurlburt* v. *Hurlburt*, 128 N. Y. 424; *Rosseau* v. *Bleau*, 131 N. Y. 183; *Matter of Chase*, 41 Hun, 204; *Sheridan* v. *Houghton*, 16 Hun, 628, aff'd 84 N. Y. 643; *Hebbard* v. *Haughian*, 70 N. Y. 55. But in this case the incompetency (discussed *ante*, at § 294) was shown to have been waived by the testator at time of execution.

In *Matter of Eldred*, 109 App. Div. 777, the will involved was holographic. There was no attestation clause. The witnesses testified somewhat unsatisfactorily. But the probate was sustained. See opinion at p. 780. In *Matter of Halstead*, 51 Misc. 542, the Surrogate found the will had been in existence; he found its contents and that it had been destroyed *after* decedent's death. But as both the witnesses were dead and there was no proof of their handwriting he refused probate.

§ 304. **Proof of codicil to or revocation of alleged lost or destroyed will.**—In case, upon an application to prove a lost or destroyed will, one opposing its probate sets up an alleged codicil or a revoking clause in a later but also lost will, the question becomes material whether this codicil or later will and its execution and contents must be established in the same way and under the same rules required in order to the admission of the will sought to be probated.

Surrogate Rollins intimates that it is not necessary, but that "any legal evidence which satisfies the Surrogate of the existence of a will executed

subsequently to the one offered for probate is sufficient also to justify the denial of probate to the earlier paper." And he held (*Colligan* v. *McKernan*, 2 Dem. 421, 425), that it was not, accordingly, necessary that two witnesses should testify as to the contents of the later instrument, nor was it necessary to show that such instrument was in existence at the time of the testator's death, nor that, if not then in existence, it had been fraudulently destroyed in his lifetime. He bases this decision upon the decision of the Court of Appeals in *Harris* v. *Harris*, 26 N. Y. 433, which held that the statutory provision respecting the mode of establishing lost wills related only to the special proceeding pointed out by the statute and did not abolish the common-law rule of evidence, which allowed the proof of a lost will by a single credible witness. See *Jackson* v. *Le Grange*, 19 Johns. 386; *Dan* v. *Brown*, 4 Cow. 483; *Jackson* v. *Betts*, 6 Cow. 377; *Chapman* v. *Rodgers*, 12 Hun, 342, 347; *Fetherly* v. *Waggoner*, 11 Wend. 599. The learned Surrogate accordingly declared he would admit parol evidence of the execution of a later will as well as of the fact that it contained a revoking clause. See *Collyer* v. *Collyer*, 4 Dem. 53, at page 59.

In *Matter of Meyers*, 28 Misc. 359, a lost will was proved to contain a clause revoking an earlier will. The latter was accordingly denied probate.

§ 305. **Nuncupative wills.**—A nuncupative will (so termed *a nuncupando*, that is, from naming an executor by word of mouth) is a verbal testamentary declaration or disposition.

By the common law, it was as valid in respect to personal estate as a written testament. A will could not only be made by word of mouth, but the most solemn instrument in writing might be revoked orally.

In a rude and uncultivated age, to have required a written will would have been a great hardship, but with the growth and progress of letters, the reason for permitting a verbal testament diminished in force, until finally an effort to establish such a will by means of gross fraud and perjury, gave rise to the Statute of 29 Charles II in 1676, termed the Statute of Frauds. *Ex parte Thompson*, 4 Bradf. 154, 155, citing *Cole* v. *Mordaunt*, 4 Vesey, 196.

Originally nuncupative wills were valid, although not made in sickness. In the reign of Henry VIII (Perkins, 476), they were defined as properly made when the testator "lieth languishing for fear of sudden death, dareth not to stay the writing of his testament, and therefore he prayeth his curate and others, his neighbors, to bear witness to his last will and declareth by word of mouth, his last will."

In a treatise published in the time of King James I (Swinbourne, page 32), it is said that this kind of testament is only made when the testator "is now very sick, weak and beyond all hope of recovery."

It has now, therefore, become the doctrine that the nuncupative will is only to be tolerated when made *in extremis*. See *Prince* v. *Hazelton*, 20 Johnson, 501, 511, reviewing history of this subject, and citing 7 Bac. Abr. by Gwillim, 305; 6 Wood on Conveyances, 574. See also 2 Blackstone's Com. 500, 501, where the learned author says, referring to the

Statute of Frauds, "thus has the legislature provided against any frauds in setting up nuncupative wills by so numerous a train of requisites that the thing itself has fallen into disuse, but in the only instance where favor ought to be shown to it, when the testator is surprised by sudden and violent sickness." See also cases of *Philips* v. *The Parish of St. Clements Danes*, 1 Eq. Cas. Abr. 404, Pl. 27, and *Hedges* v. *Hedges*, Prec. in Ch. 269; Gilb. Eq. Rep. 12. The rule contemplates cases where a man lies *in extremis* or being surprised by sickness or not having an opportunity of making his will, or lest he die before he could make it, gives away his personal property with his own hand, if he dies, it operates as a legacy, if he recovers, the property reverts to him.

At present the Revised Statutes cover the question of nuncupative wills (see § 16, Decedent Estate Law), providing that no nuncupative or unwritten will bequeathing personal estate shall be valid unless made by a soldier while in actual military service, or by a mariner while at sea. See discussion in *Ex parte Thompson*, 4 Bradf. 154, 156, containing extracts from the preface of the life of L. Jenkins, reviewing the testator's privilege in the Roman Army, and its influence among civil nations.

Before the limitation of the rights of nuncupation to soldiers and sailors, it was essential that the will should be made in the last sickness. *Prince* v. *Hazelton*, and *Ex parte Thompson*, above cited. The only other inquiry which need now be made is whether the nuncupation was made by a person entitled to that privilege, so that the evidence necessary to be adduced is first on the question whether the testator properly falls within the class.

In the case already cited (*Ex parte Thompson*) the decedent was a cook on board a steamship, and not what is ordinarily understood as a mariner, but the court held that as the term "soldier" embraces every grade from the private to the highest officer (see cases cited) so the term "mariner" under the principle upon which the privilege of nuncupation is conceded must be applied "to all persons engaged in the marine service, whatever may be their special duty, or occupation in the vessel." See cases cited. All the court can demand is to be satisfied by sufficient evidence as to the description of the last testamentary request or declaration of the decedent; this being done, a decree for probate is made, into which the testamentary disposition is incorporated as a recital, and letters must issue.

Of course "sufficient evidence" must include proof of the testamentary capacity of decedent, and proof that the declaration of the decedent was intended to be testamentary, and of course the establishing of the will may be defeated by proof of improper or undue influence exercised upon the nuncupator *in extremis*.

The opinion of Judge Woodworth in *Prince* v. *Hazleton*, above cited, is most exhaustive as to the sufficiency of evidence establishing a nuncupative will. It must be noted that the phraseology "soldier in actual military service," is unambiguous; it is not enough to be a soldier or sailor, but there must be actual service, as under the rules prescribed by Julius Cæsar,

"amid the perils of warfare, the forms prescribed by law for the execution of a will were that the soldier might declare his last wishes by word of mouth." *Ex parte Thompson*, above cited.

From what has been said, it is clear what the necessary allegations in the petition propounding a nuncupative will must be. First, the petition should contain the allegations establishing the jurisdiction of the Surrogate to probate the will. See § 275. Then must follow description of the decedent as a mariner or soldier engaged in actual military operations (see *Hubbard* v. *Hubbard*, 8 N. Y. 196, and cases cited) and allegations sufficient to show that he was actually at sea, as a mariner, or in active military service. It is to be remembered that the courts have liberally construed the term "mariner" and "soldier," holding the terms to include the whole army, naval and merchant marine service. In the case of a mariner, it must appear that he was really at sea. The term "at sea" in this connection is held to mean the open sea, where the tide ebbs and flows. See *Hubbard* v. *Hubbard, supra*, and see *Matter of Wm. Gwin*, 1 Tucker, 44, 45, citing Gilpin's R. 526; *The Thomas Jefferson*, 10 Wheaton, 428; *Steamboat Orleans* v. *Phœbus*, 11 Peters, 175; *Earl of Easton* v. *Seymour*, 2 Curteis, 339; 3 Curteis, 530, where a commander in chief of naval forces of Jamaica, lived on shore at his official residence and that of his family, and died there, it was held that he was not at sea. See also *Goods of Lay*, 2 Curteis, 375, where a seaman lying in the port of Buenos Ayres, had leave to go ashore, was injured and died; he was held by the English court to have been at sea and his nuncupative will made *in extremis* was admitted; but this was in a case where the decedent belonged to a seagoing ship, and was upon a sea voyage. While the policy of the courts is to liberally construe the definition of mariner, at sea, or soldier in active service, yet from the very nature of the personal privileges granted to this class in making testamentary disposition of personal property, the courts will not enlarge the limit laid down by the statute within which such wills may be maintained so that the practitioner propounding such a will must be careful to affirmatively establish every necessary jurisdictional and evidential fact.

§ 306. **The probate decree.**—In case the will propounded for probate is not opposed, and no objections are filed, and notice served pursuant to § 2617, the petition with the proofs attached may be marked for decree, and the decree admitting the will to probate and directing that letters testamentary issue to the executors named therein will be made pursuant to § 2623. This section will be discussed later on, following the chapter on contested probates.

CHAPTER IV

CONTESTED PROBATES

§ 307. **The manner of beginning contest.**—Every Surrogate's Court has the power to prescribe special rules as to the manner in which contestants must proceed in opposing the probate of a will. These rules must be observed so long as they are not inconsistent with the provisions of the Code or of any other statute. Reference should be had to the local rules in all cases.

In the Surrogate's Court of the county of New York this procedure is defined by Rule 4, which is as follows:

"A party seeking to contest the probate of a last will and testament must file a written appearance with the clerk of this court together with a written and verified answer, containing a concise statement of the grounds of his objection to such probate, and any facts he may allege tending to establish a want of jurisdiction of the court to hear such probate. In case such jurisdiction shall be denied or the right of any objecting party to appear and contest shall be questioned, the court will first hear and pass upon the question of jurisdiction, or the status of the contestant, unless, for the convenience of the parties or the court, it shall be ordered otherwise. When a contestant files with the Surrogate the notice provided for by § 2618 of the Code of Civil Procedure, requiring the examination of all the subscribing witnesses to a will, or any other material witness, he must present with such notice an affidavit showing the materiality of the testimony of the witnesses or witness sought to be examined, and an order requiring the production by the proponent of such witnesses or witness. A copy of such order, if the same shall be signed, must be immediately served upon the proponent or his attorney.

"In all cases of contests in probate proceedings, the proponents shall, within five days after objections to the probate are filed, present a verified petition for and procure and enter an order directing notice of the time and place of hearing of such objections to be given, and prescribing the manner of giving such notice, to all persons in being who would take any interest in any property under the provisions of the will, and to the executor or executors, trustee or trustees, named therein, if any, who have not appeared in the proceeding, as required by § 2617 of the Code, and such petition shall contain the names and addresses of such parties, and state whether any, and which of them, are infants or of unsound mind. In case the proponents shall not present such petition and enter such order within the time aforesaid, such petition may be presented and order entered by or on behalf of any party or parties interested in the estate.

"Proofs of service of such notices must be filed with the probate clerk at least four days before the date named therein for such hearing.

"In probate proceedings, when all parties in interest have waived the service of citation, notice of at least two days must be given to the probate clerk before the testimony of the subscribing witnesses will be taken.

"The will shall be filed with petition for probate, unless upon good cause shown by affidavit the Surrogate dispenses therewith, in which case it must be filed at least two days before the return day of the citation.

"In all cases a copy of the will must be filed with the petition."

The provision of Rule 4 of the New York Surrogate's Court as to filing a written and verified answer by the one who is to contest defines what is good practice in all the Surrogate's Courts, under the provisions of § 2533, which permits any Surrogate to require a party to file a written petition or answer containing a plain and concise statement of the facts constituting his claim, objection or defense with a demand of the decree, order or other relief to which he supposes himself to be entitled. Where such a rule obtains or where such an answer is directed to be filed the fundamental rules of pleading are applicable to it as to its form. However, it is undoubtedly the fact that Surrogates do not always require such strictness in regard to pleadings in their courts and it is customary to allow considerable latitude by way of amendment, if upon the hearing it shall appear necessary to protect the rights of the party.

But careless "answers" may impair the remedy desired. See *Matter of Garner*, 59 Misc. 116. The following may serve as a precedent for the answer in a contested will case:

Answer in contested will case.
Erase inappropriate allegations.

Surrogate's Court,
County of New York.

In the Matter of Proving the alleged Last Will and Testament of
S. P., Deceased.

The answer of an infant and one of the heirs-at-law and next of kin of the above named decedent, by his Special Guardian, respectfully shows to the Court, on information and belief:

I. That the paper writing bearing date the 8th day of May, 1909, and purporting to have been executed on that day, is not the last Will and Testament of said decedent.

II. That the said alleged will was not duly executed by the said S. P., deceased; that he did not publish the same as his Will in the presence of the witnesses whose names are subscribed thereto; that he did not request the said two witnesses to be witnesses thereto, and that the said alleged witnesses did not sign as witnesses in his presence or in the presence of each other.

III. That on said day of 19 the said

decedent, S. P., was not of sound mind or memory, or mentally capable of making a will.

IV. That the said paper writing was not freely or voluntarily made or executed by the said S. P., as his last Will and Testament, but that the said paper writing purporting to be his Will was obtained, and the subscription and publication thereof, if it was in fact subscribed or published by him, were procured by fraud and undue influence practiced upon the decedent by one (the principal legatee and devisee named in said paper), or of some other person or persons acting in concert or privity with him, whose name or names are at present unknown to this contestant.

V. That the paper propounded for probate herein is invalid as a last Will and Testament, and is illegal and void in respect to (the residuum thereby bequeathed).

Wherefore the above named infant by his Special Guardian, contestant, prays that this proceeding may be dismissed with costs.

Signature,
Special Guardian for infant,
address.

(Verification.)

§ 308. **Fixing the time of hearing.**—In the absence of such a rule as Rule 4 in New York County, a similar procedure is proper under § 2617, whereunder any person, "whether cited or not cited, who is named as a devisee or legatee in the will propounded, or as executor, trustee, devisee, or legatee in any other paper purporting to be a will of the decedent, or who is otherwise interested in sustaining or defeating the will, may appear, and, at his election support or oppose the application." In 1894, § 2617 was amended by adding the following clause:

> And in case the will propounded for probate is opposed, due and timely notice of the hearing of the objections to the will shall be given, in such manner as the surrogate shall direct, to all persons in being, who would take any interest in any property under the provisions of the will, and to the executor or executors, trustee or trustees named therein, if any, who have not appeared in the proceeding, and any decree in the proceeding shall not affect the right or interest of any such person unless he shall be so notified.

Where the citation of a legatee is not requisite to jurisdiction the will cannot be attacked collaterally for failure to cite him. *Matter of Wohlgemuth*, 110 App. Div. 644.

When it appears to the satisfaction of the Surrogate, or in the county of New York to the probate clerk, that all the necessary parties or the parties contemplated by this section have been cited, or served with notice of hearing of the objections, or have filed duly executed and acknowledged waivers of the issuance and service of citation, or have voluntarily appeared in the proceeding, a day is set for the hearing which thereupon proceeds before the Surrogate.

It will be recalled that the Surrogate's power to appoint referees is limited by § 2546 to proceedings other than one instituted for the probate or revocation of probate of a will, except in the case of the Surrogates of the county of New York, who may under written consent of all the parties appearing in a probate case appoint a referee to take and report the testimony (but without authority to pass upon the issues involved therein) or such Surrogates may in their discretion direct an assistant to take and report the testimony, with a similar limitation. See § 2546 of the Code. See also Laws of 1885, ch. 367, as to the power of clerk in Kings County Surrogate's Court to examine witnesses.

It has been held that the assistant appointed by the Surrogate of New York County, who is known as the probate clerk, in such cases may rule upon the admissibility of the evidence which may be offered. *Matter of Alleman*, 1 Connoly, 441.

§ 309. **Surrogate's control of the proceeding—Writ of prohibition.**—In the *Rice* will case, reported as *People ex rel. Patrick* v. *Fitzgerald*, 73 App. Div. 339, it was sought, by writ of prohibition, to prevent the probate of one will, and the rejection of probate of a later will, the witnesses to which were under indictment. The Appellate Division laid down the following legal propositions: (See headnote.)

"A writ of prohibition lies only where there is a want of jurisdiction or where the court, judge or other tribunal is proceeding in excess of the jurisdiction conferred. *See cases cited.*

"Authorities regarding it as applicable to prohibit proceedings 'contrary to the general law of the land' refer to proceedings without permitting a party to be heard, and this means no more than excess of jurisdiction.

"Errors of law or procedure must be corrected by appeal, and a writ of prohibition is not designed to regulate admission or rejection of evidence or the proceedings of an inferior court having jurisdiction.

"The right to an adjournment rests in discretion, reviewable only by direct appeal, and the question of an adjournment of civil proceedings, arising out of the same facts as pending criminal proceedings, until the determination of the criminal proceedings, is not a matter of strict legal right, reviewable by prohibition, but involves the exercise of discretion, reviewable only by direct appeal.

"A Surrogate has jurisdiction to decide whether to dismiss probate proceedings for want of proof, or to continue the proceedings to permit the presentation of further evidence, and his dismissal for want of proof would not be a dismissal upon the merits.

"A claim of privilege against self-incrimination, advanced by subscribing witnesses to a will under indictment, as an excuse for not testifying to the execution of the will, may properly be sustained. *See cases cited.*

"A decision on appeal in prohibition proceedings is not to be construed as an approval of rulings in the inferior court on evidence, practice, procedure and discretion, such as are reviewable on direct appeal.

"Where a court refuses to grant an absolute writ, upon return to an al-

ternative writ of prohibition, a stay pending appeal from the final order refusing the absolute writ is unauthorized."

§ 310. **The hearing—Examination of witnesses**—Section 2618 has been already quoted in discussing how proof of a will must be taken which is not contested. All that has been said in that connection is applicable here so far as the proponent's case is concerned. It is his duty to establish the will *prima facie*, proving its due execution and the mental capacity of the testator; the burden of establishing both is of course upon such proponent. *Delafield* v. *Parish*, 25 N. Y. 9; *Rollwagen* v. *Rollwagen*, 63 N. Y. 504; *Miller* v. *White*, 5 Redf. 320; *Legg* v. *Meyer*, 5 Redf. 320. It is true that there is a legal presumption that every man is *compos mentis* (*Delafield* v. *Parish*, 25 N. Y. 9, 97), and that the burden of proving a decedent's unsoundness of mind is upon him who asserts the existence of that unnatural condition. *Delafield* v. *Parish*, *supra*. But there is a distinction, which has been clearly drawn by the Supreme Court (*Harper* v. *Harper*, 1 T. & C. 355), in the following words:

"It is the established rule of this State that the legal presumption to begin with is, that every man is *compos mentis* and the burden of proof that he is *non compos mentis* rests on the party who alleges that unnatural condition of mind existing in the testator. But it is also the rule that in the first instance the party propounding the will must prove the mental capacity of the testator."

The practice is for the proponent to prove the formal execution of the will and to show *prima facie* by the attesting witness the decedent's age, mental competency, and freedom from restraint; the contestant then offers his evidence in support of his objections and the proponent in reply may offer rebutting evidence or strengthen his *prima facie* case as to the allegations which he is bound to maintain. It is one thing to say, that the burden of proving unsoundness of mind, that is, lack of testamentary capacity, is on the contestant; and quite another thing to say, that the proponent need not make out a *prima facie* case of mental capacity in the first instance. *Matter of Schreiber*, 112 App. Div. 495. This is manifest from the provisions of § 2623 which requires the proponent to *satisfy* the Surrogate that the testator was in all respects competent to make a will and not under restraint. Consequently, if the proponent addresses his proof only to the question of execution and rests his case without showing affirmatively that the testator was of unsound mind and free from restraint, a sufficient case will not have been made out for admitting the will to probate. See *Ramsdell* v. *Viele*, 6 Dem. 244, citing *Delafield* v. *Parish*, 25 N. Y. 9, 34; *Kingsley* v. *Blanchard*, 66 Barb. 317, 322; *Miller* v. *White*, 5 Redf. 320; *Cooper* v. *Benedict*, 3 Dem. 136; *Matter of Freeman*, 46 Hun, 467. The Court of Appeals (*Matter of Will of Cottrell*, 95 N. Y. 329, 336), says by Ruger, Ch. J.:

"The determination of the question of fact involved in the inquiry . . . . is governed by the same rules which control the trial of other issues of fact. The proponent has the affirmative of the issue, and if he fails to convince the trial court by satisfactory evidence that each and every con-

dition required to make a good execution of a will has been complied with, he will necessarily fail in establishing such will." In spite, therefore, of the elasticity of procedure occasionally obtaining in Surrogates' Courts the best practice is for the proponent to try a contested will case as strictly as he would any litigated action in the Supreme Court.

§ 311. **Issues.**—The character of the issues to be raised and tried on contested probate are readily inferred from the language of §§ 2622 and 2623 of the Code, which are as follows:

> Before admitting a will to probate the surrogate must inquire particularly into the facts and circumstances and must be satisfied of the genuineness of the will, and the validity of its execution. Before admitting a written will to probate, the surrogate may in his discretion require proof of the circumstances attending the execution, the delivery and the possession thereof, or any of them, to be made by the affidavit or testimony at the hearing of the person who received the will from the testator, if he can be produced, and also of the person presenting it for probate. **§ 2622, Code Civil Proc.**

This section replaces the old Statute which provided that the Surrogate should be satisfied with the genuineness *and validity* of the will. The words now are "validity of its execution." See *Matter of Davis*, 182 N. Y. 468. See *post*, "Determining validity of Will."

> If it appears to the surrogate that the will was duly executed and that the testator at the time of executing it was in all respects competent to make a will and not under restraint, it must be admitted to probate as a will valid to pass real property or personal property, or both, as the surrogate determines, and the petition and citation require, and must be recorded accordingly. The decree admitting it to probate must state whether the probate was or was not contested. **§ 2623, Code Civil Proc.**

The witnesses may forget, or may differ or may swear falsely. But the Surrogate is merely to be satisfied of the *facts* requisite in order to probate. *Matter of Eldred*, 109 App. Div. 777. If as to *any* requisite fact he is not satisfied he must deny probate. *Matter of Eckler*, 47 Misc. 320; *Matter of Choate*, 110 App. Div. 874.

§ 312. **Order for production of witnesses.**—With regard to the form of procedure in a contested will case it is proper to know before proceeding to discuss the cases under the various grounds of contest, that it is competent for the Surrogate upon proper application by a contestant at any time before the proofs are closed, to require under § 2618, "the examination of all the subscribing witnesses of a written will or of any other witness whose testimony the Surrogate is satisfied may be material; in which case, all such witnesses, who are within the State, and competent and able to testify, must be examined." The hearing may also be adjourned if necessary for the issuance of a commission or for the designation of a Surrogate in an adjoining county or for the execution of such other order in the premises as the Surrogate may be empowered to make. See § 2619, and § 2620 discussed in ch. III, *ante*,

Surrogate's Court,
New York County.

Petition under § 2618, C. C. P.

In the Matter of Proving the Last Will and Testament of Deceased.

State of New York, County of New York, } ss.:

Note. Contestant may be an adult and if so, state the fact.

Note. being duly sworn, deposes and says: that he is an attorney and counsellor at law having offices at No. Street in the City of New York; that on the day of 190 he was appointed Special Guardian for an infant over the age of fourteen (14) years, who is interested in the estate of the above named decedent, having been adjudged to be a necessary party thereto by an order of this Court dated the day of 190 by which order he was made a party to these proceedings; that as such Special Guardian deponent believes it to be his duty to contest the paper propounded as the last Will and Testament of deceased, and has accordingly filed objections on behalf of said infant to the probate of said Will.

That deponent has for some time been investigating this case, and has caused to be investigated the rights of his said ward, and he has made and caused to be made an examination relative to the probable testimony and evidence to be adduced upon said contested probate, and deponent is informed and verily believes that the testimony of the following witnesses will be or may be material upon the said contest for the following reasons:

Here state who witnesses are, and the facts rendering their testimony material.

On information and belief, is the proponent of the propounded paper, the petitioner herein, and is made legatee and devisee for life of the entire estate, except a few small legacies; that he had for years resided with the decedent prior to his death, during which time it was difficult to gain access to said decedent save in the said 's presence. Moreover, he is the person, who, it is alleged in the objections filed, obtained and procured the said will by the exercise of undue influence. On information and belief that the said decedent residing with said proponent for many years prior to his death, was broken in health for many years prior to the execution of said will, and was mentally incapable at the time of making an independent, voluntary, uninfluenced last will and testament.

On information and belief, that is a practicing physician and attended the decedent prior to his death and signed his certificate and record of death which is on file in the records of the Health Department in the City of New York.

That Jane Doe and Mary Roe, as deponent is informed and verily believes, were in attendance upon the said decedent at or about the time the said propounded paper purports to have been executed, and their real names are unknown to this de-

ponent, but are known to the said proponent, in whose employ they were, as deponent is informed and believes, nor are their present addresses known to deponent.

Wherefore deponent prays for an order directing the production of the said witnesses upon said contested probate, pursuant to section 2618 of the Code of Civil Procedure.

(Jurat.) (Signature.)

Surrogate's Court,
New York County.

Notice of application for order under § 2618, C.C.P

In the Matter of Proving the Last Will and Testament of Deceased.

Sirs:

Please take notice that pursuant to section 2618 of the Code of Civil Procedure, one of the contestants herein, an infant over the age of fourteen years, by his Special Guardian requires the production and examination of the following named persons as witnesses: Petitioner, a practicing physician in the City of New York,

Jane Doe and Mary Roe, servants in the employ of the decedent, during the year prior to his decease (the said names Jane Doe and Mary Roe being fictitious, the said servants' real names being unknown to the contestant).

Dated New York, 190.

Yours, etc.,

Special Guardian for Contestant.

address.

At a Surrogate's Court, held in and for the County of New York, at the New York County Court House in the City of New York, on the day of 19 .

Present:

Hon.

Surrogate.

Order.

In the Matter of Proving the Last Will and Testament of Deceased.

On reading and filing the annexed affidavit of verified the day of 190 together with a notice for the production of certain witnesses herein, as provided by section 2618 of the Code of Civil Procedure, and upon all the papers and proceedings herein, the Surrogate being satisfied that the testimony of the said witnesses whose names are mentioned in the notice hereto annexed may be material, and

upon motion of said Special Guardian for an infant over the age of fourteen (14) years, contestant, it is

Ordered, that the petitioner herein, produce for examination upon the trial of the issues herein Jane Doe and Mary Roe (the said names Jane Doe and Mary Roe being fictitious, their real names being unknown), servants in the employ of or in attendance upon said decedent, at the time of the execution of said will, at or about the 8th day of May, 1909; and it is

Further Ordered, that a copy of this order be forthwith served upon all the parties who have appeared herein, or upon their attorneys.

Surrogate.

§ 313. **Who may contest probate.**—The language of the Code is very broad as to what persons may contest the probate of a will. It is contained in the first part of § 2617.

> Any person . . . . who is named as devisee or legatee in the will propounded or as executor, trustee, devisee or legatee, in any other paper purporting to be a will of the decedent, *or who is otherwise interested in sustaining or defeating the will.*

See *ante*, §§ 284 *et seq.*

This section has no connection with § 2624 as to the right to put in issue before the Surrogate the validity, construction or effect of any disposition of personal property contained in a will [See *Jones* v. *Hamersley*, 4 Dem. 427], the cases under which are elsewhere discussed. The language of § 2617 is broad; the use of the words, "in any other paper purporting to be a will" includes papers of a testamentary character both prior and subsequent in date to the one offered for probate. See *Matter of Greeley's Will*, 15 Abb. N. S. 393. But the words, "who is otherwise interested in sustaining or defeating the will," while apparently broad and general, are limited by the courts to persons who can satisfy the Surrogate by proper proof that they are interested in the probate of the will in substantially the same way in which that interest is limited in the decisions under § 2624 above referred to, *q. v.* Therefore a person intending to contest a will must be prepared to establish by competent proof that he belongs to one of the classes specified. If he claims to be a devisee, or legatee in the will propounded, or an executor, trustee, devisee or legatee in some other alleged will, the testamentary paper itself may indicate the contestant by name; if he claims as one of a class he must prove that he belongs to that class; if he bases his right under the words, "or who is otherwise interested in sustaining or defeating the will," he must prove such a legal interest as the Surrogate would be justified in recognizing.

This naturally implies the right of the Surrogate to determine the status of the party proposing to contest. *Matter of Hamilton*, 76 Hun, 201, opinion

of Van Brunt, P. J., at page 205. The contestant must state his interest with certainty. *Public Administrator* v. *Watts*, 1 Paige, 347.

The contestants of a will have an absolute right to withdraw their objections, even against the protests of the attorney of record, claiming a lien for services. *Matter of Evans*, 33 Misc. 567.

In determining the status of the contestant it has been held that the Surrogate is not exceeding his jurisdiction or exercising equitable powers if, for example, he declares an alleged widow of a testator not to be in fact such widow; his decision as to her status does not amount to a decree annulling her marriage. See *Matter of Hamilton, supra.* In the case cited Van Brunt, P. J., observes (where the alleged widow of Robert Ray Hamilton contested probate of his will, her right to so contest being objected to by one of the legatees and the Surrogate found that she was never the wife, and therefore not the widow, of the decedent, and was not in anywise interested in sustaining or defeating his alleged will): "The appellant, by virtue of an alleged marital relation was seeking to enforce her rights in a court of law, which rights could be defeated by showing that no such relation existed, because, at the time of the attempted contract, of the disability of one of the parties. This has always been the rule, and the Surrogate, in passing upon the status of this contestant, assumed no equity jurisdiction, but was passing upon a legal question." 76 Hun, at page 206. Where one, asserting herself to be the widow of the decedent, appeared and sought to contest his will, Surrogate Rollins passed upon the regularity of a decree annulling her marriage to a former husband, and held that, while the decree was defective in form under the statute, she might offer other proof that said first marriage was void in support of her claim that she was the widow of the decedent. *Matter of Bethune*, 4 Dem. 392; *Matter of McGarren*, 112 App. Div. 305.

§ 314. **Same subject. After-born child.**—Where one claims to be the child of a decedent, born of a marriage contracted before the execution of the alleged will, he has no status to contest the probate of the will, but is confined to his remedy to recover his share of the property under § 28, Dec. Est. Law, formerly § 1868 of the Code; for such child is entitled only to that share of the estate which would have come to him had the parent died intestate (see *Davis* v. *Davis*, 27 Misc. 455), and only to that in case his birth occurred after the making of the will; and that right does not affect the right of the proponent to have the will probated. After the probate of the will, resort may be had to the remedies afforded by § 1868 of the Code of Civil Procedure. *Matter of Gall*, 5 Dem. 374; *Matter of Bunce*, 6 Dem. 278. In the last case where the decedent, an unmarried woman, died shortly after the execution of her will leaving a daughter born shortly before her death and after the execution of the will offered for probate, Surrogate Rollins held, that as such daughter would be entitled under the statute to succeed to the decedent's entire estate in the event of her intestacy, she was a proper contestant in the proceedings to prove the will.

The after-born child has no status in court unless the Surrogate ascertains that within the meaning of § 49 of title 1, ch. 6, 2 R. S. now Dec. Est. Law, a settlement was in fact made for her benefit by the alleged will; if there was, then the child is not entitled to the share in the parent's estate as if the parent had died intestate, but is entitled to oppose the probate of the alleged will upon any ground affecting its legality and validity. The Surrogate has power to pass on the regularity of adoption of a child. *Matter of Thorne*, 155 N. Y. 140, aff'g 23 App. Div. 624. But where A claimed to be an adopted child and the Surrogate passed adversely on the claim, it was held that his decree to that effect was not a bar to a subsequent suit by A under the agreement of adoption to recover the estate which the decedent had agreed to leave him. *Brantingham* v. *Huff*, 43 App. Div. 414.

§ 315. **Same subject. Other persons in interest.**—"Devisees" and "legatees" fall under two classes: those specified in the will offered for probate, and those claiming under a prior or subsequent will. Those claiming under the will offered for probate so far as rights to contest are concerned have unquestionably the right to be made parties, for they may be next of kin or heirs, whose share in the estate would be increased by defeating the will or they may be in possession of alleged codicils to the will materially affecting its testamentary provisions, and which they are entitled to have acted upon in the pending proceeding. See *Dyer* v. *Erving*, 2 Dem. 160, citing *Walsh* v. *Ryan*, 1 Bradf. 433. Or the legatee may desire to oppose probate of a codicil which purports to revoke his legacy given under the will. *Walsh* v. *Ryan*, 1 Bradf. 433. Where the devisee or legatee claims under a will prior or subsequent to that propounded, it is immaterial whether he is an heir-at-law or next of kin of the decedent. *Turhune* v. *Brookfield*, 1 Redf. 220. But if he claims under another will he must, in proving his status to the satisfaction of the Surrogate, prove that such testamentary paper existed when the decedent died, or was lost or fraudulently destroyed, within the meaning of § 2621, before his death. *Hamersley* v. *Lockman*, 2 Dem. 524, 533. See also *Will of Lucius Crittenden*, 1 Tucker, 135. An executor or trustee named in a prior or subsequent will is expressly covered by § 2617 and has the right to contest the will propounded. *Matter of Greeley's Will*, 15 Abb. N. S. 393; *People ex rel. Patrick* v. *Fitzgerald*, N. Y. Law Journal, June 12, 1902.

§ 316. **Same.**—The public administrator has been held entitled to contest a will of personal property (*Gombault* v. *Public Administrator*, 4 Bradf. 226), and the attorney general a will of real property. *Merrill* v. *Ralston*, 5 Redf. 220, 258. Surrogate Livingston (*Lafferty* v. *Lafferty*, 5 Redf. 326) held, when a devisee, named in a will offered for probate, executed a mortgage, on real estate passing under the will, after the testator's death, the mortgagee or his administrator was a person sufficiently interested to intervene in the probate proceedings. A creditor of the decedent as such has no right to contest his will (*Stapler* v. *Hoffman*, 1 Dem. 63, 65); nor has the widow of a son of decedent's husband by a

former wife; nor has the wife of an heir-at-law a right by virtue of her inchoate right of dower (*Matter of Rollwagen*, 48 How. 103); nor can a receiver in supplementary proceedings of the property of a decedent's husband, contest her will, although she has thereby cut off the judgment debtor from any share of her estate. *Matter of Brown*, 47 Hun, 360. The fact of incorporation or nonincorporation of an association is immaterial as to its right to contest, provided the association is competent to take a devise or bequest in the will propounded or in some other testamentary paper under which it claims (*Carpenter* v. *Historical Society*, 1 Dem. 606, citing *Potter* v. *Chapin*, 6 Paige, 639; *De Witt* v. *Chandler*, 11 Abb. Pr. 459; *Owens* v. *Missionary Society*, 14 N. Y. 380); nor is it material whether the force and effect of the objection which the contestant may raise may defeat the will in respect of a matter in which he may not be ultimately interested. For example, when the question of testamentary capacity is properly raised by a party having the right to raise it in some capacity, and where, upon the investigation which succeeds, the Surrogate becomes satisfied and finds that the testator had not mental capacity to make a will, and that the instrument offered for probate was obtained by fraud and undue influence exercised upon one not capable of resisting the same, it is the Surrogate's right and duty to refuse probate of the will, even though the contestant who prosecutes the controversy is only interested as an heir-at-law and not one of the next of kin. *Matter of Bartholick*, 141 N. Y. 166, 172.

§ 317. **What wills may be proved.**—Before proceeding to discuss in detail the grounds upon which a will may be contested and the sufficiency of evidence to establish a will propounded for probate, it is necessary to define clearly what wills may be proved in a Surrogate's Court.

In the first place the Consolidated Laws prescribe who may make a will of real and who of personal property. In the first respect the provision is, "All persons, except idiots, persons of unsound mind, and infants, may devise their real estate by a last will and testament duly executed according to the provisions of this article." Dec. Est. Law, § 10. As to personal property the provision is, "Every male person of the age of 18 years or upwards and every female of the age of 16 years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate by will in writing." Dec. Est. Law, § 15. See as to full discussion of who may take and create estates by will, 1 Thomas on Law of Estates Created by Will, pages 1 to 75 inclusive. In addition to these provisions of the Statutes, former § 2611 of the Code must be considered, which is now contained in the Decedent's Estate Law, which provides "what wills are entitled to probate," and is as follows:

What wills may be proved.

A will of real or personal property, executed as prescribed by the laws of the state, or a will of personal property executed without the state, and within the United States, the Dominion of Canada, or the Kingdom of Great Britain and Ireland, as prescribed by the laws of the state or country where it is or

was executed, or a will of personal property executed by a person not a resident of the state, according to the laws of the testator's residence, may be admitted to probate in this state. Dec. Est. Law, § 23. This last clause before the revision read "may be proved as prescribed in this article."

§ 24. *Effect of change of residence since execution of will.*

The right to have a will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will.

§ 25. *Application of certain provisions to wills previously made.*

The last two sections apply only to a will executed by a person dying after April eleventh, eighteen hundred and seventy-six, and they do not invalidate a will executed before that date, which would have been valid but for the enactment of sections one and two of chapter one hundred and eighteen of the laws of eighteen hundred and seventy-six, except where such a will is revoked or altered by a will which those sections rendered valid, or capable of being proved as prescribed in article first of title third of chapter eighteenth of the Code of Civil Procedure.

See § 27, *ante*, for discussion as affecting question of jurisdiction.

Prior to this section, or rather to the Act of 1876 which it now embodies, the place of residence at death, and *not at date of execution* controlled the law applicable to the *factum*. To decide, however, the fact of residence is fully within the Surrogate's power. *Matter of Spencer*, N. Y. Law J., June 2, 1908, Thomas, Surr. In this case the facts showed a holographic will. There were no witnesses. It was claimed to be valid under the law of France of which it was claimed testator was a resident. The Surrogate found

a. He was not a resident.

b. That such a will was only valid in France when made by one not a citizen of France, or not "duly domiciled" as a foreigner in France, in case it would be thus valid under the "law of domicile of origin" of the testator.

c. It being uncertain whether decedent was a resident here or in Rhode Island (where he paid taxes) the will was rejected as unwitnessed and hence unprovable in either State.

The principle is thus simply: Where a will is executed abroad *according to the laws of testator's residence*, but not according to New York law, the will is provable here under the section above quoted; but as its probate owes its force to the laws of the foreign country, so the will can be given no further effect than if proved in that country. *Matter of Cruger*, 36 Misc. 477. In this case the Surrogate construed the will as inoperative to grant the beneficiaries any greater rights than they could have taken under due probate in the country of domicile.

It will be seen by the provision of the Revised Statutes (see also New York Real Property Laws, Laws of 1896, ch. 547, § 3), to wit: "a person other than a minor, idiot, or person of unsound mind, seized of or entitled to an estate or interest in real property, may transfer such estate or interest," that the question of the testator's age at the time of making the will may be an important preliminary inquiry, whether it be a will of real

or of personal property; for no minor can devise his real estate by will; and as to the personalty the age limits are expressly designated in the statute. These limitations in the statute amount to a legislative intimation, that persons under the ages specified are presumed to be mentally incompetent to dispose of their property by will. *Townsend* v. *Bogart*, 5 Redf. 93, 105. The age of a testator in this connection is proved just as it would be in any other case. See *Matter of Paige*, 62 Barb. 476, as to what is and what is not competent evidence of age.

§ 318. **Order of discussion.**—The questions arising upon the probate of a will to which objections are interposed will be discussed in the following order:

1. Due execution of the document propounded (under which will be discussed all questions arising out of compliance or noncompliance with the statute relating to the execution of wills).

2. Testamentary capacity (for regardless of the mode or regularity of the execution if the decedent making the will had not testamentary capacity, it must be denied probate).

3. Fraud and undue influence (for conceding compliance with the statute as to its execution and testamentary capacity to make, the will may be invalidated by proof of such influence or fraud, under which falls also the knowledge of contents of the will by the testator).

DUE EXECUTION

§ 319. **Requirement of the statute**—The Consolidated Laws provide for the proper execution of wills as follows, in the Decedent Estate Law:

"Section 21. Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

"1. It shall be subscribed by the testator at the end of the will.

"2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses.

"3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament.

"4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator."

Section 22 prescribes an additional requisite, that the "witnesses to any will shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will." But, it is expressly provided, the omission to comply with this requisite merely subjects the person guilty thereof to a penalty of $50.00 to be recovered by any person interested in the property devised or bequeathed, who shall sue for the same. It shall not affect the validity of the will; nor "shall any person liable to the penalty aforesaid, be excused or incapacitated on that account,

from testifying respecting the execution of such will." *Hallenbeck* v. *Van Valkenburg*, 5 How. Pr. 281. *Dodge* v. *Cornelius*, 168 N. Y. 242, rev'g 40 App. Div. 18, was an action of this character. The constitutionality of the act was not passed on, the court finding the defendant had waived that claim (see *Ibid.* p. 245) although O'Brien and Landon, JJ., dissented (see pp. 249–254). The three years' statute, on an action for a penalty, was held to run, not from the date of the will, but from the death of testator.

§ 320. **Substantial compliance with the provisions of the statute.**—The provisions of the Statutes prescribing what the necessary formalities are in the due execution of wills, were very carefully discussed by Judge Denio in *Hoysradt* v. *Kingman*, 22 N. Y. 372, in which case the Court of Appeals declared that the restrictions which, from motives of prudence, are thrown around the general right to dispose of one's property by act in writing to take effect at testator's death, should be construed liberally in favor of the testament, and forms should not be required which the legislature has not plainly prescribed. *Ibid.* at page 379. In other words, *substantial* compliance with the requirements of the statute is sufficient. *Gilbert* v. *Knox*, 52 N. Y. 125, 129; *Matter of Menge*, 13 Misc. 553; *Matter of Carey*, 14 Misc. 486; *Larabee* v. *Ballard*, 1 Dem. 496; *Matter of Application of Beckett*, 103 N. Y. 167, 174; *Trustees, etc.*, v. *Calhoun*, 25 *id.* 422; *Gamble* v. *Gamble*, 39 Barb. 373; *Coffin* v. *Coffin*, 34 N. Y. 9; *Nelson* v. *McGiffert*, 3 Barb. Ch. 158; *Carle* v. *Underhill*, 3 Bradf. 101; *Seguine* v. *Seguine*, 2 Barb. 385; *In the Matter of Cottrell*, 95 N. Y. 329; *Lane* v. *Lane*, *id.* 494; *Seymour* v. *Van Wyck*, 2 Seld. 120; *Lyman* v. *Phillips*, 3 Dem. 459, affirmed at the General Term and in the Court of Appeals. See also *Matter of Kenny*, N. Y. Law Journal, June 1, 1908, citing *Matter of Voorhis*, 125 N. Y. 765; also *Matter of McIntyre*, N. Y. Law Journal, June 2, 1908. But this rule of substantial compliance does not permit vague, or insufficient proof as to any of the essential requirements provided by law. *Matter of Rogers*, 52 Misc. 412. The proponent of a will, having, as already stated, the affirmative of the issue, must convince the trial court by satisfactory evidence that each and every condition required to make a good execution of a will has been complied with. The rule may be stated then to be not only that substantial compliance with the statute is sufficient but also that it is absolutely essential. See *Matter of Will of Cottrell*, 95 N. Y. 329, 336; *Matter of Elmer*, 88 Hun. 290.

321. **The subscription by the testator.**—The provision of the statute is that the will shall be subscribed, by the testator, at the end thereof.

Before the Revised Statutes, it was held by the Court of Errors, that by the common law as generally received and understood in England as well as in this country on the 19th of April, 1775, when the common law was by the constitution adopted as part of the law of this State, a will found in an iron chest among valuable papers of a person deceased, without signature, having an attestation clause, without witnesses, written by the deceased with his name in the beginning thereof, in a fair hand, engrossed on conveyancing paper with a seal attached thereto, evincing much de-

liberation and foresight in its provisions, and disposing of real and personal property to a large amount, should be considered a good and valid will of the personal estate therein mentioned. *Watts* v. *Public Administrator*, 4 Wend. 168, rev'g 1 Paige's Ch. 347.

The decedent in this case had died in 1827, before the enactment of the Revised Statutes, which went into operation on the 1st of January, 1830. *Matter of Booth*, 127 N. Y. 109.

The present rule is distinct and clear that the testator's name must be subscribed *at the end of the will*. See *Hoysradt* v. *Kingman*, 22 N. Y. 372.

The object of the law as to signature at the end of the will is not only to exclude signatures at any other part (*Sisters of Charity, etc.*, v. *Kelly*, 67 N. Y. 409; *Hewitt's Will*, 91 N. Y. 261; 5 Redf. 271; *O'Neil's Will*, 91 N. Y. 516; *Matter of Sanderson*, 9 Misc. 574; *McGuire* v. *Kerr*, 2 Bradf. 244), but also in order to secure the instrument from interpolation or unauthorized addition. The provision is a judicious and wise one. The intention is that the act of authentication must take place at the termination of the testamentary disposition, and the testator and the witnesses must concur in determining that point. *Younger* v. *Duffie*, 94 N. Y. 534, 539. The law is no more fulfilled by the testator signing in the middle of the will, and the witnesses attesting at the end, than the witnesses signing in the middle and the testator at the end. They must both subscribe at the end. *McGuire* v. *Kerr*, *supra*. A will may be said, therefore, to be signed at the end thereof where nothing intervenes between the instrument and the subscription. *Gilman's Will*, 1 Redf. 354; 38 Barb. 364. Blanks in the body of a properly executed will do not affect its validity. *Matter of Murphy*, 48 App. Div. 211. See *Matter of McCarthy*, 59 Misc. 128, effect of intervening blank page in body of will. Nor is it material that at the moment of executing a will written on three sheets of paper, they were not fastened together. *Matter of Snell*, 32 Misc. 611; *In re Fitzgerald*, 33 Misc. 325.

In a very recent case (*Matter of Whitney*, 153 N. Y. 259, rev'g 90 Hun, 138), the Court of Appeals passed upon this point, stating that it was no longer an open one in that court. The will was in that case drawn upon a printed blank, covering one page, and the testator and subscribing witnesses signed at the foot thereof; the subdivisions of the will, marked respectively "First" and "Second," filled the entire blank space in the printed form, and at the end of the second subdivision were the words, "see annexed sheet." On a separate slip of paper were written two additional subdivisions marked respectively "Third" and "Fourth;" this was attached to the face of the will, immediately over the first and second subdivisions, by metal staples, so that the slip annexed had to be raised up or turned back in order to read the first two clauses.

The court held that the alleged will was not subscribed at the end thereof, observing, "the will must be a complete whole signed by the testator and witnesses at the end thereof."

The court, Judge Bartlett writing the opinion, reviewed four cases on this point as follows:

"In *Matter, etc., of Hewett,* 91 N. Y. 261, the will was written on two sides of an irregular shaped piece of paper, about one half of it upon one side and the other half upon the other side.

"The witnesses signed their names at the bottom of the first side and again at the top of the second side.

"The testator signed his name at the end of the disposing portion of the instrument, near the middle of the second side, and again at the bottom of the second side.

"It was held that the statute required that both the testator and the witnesses must sign at the end of the will. Judge Earl said: 'Wherever the will ends, there the signatures must be found, and one place cannot be the end for the purpose of subscribing by testator, and another place be the end for the purpose of subscribing by the witnesses.'

"This court held that the probate of the instrument was properly denied.

"In *Matter, etc., of O'Neil,* 91 N. Y. 516, the instrument was drawn upon a printed blank, the formal commencement being on the first page and the formal termination at the foot of the third page. The blank space was filled on the first, second and third pages and the last or thirteenth clause of the will was partly written on the third page and the balance carried over to the blank fourth page. The names of the testator and the witnesses were subscribed near the bottom of the third page, below the formal termination of the will, and there only. The written matter on the fourth page was not connected with the main body of the will by reference of any kind, although it was obviously a continuation and completion of the thirteenth paragraph of the will.

"This court held that the will was not subscribed at the end thereof and that parts of the instrument preceding the signature could not be received, as the will was either valid or invalid as a whole.

"In *Matter of Conway,* 124 N. Y. 455, there was a state of facts quite similar to *Matter of O'Neil,* just commented upon, with the exception that at the end of the provisions in the body of the will were the words, 'carried to back of will,' and upon the back of the sheet was the word 'continued.' Following this word were various bequests, and then below them were added the words 'signature on face of the will.'

"The Second Division of this court held, with three judges dissenting, that this instrument was not signed by the testator and witnesses at the end thereof, and had been improperly admitted to probate. The dissenting opinion rested mainly upon the fact that there was a clear and distinct reference in the body of the will to the provisions on the back of the paper, and that they were thereby properly connected with the subject-matter preceding the signatures.

"This court, very recently, in *Matter, etc., of Lewis R. Blair* (reported in 152 N. Y. p. 645), affirmed, without an opinion, the judgment of the General Term, First Department, reversing the decree of the Surrogate's Court of the county of New York, admitting the alleged will of Lewis R.

Blair to probate. This instrument consisted of eight pages; the testator signed at the bottom of the seventh page and the witnesses signed at the end of a proper witnessing clause at the top of the eighth page.

"After the place for the signatures of the witnesses, but before they were actually signed or the will executed, a clause was added directing the executors to sell at private sale a certain piece of real estate, and to devote the proceeds of the sale in liquidating any deficiency in interest or cash bequests under the will.

"The will was then executed, as before stated, and the testator signed the added clause, but the witnesses did not.

"The Surrogate held that the will was complete without the added clause, and admitted the main body of the instrument to probate, excluding the added words. We held that the additional clause was a part of the will, and that it was not signed at the end thereof by testator and witnesses as required by the statute.

"The object of the statute is to surround testamentary dispositions with such safeguards as will protect them from alteration and prevent fraud." *Matter of Blair*, 84 Hun, 581, citing *Sisters of Charity* v. *Kelly*, 67 N. Y. 409; *Matter of Case*, 1 N. Y. St. Rep. 152. See also *Matter of Andrews*, 162 N. Y. 1, where will was executed on reverse side of first page, the second page containing dispositive parts of will. The court held it was not subscribed "at end thereof" and also refused to read the second page into the will as by incorporation. *Matter of Donner*, 37 Misc. 57. See *Matter of Dake*, 75 App. Div. 403; *Matter of Albert*, 38 Misc. 61.

Thus while it has been intimated that the court will not undertake judicially to say, that the subscription should be one-eighth, one-half, two, or ten inches, from the last line of the instrument, yet the rule embodied in the decisions contemplates that the signature of the testator shall follow so closely after the end of the testamentary instrument as to provide a reasonable safeguard against interpolation of additional provisions, there have been a number of cases where the signature of the testator has been confused with the attestation clause (see *Matter of Noon*, 31 Misc. 420), and the signature of the witnesses; and yet, where a testator by mistake subscribed beneath the attestation clause, it was held to be a valid execution. *Will of Cohen*, 1 Tucker, 286. The learned Surrogate observed that as the statute also provided that the attesting witnesses must also sign, "at the end of the will," and as there was no provision in the statute for an attestation clause, that there was a substantial compliance with the provisions of law. "It is customary," he says, "where there is an attestation clause for the testator to sign opposite a seal and just preceding that clause and for the witnesses to sign below the clause. In that case they do not all sign in exactly the same place; yet the propriety of this practice has never, I believe, been called in question."

§ 322. **Same subject.**—In this connection it is necessary to note that the attestation clause is not an essential part of the will. *Jackson* v. *Jackson*, 39 N. Y. 153, 159, citing *Chaffee* v. *Baptist Missionary Association*, 10

Paige, 85; *Leaycraft* v. *Simmons*, 3 Bradf. 35; *Jackson* v. *Christman*, 4 Wend. 277; *Younger* v. *Duffie*, 94 N. Y. 534, 539.

Bearing in mind, therefore, that the purpose of the law which requires the subscription to be at the end of the will, is to prevent fraudulent additions to a will before or after its execution, it is manifest that the statute should be so construed as to accomplish this purpose. The testator shall determine what shall form part of the instrument which he intends as his will, that is, as the instrument by which he makes disposition of his property to take effect after his decease. In this connection the Court of Appeals observes (*Younger* v. *Duffie, supra*), "every word contained in the instrument may not relate to or bear upon the disposition of property. It is not uncommon for the testator to recite in the will his religious faith and hopes, and the moral or prudential maxims which have guided his life, and to give directions concerning his body, and to make many declarations which have no bearing whatever upon the disposition of his property; and yet they are all part of the instrument which he intends as his will. Such matters and declarations are usually inserted at the commencement of the will, but they may as well be placed after the disposing parts of the will; and yet if the signature in such case is placed below them, it is at the end of the will, within the meaning of the statute. So, too, ordinarily what is called the attestation clause, when it follows the signature, is no part of the will. *Jackson* v. *Jackson*, 39 N. Y. 153. It is not essential to the validity of the will, and as it follows the signature, it cannot be taken as a part thereof. But if the testator chooses to insert the attestation clause before his signature, thus making it a part of the instrument, then like any other matter contained in the will which does not relate to the disposition of the property, it becomes a part of the instrument called a will. If the testator, beneath the disposing part of the will, and before his signature, should insert the Apostles' creed, or the Lord's prayer, it would be a part of the instrument called a will, and although it would intervene between the signature and the disposing part of the will, it could not be contended that the will was not subscribed at its end."

It is manifest that this language contemplates a case very different from those where (as in *McGuire* v. *Kerr*, 2 Bradf. 244, and *In re O'Neil*, 91 N. Y. 516) portions of the will succeed the signature of the testator, where of course it is properly held that the will is not subscribed at the end thereof. So where a testatrix signed in a blank space in the attestation clause it was held a valid subscription. *Matter of Acker*, 5 Dem. 19. But in that case it appeared beyond doubt that it was intended by her to be a subscription to the will and was so understood by the witnesses. So, where a will was written upon an ordinary sheet of legal cap and the will covered the first and third page only, leaving the back of the first page blank and ending at the very bottom of the third page, where the testator signed it, leaving no room for the signature of the witnesses, and the attestation clause was placed upon the opposite blank second page of the instrument so that in appearance the attestation clause was in

the middle of the will and upside down, the General Term of the Second Department, Judge Barnard writing the opinion, held that the will was duly executed, and there was no fraud, that the testator signed at the end of the will; and that the will was in point of fact attested after its execution by the testator at the end of the will. *Hitchcock* v. *Thompson*, 6 Hun, 279. See also *Matter of Singer*, 19 Misc. 679, citing *Matter of Dayger*, 47 Hun, 127, and *Hitchcock* v. *Thompson*, *supra*.

It is also manifest, from what has been said as to the signature of the testator, and as to the attestation clause forming no part of the will, regarded as a testamentary disposition, that it is immaterial whether the attestation clause is carried entirely across the face of the instrument, as a matter of fact separating the signature of the testator from that of the witnesses. In such a case all signatures may properly be said to be at the end of the will. The attestation clause may be opposite the signature of the testator or below it; the cases are clear on this point. See *Matter of Beck*, 6 App. Div. 211, Cullen, J., citing *McDonough* v. *Loughlin*, 20 Barb. 238; *Williamson* v. *Williamson*, 2 Redf. 449; *Wooley* v. *Wooley*, 95 N. Y. 231. However, where testamentary dispositions are interpolated between the signature and the attestation clause, the signature is invalidated. *Matter of Sanderson*, 9 Misc. 574.

§ 323. **Same subject—Effect of reference to annexed paper.**—(See also § 438, *post*, and article in Albany Law Jour., June 3, 1899, by Henry W. Hardon). Cases have not been infrequent where a testator, by reason of carelessness or a desire to economize space or effort, has referred in his will to extraneous papers or memoranda, either as fixing the names of beneficiaries of particular devises or bequests, or as fixing the amount or the manner in which the amount of such devises or bequests is to be ascertained. It has been held that the power of incorporating the contents of extraneous papers by suitable words of reference in the will itself is undoubted, but that it is subject to certain limitations. First, the paper or papers sought to be incorporated must be shown to have been actually in existence at the time the will was executed. *Matter of Robert*, below. Second, it must be capable of identification as the self-same paper which the testator intended to indicate. Thus in *Caulfield* v. *Sullivan*, 85 N. Y. 153, the court held that proof of a codicil referring to a will was sufficient proof of the will. *Van Courtlandt* v. *Kip*, 1 Hill, 590. Third, it must not contain any testamentary dispositions of property. See *Dyer* v. *Erving*, 2 Dem. 160; *Matter of Robert*, 4 Dem. 185, 192; *In the Matter of the Will of O'Neil*, 91 N. Y. 516, 523; *Cook* v. *White*, 43 App. Div. 388, 393; *Matter of Andrews*, *id.*, p. 394, aff'd 162 N. Y. 1; *Matter of Conway*, 124 N. Y. 455; *Matter of Whitney*, 153 N. Y. 259.

In *Matter of Andrews*, *supra*, the Appellate Division said, at p. 401, "We think that under the law now prevailing in this State, extraneous documents can be referred to only to ascertain matters of description, and not for dispository provisions." This incorporation of extraneous papers by reference must not be confused with the republication of a

prior instrument either defectively published or revoked. For example, where a codicil refers to a prior unattested instrument of the character of a testamentary disposition and the codicil is duly executed, the prior instrument may be so identified by the codicil or subsequent will. See *Brown* v. *Clark*, 77 N. Y. 369, 378; *Vogel* v. *Lehritter*, 139 N. Y. 223, 235; *Caulfield* v. *Sullivan*, *supra*.

In the *Robert* case cited above the testator provided that any moneys or indebtedness which should appear upon any inventory or ledger, or a book of accounts kept by him or under his direction, "charged as due to me from any or either of my said children or Robert College of Constantinople, during my lifetime, and as an outstanding or unsettled account at the time of my decease," should be considered as forming a part of his estate, and that his executors, by discharging such indebtedness to such children or college, should be deemed to have paid an equivalent amount on account of the share given by the will to such child or college. Surrogate Rollins held that it was competent to consider all such entries as should have been made before the will was executed, and that the legacies should be abated by the amount thereby shown to have been advanced to any of his said children or said college. 4 Dem. 185. The Court of Appeals in construing this same will (*Robert* v. *Corning*, 89 N. Y. 241) held it to be valid "within this rule that a testator may direct that the amount of a legacy once completely fixed by the will itself, shall be diminished by events actually occurring as matters of fact *but not by an unattested testamentary writing, disconnected from any actual occurrence.*" See dissenting opinion in *Conway* case, 124 N. Y. 455.

So where a will directed trustees to pay to testator's sister a certain income, "excepting those items named and referred to in clause fourth of this will," by which clause the testator directed his trustees after the sister's death to distribute certain legacies to sundry institutions and persons named in "three memorandums left with this will for their guidance." After the will had been proved application was made to have these memoranda admitted to probate as a necessary and important part of the testator's will. In the petition it was alleged that these papers were in the handwriting of the testator and were prepared by him, at or before the time when the will itself was executed, with the intent that they should be treated as forming a part thereof.

The learned Surrogate Rollins (*Dyer* v. *Erving*, 2 Dem. 160), observing that he had reviewed every reported case bearing upon the subject which by diligent search he had been able to discover (at page 168, *Ludlam* v. *Otis*, 15 Hun, 410, *Brown* v. *Clark*, 77 N. Y. 369, and English and other cases cited at page 169) held:

"*First.* That words of reference in a will will never suffice to incorporate the contents of an extraneous paper, unless it can be clearly shown that, at the time such will was executed, such paper was actually in existence.

"*Second.* That an extraneous paper produced as and for a paper so referred to in a will, and shown to have been in existence when such will

was executed, may be adjudged to form part of such will, and be admitted to probate as such, under these circumstances, and no other: to wit, when by satisfactory and conclusive evidence it has been proved to be the self-same paper which the testator by his words of reference designed to indicate." He added,

"By its recent decision in *Matter of O'Neil*, 91 N. Y. 523, the Court of Appeals of this State gives distinct intimation of its unwillingness to enlarge, if not, indeed, of its disposition to narrow, the scope and effect of referential words in testamentary papers."

Consequently the proof identifying the papers referred to must be clear and satisfactory. The mere fact that they were found in the same box, or trunk, or drawer, or even in the same envelope is by no means conclusive. *Dyer* v. *Erving, supra*, at page 170 *et seq.*

A decedent left two papers, each in a separate envelope, sealed, both indorsed as purporting to contain her will, the second, however, containing this additional writing by her:

"I direct that this should not be opened until after the death of my brother Stewart and my sister Harriet." The paper contained in the first envelope purported to give the possession and use of all her estate to such brother and sister, and provided: "From and after the death of the longer lived of my said brother and sister, I give, devise, and bequeath my said estate to persons named on another sheet and enclosed in another envelope which shall not be opened until after the death of my said sister and brother."

The first paper was executed in due form and the second one contained a disposing clause between the signature of the testator and the attestation clause, and was held not to be properly executed. It was held that the first paper was valid as a will; that the second paper was void as a will; that the second paper was not sufficiently identified as the paper referred to, although corresponding generally to the description in the first, and although both were executed on the same day and were both in the handwriting of the testatrix; and finally that the reference in the valid will to a paper which could not be identified, did not have the effect of annulling the will. *Matter of Sanderson*, 9 Misc. 574. A peculiar case arose (*Vogel* v. *Lehritter*, 139 N. Y. 223) where a will was claimed to have been made by the testatrix in Germany. It appeared that the paper offered as a will was signed by the testatrix only but inclosed in an envelope within which it was sealed, and upon which was indorsed an elaborate certificate by a Royal Bavarian notary, to the effect that the envelope contained the last will of the testatrix so declared by her to him, and also indorsed by two witnesses who also signed, whereupon the notary made an additional certificate, reciting all the facts as to the publication of the will. The Court of Appeals held in the first place, that the paper contained in the envelope was not subscribed before the witnesses. Second, that the containing envelope and the certificate of the notary could not be regarded as a will or as any part of a will; and that, when the signatures were placed upon it,

there was a complete absence of any testamentary intent, and that the most that could be said was that, by these alleged formal acts before the notary, the testatrix desired to identify the paper contained in the envelope which was not in fact properly executed; and that the papers propounded could not be admitted as a will.

A writing inseparably connected with the previous clauses of the will, though named a "schedule," and sought to be incorporated solely by reference, will be deemed a part of the will where the attestation clause attests the schedule as solemnly as the will itself. *Matter of Brand*, 68 App. Div. 225, 227. In this case the "schedule" was admitted to probate with the will. *Ibid.*, citing *Matter of Hunt*, 110 N. Y. 278; *Matter of Beckett*, 103 N. Y. 167; *Matter of Turell*, 166 N. Y. 330, 337.

The annexation of papers referred to in a will, will not invalidate a proper signature at the end of the will (*Tonnele* v. *Hall*, 4 N. Y. 140), where a map of testator's property was annexed. Nor will a reference in a will to a paper which is not annexed invalidate it. *Thompson* v. *Quimby*, 2 Bradf. 449. Nor necessitate refusal of probate. *Matter of Reins*, 59 Misc. 126; *Matter of Sanderson*, *supra*, and other cases cited. The paper is to be deemed complete as it stands at the time of execution and of attestation. Where, however, after decedent's signature, a clause is inserted appointing an executor or making any testamentary disposition, the signature is not at the end of the will within the meaning of the statute. *Matter of Niles*, 13 St. Rep. 756; *Matter of Sanderson*, 9 Misc. 574.

It has been held that where a paper purporting to be a will contained a clause appointing executors after the signatures of the testator and of the witnesses, the question of validity turns on whether this clause was written in before or after the time of the execution (*Matter of Jacobson*, 6 Dem. 298), the theory of course being that if they were written in before execution then they are a part of the will, and the will is not executed at the end thereof, and is therefore invalid. If, however, the words were written in after execution, they cannot affect the validity of the will, as they are mere surplusage and cannot be considered as a part of the will. See *Matter of Conway*, 124 N. Y. 455, discussion by Parker, J., as to what is sufficient signing at the end of a will. See also *In re Purdy's Will*, 20 N. Y. Supp. 307.

§ 324. **Place of signature where will is executed without the State.**—At common law, if a person wrote his name in the body of a will or contract with intent to execute it in that manner, the signature so written was as valid as though subscribed at the end of the instrument. *Matter of Booth*, 127 N. Y. 109, citing *Merritt* v. *Clason*, 12 Johns. 102; *People* v. *Murray*, 5 Hill, 468; *Caton* v. *Caton*, 2 H. L. 127; 2 Kent's Com. 511; 1 Jarman on Wills, 79. So in the *Booth* case above cited, the only signature was the words italicized.

"If I, *Cecilia L. Booth*, should die within the year 1884, I leave to my sister, Geraldine Josephine Timoney, all money due me from my late father's deceased will, also my wearing apparel and furniture, and I also

leave to my little nephew, Albert Philip Timoney, all money deposited in the Emigrant Savings Bank in my maiden name, Cecilia L. Hatfield.

"Witnessed by

"Amelia Kurrus,

"Mamie Clifford.

"June 16th, 1884."

The Surrogate held that this instrument was well executed under the laws of New Jersey and admitted it to probate. 3 Dem. 414. This was reversed by the General Term and its judgment affirmed by the Court of Appeals. Chief Justice Follett in writing the opinion, observed, "We assume that under the laws of New Jersey a will may be legally executed if the name of the testator is written by him in the body of the instrument with intent to execute it. Nevertheless, as the record contained no evidence tending to show that the testatrix, directly or indirectly, by word or gesture, referred to her name in the first line of this paper as her signature," her simple declaration, "This is my will; take it and sign it," is insufficient to sustain a finding or verdict that her name was written with intent that it should have effect as her signature in the final execution of the will. The court said, that where signatures are subscribed at the end of the will in the usual way in which instruments are finally authenticated, there is a legal presumption that the signatures were written for the purpose of finally executing the documents, but that no presumption arises when the name of the testator appears elsewhere in the body of the instrument alleged to be authenticated thereby.

§ 325. **Manner of signature.**—The signature of a testator may be made in any one of four ways.

1. He may subscribe his name personally.
2. A third person may subscribe it for him at his request.
3. Such third person may guide the testator's hand in writing.
4. The testator may make his mark.

§ 326. **Signature by testator personally.**—When the signature purports to be that of the testator, the inquiry is addressed to the genuineness of the signature. The object of having the subscribing witnesses is that they may testify as to the fact of signature, or as to an acknowledgment by the decedent that he did in fact sign; therefore the legibility of the signature is not necessarily a test of its genuineness. Where a signature is indistinct or imperfect or illegible, but the witnesses testify that it was in fact made by the testator in their presence or acknowledged by him to them to have been made, the court will deem it to be the testator's mark (*Hartwell* v. *McMaster*, 4 Redf. 389), which as will be seen below has repeatedly been held to be a substantial compliance with the statute. Where the signature of the testator is disputed or where the subscribing witnesses are dead, the genuineness of the signature must be proved. See *Matter of Hesdra*, 119 N. Y. 615, aff'g 17 N. Y. St. Rep. 612.

§ 327. **Burden of proof.**—The burden of satisfying the Surrogate of the genuineness of the signature is on proponent throughout. Hence,

contestant need not, in proving forgery, establish it "to the exclusion of every other reasonable hypothesis." If the Surrogate be not *satisfied* that the signature is genuine, he will refuse probate. The fact that the will is holographic has been held to raise no presumption of actual execution. *Matter of Burtis*, 43 Misc. 437. Expert evidence is of value only where the opinion given is based on satisfactory premises, i. e., established facts, as reasons for the opinion. In the *Burtis* case the signature was *too good*. It was so identical with a concededly genuine one as to afford strong proof of superimposition and tracery. See cases cited in opinion.

§ 328. **Signature by other than testator.**—The Court of Appeals has held in regard to the acts which the statute requires of a testator in the execution of his will, that it is not absolutely essential that he should perform them himself, provided they are done by a third person in his presence and he assents thereto and adopts the same. *Gilbert* v. *Knox*, 52 N. Y. 125, 130. This has chiefly been held with regard to declarations by the draughtsman or some one else present, that the paper is the testator's will, or where such third person requests the witnesses to sign or asks the decedent whether he desires them to sign. This same rule that the act of the third person may be adopted has been applied to the signature; namely, that it is competent for a third person to sign the will for the testator and in his name; only, in such cases the courts will require conclusive proof that this was done at the testator's express desire and also that he was himself unable to append his signature thereto in person. *Merchant's Will*, 1 Tucker, 151; *Robbins* v. *Coriell*, 27 Barb. 556. In the first of the cases last cited there was a dispute upon the probate of the will as to whether the name of the testator was in his handwriting; it was proved, however, that at the time the subscribing witnesses signed, the testator drew a paper out of his pocket, and that his name appeared already signed at the end of the will, and the subscribing witnesses thereupon duly signed their names as such; there was also proof that the testator acknowledged the signature before the witnesses. It was held first that convincing proof of such acknowledgment would amount to an adoption of the signature whether in fact made by the testator or not. Second, that there was not sufficient proof of the forgery alleged in respect of such signature. Where, however, the name is written by another than the testator at his request, the usual acknowledgment that the paper is the will of the testator which is sufficient where the subscription is made in the presence of the witnesses is not sufficient. The testator must expressly adopt the signature.

So Chancellor Walworth held (*Chaffee* v. *Baptist Missionary Convention*, 10 Paige, 85, 92), that there must be either, "the actual subscription in the presence of the witnesses or an acknowledgment to each of them that the testator had previously subscribed or had directed some other person to sign it with the testator's name which appeared thereon."

The Court of Appeals (*Matter of Will of Phillips*, 98 N. Y. 267, 273), Rapallo J., said in a case where the signature was not made in the pres-

ence of the witnesses, the exhibition of the will and of the testator's signature attached thereto and his declaration to the witness that it was his last will and testament and his request to the witness to attest the same, were a sufficient acknowledgment of the signature; *but the acknowledgment of the signature must in every case include the same identification of the written words as necessarily exists when the witnesses see the testator write. Mitchell* v. *Mitchell*, 16 Hun, 97, 98, aff'd in 77 N. Y. 596.

Under the Revised Statutes (2 R. S., ch. 6, title 1, art. 3, § 33), it was provided that any person who should sign the testator's name to any will by his direction, should write his own name as a witness to the will, under a pecuniary penalty of $50.00 in case of omission. Such omission, however, neither disqualified the person from testifying respecting the execution of the will nor did it affect the validity thereof. This provision was repealed by Laws of 1880, ch. 245, but though inserted in § 41 is not now in Decedent Estate Law. See as to signing through another, *Butler* v. *Benson*, 1 Barb. 526; *Campbell* v. *Logan*, 2 Bradf. 90; *Hollenbeck* v. *Van Valkenburgh*, 5 How. 281.

§ 329. **Guiding testator's hand.**—In the third place the testator's hand may be guided by a third person in cases of illness, or weakness, or illiteracy and a subscription so made is valid. *Campbell* v. *Logan*, 2 Bradf. 90. See also *Van Hanswyck* v. *Weise*, 44 Barb. 494; *Simpson's Will*, 2 Redf. 29. The reason for requiring conclusive proof of an express desire on the part of a testator that another should sign his name for him to the will or should guide his hand in making his own subscription is that in the case of persons who are so ill, or otherwise disabled as to be unable to write, as well as in cases of illiteracy, there is no presumption that the testator knew what he was doing; but the knowledge of the contents of the will and the character of the paper have to be proved. The contestant may well urge that there was undue influence in persuading the ill, disabled, illiterate testator in performing the act of signature. See *Rollwagen* v. *Rollwagen*, 3 Hun, 121.

The material inquiry is whether the aid rendered was assistance or control. *Matter of Kearney*, 69 App. Div. 481, 483. So, if, against the wish of the alleged testator at the time, or without his consciousness as to the purpose, another writes the name with a pen which is merely in physical contact with the hand of the alleged testator, then the signature is not, in legal intent, made by the latter. *Ibid.*, citing *Butler* v. *Benson*, 1 Barb. 526; *Campbell* v. *Logan*, 2 Bradf. 90, 97.

§ 330. **Signature by testator's mark.**—It has been observed that legibility of the signature is unimportant. So if the signature is indistinct, if all the letters necessary to the proper spelling of the name cannot be made out, the court may treat the signature as the testator's mark, and signature by mark has long been upheld as valid. See *Jackson* v. *Jackson*, 39 N. Y. 153. In *Matter of Hopkins*, 172 N. Y. 360, the court refers to the experts' using testator's *mark* in executing or cancelling will as a basis of comparison.

In the first place signature by mark must not be confused with signature of the testator's name by a third party at his direction; nor is the writing of the testator's name around or on either side of, or above, or under the mark made by the testator to be deemed, "signing the testator's name by his direction;" the two are wholly distinct; the testator may subscribe the will by his full name or by his mark, and if he does so that is the subscription required by the statute and would be effective as such even though no one made the written memorandum thereof around such mark. Such memorandum is useful and important not only as a guide to the memory of witnesses and a contemporaneous declaration of the purpose of the mark and that it was made by the testator, but as a protection against fraud; but it is not the essence of the execution. Where it is necessary to prove the execution of an instrument, "by a marksman," the proof consists of evidence of the making of the mark; the writing of the name around it is no essential part of the execution. *Jackson* v. *Jackson, supra,* at page 160, citing *Butler* v. *Benson,* 1 Barb. 526; *Chaffee* v. *Baptist Missionary Convention,* 10 Paige, 91. See *Matter of Engler,* 56 Misc. 218. But the illiterate must *subscribe.* So where he merely put a check mark O.K'ing a written memo made by a witness "the will is not subscribed by testator because he is illiterate" it is held not to be a subscription. *Matter of Beneventano,* 38 Misc. 272. So where one of the witnesses was dead and the other when examined testified that he did not see the mark made, probate was necessarily denied. *Porter's Will,* 22 N. Y. Supp. 1062. But in case where one of the witnesses is dead and the surviving witness testifies clearly and conclusively as to the making of the mark by testator it has been held to be sufficient proof without confirmatory evidence by other witnesses. *Hylands's Will,* 27 N. Y. Supp. 961, discussing *Matter of Walsh,* 1 Tucker, 132, criticised in *Simpson's Will,* 2 Redf. 29; *Reynolds's Will,* 4 Dem. 68; *Worden* v. *Van Gieson,* 6 Dem. 237; *Matter of Dockstader,* 6 Dem. 106; *Matter of Phelps,* 5 N. Y. Supp. 270.

As a cross mark has no such cast or form as to distinguish it from a like mark made by any other individual, it cannot of course be the subject of expert testimony; so unless the witnesses actually saw the mark made, or other witnesses are procurable to testify in this regard, probate must be refused. Yet see *Hopkins* case, *supra.*

In the *Hyland* case Surrogate Ransom summed up his examination of the adjudicated cases in these words:

"While it is desirable to have the testimony of both witnesses to prove the making of a mark by a testator, yet when one cannot be produced and no other person was present, the testimony of the other if his character is not impeached, supported by the apparent good faith of the transaction and a full attestation clause, I hold to be sufficient." 27 N. Y. Supp. 961, 965.

The effect of the attestation clause will be discussed directly, but it may be here observed, that while the decision in the *Hyland* case referred to the

existence of an attestation clause it did not really turn upon that fact. The point decided and we think properly decided was, that if the testimony as to the making of the mark is clear and uncontradicted the will may be admitted upon the testimony of one credible and disinterested witness, it being impossible to produce and examine the other. See also *Matter of Wilson*, 76 Hun, 1, citing *Matter of Kane*, 20 N. Y. Supp. 123, and *Matter of Hyland, supra*. Neither a will of real nor of personal property requires a seal and if it has a seal that fact does not permit the court to attach any greater solemnity to the instrument or to dispense with any of the statutory requirements in ascertaining whether it was duly executed. See *Will of Diez*, 50 N. Y. 88. See *Matter of McCarthy*, 59 Misc. 128, Ketcham, Surr., as to recital of seal where there is in fact none. An imperfect signature cannot be deemed the testator's mark where the proof shows that it was after all an uncompleted signature due to the illness, or death of the decedent preventing his completion thereof at the time of the alleged execution. Thus, where the testimony proved that the decedent, Patrick J. O'Neil, started to sign his name but that when he had finished the letter "t" the pen dropped from his hand and he said that he could not go any further, whereupon a third person present took up the pen, made a cross mark, and finished the signature; but there was no proof that his act in so doing was either at the request or with the knowledge and approbation of the testator, Surrogate Rollins held that there was not a sufficient execution. *Knapp* v. *Reilley*, 3 Dem. 427. See also *Matter of Van Geisen*, 47 Hun, 5. The misspelling of the name of a testator subscribed to a will raises no presumption of forgery and if the subscribing witnesses swear the signature was in fact made in their presence and the other formalities were duly observed, the will must be admitted. *Matter of Williams*, 40 N. Y. St. Rep. 356.

§ 331. **The second statutory requirement.**—The second subtopic in this discussion falls under the provision of the statute, *supra*, to wit:

"Such subscription shall be made by the testator in the presence of each of the attesting witnesses *or* shall be acknowledged by him, to have been so made, to each of the attesting witnesses." See *Matter of Purdy*, 46 App. Div. 33. The discussion of this provision of the statute is closely related to the foregoing. This provision contemplates that all the subscribing witnesses may be able to testify, that the testator signed in their presence, or they shall severally be able to testify that the testator acknowledged to each that his subscription had been made by him. This provision may be paraphrased by saying, the subscription may be made by the testator either in the presence of each of the witnesses, which means in the presence of both, or it shall be acknowledged by him to each of them as having been theretofore made. Accordingly it has been held that he may make it in the presence of either and acknowledge to the other or that he may make it in the presence of neither and acknowledge it to each. See *Matter of Diefenthaler*, 39 Misc. 765, Thomas, Surr., citing *Hoysradt* v. *Kingman*, 22 N. Y. 372; *Willis* v. *Mott*, 36 N. Y. 486; *Matter of Carey*, 14

Misc. 486; *Barry* v. *Brown*, 2 Dem. 309; *Lyman* v. *Phillips*, 3 Dem. 459, aff'd 34 Hun, 627, and 98 N. Y. 267; *Matter of Engler*, 56 Misc. 218.

Signature in the presence of the witnesses even though they do not see the mark made by the pen in the testator's hand has been held to be sufficient. Thus, in *Matter of Van Houten*, 15 Misc. 196, it appeared that the signature of the testator upon an alleged codicil appeared in the form of a cross mark between the Christian and surname. Both the subscribing witnesses were present. The testator's counsel who prepared the will, read the will to the testator and then held the pen and wrote the testator's name, the testator holding the penholder while he wrote. The witness testified that he did not see what mark the pen made and could not swear whether the signature or the cross mark was made when the testator had his hand on the pen. The other witness testified substantially to the same effect and added that he heard a scratching noise made by the pen. Surrogate Tompkins held from this testimony that the codicil was signed in their presence by the testator and should be probated.

In *Matter of Beneventano*, 38 Misc. 272, Church, Surr., held a will unexecuted where it appeared that decedent did not sign it, but merely made a check mark opposite a statement at the end of the alleged will, written by the draughtsman, "The present will is not subscribed by the testator because he has stated he is illiterate."

The Court of Appeals in a very recent case (*Matter of Laudy*, 148 N. Y. 403, 407, modifying *S. C.*, 78 Hun, 479; *S. C.*, later, 161 N. Y. 429), reiterated the rule formerly declared (*Matter of the Probate of the Last Will and Testament of James Mackay, Deceased*, 110 N. Y. 611) that, "subscribing witnesses to a will are required for the purpose of attesting and identifying it," (*Lewis* v. *Lewis*, 11 N. Y. 220; *Mitchell* v. *Mitchell*, 77 N. Y. 596, aff'g 16 Hun, 97; *Matter of Nevins*, 4 Misc. 22; *Baskin* v. *Baskin*, 36 N. Y. 416; *Chaffee* v. *Baptist Missionary Society*, 10 Paige, 85) and in order to do this it is essential, (*a*) that they should see the testator subscribe his name, or (*b*) that with the signature visible to them he should acknowledge it to be his.

In *Matter of Clute*, 37 Misc. 586, the court observed: A subscribing witness is one who was present at the time when the instrument was executed, and who at that time subscribed his name to it as a witness of the execution. *Henry* v. *Bishop*, 2 Wend. 575. Although the witness was present at the execution, if he did not subscribe the instrument at that time, but did it afterwards without request of the parties, he is not a good attesting witness. *Hollenback* v. *Fleming*, 6 Hill, 303; *Welch* v. *St. Patrick Church*, 63 N. Y. St. Rep. 235; 81 Hun, 372; *Pritchard* v. *Palmer*, 68 N. Y. St. Rep. 588; 88 Hun, 416.

A notary who subscribed the notarial certificate of acknowledgment is not a subscribing witness. *Mutual Life Ins. Co.* v. *Corey*, 27 N. Y. St. Rep. 608, rev'd 48 *id.* 247, but not on above point. *Matter of Rogers*, 52 Misc. 412.

In *Lewis* v. *Lewis*, *supra*, it appeared that the paper was so folded that

the witnesses did not see any subscription. The court held the will not properly executed, and said: "If the party does not subscribe in their (the witnesses') presence, then the signature must be shown to them, and identified, and recognized by the party, and in some apt and proper manner designated by him as his signature. The statute is explicit and will not be satisfied with anything short of a substantial compliance with its terms."

In *Matter of Mackay, supra,* it appeared that the paper was so folded that the witnesses could see no part of the writing except the attestation clause, and they did not see either testator's signature or his seal. For this reason the will was held not to have been properly executed.

This language of the courts has been held to mean that the signature of the testator must be so far visible to the witnesses as that they can see and know that the name purporting to be subscribed is the very name of the testator, otherwise they cannot identify it as that of the testator as required by the rule laid down in *Matter of Laudy,* 148 N. Y. 403. If the will is so far sealed or covered up by the testator that the witnesses can merely see some writing where the signature is claimed to have been, then the signature cannot be fairly said to be visible to the witnesses in such a sense as to constitute a compliance with the statute and the construction given to its language by the courts. *Matter of Laudy,* 14 App. Div. 160, opinion of Williams, J., at page 164. See also *Matter of De Haas,* 9 App. Div. 561, and same case on appeal after the jury trial (reported in 19 App. Div. 266) had been had. If the signature is in plain sight, a request that the witnesses sign the paper published and declared as a will is a sufficient acknowledgment of the signature. *Matter of Phillips,* 98 N. Y. 267; *Matter of Lang,* 9 Misc. 521; *Matter of Stockwell,* 17 Misc. 108. But where a will was shown not to have been signed in the witnesses' presence, and neither witness saw the signature, probate was refused, although one witness testified to an acknowledgment by the testatrix. *Matter of Abercrombie,* 24 App. Div. 407, 408. The Appellate Division says: "It is the subscription, and not the instrument, which the statute requires to be acknowledged; and a signature which is neither seen nor identified can in no proper sense be said to have been acknowledged by the mere statement that it had been affixed to a paper which was characterized as a will." *Id.,* citing *Chaffee* v. *Baptist Miss. Convention,* 10 Paige, 85; *Lewis* v. *Lewis,* 11 N. Y. 220; *Mitchell* v. *Mitchell,* 16 Hun, 97, aff'd 77 N. Y. 596; *Matter of Mackay,* 110 N. Y. 611; *Matter of Laudy,* 148 N. Y. 403; *Matter of Whitney,* 153 N. Y. 259.

A third witness is unnecessary and may be disregarded if there are two subscribing witnesses. *Matter of Sizer,* 129 App. Div. 7.

§ 332. **Same subject.**—The testator's signature must have been made before the witnesses signed. This rule was established by the case of *Jackson* v. *Jackson,* 39 N. Y. 153, 161. It has been uniformly followed by the subsequent decisions; so where the testator after the witnesses had signed added an attestation clause in his own handwriting, beginning with

the words, "subscribed by John Kelly, the testator named in the foregoing will," the Court of Appeals held that the will was not properly executed and probate should be denied. *Sisters of Charity* v. *Kelly*, 67 N. Y. 409, 413. This case has been cited as holding that the testator may sign after witnesses if he subsequently acknowledges his signature. An examination of the first three paragraphs negatives this. See cases discussed in opinion of Folger, J. See also *Matter of Blair*, 16 N. Y. Supp. 875. The acknowledgment by the testatrix in the presence of the witnesses of the making of a signature amounts to nothing if as a matter of fact there was no signature at the end of the will as required by statute. *Matter of Booth*, 127 N. Y. 109, 115. The same rule applies where the name of the testator written in at some place other than at the end of the will is not shown to have been written with intent to execute the will.

§ 333. **Publication.**—The testator at the time of making such subscription or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament. "At the time of" merely requires "contemporaneity in the whole transaction;" e. g., A, the testatrix, says: "this paper is my will and I wish you two to witness it." Then she signs and they sign. This is a sufficient declaration and request. *Matter of Gamber*, 53 Misc. 168. The object of this provision of the statute is obvious; it is that the will shall be declared to be the testator's last will and testament, and that it shall be so declared to the subscribing witnesses and that such declaration shall be made at the time of executing the will.

While the recitals in an attestation clause may have a strong corroborative effect in supplying deficiencies in proof in certain cases, the absence of recitals in the attestation clause as to the occurrence of one of the essential acts making up a due execution is by no means conclusive. Thus, publication of the will may be proved wholly regardless of the contents of such attestation clause. The omission to recite at the end of the will any or all of the prescribed forms affects neither the validity of the instrument nor the proof thereof. *Leaycraft* v. *Simmons*, 3 Bradf. 35, 37.

A will offered for probate must be the will of the testator and of no one else, and when a testator is ignorant of the contents of the paper propounded, it cannot be said to be his will. Proponents are bound to show affirmatively as a condition of probate, that the testator had an intelligent knowledge of the contents of the will. *Matter of De Castro*, 32 Misc. 193, citing *Barry* v. *Boyle*, 1 T. & C. 422; *Townsend* v. *Bogart*, 5 Redf. 93; *Hyatt* v. *Lunnin*, 1 Dem. 14; *Cooper* v. *Benedict*, 3 *id.* 136; *Heath* v. *Cole*, 15 Hun. 100; *Jones* v. *Jones*, 42 *id.* 563; *Matter of Green*, 67 *id.* 527. See also *Rollwagen* v. *Rollwagen*, 63 N. Y. 504.

The testamentary character of the instrument must have been *unequivocally* communicated by testator to witnesses. *Matter of Delprat*, 27 Misc. 355, citing *Lewis* v. *Lewis*, 11 N. Y. 220; *Ex parte Beers*, 2 Bradf. 163. See also *Matter of Dale*, 56 Hun, 169, aff'd 134 N. Y. 614; *Matter of Turrell*, 28 Misc. 106, 108. When a will was read over to testator who said,

"It was all right," held, together with full attestation clause sufficient evidence of publication. *Matter of Buel*, 44 App. Div. 4, 5. Where the witnesses deny publication, the impeaching of their credibility does not *affirmatively prove what they deny*, even where will is holographic. *Matter of Moore*, 109 App. Div. 762.

The publication must be proved *to both witnesses;* this is elementary. *Matter of Sarasohn*, 47 Misc. 535. A request to both to sign, and a confidential statement made to but one that the paper is a will is fatally insufficient. *Ibid.*

The rule requiring substantial compliance with the statute permits, however, any communication by the testator to the witnesses, at the time of signing or acknowledging, indicating that the testator intended to give effect to the paper so signed and attested as his will. *Remsen* v. *Brinckerhoff*, 26 Wendell, 325, 332. Judge Nelson observed in the case just cited, "Any communication of this idea or to this effect will meet the object of the statute." *Coffin* v. *Coffin*, 23 N. Y. 1. It has never been supposed that a particular or in fact any form of words was necessary to effect it. *Lane* v. *Lane*, 95 N. Y. 494, 498, citing *Remsen* v. *Brinckerhoff*, *supra*.

In the *Lane* case, Judge Danforth adopted the language of the Court of Errors defining the word "declare" as signifying, "to make known, to assert to others, to show forth," and this in any manner, either "by word or by act, in writing or by signs;" in fine "that to declare to a witness that the instrument described was the testator's will, must mean to make it at the time distinctly known to him by some assertion, or by clear assent in words or signs." *Lane* v. *Lane*, *supra*, 498, 499, citing *Coffin* v. *Coffin*, 23 N. Y. 1; *Trustees of Auburn Seminary* v. *Calhoun*, 25 N. Y. 422; *Gilbert* v. *Knox*, 52 N. Y. 125; *Thompson* v. *Stevens*, 62 N. Y. 634; *Rugg* v. *Rugg*, 83 N. Y. 592; *Dack* v. *Dack*, 84 N. Y. 663; *In re Pepoon*, 91 N. Y. 255.

The necessary publication may be proved by circumstances as well as words (*Lewis* v. *Lewis*, 11 N. Y. 220), and inferred from the conduct and acts of the testator and those of the attesting witnesses in his presence (*Lane* v. *Lane*, *supra*), as well as established by their direct and positive evidence.

Any act of a testator in the presence of the witnesses at the time of the execution of the will that tends to show that he desired to publish the paper as his will, and that he wishes the witnesses to execute it, may be considered. *Matter of Hardenburg*, 85 Hun, 580, 587, citing *Lane* v. *Lane*, *supra; Reeve* v. *Crosby*, 3 Redf. 74; *In the Matter of the Revocation of the Probate of the Last Will and Testament of Ann Voorhis, Deceased*, 125 N. Y. 765; *Darling* v. *Arthur*, 22 Hun, 84; *Matter of Cottrell*, 95 N. Y. 329; *Matter of the Will of Bernsee*, 141 N. Y. 389; *Matter of Hunt*, 110 N. Y. 278. So it is held that a man is not to be denied the right to make a testamentary disposition of his property on account of defect of speech and hearing; and a deaf and dumb man may make a will if only the formalities prescribed by the statute are observed in their spirit and intent in

such manner as is practicable under the condition existing. *In re Perego's Will*, 65 Hun, 478. So where a testator makes his will during an illness and his only declaration is in the form of a sign of assent, when asked by the draughtsman or by any person present, if he declares the will to be his last will and testament and desires the witnesses to sign it as such, it will be held sufficient; but such assent in such case must be clearly proved. *Heath* v. *Cole*, 15 Hun, 100; *Matter of McGraw*, 9 App. Div. 372, 381. So where the witnesses are present as the will is being drawn up and are told by the draughtsman that he is writing the testator's will and that they had been sent for as witnesses, and upon the completion of the will the testator takes and reads it and signs it, and then passes it over to the witnesses for their signatures, the circumstances are sufficient to constitute a declaration within the meaning of the statute. See *Lane* v. *Lane*, 95 N. Y. 494, 500.

§ 334. **Meaning of the words, "at the time of."**—The object is general contemporaneity, as above noted. The intent of the statute is that the publication should be made *at the time of execution*. *Ex parte Collins*, 5 Redf. 20; *Matter of Phillips*, 98 N. Y. 267; *Walsh* v. *Laffan*, 2 Dem. 498; *Jackson* v. *Jackson*, 39 N. Y. 153. A subsequent declaration is not by itself sufficient. *Matter of Moore*, 109 App. Div. 762. The purpose is that the acts constituting the declaration and publication must be contemporaneous with the execution, that is, form part of the same transaction. Thus the publication may be incorporated with the request to the witnesses to sign. *Matter of Murphy*, 15 Misc. 208; *Coffin* v. *Coffin*, 23 N. Y. 9. Or the publication of the will may be made by the testator immediately before he signs his own name. *Matter of Williams*, 2 Connoly, 579. If the declaration is made while the witness is signing, it is sufficient. *Matter of Phillips*, 98 N. Y. 267. In this case the Court of Appeals held that although when the witness started to sign he did not know he was witnessing a will, yet since the declaration was made before the signature was finished, the execution was valid. So where a testator reads his will and signs it in the presence of the witnesses and hands it over with the request that the witnesses read the attestation clause which contains a recital of publication, and the witness does so, there is sufficient compliance with the statute. *Matter of Woolsey*, 17 Misc. 547. The wording of the statute that the testator should declare the instrument either at the time of making his subscription or at the time of acknowledging the same implies that the declaration may be made to the witnesses apart from each other, for the signature may be acknowledged to them separately. *Barry* v. *Brown*, 2 Dem. 309, Rollins, Surr.; *Hoysradt* v. *Kingman*, 22 N. Y. 372. Surrogate Calvin held (*Von Hoffman* v. *Ward*, 4 Redf. 244), where testator in the presence of all the witnesses read the will adding, "evidently I give all I possess to my mother," that there was sufficient publication, there being also an attestation clause reciting due publication. See also *Seymour* v. *Van Wyck*, 6 N. Y. 120. It has been stated that, "knowledge derived from any other source or at any other time, cannot stand as a

substitute for the declaration of the testator." Thomas on Law of Estates Created by Will, vol. 2, page 1162. That is to say, that a communication by the testator to the witnesses at some subsequent time, that the paper which they had signed is his will, is not a compliance with the statute. *Matter of Dale*, 56 Hun, 169. But the Court of Appeals held (*Matter of Application of Beckett*, 103 N. Y. 167) where a testatrix who had previously made a will and had had some conversation with the witnesses in regard to availing herself of their services in that capacity, called them in after her will was ready for execution and said to one, "This is the paper I spoke to you about signing," and in speaking to the other witness who had witnessed the prior will, asked her if she would sign "that paper" and that she was sorry to trouble her again to sign "the paper," that it was a sufficient compliance with the statute. The court held that there was a sufficient identification of the paper as a will and that the remarks of the testatrix relating back to the prior conversation were not too indefinite or imperfect, but that the witnesses could hardly fail to correctly interpret her meaning, to wit: that the paper she referred to was her will. See opinion of Ruger, Ch. J., at pages 174, 176.

But a mere request to witness "this instrument" is an insufficient publication of it as a will (*Matter of Delprat*, 27 Misc. 355, citing *Rutherford* v. *Rutherford*, 1 Den. 33; *Wilson* v. *Hetterick*, 2 Bradf. 427), or "document," even though it proves to be a *holographic* will. *Matter of Turrell*, 28 Misc. 106, aff'd 47 App. Div. 561, aff'd 166 N. Y. 330. Witnesses may not guess it to be a will, or infer it such. *Wilson* v. *Hetterick*, *supra*. See, where after hearing will read testator said, "It is all right," *Matter of Buel*, 44 App. Div. 4. (There was, however, an attestation clause in this case.)

§ 335. **Effect of assent where there is no express declaration.**—The assent by sign or by affirmative response to a question by the scrivener or counsel, or by any person present, whether the testator declares the instrument to be his last will and testament is usually a valid publication as has been already indicated. *Matter of Menge*, 13 Misc. 553; *Matter of Murphy*, 15 Misc. 208. But this must be clearly proven, particularly where the testator is in his last sickness, or very feeble, or is shown to have been unconscious, or under the influence of some drug, such as opium. *Heath* v. *Cole*, 15 Hun, 100; *Matter of Lyman*, 14 Misc. 352. Where the sum of the testimony of the witnesses is to the effect that all the formalities required by the statute were complied with, it is immaterial whether both witnesses testify to identical transactions, so long as there is no conflict between them. Thus where one of the witnesses testified that the testator's counsel who was present asked the testatrix, if it was her desire that the witnesses should witness her will, and she answered yes; and the other witness testified that either the counsel or the testatrix said, at the time of the execution, that the paper they were called upon to witness was the will of the testatrix, it was held to be sufficient evidence of publication. *Matter of Voorhis*, 125 N. Y. 765. The

effect of an attestation clause, where the witnesses do not recollect o where their recollection conflicts, is discussed below. See *Matter of Bernse* 141 N. Y. 389, 392.

§ 336. **Republication.**—Cases may occur where the publication of subsequent or supplemental testamentary instrument may cure defects i publication of a prior will. This rule usually applies to cases where th second will or codicil is executed upon a distinctly separate occasion subse quent in time and affects the prior instrument by reference or incorpora tion; but cases have arisen where the two instruments are shown to hav been prepared and in existence simultaneously and to have been the sub ject of the one act of execution. Thus in the *Hardenburg* case, 85 Hun 580, the General Term held there was due publication upon the following facts: The will having been drawn and read to the testator the draughts man was requested to change a certain clause of the will which was don in the presence of the testator, not, however, by changing the body of th instrument but by appending a brief clause entitled "codicil." The wil was signed by the testator by his mark; then followed the attestation claus signed by both the witnesses one of whom also witnessed the mark; then followed the codicil bearing the same date again signed by the testato and the two witnesses. The subscription to the will and codicil were made at the same time, the testator requested one of the witnesses to sign for him; the attesting clause was read aloud and the witnesses subscribed in both places on the same occasion. The General Term held that the paper though apparently divided into a will and codicil, was really one instrument executed at one time, and to be taken together as one transaction. The declaration of the deceased, after he had executed the paper by signing his name twice, that it was his last will and testament, was a declaration as to the whole instrument, and his request to the witnesses to sign it related to the same. See *Graham's Will*, 9 N. Y. Supp. 122, and cases cited.

§ 337. **Same subject.**—But where the paper purporting to be a will or codicil (the due publication or execution of which is alleged to give validity to an imperfectly executed prior testamentary instrument) (see *Matter of Douglas*, 38 Misc. 609) is executed on an entirely distinct separate occasion, not only must all the formalities of execution (*Matter of Stickney*, 161 N. Y. 42), be distinctly and separately proven in substantial compliance with the statute, but the fact of reference to or incorporation in such will or codicil must satisfactorily appear. The codicil, however, distinctly referring to the will, need not be actually annexed to the will; it may be on an entirely separate paper; any sufficient words of reference will operate as a republication. *Van Cortlandt* v. *Kip*, 1 Hill, 590. This has long been the rule. In the case last cited Judge Cowen remarked, "It seems to me that at this day it would be a violation of all reliable authority to deny that a codicil duly attested to pass real estate would *per se*, whether it related to real or personal property, operate as a republication of a devise, unless the testator declares that he does not intend the codicil should have that

effect" (see cases cited at page 593); and the learned justice quoted the words of Lord Commissioner Eyre, that a codicil might be inseparably annexed to a will not by a wafer or wrapper, but by *internal annexation*. But a wholly invalid codicil was held inoperative to republish a will to which it was annexed, when revoked by a later will. *Matter of Frost*, 38 Misc. 404. In *Matter of Emmons*, 110 App. Div. 701, the rule is stated that a codicil, properly executed, is a final testamentary disposition; and so, if there be an existent and complete will, it takes it up and incorporates it, citing *Matter of Campbell*, 170 N. Y. 84. But if the will sought to be so taken up is not itself an existent, validly executed will (e. g., only one witness) the codicil cannot so operate, and stands only if complete in itself. *Ibid.* Hence, it may stand if it suffice to merely designate an executor.

Yet, if there be sufficient identification of the prior will due execution of a codicil to it validates the will not only without re-execution thereof, but even where it has been formally revoked by a subsequent will. *Cook* v. *White*, 43 App. Div. 388, 392. *In re Knapp's Will*, 23 N. Y. Supp. 282, citing 1 Jarman on Wills, page 188; *Storm's Will*, 3 Redf. 327; *Illensworth* v. *Illensworth*, 39 Misc. 194; *Brown* v. *Clark*, 77 N. Y. 369. The Court of Appeals held in the case last cited, that where a woman, being unmarried had made her will, and, after her marriage, duly executed a codicil to such will, any testamentary document in existence at the execution of the latter testamentary instrument might by reference be incorporated into it, and the will and codicil were accordingly sustained although the will by law had been revoked by the marriage. The effect of sustaining a will and codicil in such cases, is to revoke the intermediate will, for the date of the codicil attaches to the will revived or republished thereby and constitutes the last will and testament of the testator. See *Matter of Miller*, 11 App. Div. 337.

"A testatrix named Ellen Campbell made a will on July 6, 1897, revoking all former wills and this she specifically revoked by a will made in 1899. On December 7, 1900, she executed a paper, headed "Codicil to the last will and testament of Miss Ellen Campbell, which will bears date July 6, 1897," and this contained no revocation clause whatever.

Held that the will of 1899 was not her last will.

That the codicil amounted to a republication of the will of 1897 and made it speak, as modified by the codicil, as of the date of the codicil. *Matter of Campbell*, 35 Misc. 572 (*headnote*). In *Cook* v. *White*, *supra*, it was held that a will made while testator was insane could be validated if republished in a lucid interval, citing 1 Wms. on Exrs., 7th Am. ed., 267. In *Langdon* v. *Astor's Executors*, 16 N. Y. 9, the Court of Appeals held that the effect of a codicil re-executing a will made six years prior, giving a legacy which was in the meantime satisfied or adeemed, did not operate to revive or reinstate such satisfied legacy. See opinion of Denio, C. J., at pages 37 and 38. Generally speaking, then, the publication of a codicil operates as a republication of the will and, so far as regards the formalities of execution, the will is sufficiently proved by proof establishing that the

codicil was executed, in accordance with law. *Matter of Nisbet*, 5 Dem. 286, Rollins, Surr., citing among other cases, *Van Cortlandt* v. *Kip*, 1 Hill, 590; *Kip* v. *Van Cortlandt*, 7 Hill, 346; *Van Alstyne* v. *Van Alstyne*, 28 N. Y. 375; *Brown* v. *Clark*, 77 N. Y. 369.

The language of the Court of Appeals in *Langdon* v. *Astor's Executors*, *supra*, to the effect that the republication of a will by a subsequent codicil or codicils does not cause the will and codicils to speak as one as of the date of the last execution (see headnote at page 12), must not be extended beyond the evident meaning of the court in that case; for the learned chief justice observed (at page 537) that all the instruments together although executed at different times did in fact constitute the last will and testament of the deceased. And in the *Van Alstyne* case, 28 N. Y. 375, Judge Selden observed that a codicil to a will amounts to a republication of the whole will so far as it is not changed by the codicil, and must be held to speak as of the time of the execution of the codicil. The point involved in that case was as to what charges were released by the testator. See as to republication of a will, *Rogers* v. *Potter*, 9 Johns. 312; *Simpson's Will*, 56 How. Pr. 125; *Master's Estate*, 1 McCarthy, 459. The rule was summarized by Judge Earl (*Caulfield* v. *Sullivan*, 85 N. Y. 153, 160), by observing, that where a codicil distinctly refers to and identifies the will and reaffirms the same, the will and the codicil together constitute the will of the testator; the provisions of the former may be treated as embodied in the latter and both may be treated as if executed and published at the same time. *Brown* v. *Clark*, 77 N. Y. 369, *q. v.* at page 375. See *Mooers* v. *White*, 6 Johns. Ch. 375; *Jackson* v. *Holloway*, 7 Johns. 394. See also *Moffett* v. *Elmendorf*, 82 Hun, 470.

§ 338. **Insufficient publication.**—Failure to comply substantially with the statute as quoted above, namely, that the testator indicate in some sufficient manner to the witnesses and every of them that the instrument they are by him requested to sign as witnesses is his last will and testament, will necessitate a refusal of probate. Thus, where a draughtsman, sent out to bring two persons desired by the testator to witness his will, requested them to come to the house to witness a paper or a will, but it did not appear from the testimony that when they actually were present at the time of execution any declaration was made by or on behalf of the testator identifying the paper which they witnessed as a will, probate was refused for want of due publication. *McCord* v. *Lounsbury*, 5 Dem. 68. So where testator of a holographic will requests A to witness "this document" held insufficient. *Matter of Turrell*, 28 Misc. 106, aff'd 166 N. Y. 330. There must be a declaration of the testamentary character of the instrument. *Ibid.*, citing *Baskin* v. *Baskin*, 36 N. Y. 416; *Matter of Will of Phillips*, 98 N. Y. 267; *Matter of Mackay*, 110 N. Y. 611; *Matter of Laudy*, 148 N. Y. 403. It must be remembered in this regard that publication is one of the distinct acts constituting execution; it is an independent fact from subscription or acknowledgment of subscription or from request to sign and must be sufficiently separately proven. *In re Nevin's Will*, 24 N. Y. Supp.

828, citing *Baskin* v. *Baskin*, 36 N. Y. 416. The fact that the messenger sent for the witnesses states to them that they are desired to witness a will, is of itself wholly immaterial except that proof of such fact might contribute in a doubtful case to satisfy the Surrogate that acts or conduct on the part of the testator alleged to constitute a declaration by assent was clearly understood by the witnesses to relate to the execution of a testamentary instrument. See also *Dodworth* v. *Crow*, 1 Dem. 256; *Matter of Kane's Will*, 20 N. Y. Supp. 123; *Burke* v. *Nolan*, 1 Dem. 436, 440, 441.

§ 339. **The witnesses.**—There shall be at least two attesting witnesses, each of whom shall sign his name at the end of the will as witness at the request of the testator. In the first place it may be said that the words, "at the end of the will," have the same meaning already discussed with regard to the testator's signature, except that as the witnesses are supposed to attest an executed instrument, the statute contemplates that they shall sign after the testator has signed (*Jackson* v. *Jackson*, 39 N. Y. 153; *Rugg* v. *Rugg*, 83 N. Y. 592), or at the end of the signed will. The object of having witnesses is not only that there may be persons capable of identification, and who may be called upon to testify as to substantial compliance with the provisions of the statute, but, particularly, in order that they may by the act of witnessing record the fact that at that time the will had been duly and actually signed by the testator; or as Surrogate Silkman says (*Losee's* case, 13 Misc. 298):

"In the case of a will a witness must have knowledge that the paper is a will by the declaration of the testator that it has been signed, by either seeing the signature written or by seeing the signature with an accompanying acknowledgment by the testator that it is his or her signature." *Lewis* v. *Lewis*, 11 N. Y. 220; *Mitchell* v. *Mitchell*, 16 Hun, 97; *In re Mackay*, 110 N. Y. 611; *Sisters of Charity* v. *Kelly*, 67 *id.* 409; *Willis* v. *Mott*, 36 *id.* 486; *Matter of Van Geisen*, 47 Hun, 8; *Matter of Bernsee*, 141 N. Y. 389.

In the *Mackay* case, Earl, J., in writing the opinion, says:

"Subscribing witnesses to a will are required by law for the purpose of attesting and identifying the signature of the testator, and that they cannot do unless at the time of the attestation they see it."

And in the case of *Bernsee*, Andrews, Ch. J., cites the *Mackay* case, and says: "It is essential to the due publication of a will either that the witnesses should see the testator sign the will or that such signature should have been affixed at some prior time and be open to their inspection." Where both witnesses sign before the testator does probate must be refused. See *Knapp* v. *Reilly*, 3 Dem. 427. From what has been already said in another connection it will be remembered that intervention of the attestation clause between the testator's and witnesses' signatures, is perfectly proper. See *Williamson* v. *Williamson*, 2 Redf. 449; *McDonough* v. *Loughlin*, 20 Barb. 238; *Matter of Dayger*, 110 N. Y. 666, aff'g 47 Hun, 127.

§ 340. **Same subject.**—There is nothing in the statute as to the witnesses subscribing in the presence of each other. *Lyman* v. *Phillips*, 3 Dem. 459, aff'd 98 N. Y. 267; *Herrick* v. *Snyder*, 27 Misc. 462; *Matter of*

Diefenthaler, 39 Misc. 765; *Willis* v. *Mott*, 36 N. Y. 486; *Matter of Engler*, 56 Misc. 218. If the testator signs in the presence of one witness requesting him to sign which he thereupon does, and subsequently acknowledges his signature to the other witness who thereupon signs in his presence, it is immaterial that the two witnesses did not subscribe in the presence of each other. *Hoysradt* v. *Kingman*, 22 N. Y. 372. If the witnesses, however, are not present at the same time all the formalities must be repeated in the presence of each. *Tyler* v. *Mapes*, 19 Barb. 448. If there are more than two witnesses the will may be probated if the formalities were sufficiently complied with in the presence of at least two. *Carroll* v. *Norton*, 3 Bradf. 291.

Where the signature purports to have been made in the presence of the witnesses, it has been held sufficient, provided it clearly appeared that the witnesses signed after the signature of the testator had been appended; but where the recollection of a witness is defective upon the point whether the witness saw the testator actually sign, the courts will hold that if the witness was in a position where he could have seen the act of signature he did see it. This is the English rule as stated by Lord Ellenborough that "in favor of attestation it is presumed, if he might see he did see." See *Spaulding* v. *Gibbons*, 5 Redf. 316, 319; *Gardiner* v. *Raines*, 3 Dem. 98; *Peck* v. *Carey*, 27 N. Y. 9, 31.

So, in case where one of the witnesses testified that she was in the same room with the testatrix when she signed, but refrained from looking at her "from fear it would make her nervous," the execution was not invalidated. *Bedell's Will*, 12 N. Y. Supp. 96. The statute of course contemplates the signature "at the end of the will" by the witnesses; a total absence of signature by a sufficient number of witnesses or at "the end of the will" within the legal meaning of the term invalidates its execution. *Ex parte Le Roy*, 3 Bradf. 227; *Heady's Will*, 15 Abb. Pr. N. S. 211; *Matter of Case*, 4 Dem. 124. And while the witnesses need not actually attest in the presence of each other (*Matter of Carey*, 14 Misc. 486), yet they must attest upon the same occasion, that is to say, there must be sufficient contemporaneity to make all the acts constituting due execution parts of the same transaction. The continuity of the transaction is of course interrupted if the testator's death intervenes before all the formalities have been complied with, for of course the statute contemplates that all the acts going to make up due execution shall occur during the lifetime of the testator; so where a testatrix died after one witness had signed and before the other could sign, her will was properly refused probate. *Matter of Fish*, 88 Hun, 56. In that case the General Term held that while it was manifest that the instrument attempted to be executed contained the intentions of the testatrix, and that she intended and had requested the witness to sign it as such, yet in construing the statute the intention of the legislature and not that of the testator must be kept in mind, and that as a will takes effect at the instant the testator dies, it must at such instant be a valid, complete, perfect instrument. It was held (*Herrick* v. *Snyder*, 27 Misc.

462, 466, by Hiscock, J.), that signature by a witness, *not in the presence of testator*, fifteen minutes after testator signed and published the will, at another house, was sufficient, citing *Lyon* v. *Smith*, 11 Barb. 124. See also *Matter of Phillips*, 34 Misc. 442; *Ruddon* v. *McDonald*, 1 Bradf. 352.

The witnesses may subscribe by mark or *per alium*. *Mock* v. *Garson*, 84 App. Div. 65. So Surrogate Bradford upheld a will where one of the witnesses attested by making a mark which she then acknowledged to be her mark and signature. *Meehan* v. *Rourke*, 2 Bradf. 385, 392. See *Jackson* v. *Van Deusen*, 5 Johns. 144. Signature by mark is resorted to only in case of illiterate witnesses, but a witness otherwise able to write may be temporarily incapacitated, in which case a request to a third party, even the other witness, to sign for the incapacitated witness, properly proven, will sustain the execution of the will. *In re Strong's Will*, 16 N. Y. Supp. 104, where one of the witnesses had a felon on her right hand. The case last cited was peculiar in that, after the death of the testatrix, the witness whose signature had been at her request written by her husband, the other witness, caused her name as written by her husband to be erased and then personally signed her name in its place; the Surrogate does not seem to have passed upon this singular act in his opinion. A subsequent case by Surrogate Silkman in the same county which purports by the headnote to be in conflict with this, is not in fact authority to the contrary. *In re Losee's Will*, 34 N. Y. Supp. 1120. The learned Surrogate in that case held that as the witness who signed *per alium*, so signed because her eyesight was too defective for her to see to write her own name, she could not be a competent attesting witness to a will at all. He says at page 1122:

"There must be an identification of the instrument by one who has seen the signature written, or has seen the signature which has been acknowledged by the testator as his or hers. The paper propounded is identified only by the witness, Lefurgy. She is the only one who saw the signature of the decedent at the time of the execution, and can swear that it is the paper that the decedent signed, and which she signed as a witness. It is true that the statute permits the proof of the handwriting of the decedent and of the subscribing witness or witnesses, where the subscribing witness or witnesses are dead, or absent from the State, and their testimony cannot be obtained; but the statute applies only where there have been two attesting witnesses who have signed their names as such. The statute was passed to allow the probate of wills that had been executed with all the formalities required by law. The difficulty in this case is that there was but one witness, and the formalities prescribed by the statute were not fulfilled. Mrs. Brown was not a witness, because she could not see at the time of the alleged execution. If she had been able to see then, and subsequently lost her sight, the case might be different. Such was the case of *Cheeney* v. *Arnold*, 18 Barb. 434, relied upon by the proponents. In that case, a subscribing witness who had signed the will had become blind by reason of great age. The case was decided upon the well-established legal principle that, where the witnesses are dead, or by lapse of time do

not remember the circumstances attending the execution, the law, after diligent production of all the evidence existing, if there are no circumstances of suspicion will presume a proper execution of the will, particularly when the attestation clause is full. The statute prescribing the necessary formalities for the due execution of a will was passed to provide against fraud and imposition, and the protection given by it cannot be repealed by the court. Its wisdom needs no argument to sustain it, even though in isolated cases injustice is done and the wishes of the dead thwarted. A decree will be entered denying probate."

§ 341. **The request to the witnesses to sign.**—The statute requires a request by the testator that the witnesses sign the paper declared by him to be his will as witnesses thereof. The circumstances, however, under which wills are frequently executed are such, that the request is not and indeed cannot always be made by the testator. The same principle above noted in other connections may be relied upon in support of valid execution, to wit: that the attendant circumstances were such that from them a request by the testator may properly be implied.

The Court of Appeals in an early case (*Coffin* v. *Coffin*, 23 N. Y. 1, 16), Comstock, Ch. J., says: "Now, the statute, it is true, declares that each witness must sign on such request. But the manner and form in which the request must be made, and the evidence by which it must be proved, are not prescribed. We apprehend it is clear that no precise form of words, addressed to each of the witnesses at the very time of the attestation, is required. Any communication importing such request, addressed to one of the witnesses in the presence of the other, and which, by a just construction of all the circumstances, is intended for both is, we think, sufficient. In this case both the witnesses, by the direction or by the knowledge of the testator, were summond to attend him for the purpose of witnessing his will. They came into his presence accordingly, and, in answer to the inquiry of one of them, in which the singular instead of a plural pronoun was used, he desired the attestation to be made. In thus requiring both the witnesses to be present, and in thus answering the interrogatory addressed to him by one of them, we think that he did, in effect, request them both to become the subscribing witnesses to the instrument. Any other interpretation of his language, and of the attending circumstances, would be altogether too narrow and precise." See also *Brady* v. *M'Crosson*, 5 Redf. 431. Where witnesses have previously been requested by the testator to attend on a certain occasion to witness his will, and are accordingly so present, and hear the will read and see it signed, and sign it themselves, there is a presumption that the desire of the testator continues and the request to the witnesses though not distinctly proven to have been made in so many words at the time of execution, may be presumed from all the circumstances. *Coffin* v. *Coffin*, 23 N. Y. 1, 16; *Brady* v. *M'Crosson*, 5 Redf. 431. As to whether the circumstances amount to a request in substantial compliance with the statute, depends upon the facts in each particular case. And so the courts have always held that there is no par-

ticular form or manner in or by which it is requisite that the request of the testator should be made; it may be verbal; or it may be by sign; it may come directly from the testator to the witnesses; or it may come interrogatively from the witness to the testator, in which case it will be sufficient if assented to by the latter. See *Hutchings* v. *Cochrane*, 2 Bradf. 295. In the case last cited two witnesses were in attendance upon the testatrix, one of whom, George C. Barrett, had copied the will which included an attestation clause. The testatrix knew the purpose for which the witnesses had come; she read the formal attestation clause in their presence; she was told by one that two witnesses were necessary; she signed and published the instrument as her will and they signed it as witnesses in her presence. The request was held to be sufficiently shown. *Id.*, page 296, citing *Doe* v. *Roe*, 2 Barb. 200.

Where the words of request are made on behalf of the testator by a third person they must be made in presence of the testator, and his assent to such request may be manifested by words, sign or conduct, indicating acquiescence or approval.

In *Peck* v. *Carey*, 27 N. Y. 9, the draughtsman, in the presence of the testator, requested the witnesses to sign the will, and they thereupon signed it; it was held to have been done at the request of the testator.

In *Gilbert* v. *Knox*, 52 N. Y. 125, one of the subscribing witnesses had charge of the execution of the will and assumed to act and speak for the testator, and publicly stating the character of the instrument, observed that it was necessary that the testator should request those who were in attendance as witnesses to sign the will as such, and then stated in the presence of the testator and such witnesses, that the testator wished them to sign the will in that capacity, the testator made no dissent, and when the will had been executed took it into his possession and thereafter retained it; held, to be a sufficient request. See also *Matter of Nelson*, 141 N. Y. 152; *Matter of Barnes*, 70 App. Div. 523, 528.

In *Brinkerhoff* v. *Remsen*, 8 Paige, 499, the chancellor observes: "I think, therefore, there can be no reasonable doubt that, if this will and this attestation clause, or this attestation clause alone, had been read over in the presence and hearing of the testatrix, so that the witnesses could be fully satisfied that she knew and understood its meaning, her request to them to attest it as witnesses would have been such a recognition of the instrument as her will as to make it a good execution thereof, according to the intent and spirit of the statute." See also *Trustees of Auburn Theological Seminary* v. *Calhoun*, 25 N. Y. 422.

The rule in regard to the communication by a testator of his request to witnesses through a third person was stated by Surrogate Livingston (*Burke* v. *Nolan*, 1 Dem. 436) as follows: "If the communication is made through the intervention of a third person it must be so made in the presence and hearing of the testator, and to the witnesses, so that the attesting witnesses may know of their own knowledge that what was said or done by the third person on behalf of the testator was assented to by him," citing *Thompson*

v. *Stevens*, 62 N. Y. 634; *Stein* v. *Wilzinski*, 4 Redf. 441, 448; *McDonough* v. *Loughlin*, 20 Barb. 238, 244. In the case in which he so stated the rule, the learned Surrogate denied probate for the reason that while the witnesses heard the lawyer who superintended the will ask the testator, "if he wanted those gentlemen to witness it," to which the witnesses testified he made some affirmative motion or indicated his assent in some way, yet there was no evidence that the testator knew whom the lawyer referred to, nor that he knew that the witnesses were there for the purpose of witnessing his will; and moreover the testator was not in a condition to observe or take notice of things not pressed upon his attention. He says (at page 422), "Under such circumstances it must appear that the questions which were asked (of the testator) were made very clear to him," citing *Heath* v. *Cole*, 15 Hun, 100. Moreover, it appeared in that case that one of the witnesses was in an outer room and not near enough to the testator or the lawyer to come within the scope of the cases, holding, that where the witness was in such a position that he could and ought to have heard what was said, the request will be presumed to have been made in his hearing. In such cases the presumption will outweigh a defective recollection but not positive testimony that he did not hear. See *Lewis* v. *Lewis*, 11 N. Y. 220, 224; *Orser* v. *Orser*, 24 N. Y. 51; *Wilson* v. *Hetterick*, 2 Barb. 427.

Where a decedent, a man of upwards of sixty years of age, had been deaf and substantially dumb from early childhood, and accustomed to communicate his ideas mainly by signs and gestures, and it appeared from the evidence of the witnesses that the dumb show by the testator indicating his desire that they should witness the instrument, and his thanks to them when they had done so, was unmistakable, the General Term reversed a decree of the Surrogate denying probate and ordered a trial by jury of the material questions of fact as to the execution. *Matter of Perego*, 65 Hun, 478. See also *Matter of Beckett*, 103 N. Y. 167, 174; *Matter of Stillman*, 29 N. Y. St. Rep. 213, and cases cited. The desire of the testator that the witnesses sign may consist merely in a passive acquiescence in the acts and words of the one superintending the execution of the will. *Matter of McGraw*, 9 App. Div. 372; *Matter of Lyman*, 14 Misc. 352; *Matter of Menge*, 13 Misc. 553; *Matter of Voorhis*, 125 N. Y. 765. The request may be combined with the publication (*Matter of Murphy*, 15 Misc. 308), and may be made to the witnesses before the testator has actually subscribed his own name (*Matter of Williams*, 2 Connoly, 579), and is sufficient although it consists merely in a request to one or both witnesses, or to the scrivener to read aloud the attestation clause which contains such request. See *Matter of Woolsey*, 17 Misc. 547. See also *Kingsley* v. *Blanchard*, 66 Barb. 317; *Stewart's Will*, 2 Redf. 77, 79; *Neugent* v. *Neugent*, 2 Redf. 369, 375. In the case last cited Surrogate Calvin held the request insufficient as not appearing to have been made in the presence or hearing of the testatrix, one of the witnesses having subscribed in an adjoining room, there being an absence of sufficient proof that such witness had

validly subscribed the instrument. The learned Surrogate remarked: "I am aware that it is not essential that the attesting witnesses should each subscribe in the presence of the other (*Hoysradt* v. *Kingman*, 22 N. Y. 372; *Willis* v. *Mott*, 36 *id.* 486), nor is it necessary that the witnesses should sign in the presence of the testator. *Ruddon* v. *McDonald*, 1 Bradf. 352; *Jackson* v. *Christman*, 4 Wend. 277. If they sign at the testator's request, although in an adjoining room, out of sight, it is sufficient, though their signing must be done at the time of the execution, or acknowledgment, with the knowledge and at the request of the testator (*Lyon* v. *Smith*, 11 Barb. 124), but I think the proof in this case fails to show that the signing of the witness Cosgrove was with the knowledge, or at the request, of the testatrix." See *Troup* v. *Reid*, 2 Dem. 471, where Surrogate Rollins collates the authorities upon the question of the sufficiency of a decedent's assent to the words of another upon this question. *Rutherford* v. *Rutherford*, 1 Denio, 33; *Doe* v. *Roe*, 2 Barb. 200; *Brown* v. *De Selding*, 4 Sandf. 10; *Torry* v. *Bowen*, 15 Barb. 304; *Trustees of Auburn Seminary* v. *Calhoun*, 25 N. Y. 422; *Matter of Gilman*, 38 Barb. 364; *Gamble* v. *Gamble*, 39 Barb. 373; *Peck* v. *Carey*, *supra*; *Gilbert* v. *Knox*, *supra*; *Heath* v. *Cole*, *supra*; *Burke* v. *Nolan*, *supra*.

§ 342. **Effect of attestation clause.**—In connection with all that has been said above with regard to the formal execution of a will, the importance of a proper attestation clause containing recitals of all the acts required by the statute constituting due execution will be manifest. Particularly will this be so where one or more of the witnesses may have died and their oral testimony as to what actually took place cannot be obtained. And its absence, where the witnesses contradict one another as to the occurrence of one of the cardinal facts of due execution may defeat probate. *Matter of Sarasohn*, 47 Misc. 535. We have already discussed § 2620 of the Code (see *ante*, page 290), which permits the Surrogate to dispense with the testimony of a subscribing witness, who may be dead or incompetent by reason of lunacy or otherwise, or is unable to testify, or if such a subscribing witness is absent from the State, or if such subscribing witness has forgotten the occurrence or testifies against the execution of the will. Section 2620 provides in such cases that the will may nevertheless be established upon proof of the handwriting of the testator and of the subscribing witnesses, and also "of such other circumstances as would be sufficient to prove the will upon the trial of an action;" this section requires a little further discussion in connection with this discussion of the effect of the attestation clause.

Forgetfulness on the part of a witness may be pecuniarily induced. The courts have held that positive denial of execution of a will by a subscribing witness whose name appears to be signed thereto is "forgetfulness" within the meaning of this section. *Estate of Bogart*, 67 How. Pr. 313. This section of the Code puts in the form of a statutory enactment, a rule in relation to the proof necessary to show the valid execution of a will, which had been, indeed, before then well settled but had previously

existed by force of adjudication alone, to wit: that the due execution of a will might be established by competent evidence even against the positive testimony of the subscribing witnesses thereto. *Matter of Cottrell*, 95 N. Y. 329, 332. See also *Wyman* v. *Wyman*, 118 App. Div. 109. And see opinion of Marcus, Surr., in *Matter of Moor*, 46 Misc. 537, when the witnesses were all hostile to probate, and so "failed" to remember any publication by decedent. In this case there was a holographic will. Held, this was a persuasive element in deciding on testator's declaration, for the object of the declaration exacted by the statute is *to make sure that testator* knew he was making a will. *Trustees* v. *Calhoun*, 25 N. Y. 422. Prior to the Code it had been held that the facts making due execution need not *all or any of them* be established by the concurring testimony of the two subscribing witnesses; while both of such witnesses must be examined, a will could be established even in direct opposition to the testimony of both. *Trustees of Auburn Seminary* v. *Calhoun*, 25 N. Y. 425; *Tarrant* v. *Ware*, reported as a note to *Trustees of Auburn Seminary* v. *Calhoun*, where Judge Denio says: "My purpose is to show that whether their denial of what they had attested proceeds from perversity or want of recollection, the testament may in either case be supported." See also *Rugg* v. *Rugg*, 83 N. Y. 592; *Lewis* v. *Lewis*, 11 N. Y. 220. So Chancellor Walworth stated the rule to be (*Jauncy* v. *Thorne*, 2 Barb. Ch. 59), "A will may therefore be sustained even in opposition to the positive testimony of one or more of the subscribing witnesses who either mistakenly or corruptly swear that the formalities required by the statute were not complied with, if from other testimony in the case the court or jury is satisfied that the contrary was the fact." See also *Chaffee* v. *Baptist Missionary Conv.*, 10 Paige, 91.

In *Matter of Fitzgerald*, 33 Misc. 325, the Surrogate refused to believe the subscribing witnesses, and admitted the will on the testimony by another of due execution, which was "complete and satisfactory," citing *Matter of Cottrell*, 95 N. Y. 329; *Matter of Carey*, 24 App. Div. 531, 542.

§ 343. **Same subject.**—The cases cited under the discussion (§ 2620 of the Code) are sufficient to indicate the rule. It is now proper to consider what effect, presumptive or otherwise, a proper attestation clause will be deemed to have. In an early case (*Nelson* v. *McGiffert*, 3 Barb. Ch. 158, 163), the chancellor held, that an attestation clause, after a considerable lapse of time, when it may reasonably be supposed that the particular circumstances attending the execution of the will have escaped the recollection of the attesting witnesses, is a circumstance from which the court or a jury may infer that the requisites of the statute were complied with. This rule so declared has been substantially adopted in subsequent decisions. See *Matter of Bernsee*, 141 N. Y. 389, 392; *Matter of Probate of Will of Pepoon*, 91 N. Y. 255; *Matter of Cottrell*, 95 N. Y. 329; *Lane* v. *Lane*, 95 N. Y. 494; *Brown* v. *Clark*, 77 N. Y. 369; *Peck* v. *Carey*, 27 N. Y. 9, 31; *Trustees of Auburn Seminary* v. *Calhoun*, 25 N. Y. 422; *Matter of Van Houten*, 15 Misc. 196; *Matter of Merriam*, 16 N. Y. Supp. 738; *Matter of Sears*, 33 Misc. 141; *Matter of Buel*, 44 App. Div 4. See, also, *Matter of*

Foley, 55 Misc. 162, where all the witnesses were dead, and testatrix had signed by "mark," of which there was no eyewitness procurable, nor any "standard of comparison" to prove his "writing." The Surrogate held that these facts, and the fact there was no case in point, "should not dethrone reason!" Nor should it warrant "a constipated construction of the Statute;" so he admitted the will on "common-law evidence." See, as to when this rule is not applicable, *Matter of Turrell*, 28 Misc. 106, 109, aff'd 166 N. Y. 330. As when, e. g., one of its recitals is shown to be false. *Porteus* v. *Holm*, 4 Dem. 14; *Rumsey* v. *Goldsmith*, 3 Dem. 494. So, where the distinct recollection of the witnesses contradicts a recital. *Matter of Nash*, 76 App. Div. 212.

In *Matter of Pepoon*, *supra*, the court held, "Where the attestation clause of a will is full and complete it is not always essential that all the particulars required by the statute to constitute a valid execution of the instrument should be expressly proved." 91 N. Y. 255, 257. See also *Matter of Carey*, 24 App. Div. 531, 543. The Court of Appeals also observed in the *Pepoon* case, *supra*, "the rule is well established that when there is a failure of recollection by the subscribing witnesses the probate of the will cannot be defeated if the attesting clause and the surrounding circumstances satisfactorily establish its execution." See *Rugg* v. *Rugg*, *supra*; *Matter of Kellum*, 52 N. Y. 517, 519. See also *Lane* v. *Lane*, 95 N. Y. 494.

In *Matter of Sizer*, 129 App. Div. 7, Gaynor, J., asks whether a full attestation clause *and* proof of the signatures of the testator and the witnesses was "alone evidence of the execution of the will with the formalities required by law?" He answers: "It was." See opinion at p. 9 and cases at p. 10.

§ 344. **Same subject.**—It has already been observed that the attestation clause is no part of the will, but is useful merely as a memorandum of facts which may be presumed to have transpired, which may aid the recollection of the witnesses and even overbear their testimony where there is a conflict. Where one of the witnesses is dead and the recollection of the other is defective much effect may be given to the attestation clause; especially so when it purports to make the subscribing witnesses say that all the essentials to the proper execution of the will were observed. *Matter of Brissell*, 16 App. Div. 137, 139, citing *Matter of Will of Kellum*, 52 N. Y. 517; *Brown* v. *Clark*, 77 N. Y. 369; *Matter, etc., of Pepoon*, 91 N. Y. 255; *Matter, etc., of Cottrell*, 95 N. Y. 329; *Matter, etc., of Hesdra*, 119 N. Y. 615. This presumption in favor of the regularity of the execution of a will when the attestation clause contains full recitals, may be strengthened by proof, that it was read aloud at the time of the execution. *Matter of Wilcox*, 14 N. Y. Supp. 109.

But the formal proof may not be presumed from the attestation clause *alone*. *Matter of Delprat*, 27 Misc. 355, citing *Woolley* v. *Woolley*, 95 N. Y. 231; *Lewis* v. *Lewis*, 11 N. Y. 220. But the presumption created by the existence of such a clause may be rebutted. In *Woolley* v. *Woolley*, 95 N. Y. 231, it was held that the attestation clause was not effectual to raise

the presumption of the formal and due execution of the will against positive evidence to the contrary. See also *Lewis* v. *Lewis*, 11 N. Y. 220; *Mitchell* v. *Mitchell*, 77 N. Y. 596; *Matter of Van Geison*, 47 Hun, 5. But these are cases where the evidence of the witnesses against the recitals in the attestation clause is positive and explicit as to the nonoccurrence of one of the essential facts recited in such clause. See also *Rumsey* v. *Goldsmith*, 3 Dem. 494. Failure of the memory of both witnesses may, however, be disregarded if the facts may be found from other evidence in the case and the inference to be drawn therefrom. *Matter of Laudy*, 14 App. Div. 160, Williams, J. So, if it appears that at the time of the execution the attestation clause was not read and the witnesses were not even permitted to see it, and the witnesses differ as to the compliance with the statute, the attestation clause cannot have its usual effect. *Matter of Laudy, supra; M'Cord* v. *Lounsbury*, 5 Dem. 68. Surrogate Rollins discussed the adjudicated cases somewhat fully (*Rolla* v. *Wright*, 2 Dem. 482), in connection with § 2620 of the Code and the effect of an attestation clause (among others *Butler* v. *Benson*, 1 Barb. 526; *Rider* v. *Legg*, 51 Barb. 260; *Moore* v. *Griswald*, 1 Redf. 388), in all of which cases the court commented on the absence of circumstances calculated to arouse suspicion. In the following cases a full attestation clause was instrumental in sustaining a will where the memory of witnesses was defective. *Matter of Sears*, 33 Misc. 141, 146; *Matter of Graham*, 9 N. Y. Supp. 122; *Matter of Hunt*, 110 N. Y. 278; *Matter of Rounds*, 7 N. Y. St. Rep. 730; *Matter of Townley*, 1 Connoly, 400; *Matter of Wilcox*, 14 N. Y. Supp. 109; *Matter of Langtry*, 5 N. Y. Supp. 501; *Matter of Frey*, 2 Connoly, 70; *Potter* v. *McAlpine*, 3 Dem. 108.

But on the other hand where the attestation clause is as to its recitals in conflict with one of the witnesses and it appears the other never read it, it loses its value. *Porteus* v. *Holm*, 4 Dem. 14, 23. So if any one of the recitals in the attestation clause is shown to be false it loses its presumptive force. *Rumsey* v. *Goldsmith*, 3 Dem. 494; *Matter of Turrell*, 28 Misc. 106, 109, aff'd 166 N. Y. 330; *Porteus* v. *Holm*, 4 Dem. 14. The attestation clause itself is always some proof of the due execution of the will (*Matter of Nelson*, 141 N. Y. 152, 156), although it does not furnish any evidence of the facts. *Matter of Look*, 125 N. Y. 762, aff'g 4 Silv. 233. But where beyond its presence or in addition to its presence there is evidence that it was read aloud in the hearing of the testator and witnesses, with the assent of all concerned, express or inferential, to its statement of facts, it cannot in the words of Judge Finch (*Matter of Nelson, supra*), "be denied that there is some and quite persuasive evidence of the actual occurrence of the facts recited." This is so even if one of the essential requirements is omitted from the recital. If in addition to such omission, however, which lays the fact open to dispute, one of the surviving witnesses denies the occurrence of the fact, the Surrogate is warranted in refusing probate unless there is other and convincing evidence either from persons present, whether as witnesses or not, or from the attendant circumstances which tend to satisfy him that the omission was accidental and that the re-

quirements so omitted were actually complied with. *Matter of Nelson, supra.*

But it must be noted that the absence of an attestation clause does not invalidate the will, nor raise any presumption of defective execution. *Lewis* v. *Merritt,* 98 N. Y. 207; *Matter of Crane,* 68 App. Div. 355, 357.

§ 345. **Due proof.**—Due execution of a will is presumed although all the witnesses are dead, provided their handwriting be proved as required by the Code, even though there is an attestation clause defective in respect of some one of the essential requirements. *Price* v. *Brown,* 1 Bradf. 291. See § 300, *ante,* discussing § 2620 of the Code. But in such case it is proper for the Surrogate to require proof of "other circumstances" under § 2620. See *Brown* v. *Clarke,* 77 N. Y. 369. Surrogate Fitzgerald in a recent case (*Matter of the Will of John Oliver,* 13 Misc. 466), reviewed the cases and stated what are the "other circumstances" which in the judgment of a Surrogate should be sufficient to prove the will within the meaning of § 2620. The learned Surrogate uses this language at page 473: "I have before me proof of the handwritings of the testator and of his deceased witnesses; a will reasonable in its provisions when the circumstances of the family are considered, the scheme of which was suggested in part, but as a whole was approved by the testator; his declarations as to the manner in which it was executed, showing that he knew the requisites of the execution, and that all the facts were in conformity with the statute, and the whole transaction from beginning to end in apparent good faith with nothing to raise a suspicion to the contrary; and the paper was preserved for ten years with no suggestion of dissatisfaction with its provisions. These facts, under the decisions, would be ample proof to admit the will in evidence on the trial of an action, when its admission might go far to determine, if it would not be conclusive of, the rights of the parties to the controversy, and under § 2620 of the Code, already cited, the facts are equally effective to prove its execution in a special proceeding on the probate of a will in this court.

"I hold that the will was duly executed and I will sign a decree admitting it to probate." So Surrogate Calvin, where two of the witnesses were dead and the handwriting of a testator and such witnesses was proved and there was a full attestation clause, took into consideration the fact that the testator was a lawyer and the will was in his handwriting, as circumstances tending to show regularity in execution. *Williamson* v. *Williamson,* 2 Redf. 449. In addition, in this case there was a third witness who corroborated the attestation clause in all respects. Where a witness did not recollect distinctly the occurrences at the time of execution but on reading the attestation clause testified that he believed it was true in its recital of the facts, the will was admitted to probate. *In re Klett,* 3 Misc. 385.

Where the subscribing witnesses are strangers to the testator, while their testimony is sufficient to prove due execution (*Marx* v. *McGlinn,* 88 N. Y. 357), it is proper to identify the testator by proving his handwriting or by any other sufficient method. *Mowry* v. *Silber,* 2 Bradf. 133.

See also *Simpson's Will*, 2 Redf. 29; *Peebles* v. *Case*, 2 Bradf. 226, which see for full discussion of circumstantial evidence where witnesses deny or forget the execution, citing *Jackson* v. *Christman*, 4 Wend. 277, where Justice Sutherland said: "If the subscribing witnesses all swear that the will was not duly executed, the devisee may notwithstanding go into circumstantial evidence to prove its due execution."

While it has been held that the testimony of persons present at the execution of a will other than the subscribing witnesses, is not entitled to the same weight as that of such witnesses (*Matter of Higgins*, 94 N. Y. 554), on the principle doubtless that the minds of the subscribing witnesses being addressed to the fact of execution are more likely to be actually retentive of the circumstances, yet this will not be true where the third person happens to be the lawyer superintending the execution of the will and familiar with the legal requirements, particularly if the subscribing witnesses are persons who are not shown to possess knowledge of the essential elements of a valid execution. See *Egan* v. *Pease*, 4 Dem. 301; *Matter of Cornell*, 89 App. Div. 412. See *ante*, at page 288, as to when an attorney, not a subscribing witness, may testify, i. e., where testator has waived the statute.

Where the will is holographic and particularly where the testator is shown to have been familiar with the requirements essential to due execution, there is some presumption so far as the acts of the testator are concerned that he complied with the statute. See *Lawrence* v. *Norton*, 45 Barb. 448; *Matter of Buckley*, 2 N. Y. Supp. 24; *Williamson* v. *Williamson*, 2 Redf. 449; *Matter of Stillman*, 9 N. Y. Supp. 446. But in *Matter of Turrell*, 28 Misc. 106, aff'd 47 App. Div. 561, and 166 N. Y. 330, where witness was asked to witness a "document" it was held insufficient, though the "document" was a holographic will, citing *Matter of Beckett*, 103 N. Y. 167, 174. See also *Lewis* v. *Lewis*, 11 N. Y. 220; *Matter of Dale*, 56 Hun, 169; *Matter of Eldred*, 109 App. Div. 777. In *Matter of Moor*, 109 App. Div. 762, it is said: "In proving the execution of a will of that kind, the evidence of its publication may be relaxed somewhat." See also *Matter of Palma*, 42 Misc. 469.

TESTAMENTARY CAPACITY

§ 346. **Presumption that everyone is compos mentis.**—See Jarman on Wills, ch. 3, on personal disabilities of testators, Redf. on Wills, 4th ed., vol. 1, ch. 4, on mental capacity requisite to execute a valid will, Schouler on Wills, 2d ed., part 2, ch. 1, on capacity and incapacity to make a will.

It has already been stated that the proponent must sustain the burden of proof, and in offering his evidence in support of the will must make out a *prima facie* case as to the testator being at the time the will is alleged to have been executed competent in the eyes of the law to dispose of his property. The proponent, however, has in his favor the legal presumption that every man is *compos mentis*. The provisions of the Revised Statutes which permit the making of a will of personal property by any male of the age

of eighteen years or upwards or any female of the age of sixteen years or upwards "of sound mind and memory," and the making of a will of real property of all persons except "idiots, persons of unsound mind and infants," are the provisions under which the law of testamentary capacity in this State has developed. The party propounding the will is bound to prove to the satisfaction of the court that the testator was at the time of making and publishing the document propounded as his will "of sound and disposing mind and memory." *Delafield* v. *Parish*, 25 N. Y. 9. See also *Ramsdell* v. *Viele*, 6 Dem. 244, citing *Harper* v. *Harper*, 1 T. C. 355; *Kingsley* v. *Blanchard*, 66 Barb. 317, 322; *Miller* v. *White*, 5 Redf. 320; *Matter of Cottrell*, 95 N. Y. 336; *Cooper* v. *Benedict*, 3 Dem. 136; *Matter of Freeman*, 46 Hun, 467; *Matter of Goodwin*, 95 App. Div. 183.

Of course if it develops upon the proponent's case that the testator was very old, or very sick, or very weak, or the subject of habits of intoxication or other self-indulgences from which physical or mental weakness might develop, the burden upon the proponent is increased and he will have to offer clear and convincing proof that the testator's mind accompanied the act of execution. See *Matter of Hitchcock*, 16 Weekly Dig. 533; *McSorley* v. *McSorley*, 2 Bradf. 188; *Loder* v. *Whelpley*, 111 N. Y. 239. See *Hyatt* v. *Lunnin*, 1 Dem. 14, 20. So in *Weir* v. *Fitzgerald*, 2 Bradf. 42, the court held, something more than formal proof of execution is necessary to establish the validity of a will when from the infirmness of the testator or the circumstances attending the transaction the usual inference cannot be drawn from the execution itself.

§ 347. **What is testamentary capacity.**—In the first place the age of the testator is a material fact. The statutes fix the minimum age when persons of sound mind may execute a will; this has been held to indicate the judgment of the legislature that a person under that age is not of sufficient mental capacity presumably, though with ordinary intelligence, to execute such an instrument. See *Townsend* v. *Bogart*, 5 Redf. 93, 105. But once the age which the statute fixes as the age at which persons may make wills has been reached, then there is no presumption from mere advanced age without proof of other circumstances of mental unsoundness; or as Judge Rollins puts it, "no man can live so long as to be legally incapable by the mere lapse of years, from ordering the disposition which shall after his death be made of his estate." *Matter of Henry*, 18 Misc. 149; *Matter of Halbert*, 15 Misc. 308; *Matter of Pike*, 83 Hun, 327; *Matter of Otis's Will*, 22 N. Y. Supp. 1060; *In re Carver's Will*, 23 N. Y. Supp. 753; *Cornwell* v. *Riker*, 2 Dem. 354, 366, citing *Van Alst* v. *Hunter*, 5 Johns. Ch. 158; *Clarke* v. *Fisher*, 1 Paige, 171; *Horn* v. *Pullman*, 72 N. Y. 276; *Maverick* v. *Reynolds*, 2 Bradf. 360; *Moore* v. *Moore*, 2 Bradf. 261; *Leaycraft* v. *Simmons*, 3 Bradf. 35; *Carroll* v. *Norton*, 3 Bradf. 291; *Crolius* v. *Stark*, 64 Barb. 112.

The general principles of law in relation to the capacity of a person to make a will have long been settled. So Chancellor Walworth declared (*Clarke* v. *Fisher*, 1 Paige, 171, 173) that "the testator must be of sound and disposing mind and memory so as to be capable of making a testa-

mentary disposition of his property with sense and judgment in reference to the situation and amount of such property, and to the relative claims of the different persons who are or might be the objects of his bounty." *Stewart* v. *Lispenard*, 26 Wend. 255, 306, 311, 312; *Blanchard* v. *Nestle*, 3 Denio, 37. The rule as to what constitutes testamentary capacity has been variously stated, but nowhere perhaps more clearly than in the leading case of *Delafield* v. *Parish*, 25 N. Y. 9, to wit: "It is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relation to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the Statute of Wills, a person of sound mind and memory, and is competent to dispose of his estate by will." See also *Matter of Townsend*, 75 Hun, 593; *Matter of Seagrist*, 1 App. Div. 615, 620; *Matter of Carey*, 14 Misc. 486; *Matter of Will of Snelling*, 136 N. Y. 515, 517; *Matter of Flansburgh*, 82 Hun, 49; *Matter of McGraw*, 9 App. Div. 372; *Matter of Bolles*, 37 Misc. 562, 566; *Van Guysling* v. *Van Kuren*, 35 N. Y. 70; *Matter of Martin*, 98 N. Y. 193. See *Lavin* v. *Thomas*, 123 App. Div. 113. The general line along which all the cases have been decided is very clearly discussed by Senator Verplanck, in *Stewart* v. *Lispenard*, 26 Wend. 255, at page 306: "When the testator is shown to possess such a rational capacity as the great majority of men possess, that is sufficient to establish his will. 'When this can be truly predicated, bare execution is sufficient' (per Sir J. Nichol, 1 Hagg. R. 385); no matter how arbitrary its provisions, or how hard and unequal may be its operation on his family. On the other hand, when a total deprivation of reason is shown, whether from birth, as in idiocy, or from the entire subsequent overthrow of the understanding, whether permanently or existing only at the time of execution, further inquiry is needless; the will is itself a nullity, however just and prudent in its provisions, and with whatever fairness of intention it may have been obtained by well meaning friends. This intermediate class, who fall below the most ordinary standard of sound and healthy minds, whether from the partial disease of one faculty, or the general dullness and torpor of the understanding, are not on that account interdicted from the common rights of citizens, and least of all from that of testamentary disposal. But their defect of intellect may furnish most essential and powerful evidence, in union with other proof, that some particular will or codicil was obtained by fraud and delusion; that it had not the consent of the will and understanding, and was not executed by one who in *that respect* was of a sound and disposing mind and memory. As in the former class of cases, there is a general legal disability, because the party, from total unsoundness of

mind and memory is unable to consent, with understanding, to any legal act whatever; so, in the latter instances, there may be shown an absence of consent to the particular will, from inability to comprehend its effect and nature." See also *Horn* v. *Pullman*, 72 N. Y. 269, 276.

§ 348. **Same subject.**—It has already been intimated that mere advanced age does not create any presumption of lack of testamentary capacity; but it is always a most material inquiry as to whether by reason of advanced age the testator's powers have been thereby impaired and weakened to the extent of rendering him incapable of making a lawful will. *Horn* v. *Pullman*, 72 N. Y. 269; *Van Guysling* v. *Van Kuren*, 35 N. Y. 70, 74; *Bleeker* v. *Lynch*, 1 Bradf. 458, 472; *Matter of Metcalf*, 16 Misc. 180, 182, citing *Matter of Carver*, 3 Misc. 573. So in *Matter of Dwyer*, 29 Misc. 382, it was held that the marriage of a woman seventy years old with a much younger man, of itself, though foolish, did not rebut the presumption of sanity. See *Matter of Barbineau*, 27 Misc. 417. In *Matter of Brower*, 112 App. Div. 370, capacity was predicated of a testatrix ninety-six years old.

It has been held that there is no standard of mental capacity which it is necessary for a person to possess to enable him to make a disposition of his property by will; all that is required is that the testator have sufficient intelligence and mental power to understand what he is doing and the legal effect of the instrument he is making. *In re Otis's Will*, 22 N. Y. Supp. 1060; *In re Gray's Will*, 5 N. Y. Supp. 464. Therefore no presumption arises from the mere fact of old age if the faculties be unclouded and the testator have competent understanding; which necessarily must be determined from the facts of each particular case. See *Delafield* v. *Parish*, 25 N. Y. 9; *Clark* v. *Davis*, 1 Redf. 249. Chancellor Kent (*Van Alst* v. *Hunter*, 5 Johns. Ch. 158) laid down the rule which has always been followed that the law looks only to the competency of the understanding and neither age nor sickness nor extreme distress nor debility of body will affect the capacity to make a will if sufficient intelligence remains. So Judge Andrews says (*Horn* v. *Pullman, supra*), incapacity cannot be inferred from vast age, or a feeble condition of the mind or body; and he adds (72 N. Y. 269, 276), "such a rule would be dangerous in the extreme and the law wisely sustains testamentary disposition made by persons of impaired mental and bodily powers, provided the will is the free act of the testator and he has sufficient intelligence to comprehend the condition of the property and the scope, meaning and effect of the provisions of the will." See *Matter of Conaty*, 26 Misc. 104. So proof that testator was "an old man, feeble in mind and body and could not make his mark unassisted," was held insufficient of itself to show lack of capacity. *Matter of Dixon*, 42 App. Div. 481; *Patterson's Will*, 13 N. Y. Supp. 463. Therefore it may be observed that the existence of physical infirmity whether due to age or illness, merely operates so that the usual inference as to capacity cannot be drawn from the mere formal execution of the will. *Weir* v. *Fitzgerald*, 2 Bradf. 42, 69.

§ 349. **Analysis of discussion.**—The more important decisions in respect of this subject will be discussed under the following heads:

Illness and bodily infirmity.

Eccentricity.

Addiction to the use of liquor, opium, etc.

Idiocy, lunacy and delusions.

§ 350. **Rule of evidence.**—It has been noted in an early chapter that, as to the examination of witnesses, the generic rules in Courts of Record prevail in the Surrogate's Court, e. g., where a legatee under a will has made admissions as to the lack of testator's testamentary capacity as of the date of the will, or even prior thereto, such admissions may be competent and cogent to bind him, were he the only person in interest; but they cannot be held binding on other legatees, for their interest is separate and several. *Matter of Kennedy*, 167 N. Y. 163, 177; *Matter of Myer*, 184 N. Y. 54, 61.

§ 351. **Illness and bodily infirmities.**—The effect of chronic or acute illness or of congenital bodily infirmities must always be taken into account in determining the question of testamentary capacity; but the existence of such illness is by no means conclusive upon the question. *Matter of McLean*, 31 Misc. 703; *Matter of White*, 121 N. Y. 406, 413; *Dobie* v. *Armstrong*, 160 N. Y. 584, 593. The fact that a man is upon his deathbed when he executes a will is no argument against its validity (*Matter of Seagrist*, 1 App. Div. 615, 620); nor will medical testimony to the effect that the testator was very weak, and that his mental powers were impaired, or that he was a mental and physical wreck or incoherent in speech suffice to outweigh positive testimony by other witnesses competent and disinterested to testify to actual facts, from which the court may infer that the testator was possessed of sufficient comprehension to enable him to comprehend generally the existence of his property, to remember the persons who depended upon him, and to decide intelligently as to the propriety of his benefactions to them. *Matter of Seagrist, supra; Opinion of Rumsey*, page 620. The character of the will, plus proof that the testator, while dictating it, was under a powerful dose of morphia, may turn the scale in deciding the question, "Is it, or is it not, the real testamentary desire of the decedent?" *Matter of Simon*, 47 Misc. 552. See also *In re Buckley's Will*, 2 N. Y. Supp. 24, Ransom, Surr. See also *In re Liddy's Will*, 4 N. Y. Supp. 468, Ransom, Surr., the first headnote: "The testimony of the three subscribing witnesses to a will, showing testamentary capacity, will prevail over the opinion of an expert, where to give credence to the latter would be to impute perjury to the former." But where the evidence of the attending physician, as to a condition of stupor or of impairment of faculties or of incoherence on which he bases an opinion as to lack of capacity to transact business or to make a will is corroborated as to the facts on which he bases an opinion by the testimony of the subscribing witnesses or of other persons at the time of execution, probate will be refused. See *Matter of Coop*, 6 N. Y. Supp. 664. Where a testator over ninety years of age met with an accident by which

he fell and broke his thigh, from which injury he died in a short time, and it appeared that he suffered much pain, and was in the language of the witness "a very sick man after the accident," yet it nowhere appeared that his mind was affected or impaired by the accident up to the time of the execution of the will, but it was clear he understood the nature of such will and gave explicit directions in regard to its construction, the will was admitted to probate. *Matter of Harris*, 19 Misc. 388. See also *In re Schreiber's Will*, 5 N. Y. Supp. 47, where testator suffered from Bright's disease and was at times intemperate. In *Matter of Soden*, 38 Misc. 25, probate was refused of a will of a woman of seventy, where the will was proven to be in conflict with previously expressed testamentary intentions and was executed when she was a victim of tumor in the face, paralysis, progressive aphasia and symptoms of paresis, and afflicted with a delusion. So, where a person tenaciously holds to a belief that a certain state of affairs exists, which do not, he is suffering from a delusion, and where a will is governed by such a delusion it is invalid. *Matter of Lapham*, 19 Misc. Rep. 71; *Matter of Soden*, 38 Misc. 25, 27.

§ 352. **Same—Paresis; heredity.**—In *Matter of Myer*, 184 N. Y. 54, the attack on capacity was based on paresis. Contestant, in a proceeding to revoke probate, sought to prove this condition by calling two physicians who had attended the brother and the mother of testatrix. These physicians testified that both their patients had general paresis. The Court of Appeals, reversing the courts below, held that such testimony was prohibited by § 834, and not within the exceptions of § 836; also, that there was no proof, anyhow, that the paresis as to which they testified was of the transmissible type so as to involve a hereditary taint in testator. The general rule is stated to be: "Where the mental soundness of an individual is in question, the sanity of the blood relations in the ancestral line may be shown, as tending to establish the fact in issue," citing *Welsh* v. *People*, 88 N. Y. 458. But "there must be evidence that such disease is hereditary or transmissible." *Ibid.*

Admissibility of proof of hereditary tendency is upheld only in aid or support of other evidence going directly to show disordered mind in the person whose capacity is under examination. *Pringle* v. *Burroughs*, 185 N. Y. 375, 381, aff'g 100 App. Div. 366.

§ 353. **Same—General debility or paralysis.**—In *Matter of Rounds*, 25 Misc. Rep. 101, it was held of a will executed when the testatrix was in a very feeble condition, being afflicted with creeping palsy, and a witness testifying to an expressed desire of the testatrix for a different disposition of the property, than that made, that probate was properly refused, citing *Delafield* v. *Parish*, 25 N. Y. 9; *Van Guysling* v. *Van Kuren*, 35 *id.* 70. A mere progressive paralysis although conducing to, or resulting in death, and extending over a period of years will not raise any presumption of incapacity, if the decedent continued to administer all his business affairs with prudence and judgment. *In re Birdsall's Will*, 13 N. Y. 421. Incompetency may, under acute recurring attacks, be intermittent. *Matter*

of Winne, 50 Misc. 113. It may be observed that the intimation in the celebrated case of *Stewart* v. *Lispenard*, 26 Wend. 255 to 306, that a man's capacity may be perfect to dispose of his property by will, although wholly inadequate to the management of other business, as for instance to make contracts for the purchase or sale of property, has not been wholly approved in subsequent decisions. See *Delafield* v. *Parish*, *supra*. And proof of a testator's ability to transact his ordinary business affairs with judgment and discretion, and to manage his property with reasonable prudence, will generally be considered very strong if not conclusive evidence of testamentary capacity. See *Matter of Birdsall's Will*, *supra*; *Matter of Kiedaisch*, 2 Connoly, 435; *Matter of Gray*, 5 N. Y. Supp. 464; *Coit* v. *Patchen*, 77 N. Y. 533; *Horn* v. *Pullman*, 72 N. Y. 269; *Pilling* v. *Pilling*, 45 Barb. 92; *Crolius* v. *Stark*, 64 Barb. 112; *Heyzer* v. *Morris*, 110 App. Div. 313. So evidence of some acute serious illness during which the testator may well be said to have been incapable of making a will, must if it is desired to show lack of capacity at the time of execution be followed by affirmative proof showing that the effect of such illness or attack continued; for there is no presumption that it does. Just as has been held in the case of intoxication and drunkenness the disability ends when the exciting cause is removed. *In re Johnson's Will*, 27 N. Y. Supp. 649, 650, Fitzgerald, Surr. In this it differs from insanity which once shown to exist is presumed to continue until there is proof that intelligence and reason have reasserted themselves. Where a paralytic attack is of so severe a character as to completely alter the testator's disposition and personal habits, destroying his aptitude for business and results in moroseness and delusions, these facts may raise a presumption of impairment of the mental powers, but this presumption may always be met by proof that at the time of execution the testator knew what he was about and exercised his judgment, will, and memory in the testamentary act. See *Sheldon* v. *Dow*, 1 Dem. 503, and *Delafield* v. *Parish*, 25 N. Y. 1. So where at the time or just prior to the execution of the will the testator has fainted and lost consciousness, this does not prove sufficient mental weakness to render him incapable of executing a will, particularly if, subsequently, the testator refers to the fact of having made a will or to some of the testamentary dispositions contained in the instrument. *Matter of Mahoney*, 34 St. Rep. 183. See also *Cheney* v. *Price*, 90 Hun, 238.

If the Surrogate is satisfied that at the time the will was executed the testator was competent and of sound mind, proof of severe illness prior to that time culminating subsequently in acute mental disorder or in irrational action or dementia is immaterial. *Matter of Davis*, 91 Hun, 209; *Matter of Fricke*, 19 N. Y. Supp. 315. Evidence of subsequent physical or mental weakness is of course proper only as bearing upon the impairment of his mind and body. *Matter of Skaats*, 74 Hun, 462, where the General Term in the First Department (at p. 467) says: "It is conceivable that, by reason of physical and mental weakness, one might be deprived of testamentary capacity just prior and subsequent to a period when such

capacity existed, and the question in all such cases necessarily must be as to the mental condition of the testator at the date when the will was made." Declarations of the testator, while incompetent to prove external facts are admissible on the question of mental capacity or undue influence. *Matter of Woodward*, 167 N. Y. 28; *Matter of Potter*, 161 N. Y. 84; *Waterman* v. *Whitney*, 11 N. Y. 157; *Chambers* v. *Chambers*, 61 App. Div. 299, 308; *Marx* v. *McGlynn*, 88 N. Y. 374; *Matter of Clark*, 40 Hun, 233.

§ 354. **Same—Total breakdown.**—When the disease is one which, if proven to exist, by its very nature involves breaking down of the brain tissues, the decision is easily made. Non experts may testify to acts and symptoms. The expert may give his opinion, by observation or inference, as to the nature and effect of the disease. *Matter of Wendel*, 43 Misc. 571.

§ 355. **Same—Nature of will.**—The unfairness or injustice of a will made by a sick or aged testator, is no proof of lack of testamentary capacity in and of itself. If the disposition is unnatural and inconsistent with the obligation of the testator, it then becomes the duty of the proponents to give some explanation. *Matter of Budlong*, 126 N. Y. 423; *Matter of Soden*, 38 Misc. 25, 27. *Matter of Donohue*, 97 App. Div. 205. An unnatural disinheritance of an infant child taken together with testimony as to mental weakness requires submission to a jury, in an action under § 2653*a*. *Byrne* v. *Byrne*, 109 App. Div. 476. But, if a testator says in his will that the disinherison of a child is for undutifulness, the proponent is not under any burden of accounting therefor. *Matter of Arensburg*, 120 App. Div. 463, citing *Ross* v. *Gleason*, 115 N. Y. 664. Of course, if the disinheritance is the result of fraud or undue influence a different situation is presented. (See below.)

In *Matter of Lowenthal*, 2 Misc. Rep. 323, it was held that where a testator died of paralytic dementia, having made his will while in the first stages of the disease and giving his wife but a small sum, where their devotion prior to that time was marked, a finding of incompetency was sustained.

It is proper to consider the provisions of the will in determining this question (*La Bau* v. *Vanderbilt*, 3 Redf. 384), but the crucial inquiry is, was the testator *compos mentis* at the time of execution (*Hoyt* v. *Ross*, 20 N. Y. Supp. 521); if he was, his will must stand, although it is evidently the result of anger or ill-will. *Matter of Suydam*, 84 Hun, 514.

§ 356. **Forgetfulness and mistake.**—Failure of memory is not of itself evidence of lack of mental capacity, nor will the mistakes consequent thereon invalidate a will (*Matter of Stewart*, 13 N. Y. Supp. 219; *Matter of Lang*, 9 Misc. 521); still if the failure of memory is so complete as that the testator cannot recognize or recall those dependent upon his bounty or so marked as to obscure his testamentary intentions, it may be sufficient when viewed in connection with other circumstances to warrant a finding of lack of testamentary capacity. The rule seems to be that where defect of memory is proven it will not be sufficient to create incompetency unless it be total or appertain to things very essential. See *Bleeker* v. *Lynch*, 1

Bradf. 458, 466, 467. See also *Reynolds* v. *Root*, 62 Barb. 250. See also *Children's Aid Society* v. *Loveridge*, 70 N. Y. 387.

§ 357. **Eccentricities.**—Contestants of wills on the ground of lack of testamentary capacity, frequently rely unduly upon eccentricities displayed by the testator in his habits or conduct, particularly when such eccentricities begin and seem to develop from and after paralytic or apoplectic seizures or chronic diseases. Undoubtedly such eccentricities are symptomatic, and may be proven as facts from which the court may be asked to infer mental unsoundness; and while as Lord Brougham observed, it is not the duty of the court to strain after probate, and the proponent is undoubtedly bound to sustain the burden of proof and satisfy the court that the testator was competent to make the will propounded, nevertheless Surrogates are loath to predicate insanity or unsoundness of mind upon acts often innocent and harmless, occasioned by individualities of disposition or peculiarities of circumstance. The leading case already freely cited (*Delafield* v. *Parish*, 25 N. Y. 9), was one as the headnote says: "Where the question of fact, whether the deceased possessed that moderate degree of reason and understanding which is required to enable one to dispose of his property by will, was determined in the negative." In that case prior to the paralytic attack resulting in the conditions which were made the basis of contest the testator was a wealthy, refined gentleman, hospitable, of great command of temper and strict observance of decorum. The Court of Appeals refers with some detail to the melancholy developments resultant from the attack of paralysis, that he was often violent, vulgar, offensive and rude, showing as the court remarks, "the changed man, the forgetfulness of the gentleman, and the habits of the imbecile." The numerous eccentricities of character and conduct, totally inconsistent with and opposite to his character and conduct prior to his paralytic attack, the court held were most significant and material on the point of testamentary capacity. See opinion of Davies, J., at page 47.

So Surrogate Rollins (*Cornwell* v. *Riker*, 2 Dem. 354, 368), observes: "Evidence respecting eccentricities of dress or demeanor, weakness of memory, absurdities of speech or conduct, and such like things, on the part of a decedent, is admissible in opposition to the probate of a paper offered as his will, only because it tends to show, in a greater or less degree, that, in the making and execution of such a paper, such decedent did not thoroughly understand what he was doing; was not able to appreciate the nature and extent of his possessions; could not, after calling to mind the persons who might naturally expect, because of the claim of kinship or for other reason, to participate in his bounty, form an intelligent purpose as to whom he would make, and whom he would refuse to make, his testamentary beneficiaries."

In the case last cited the eccentricities claimed to be at variance not only with the demeanor that persons endowed with reason and intelligence exhibit, but also with the habits of the decedent herself earlier in life, were proven in great detail before the Surrogate; they tended to

establish penuriousness, conspicuous untidiness, want of delicacy in certain features of her daily life; it was claimed that there was a great and general impairment of all her mental faculties, that she was slovenly as to the care of her body, and as to the fashion of her apparel, coarse and vulgar in her tastes, grossly offensive in her personal habits, and well-nigh bereft of her powers of memory. Nevertheless the Surrogate found that the will expressed the free, unrestrained, deliberate purpose of the decedent and that she was of sound mind and memory when she published it. *Id.* at page 395. See also *Matter of Murphy*, 41 App. Div. 153; *Ivison* v. *Ivison*, 80 App. Div. 599; *Matter of Armstrong*, 55 Misc. 487.

In this connection it is proper to note that the witnesses must be interrogated as to facts which they have observed. *Petrie* v. *Petrie*, 126 N. Y. 683, affi'g 6 N. Y. Supp. 831. The Court of Appeals has summarized the rule in this regard. *Hewlett* v. *Wood*, 55 N. Y. 634.

"The general rule is that witnesses must speak of facts alone, and may not utter opinions, conclusions or inferences. To this rule there are these exceptions.

"The subscribing witness to a will may speak as to the sanity of the testator at the time of executing a will. Powell on Devisees, 69; *Clapp* v. *Fullerton*, 34 N. Y. 190.

"Experts may give their opinions (see *post*, page 369) upon questions of trade, skill, or science from the facts proven, or the circumstances noted by themselves. Persons not experts may testify to facts and incidents, known or observed by them, in relation to a testator, which tend to show soundness of mind or the contrary, and may testify to the impression produced upon them by what they beheld or heard, and whether the acts and declarations thus testified to seemed to them rational or irrational (*Clapp* v. *Fullerton*, *supra*); but they may not express any opinion as to the general soundness or unsoundness of the mind of the testator (*People* v. *O'Brien*, 36 N. Y. 276; *Real* v. *People*, 42 *id.* 270), nor as to the competency of the testator to execute a will. 36 N. Y. 276; *De Witt* v. *Barley*, 17 *id.* 340. In a later case (*Holcomb* v. *Holcomb*, 95 N. Y. 316), Judge Danforth reviewed the cases in this connection. *De Witt* v. *Barley*, 17 N. Y. 340; *Clapp* v. *Fullerton*, 34 N. Y. 190; *O'Brien* v. *People*, 36 N. Y. 276; *Real* v. *People*, 42 N. Y. 270; *Hewlett* v. *Wood*, *supra*; *Rider* v. *Miller*, 86 N. Y. 507; *Matter of Ross*, 87 N. Y. 514. Judge Danforth says, citing *Clapp* v. *Fullerton*, that when a layman is examined as to facts within his own knowledge and observation tending to show the soundness or unsoundness of a testator's mind, he may characterize as rational or irrational the acts to which he testifies.

"But to render his opinion admissible even to this extent, it must be limited to the conclusions from the specific facts he discloses; he may testify to the impression produced by what he witnesses, but he is not legally competent to express an opinion on the general question whether the mind of the testator was sound or unsound." This limitation applied to such witnesses is made more apparent by the exception in favor of sub-

scribing witnesses; they may be required to state not only such facts as they remember, but their own conviction of the testator's capacity. *Clapp* v. *Fullerton*, 34 N. Y. 190. See also *Matter of Peck*, 17 N. Y. Supp. 248; *Matter of Folts*, 71 Hun, 492. This exception, however, also has its limitations; thus where a subscribing witness was asked, "Do you think the testator had mind sufficient, at the time he is alleged to have executed that will, to give those specific directions with reference to the disposition of this property?" the General Term (*Matter of McCarthy*, 5 Hun, 7, Barker, P. J.) held the admission of the question error, on the ground that the inquiry was not limited to an expression of the opinion of the witness as to the sanity of the testator at the time of the execution of the will so as to bring the case within the rule stated in *Clapp* v. *Fullerton* and *Hewlett* v. *Wood*. The court adds, "in determining the question of testamentary capacity on the part of the testator in particular instances whenever the question arises, the inquiry is not, had the testator capacity to make the will in question, but, whether he was of sound mind and memory at the time of its execution." Mere opinions of witnesses as to the testator's lack of capacity will be given little weight aside from the facts upon which they are claimed to be based (*Nexsen* v. *Nexsen*, 2 Keyes, 229), and even though the witnesses be distinguished experts their conclusions and opinions may be rejected or disregarded when they are based upon premises which the Surrogate is unable to infer from the facts proven. *Cornwell* v. *Riker*, 2 Dem. 354, 368; *Harper* v. *Harper*, 1 S. C. 351; *Matter of Connor*, 7 N. Y. Supp. 855; *Matter of Buckley*, 2 N. Y. Supp. 24; *Matter of McArthur*, 12 N. Y. Supp. 822. And their competency may be tested upon cross-examination. *Hoag* v. *Wright*, 174 N. Y. 36.

In *Matter of Myer*, 184 N. Y. 54, the following was in the record: "Q. Did such acts and conversations make any impression on you as to their being rational or irrational? A. I think they were irrational" (stricken out). Whereupon he answered: "Yes, they did. Q. What was the impression made on you? A. She was irrational, *I thought.*"

Held the last answer should have been stricken out. The question was proper in form; but the answer was an attempt by a lay-witness to give an opinion upon the question of capacity. They can only give their contemporary impressions as to the rationality or irrationality *of the acts* testified to. *Ibid* and cases cited at p. 60.

The exception taken on this record appears hypertechnical. In fact the court concedes that alone it would not justify a reversal. It was as nearly exact and direct as a woman and lay-witness could be expected to give. Even an expert's opinion evidence carries only the weight of its logical sequence from stated facts, and some latitude, in non-jury cases is preferable to a rule which would practically require the "coaching" of witnesses. See *Wyse* v. *Wyse*, 155 N. Y. 367.

§ 358. **Capacity for business.**—Referring generally to insane delusions, intoxication, existence of prejudices in the mind, sudden fits of anger, melancholia, etc., it may be said that the possession by testator of a ca-

pacity for transacting his business and amassing an estate, establishes a strong presumption that the testator also has a capacity to direct how that estate shall be disposed of after his death. *Matter of Murphy*, 41 App. Div. 153, 156 (where court described testatrix as "shrewd, rugged old woman," of "whims and filth," "parsimoniously clinging to her property"). Contestants of a will can often prove eccentricity of character by emphasizing and exaggerating idiosyncrasies which have formed a part of testator's character and individuality among those who knew him, but which emphasized may, to an outsider, and one unacquainted with his character, make him appear to border on the insane.

The knowledge of this fact will make courts extra cautious in their consideration of such evidence; see *Matter of Murphy*, 41 App. Div. 153, 156; particularly when the same is advanced by interested witnesses. The Court of Appeals has summarized this rule by saying (*Brick* v. *Brick*, 66 N. Y. 144, 148, Rapallo, J.), "It would be indeed strange that a person should have the capacity to acquire a large fortune by his personal industry and intelligence, and from causes existing at the same time be held not to have sufficient mental capacity to dispose of it by will."

§ 359. **Addiction to the use of liquor, opium, etc.**—The leading case in this connection is *Peck* v. *Carey*, 27 N. Y. 9. In that case the testator for some time before making his will had become excessively addicted to the use of spirituous liquors; had experienced several attacks of the particular mania arising from such habits; had more than once attempted to put an end to his existence by means of poisonous drugs; and eventually committed suicide; there was testimony to the effect that he indulged in habits of licentiousness and was scarcely ever sober. Denio, Ch. J., observed, that in order to avoid a will made by an intemperate person it must be proved that he was so excited by liquor, or so conducted himself during the particular act as to be at the moment legally disqualified from giving effect to it; and adds it is not to be understood that a will made by one who is at the time under the influence of intoxicating liquor is for that reason void . . . . for under a slight degree of excitement from liquor, the memory and understanding may be as correct as in the total absence of any exciting cause. A drunkard may make a valid will even if at the time of the execution of the instrument he is under the influence of liquor, provided he comprehends the nature and extent and disposition of his estate, his relation to those who have or might have come upon his bounty and is free from undue influence, fraud or coercion. *Matter of Reed*, 2 Connoly, 403, 405, Ransom, Surr., citing *Peck* v. *Carey*, *supra; Gardner* v. *Gardner*, 22 Wend. 526; *Van Wyck* v. *Brasher*, 81 N. Y. 260. See also *Matter of Sutherland*, 28 Misc. 424, 427; *Cook* v. *White*, 43 App. Div. 388, 392; *Matter of Hewitt*, 31 Misc. 81. See also *Matter of Will of Johnson*, 7 Misc. 220, Fitzgerald, Surr. The reason for this rule is stated to be that the most pronounced drunkards have times when they are sober and have perfectly lucid intervals in which every act performed is of course legal and binding, their deranged condition of mind is transitory and when the ex-

citing cause is removed and the effects have disappeared the person is capable in the eyes of the law. See *Matter of Halbert*, 15 Misc. 308, and cases cited at page 311; and *Matter of Tifft*, 55 Misc. 151; *Matter of Feeney*, 55 Misc. 158.

In *Matter of Woolsey*, 17 Misc. 547, the Surrogate found from testimony of the subscribing witnesses that the testator was not drunk at the time the will was executed, although it appeared that he had taken three bottles of whiskey during the day, the will being executed in the evening; he held from all the evidence that the testator's understanding was not clouded or his reason dethroned by actual intoxication at the exact time the will was executed. See also *Matter of Watson*, 12 N. Y. Supp. 115, where a person had been declared to be an habitual drunkard after judicial inquiry. *Matter of Sutherland*, 28 Misc. 424, 427. It was held in several early cases that his will would not therefore be void, but that there must be satisfactory affirmative proof of his mental capacity. *Lewis* v. *Jones*, 50 Barb. 645. See also *Ex parte Patterson*, 4 How. Pr. 34; *McLaughlin's Will*, 2 Redf. 504.

Whether, therefore, the intoxication is habitual or not the court's inquiry is addressed to the question, was the decedent intoxicated at the time of executing the will? If he was, the further inquiry is, whether he was so intoxicated as to disorder his faculties and pervert his judgment sufficiently to incapacitate him. The same rule applies where the indulgence by the testator is in opium or other drugs tending to impair the mental powers or disturb the testator's volition or judgment; the same rule holds that it must appear that the action of the drug at the time of execution was such, that the testator cannot be said to have been in possession of his faculties or to be acting as a free agent. See *Glockner's Will*, 2 N. Y. Supp. 97; *Matter of Lowman's Estate*, 1 Misc. 43.

Where a will was executed under circumstances presenting the question of incapacity by reason of intoxication, but there was no such evidence in regard to a codicil which in express terms ratified the will, the court would uphold the will, upon due proof of the codicil. *Cook* v. *White*, 43 App. Div. 388, 392.

§ 360. **Idiocy, lunacy and insane delusions.**—It has been held that by the words, "a sound mind," in the meaning of the law is not meant a mind which is perfectly balanced and free from all prejudice or passion (*Phillips* v. *Chater*, 1 Dem. 533, 547); nor will mere imbecility of mind incapacitate a testator, if there be sufficient understanding to satisfy the rule, to wit: that the testator must have at the time of executing the will sufficient capacity to comprehend the condition of his property and his relation toward the persons who are or might be objects of his bounty, and the scope and bearing of the provisions of the will. *Wade* v. *Holbrook*, 2 Redf. 378. See also *McLaughlin's Will*, *id.*, page 504. "An imbecile is neither a lunatic nor an idiot." *McGown* v. *Underhill*, 115 App. Div. 638. "Imbecility is not a disqualification for making a will, provided the testator has the capacity which the law requires, and that is determined not by

any mere generalization of his capacity (i. e., by expert opinion that he was imbecile) but from his acts in reference to the particular business in hand." *Ibid.* It has already been noted that mere eccentricities are not enough to disturb testamentary capacity. See cases cited, *supra*, and *Hartwell* v. *McMaster*, 4 Redf. 389, 394. One who is congenitally an idiot comes within the prohibition of the statute and is incompetent to make a will. Insanity, if it is shown to have existed at the time of execution, will also incapacitate. *Matter of Lawrence*, 48 App. Div. 83; *Matter of Richardson*, 51 App. Div. 637. The difficulty had always lain in the question whether the specific acts proven are sufficient to warrant the conclusion that the testator was in fact at such time insane. It has already been noted that insanity or imbecility will not be presumed merely from extreme old age. See cases cited, *supra*, and also *Romaine's Will*, 6 N. Y. Legal Observer, 1056. In regard to imbecility, insanity or insane delusions, the court must judge from the facts. Opinions of medical men and of alienists have no more value than attaches to the reasonableness of their conclusions from the facts from which they testify. Nor is insanity inferable from the mere act of suicide. *Roche* v. *Nason*, 185 N. Y. 128, 137 (105 App. Div. 256), citing *Weed* v. *Mutual Ben. Life Ins. Co.*, 70 N. Y. 561; *Shipman* v. *Protected Home Circle*, 174 N. Y. 398, 405.

In respect to the subject now under discussion the ordinary presumption is that every man is *compos mentis* and he that alleges the contrary must prove it. If testator is proved to have been insane on a date subsequent to that of the will's execution, it cannot affect its validity. *Matter of Lawrence*, 27 Misc. 473. But once lunacy has been shown to have existed, the legal presumption arises that it continues, and the burden of proof then rests upon a proponent to show that the execution of the will took place during a lucid interval. *Matter of Coe*, 47 App. Div. 177; *Carter* v. *Beckwith*, 128 N. Y. 312, 316; *Matter of Lapham*, 19 Misc. 71, 75. See also *Wadsworth* v. *Sharpsteen*, 8 N. Y. 388; *Hughes* v. *Jones*, 116 N. Y. 67; *L'Amoureux* v. *Crosby*, 2 Paige, 422. This presumption arises as soon as a testator has been declared incompetent in lunacy proceedings; it is not conclusive as to testamentary incapacity, but *prima facie* or presumptive evidence thereof. *Matter of Widmayer*, 34 Misc. 439, citing *Matter of Coe*, 47 App. Div. 177; *Matter of Clark*, 57 App. Div. 5; *Lewis* v. *Jones*, 50 Barb. 645; *Wadsworth* v. *Sharpsteen*, 8 N. Y. 395. But if a person so declared a lunatic is subsequently declared to have recovered his sanity, a will executed thereafter has the benefit of the presumption of his continued sanity; if subsequently he is again declared insane it is for the Surrogate to determine from all the available evidence whether at the time of the execution of the will he possessed testamentary capacity; in such a case a Surrogate will attach more importance to the testimony of witnesses who observed the testator's daily life and conduct, than to the evidence of medical experts in answer to hypothetical questions. See *Matter of Kiedaisch*, 13 N. Y. Supp. 255. In the case last cited Surrogate Ransom referred in his opinion at page 260, to the *Pendleton* case, 5 N. Y.

Supp. 849, where the will of a person who at the time the will was made was under the care and custody of a commission in lunacy, was admitted to probate. The learned Surrogate intimated that the case was an authority only to the effect that the existence of the commission in lunacy was not conclusive upon the question of capacity and that the court had a right to inquire independently into the facts to ascertain whether the alleged insane person was in fact sane or executed a will in a lucid interval. See also *Van Guysling* v. *Van Kuren*, 35 N. Y. 70.

§ 361. **The test of insanity.**—It is by no means always or frequently the case that the testator who is alleged to have been insane had in fact passed the scrutiny of judicial proceedings *de lunatico inquirendo*, and the court is usually asked to infer that he was insane from his peculiar conduct or the extraordinary character of his disposition. The cases will fall under two general heads:

(*a*) Where alleged insanity is based upon the existence of insane delusions.

(*b*) Where it is claimed to follow as an irresistible inference from the condition of health or the eccentric behavior of the decedent.

§ 362. **Insane delusions.**—First then as to predicating insanity upon the existence of insane delusions. In this connection it will be noted from the cases about to be discussed that two facts must be proved:

1. The insane delusion must be shown to have existed.

2. The insane delusion must be shown to have operated on the mind of the testator in making the particular will sought to be invalidated. See *Matter of Richardson*, 51 App. Div. 637, 638.

In the leading case in this State (*Society* v. *Hopper*, 33 N. Y. 624), Judge Denio, in delivering the opinion of the court, enunciates the principle governing this class of cases of dementia, or loss of mind and intellect, "The true test of insanity is mental delusion. . . . If a person persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion, and delusion in that sense is insanity. Such a person is essentially mad or insane on those subjects, though on other subjects he may reason, act, and speak like a sensible man. If the deceased was unconsciously laboring under a delusion as thus defined, in respect to his wife and family connections, who would naturally have been the objects of his testamentary bounty when he executed his will, or when he dictated it, and the courts can see that its dispository provisions were or might have been caused or affected by the delusion, the instrument is not his will, and cannot be supported as such in a court of justice. The conduct and designs which he imputed to his wife and relations were such as, upon the assumption of their existence, should have justly excluded them from all share in the succession of his estate." See also definition in *In re Smith's Will*, 24 N. Y. Supp. 928.

In the light of this opinion it is manifest, first, that the courts will require

proof that the testator's mind was possessed, (*a*) of a conviction, (*b*) actually influencing his conduct, (*c*) which has no foundation in the facts. These three conditions should be shown to coexist.

§ 363. **Insane delusions, spiritualism.**—Having observed that the three conditions above noted must coexist, to wit: a conviction, actually influencing conduct, without reasonable foundation in fact, it is important to note first, that the court will not go in its inquiry into those realms of thought in which all persons are free to indulge in independent individual speculation unless a clear case is made out amounting to religious mania, and even in such cases the existence of such religious mania is deemed symptomatic and is only important as bearing upon the general sanity or insanity of the decedent. It is manifest, for example, that the courts will not regard infidelity or a lack of adherence to generally accepted religious truths as indicating insanity in the eye of the law whatever may be the theological view. To illustrate, Surrogate Coffin observes (*Hartwell* v. *McMaster*, 4 Redf. 389, 394), "The testator's want of belief in the saving efficacy of infant baptism, and of the doctrine of the Real Presence are utterly without significance as evidence of his insanity." Again Surrogate Calder (*Matter of Halbert*, 15 Misc. 308, 318), observes, "We are not to treat spiritualism theologically but legally, in its application to the testamentary capacity of the testatrix. It matters not what our individual opinion may be as to the facts, formalities or claims of spiritualism." In that case it appeared that the testatrix had been a spiritualist and had done many things consistent with the teachings of spiritualism. "She visited the cemetery and communed with the spirits of her deceased husbands; set apart a bedroom for them in order that they might have a place to rest when they visited her; placed at the table a sufficient number of plates for them," etc. But the learned Surrogate observed, "It is well settled that believers in this faith, when testamentary capacity is in question, must be considered in the same light as they who take part in any other religious ceremony," citing *Keeler* v. *Keeler*, 22 N. Y. St. Rep. 439; *Matter of Vanderbilt*, 3 Redf. 384; *Matter of Vedder*, 14 St. Rep. 470. So again, Surrogate Calvin (*Matter of Cornelius Vanderbilt*, 3 Redf., 384) held that evidence of a belief in clairvoyance on the part of a testator might be material, provided the will sought to be proved was the direct offspring of the belief. He cites the case of *Robertson* v. *Adam*, Redf. Cases upon Wills, 367, where the will was shown to be the direct offspring of the testatrix's assumed communication with her deceased husband, and her belief in regard to her son-in-law being possessed of a supernatural control over his wife, and of himself being under the immediate control of evil spirits; and he cites an excellent definition by Judge Redfield of an insane delusion as, "the result of a false perception of the mind that cannot be cured or dispelled by any amount of evidence or argument addressed to the mind while in this insane state." Mere speculative opinion upon religious questions however singular or absurd in the common judgment, will not affect the validity of wills made by such persons. No belief as to future

rewards and punishments or principles of justice upon which they are to be administered, or other religious creed, can be regarded as evidence of insanity, since there is no test by which their truth can be ascertained so as to determine whether they are delusions or not, and if so, whether they will yield to reason or not. *Will of Cornelius Vanderbilt*, at page 388, *supra*. In *Matter of Brush*, 35 Misc. 689, it was held that a belief in Christian Science, when founded on religious convictions, is consistent with testamentary capacity, and beyond the scope of judicial inquiry. In fact, the truth or falsity of religious beliefs has always been held an improper subject of judicial inquiry. *Keeler* v. *Keeler*, 20 N. Y. St. Rep. 439.

In the case of *Thompson* v. *Quimby*, 2 Bradf. 449, where a great deal of evidence was given as to singular beliefs held by the testator as to the Philosopher's Stone, as to his ability to locate the treasures of Captain Kidd; and as to his having a spiritual eye by which he could discern the presence of ghosts, and of spirits in the moon, Surrogate Bradford discussed the question at great length (see especially page 474 *et seq.*), and commented upon the danger of confounding the results of ignorance, early impression, credulity, and superstition with the phenomena of mania, and noted that it would be most dangerous as erecting a standard of sanity dependent upon education and knowledge; and he observes that where peculiar speculative beliefs are the result of impressions of childhood they are not only very seldom throughly eradicated, but have very little evidential value in this connection, as compared to cases where they break out suddenly or at an advanced stage of life or subsequent to some sudden illness or seizure. See exhaustive statement of deductions and conclusions at the end of *Thompson* v. *Quimby*, at pages 507, 508.

In *Matter of Rohe*, 22 Misc. 415, Surrogate Marcus observed, that while the testimony offered proved the fact that the testatrix was a believer in spiritualism and that she was a constant attendant upon spiritualistic séances there was not sufficient proof that either the spirits or mediums in which she believed or with which she had relations operated to induce or affect specific dispositions in her will. So a belief in transmigration of souls is not of itself proof of lack of testamentary capacity. *Matter of Bonard*, 16 Abb. Pr. N. Y. 128. See also *Fowler* v. *Ramsdell*, 4 Albany Law Journal, 94. So the courts have held that the belief in spiritualism is so common that so far as testamentary capacity is concerned the law must treat it as it would any other religious conviction. *Keeler* v. *Keeler*, 3 N. Y. Supp. 629.

In *Matter of Vedder*, 6 Dem. 92, a will was admitted to probate in spite of the testator's belief in witches and in witchcraft and proof of various hallucinations, such as, that she had been and conversed with Jesus; that if live coals and a red garter should be put under a churn the butter would come; that it was impossible to keep her horses fat because the witches rode them at night, etc., it appearing that her belief did not affect her testamentary act. See opinion at pages 104 and 105 and cases cited at page 101. In *Forman's Will*, 54 Barb. 274, 297, it was held that a believer

in witches and witchcraft, in spiritualism, or in the doctrines of Mohammed, may make a valid will. The General Term in affirming Surrogate Bradford's decision (*Thompson* v. *Quimby*, 21 Barb. 107), observed: "Erroneous, foolish and even absurd opinions on certain subjects do not show insanity when the person entertaining them still continues in the possession of his faculties, discreetly conducting not only his own affairs but the business of others." So also on the subject of religion. *Matter of White*, 121 N. Y. 406. In *Van Guysling* v. *Van Kuren*, 35 N. Y. 70, it appeared that the testatrix believed she was tormented by witches and spooks which kept her awake at night and became enraged at those who told her there were no witches; that she imagined she saw things that did not exist and described visions she had while sleeping; that she used the fingers in place of knife and fork; and that her eyes were frequently wild and glaring. The Court of Appeals held she was of disposing mind and memory.

§ 364. **Insane delusion as distinguished from mistaken beliefs.**—Proof of a mistaken belief not amounting to an insane delusion will not invalidate a will. *Clapp* v. *Fullerton*, 34 N. Y. 190. The inquiry which the court must make has been stated to be whether a person situated in all respects like the decedent might have believed all that the evidence shows he believed, and yet have been in full possession of his senses. *Phillips* v. *Chater*, 1 Dem. 533, 543. So the Court of Appeals (in *Clapp* v. *Fullerton*, *supra*) sustained probate where a testator excluded one of his children by reason of his mistaken belief that she was illegitimate. See also *Matter of Gross*, 14 St. Rep. 429. See also *In re Smith's Will*, 24 N. Y. Supp. 928.

§ 365. **Erroneous belief resulting in disinheritance of an heir.**—Where a testator is shown to have possessed erroneous ideas or beliefs in regard to one or more of the persons who might naturally be supposed to benefit by his will, and by reasons of such beliefs disinherits them, the court will not be influenced by sentiment (*Potter* v. *McAlpine*, 3 Dem. 108, 113), but can deny probate only where the mistaken belief amounts to an insane delusion. *Matter of O'Dea*, 84 Hun, 591, affirming probate on opinion of Surrogate Fitzgerald. Unjustifiable impressions, resulting in an estrangement so that testator disinherits the one as to whom he entertains such impressions cannot be styled delusions. *Dobie* v. *Armstrong*, 160 N. Y. 584. A testator, may "use his will for displaying kind or vindictive sentiment, may indulge if he choose, his whims, spite, vanity, or his egotism, or his animosities, to the top of his bent; if he is not deficient in mental capacity and is observant of the forms which have been established by law for the execution of the testamentary instrument, his wishes must be respected by the courts, at least to the extent of adjudging that they be made effectual." *Hagan* v. *Yates*, 1 Dem. 584, 596, Rollins, Surr. In the case last cited the testator had discriminated against two daughters by his first wife for what the court termed a very ignoble reason; but the Court of Appeals intimates in *Horn* v. *Pullman*, 72 N. Y. 269, that if a reason is

satisfactory to the testator, however inadequate it may seem to a court, it is no ground of itself for setting aside a will.

In *Phillips* v. *Chater, supra,* a wife was excluded from her husband's will owing to a mistaken impression on his part that she had been unfaithful. The Surrogate sustained the will, holding that the facts upon which his belief was evidently based would warrant such a person as the testator in entertaining the belief. In *Matter of Jenkins,* 39 Misc. 618, there was no reasonable basis for this belief of infidelity, and the Surrogate set aside the will cutting off the wife on the ground it was the "offspring of delusion." He uses this definition, "A person is under a delusion where he, without cause or evidence, firmly and persistently believes in and acts upon certain premises as existing facts when no such facts really exist."

This is correct if the word "delusion" is read in the light of Bouvier's definition quoted at page 620 of the opinion. So wills have been admitted to probate where the testator had a mistaken belief that one of his kinsmen had wronged him. *Matter of Lang,* 9 Misc. 521. But where the testator after his second marriage became possessed of the belief that his children were opposed to the marriage and were all trying to rob him and lived apparently in continual fear of them and became violent whenever they were referred to, it was held that he was a monomaniac on the subject of his children, the delusion having no basis in fact and such delusion operating directly to modify his testamentary dispositions, the will was not admitted. *Matter of Dorman,* 5 Dem. 112, 117, citing *Matter of Shaw's Will,* 2 Redf. 107; *Lathrop* v. *Borden,* 5 Hun, 560; *Stanton* v. *Wetherwax,* 16 Barb. 259; *Seaman's Friend Society* v. *Hopper,* 33 N. Y. 619; *Morse* v. *Scott,* 4 Dem. 507; *In re McCue,* 17 Weekly Dig. 501; *Riggs* v. *American Tract Society,* 95 N. Y. 503. So a will was admitted to probate where the testatrix excluded her brother from her will by reason of a deep-rooted and long-continued dislike of him; and a belief that he had in some indefinite manner wronged her. *Bull* v. *Wheeler,* 6 Dem. 213. The insignificance of the matter out of which the dislike arises is immaterial. In the case last cited the trouble seems to have originated in regard to the use of a horse and a wagon. Where a testator was shown to have repeatedly declared that a certain young man whom he had adopted was not his son and in fact left him out of his will, it was held not to be sufficient proof of insane delusions. *Matter of Zeigler,* 19 N. Y. Supp. 947.

Where a decedent at the time of making his will was persuaded that his wife and children had entered into a conspiracy against him to send him to a lunatic asylum; that they had attempted to poison him and it was proven that he finally killed his wife and attempted to kill himself, Surrogate Ransom held that he was laboring under an insane delusion and denied probate to his will (*Matter of Kahn,* 1 Connoly, 510, 514), holding that the proof showed that the instrument propounded had its origin in the delusion of a mind unsound in respect of the subject involved. So where a testator, who ultimately died in an insane asylum of progressive paresis, made a will during the first stage of the disease discriminating against his

wife with whom prior to his disorder his relations had been "more than ordinarily felicitous," the General Term of the Common Pleas (*Matter of Loewenstine's Will*, 2 Misc. 323), held that there was not reasonable basis for his delusion, that he was unduly influenced thereby in the making of his will, and accordingly refused to disturb the finding of a jury that he was not possessed of testamentary capacity. See also *Matter of Weil*, 16 St. Rep. 1. So where a testator among other delusions believed that his brothers and sisters desired to poison him and made special provision in his will for his executor of a sum "large enough to be over and above any bribe that may be offered by my brothers and sisters, and children," it was held that he was laboring under an insane delusion sufficient to invalidate the will. *Matter of Lockwood*, 8 N. Y. Supp. 845. The Court of Appeals in a recent case (*Matter of Will of White*, 121 N. Y. 406) where the prejudice of the testator against his son grew out of the fact that he was a Free Mason, of which order the testator had from his youth entertained a bitter dislike, sustained the will. Judge Gray remarks in his opinion: "On questions of testamentary capacity courts should be careful not to confound perverse opinions and unreasonable prejudices with mental alienation," citing *Seaman's Friend Society* v. *Hopper*, 33 N. Y. 624. "Delusion is insanity, where one persistently believes supposed facts, which have no real existence, except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumpton of their existence. But if there are facts, however insufficient they may in reality be, from which a prejudiced, or a narrow, or a bigoted mind might derive a particular idea, or belief, it cannot be said that the mind is diseased in that respect. The belief may be illogical, or preposterous, but it is not, therefore, evidence of insanity in the person. Persons do not always reason logically, or correctly, from facts, and that may be because of their prejudices, or of the perversity, or peculiar construction of their minds. Wills, however, do not depend for their validity upon the testator's ability to reason logically, or upon his freedom from prejudice." *Clapp* v. *Fullerton*, 34 N. Y. 190. See also *Dobie* v. *Armstrong*, 160 N. Y. 584. See *contra*, *Lathrop* v. *American Board of Foreign Missions*, 67 Barb. 590.

Where a testator who left all his property to his wife was shown to have a delusion that his brother by athletic exercise was developing his muscle for the purpose of killing him, probate was sustained. *Fricke's Will*, 19 N. Y. Supp. 315. The court will always take into consideration where the disinheritance of an heir or one of the next of kin is alleged to be due to an insane delusion, the relation of the person disinherited to the decedent. See *Probate of the Will of Forman*, 1 Tucker, 205, 221. See also *Matter of Springstead*, 8 N. Y. Supp. 596. Those who in the testator's lifetime have been unfriendly or bitter, or hostile in their conduct towards him will not be heard to complain if the natural result of disinheritance from a share in the estate after his death follows therefrom. *Dobie* v. *Armstrong*, 160 N. Y. 584; *Matter of Will of White*, 121 N. Y. 406; *Matter of Iredale*, 53 App. Div. 45, 51.

§ 366. **Insane delusions must be effectual.**—Where an insane delusion is relied upon in contesting a will it must not only appear that it existed but that it *materially affected the testamentary disposition* made by the will propounded. For example, where a testator had an exaggerated idea as to the extent of his own property, and was shown to have declared that he had more property than anyone knew, Surrogate Davie admitted his will to probate although there was other evidence indicating that the testator was of a licentious nature, vulgar and indecent in conversation, passionately fond of narrating his amorous exploits, speaking of his liaisons publicly and boastingly. *In re Jones's Will*, 25 N. Y. Supp. 109. The Surrogate observes: "The inference is fairly justified by the evidence that the testator was either a notorious romancer or a veritable Don Juan; but eccentricities of habit or perversion of feelings and conduct, forming what is termed 'moral insanity,' do not constitute legal incapacity. 1 Jarm. Will., p. 75. The law, recognizing the fact that proof of moral depravity does not necessarily establish a lack of intellectual ability, does not require any particular grade of moral rectitude as an element of testamentary capacity. Even pronounced insane delusions, if they do not relate to, or directly bear upon, the testamentary act, do not invalidate a will. Cases illustrating the proposition are numerous. *Coit* v. *Patchen*, 77 N. Y. 533; *Society* v. *Loveridge*, 70 N. Y. 387; *Van Guysling* v. *Van Kuren, supra; Thompson's Case*, 21 Barb. 107; *Forman's Will*, 54 Barb. 274; *Bonard's Will*, 16 Abb. Pr. (N. S.) 128; *In re MacPherson's Will* (Surr.), 4 N. Y. Supp. 181. Several witnesses on part of the contestant have described certain acts and statements of testator, and characterized them as irrational, *but such expression of opinion affords no evidence of mental unsoundness. In re Rapplee's Will* (Sup.), 21 N. Y. Supp. 801. No reliable estimate of one's mental condition can be predicated upon isolated and independent acts. It is the entire line of conduct, each act examined with reference to that which preceded and that which followed it, which indicates whether the man is controlled by the dictates of sense and reason, or by the illusions of a disordered mind or imagination." In the *Vedder* case, 6 Dem. 92, where the eccentricities and alleged delusions, were of extraordinary character, the learned Surrogate nevertheless observed (at page 97): "There is no evidence whatever to show that any or all of these beliefs, delusions, eccentricities, or peculiarities had the slightest connection with or influence upon her testamentary act here in question." The cases are uniformly to the effect that unless the delusion entered into the testamentary act, its existence will not operate to defeat probate. See *Matter of Lapham*, 19 Misc. 71; *Matter of Gannon*, 2 Misc. 330; *Matter of Loewenstine*, 2 Misc. 323; *Matter of Dorman*, 5 Dem. 112; *Lockwood's Will*, 2 Connoly, 118; *Matter of Kahn*, 1 Connoly, 510; *Leslie* v. *Leslie*, 92 N. Y. 636; *Matter of McCue*, 17 Weekly Dig. 501; *Keeler* v. *Keeler*, 3 N. Y. Supp. 629. In *Matter of Long*, 43 Misc. 560, Church, Surr., denied probate of a will made by a woman, fifty years married, which cut off her husband as to whom he found she was under the insane delusion that he was unfaithful and an

habitual drunkard. Singularly, the husband was not contestant; but the ruling was made in a contest by a collateral relation (see opinion and cases).

§ 367. **Expert and opinion evidence.**—Allusion has already been made to the weight and value which the courts attach to the opinions of witnesses testifying to the insanity or sanity of a testator, and the fact has been noted that subscribing witnesses to a will may testify as to the testamentary capacity of the decedent, stating their opinion that he was or was not capable of making a will. (See *ante.*) See *Matter of Peck*, 17 N. Y. Supp. 248, and other cases cited, *supra.* So, also, it is held that testimony of subscribing witnesses who had opportunity of seeing and observing testator, should prevail over the opinion of an expert, based merely upon a hypothetical question. *Matter of Connor*, 29 Misc. 391, 393, citing *In re Lyddy's Will*, 4 N. Y. Supp. 468; *Matter of Kiedaisch*, 13 N. Y. Supp. 255, 260; *Matter of Johnson*, 7 Misc. 220. The declarations of beneficiaries under the will are incompetent, however, on this inquiry. *Matter of Van Dawalker*, 63 App. Div. 550. The Court of Appeals in a recent case restated the rule in regard to evidence given by nonexperts (*Paine* v. *Aldrich*, 133 N. Y. 544, 546) upon the trial. The Court of Appeals says: "The trial court applied the correct rule in regard to this class of evidence. The witness was a layman and could not properly give an opinion as to the mental capacity of the grantor, or as to whether he was rational or irrational, even when such opinion might be based upon specific acts and conversations, and his personal observations. He could state the acts and conversations of which he had personal knowledge, and then be permitted to say whether, in his judgment, such acts and conversations were rational or irrational, or were those of a rational or an irrational person. This is the extent to which any of the cases have gone, and the tendency is to limit rather than enlarge the rule, because, even in the present form, it is an infringement of the fundamental law of evidence that a witness, who is not an expert, shall not be permitted to testify to his conclusions or opinions as to an issuable fact." See also *Hewlett* v. *Wood*, 55 N. Y. 634, where it was said: "Persons not experts, after testifying to facts and incidents in relation to a testator, tending to show soundness of mind or the contrary, may testify to the impression produced upon them thereby, and also whether the acts and declarations testified to seem to them rational or irrational, but they may not testify as to the general soundness or unsoundness of mind of the testator." See also *DeWitt* v. *Barley*, 9 N. Y. 371. *Nonexperts* may observe and testify to *facts as symptoms* of a disease, of which the *expert* may state the *nature and effect. Matter of Wendel*, 43 Misc. 571. While of course an expression of opinion by a witness in a contested will case that the testator's conduct observed by him was irrational and showed unsoundness of mind, does not of itself prove a lack of testamentary capacity (*Matter of Rapplee*, 66 Hun, 558), yet if he has testified to particular acts or remarks of the testator, he may also testify as to the impression received by him from such acts or remarks. See *People* v. *Strait*, 148 N. Y. 566; *Petrie* v. *Petrie*,

6 N. Y. Supp. 831; *Matter of Folts*, 71 Hun, 492; *Yeandle* v. *Yeandle*, 5 N. Y. Supp. 535. The limitations of § 834, Code Civ. Proc., must be kept in mind. *Matter of Myer*, 184 N. Y. 54. Where expert evidence is attempted to be offered it must first be noted, that the question whether the witness is or is not an expert, is a question of fact for the trial court. See *Otis* v. *Cowles, etc., Co.*, 13 N. Y. Supp. 251; *Hyman* v. *Boston Chair Co.*, 13 N. Y. Supp. 609. Second, that they are competent witnesses to testify to their opinions as to matters which are the subject of their expert knowledge. *Garbig* v. *N. Y., L. E. & W. R. R. Co.*, 75 Hun, 605. See also *Reich* v. *Union R. R. Co.*, 78 Hun, 417. In *Hewlett* v. *Wood*, 55 N. Y. 634, the court stated the rule, that witnesses testifying as experts may give opinions upon questions of trade, skill or science, from facts proven or the circumstances noted by themselves. Applying this rule the General Term (*Matter of Arnold*, 14 Hun, 525, 527), held it error to admit the second of the following questions, to a medical expert in a contested will case.

"Q. Do you understand what is meant in law or medical jurisprudence by the term, 'testamentary capacity'? A. I do.

"Q. Did you consider him possessed of that power between the time of this shock and the time of his death?" (Objected to, objection overruled and exception.) "A. No, sir, I do not think he was."

Similarly where a physician was permitted to testify under the objection and exception of the proponent that the testatrix, "had not sufficient mental strength to manage her estate or conduct the business connected with it," held error. *Matter of Mason*, 60 Hun, 46, 54. Where the expert witness personally observed the testator at or about the time of the execution of the will he should testify to the facts, and may be allowed to give his opinion therefrom, but where medical experts are called to testify in answer to hypothetical questions the court will require the hypotheses upon which the question is based to be founded upon facts proved in the case. The Court of Appeals has laid down this rule, "Hypothetical questions are allowed to be put to experts but the hypothesis upon which they are examined must be based upon facts admitted or established by the evidence, or which if controverted the jury might legally find on weighing the evidence." *People* v. *Augsbury*, 97 N. Y. 501. And again, "In such a case it is not the province of the witness to reconcile and draw inferences from the evidence of other witnesses, and to take in such facts as he thinks their evidence has established or as he can recollect and carry in his mind, and thus form and express an opinion." *Matter of Mason, supra*, at p. 55, citing *Reynolds* v. *Robinson*, 64 N. Y. 589; *Guiterman* v. *Liverpool, etc., S. S. Co.*, 83 N. Y. 358; *Hagadorn* v. *Conn. Mutual Life Ins. Co.*, 22 Hun, 249. Nor can medical books be introduced in evidence; nor can an expert witness be permitted to testify to statements made therein. See *Roe* v. *Strong*, 107 N. Y. 350; *Matter of Mason, supra*, and cases cited at page 57.

Where a testatrix out of extreme caution secured two experts in insanity as subscribing witnesses to her will, both of whom testified in the probate proceedings that she was of sound mind, memory and understanding at the

time of execution, the Appellate Division of the Second Department (*Matter of Journeay*, 15 App. Div. 567, Bartlett, J.), held that there was nothing suspicious in the circumstances of having such persons act as subscribing witnesses, and further that the clear and explicit evidence given by these qualified specialists as to the mental condition of the testatrix at the very time of executing the codicil republishing her will should prevail, "even if the proof from other sources indicating that the testatrix had been deranged or suffered from delusions at other times was much stronger than it actually was." The Court of Appeals has stated the rule as to the value attached to expert witnesses. *People* v. *Kemmler*, 119 N. Y. 580, 583. "Expert evidence is only entitled to much importance in arriving at a judgment, when fairly given by one properly accredited to give it, through his experience, study and scientific eminence, and upon a hypothesis which shall be true in relation of its parts to the whole case which is the subject of inquiry." And it has very properly been stated that the testimony of an expert, "although admissible and always a great aid to a court or jury in discovering where the truth lies in a question of this kind cannot ever be held to be conclusive and controlling against the testimony of persons of intelligence who saw the testator daily and who had transactions with him socially and on business." *Matter of Kiedaisch*, 13 N. Y. Supp. 255, 260, Ransom, Surr. *Matter of Tifft*, 55 Misc. 151; *Matter of O'Connor*, 29 Misc. 391. In framing a hypothetical question, however, the rule, that it must be based upon facts in the case, does not debar counsel from assuming the facts to be in accordance with his theory of them; he may assume any facts within range of the evidence already offered (*Cowley* v. *People*, 65 N. Y. 464; *Harnett* v. *Garvey*, 66 N. Y. 641), but when this opinion is asked upon facts not within his personal knowledge or observation, the question must be based upon some particular specified state of facts. *Bolt* v. *Murray*, 2 N. Y. St. Rep. 232. See *Barton* v. *Govan*, 116 N. Y. 658. See also *Bristed* v. *Weeks*, 5 Redf. 529, Rollins, Surr. See also *In re Lyddy's Will*, 4 N. Y. Supp. 468, 470, Ransom, Surr. If the hypothetical question, however, does not state the facts as proven, it becomes valueless as the basis for a determination. *Matter of Connor*, 29 Misc. 391, 392; *Dickie* v. *Van Vleck*, 5 Redf. 284, 293. Or, if based on a hypothesis shown to be erroneous it becomes valueless. *Philips* v. *Philips*, 77 App. Div. 113. See *Heyzer* v. *Morris*, 110 App. Div. 313, 317.

UNDUE INFLUENCE

§ 368. **Definition.**—Undue influence as used with reference to wills has been defined as, "that which compels the testator to do that which is against his will, from fear, a desire of peace or some feeling which he is unable to resist" (Schouler on Wills, 2d ed. par. 22); or again, "the influence that will avoid a will on account of undue influence must amount to moral coercion, restrain independent action and destroy free agency; or the importunities must be such as to constrain the testator to do that which is against his desire;" or again, "undue influence has been defined to be

any improper or wrongful constraint, machination or urgency of persuasion, whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely." 27 American and English Encyclopedia of Law, 453, citing 2 Abb. Law Dictionary, page 615. And the same authority at page 454 continues: "Influence which exists from attachment, affection, or a desire to gratify, or which results from argument and appeal to reason and judgment, is not undue influence." See, e. g., gratitude for saving life, *Matter of Cleveland*, 28 Misc. 369. (See *post*, p. 374.) Or undue influence may by way of summary be defined as the exerting upon a testator of an improper *influence* whether fraudulent, threatening, or otherwise *coercive*, so as to *effect a change* in the testator's testamentary dispositions so that the will made is not the will he would, if uninfluenced, have made. See *Matter of Bolles*, 37 Misc. 562, 568; *Matter of Martin*, 98 N. Y. 193; *Matter of Vedder*, 14 N. Y. St. Rep. 470. See *Matter of Eckler*, 47 Misc. 320. An extreme case is presented where a stranger to the blood secures a will in his favor, drawn by himself, from an aged and infirm person of wealth who before and after the event has denied that he will leave any will.

The circumstance is so suspicious that in order to "satisfy" the Surrogate he is under the burden of overcoming by a preponderance of evidence the presumption of undue influence resulting therefrom.

§ 369. **Burden of proof.**—The underlying idea of undue influence is that the will of another is substituted for that of the testator nominally acting, whose act is only the expression of another's will, so that all questions of free agency fail. Any influence to be material must be operative and must actually produce an effect which is clear. It can never be inferred from mere opportunity. It must arise in one of two ways: either from proof, or presumption of law. The exerting of undue influence is a fact and must be proved like any other fact, it must not be guessed out. *Stebbins* v. *Hart*, 4 Dem. 501, 505; *Mason* v. *Williams*, 53 Hun, 398. It is to be established affirmatively from the circumstances. *Matter of Murphy*, 41 App. Div. 153, 157; *Matter of Shannon*, 11 App. Div. 581; *Matter of Snelling*, 136 N. Y. 515; *Matter of Rohe*, 22 Misc. 415. That is to say the facts proved must be sufficient to justify an affirmative finding. *Matter of Hurlbut*, 48 App. Div. 91.

The burden of proof has been held almost, if not quite generally, to be upon those who allege it, and anyone contesting a will on those grounds, who sets the same up in his pleadings must prove such undue influence by a clear preponderance of evidence. *Matter of Read*, 17 Misc. 195, 198; *Dobie* v. *Armstrong*, 160 N. Y. 584; *Matter of Nelson*, 97 App. Div. 212; *Matter of Mondorf*, 110 N. Y. 450. To invalidate a will on the ground of undue influence there must be affirmative evidence of the facts from which such undue influence is to be inferred; it is not sufficient to show that a party benefited by a will had both motive and opportunity to exert such influence; it must be shown that he did exert it and so controlled the actions of the testator either by importunities which he could not resist or by de-

ception, fraud or other improper means that the instrument is not really the will of the testator. *Cudney* v. *Cudney*, 68 N. Y. 148, opinion of Rapallo, J., at page 152. So it has been held, "If there is testamentary capacity and a present knowledge of the contents of the will and the will is executed pursuant to the formalities prescribed by the statute, it can only be avoided by proof of influence amounting to force or coercion and the burden is on the party making the allegation, that the testatrix was imposed upon or overcome by the acts or practice of the beneficiary." *Matter of Mabie*, 5 Misc. 179, 183, citing *Matter of Martin*, 98 N. Y. 193; *Loder* v. *Whelpley*, 111 *id.* 239; *Matter of Williams*, 19 N. Y. Supp. 778, and cases cited. See also *In re Soule*, 3 N. Y. Supp. 259, 268; *Matter of Cornell*, 43 App. Div. 241, 242; *Matter of Munger*, 38 App. Div. 268.

§ 370. **Mutual wills.**—Where mutual wills are simultaneously executed there arises a nearly absolute presumption that no undue influence was exerted. *Matter of Tredwell*, 58 Misc. 103, citing *Matter of Drake*, 45 App. Div. 206; *Matter of Nelson*, 97 App. Div. 212; *Matter of Martin*, 98 N. Y. 193.

§ 371. **Character of evidence required.**—It has been held that, "The proof of undue influence must be by direct affirmative evidence, or by such an array of circumstances as to make the inference of its exercise irresistible; in other words, the contestants must show facts utterly inconsistent with the hypothesis of the execution of the will by any other means than undue influence." *In re Williams' Will*, 15 N. Y. Supp. 828, 834, citing *Gardiner* v. *Gardiner*, 34 N. Y. 155; *Loder* v. *Whelpley*, *supra*; *In re Clausmann*, 9 N. Y. St. Rep. 182; *Marx* v. *McGlynn*, 88 N. Y. 357. See also *Matter of Murphy*, 41 App. Div. 153; *Matter of Snelling*, 136 N. Y. 515. On the other hand, it has been stated that, "Direct proof is never required, but the fact of its exercise always may be inferred from other facts proven." *Matter of Read*, 17 Misc. 195, 198. For it is rarely that a case is susceptible of such direct evidence. *Chambers* v. *Chambers*, 61 App. Div. 299, 310, citing *Tyler* v. *Gardiner*, 35 N. Y. 559; *Marvin* v. *Marvin*, below; *McLaughlin* v. *McDevitt*, below; *Rollwagen* v. *Rollwagen*, 63 N. Y. 504. See also *Matter of Blair*, 16 Daly, 547. See also as to *onus probandi*, *Van Orman* v. *Van Orman*, 34 N. Y. St. Rep. 824; *Matter of McGraw*, 9 App. Div. 372. Also *Lake* v. *Ranney*, 33 Barb. 49; *Ewen* v. *Perrine*, 5 Redf. 640, 642; *Weir* v. *Fitzgerald*, 2 Bradf. 42; *Matter of Pike*, 83 Hun, 327, 330, citing *Tyler* v. *Gardiner*, 35 N. Y. 559; *McLaughlin* v. *McDevitt*, 63 N. Y. 213; *Matter of Will of Budlong*, 126 N. Y. 423; *In re Will of Martin*, 98 N. Y. 193; *In re Green*, 67 Hun, 531; *In re Wheeler's Will*, 25 N. Y. Supp. 313, 318. See also *Ledwith* v. *Claffey*, 18 App. Div. 115, 119; *Brick* v. *Brick*, 66 N. Y. 144; *Matter of Mondorf*, 110 N. Y. 450; *Marvin* v. *Marvin*, 3 Abb. Ct. of App. Dec. 192; *Seguine* v. *Seguine*, 4 Abb. Ct. of App. Dec. 191. See also *Matter of Spratt*, 17 App. Div. 636.

§ 372. **How a presumption of undue influence will arise.**—It has been stated that undue influence must be proved as any other fact; and further that a case of undue influence must arise in one of two ways, either from proof or from a presumption of law.

Before discussing what is or is not proof of the exercise of undue influence it may be well to indicate the various classes of cases where the courts have held that no presumption of undue influence will be necessarily entertained. It is true that undue influence is not always capable if ever of being proven by direct evidence and must usually be proven or inferred from circumstantial evidence. See *Marvin* v. *Marvin*, 3 Abb. Ct. of App. Dec. 192. See *Chambers* v. *Chambers*, 61 App. Div. 299, 310. The Court of Appeals (*Tyler* v. *Gardiner*, 35 N. Y. 559) has properly declared: "It is not to be supposed that fraud and undue influence are ordinarily susceptible of direct proof. The purposes to be served are such as court privacy rather than publicity. In some cases, as this court said, in the case of *Sears* v. *Shafer*, 'undue influence will be inferred from the nature of the transaction alone; in others from the nature of the transaction and the exercise of occasional or habitual influences. The grounds for imputing it, as Sir John Nicholl said in the case of *Marsh* v. *Tyrrell*, must be looked for in the conduct of the parties and in the documents, rather than in the oral evidence. The necessary inferences to be drawn from that conduct will afford a solid and safe basis for the judgment of the court. Where the oral evidence harmonizes with those inferences, a moral conviction rightfully follows; but the dispositions, where they are at variance with the conduct of the parties, and with the *res gestæ*, are less to be relied upon.' " See also *Matter of Baker's Will*, 2 Redf. 179.

On the question, however, of presumption it may be remarked first that there are certain classes of circumstances or degrees of relationship which if shown may be material although not necessarily conclusive upon the question of undue influence. This may be discussed under the following headings:

1. Confidential relationship and fiduciary relationship.
2. Opportunity.
3. Weakness of testator.

§ 373. **Confidential relationship and fiduciary relationship.**—In regard to any presumption arising from proof of the persons benefiting by the will alleged to have been procured by undue influence sustaining near relations of kinship or affection to the testator, it may be said in the first place that it has been repeatedly held that there is a legitimate influence which such persons may indulge in without danger of the wills being set aside upon the ground of undue influence. Thus it has been said that "certain forms of influence, such as suggestion and advice or solicitation, persuasion and entreaty, unless the testator is worn out by importunities so that his will at last gives away, have been held not to be undue, although the amount of pressure allowable always depends upon the relation of the parties in each case, and the strength of the testator's resistance." *Matter of Read*, 17 Misc. 195, 198. Again it has been held, "Such influence as arises from gratitude, esteem or affection does not come within the meaning of undue influence." *Ledwith* v. *Claffey*, 18 App. Div. 115, 119. The Appellate Division in the First Department has stated the rule very clearly (*Matter*

of Seagrist, 1 App. Div. 615), as follows: "Those persons who occupy intimate and affectionate relations with any individual have the right, by personal request, by fair argument, and even by decent importunities, to procure a will to be made. The fact that they have done so is no argument against the validity of the paper, provided these importunities do not proceed so far as to overpower the will of the testator and induce him to do the thing which he would not have done but for these importunities, and to substitute the will of the beneficiary in the place of his own uncontrolled judgment." Opinion of Rumsey, J., at page 619, citing *Tyler* v. *Gardiner*, 35 N. Y. 559. See also *Matter of Hedges*, 57 App. Div. 48, reviewing cases; *Matter of Cruger*, 36 Misc. 272; *Matter of McGill*, 26 Misc. 102; *Matter of Hurlbut*, 48 App. Div. 91; *Matter of Bonner*, 33 Misc. 9, 11. So, where the chief beneficiary of a proposed will was trustee of testatrix during her lifetime, and had control and custody of her estate, while he is under the burden of showing that the will was her free, untrammeled and intelligent act, yet he has "a right by faithful service and delicate attention to win her esteem." *Matter of De Vaugrigneuse*, 46 Misc. 49. In this case, Thomas, Surr., uses the words "to create a testamentary intention in his favor" in decedent's mind. So, no presumption of undue influence arises from the fact that one child gets more than another. *Matter of Woodward*, 52 App. Div. 494. The importunities, requests or arguments, which it has been intimated may be resorted to to influence the testator in making his will, must not, however, be such as to fraudulently deprive any other person or persons of a share of the testator's estate. Thus where a daughter by vague and indefinite charges against her brother of improper conduct towards her persuaded her mother to discriminate against him in her will, there being no reasonable basis for these charges, and the mother, while of testable capacity, being in a condition such as to be peculiarly exposed to the exercise of undue influence, the Court of Appeals held, that a will executed under such circumstances should be rejected. *Tyler* v. *Gardiner*, 35 N. Y. 558. See *Matter of Drake*, 45 App. Div. 206. And obtaining control of an aged, infirm parent, by constant importunity and insidious effort may be held undue influence. *Matter of Sears*, 33 Misc. 141, 142. See also *Matter of White*, 23 N. Y. St. Rep. 882; *Matter of Bishop*, 31 N. Y. St. Rep. 314. Importunity amounting to threats is improper. *Chambers* v. *Chambers*, 61 App. Div. 299. And the Appellate Division of the First Department (*Matter of Spratt*, 4 App. Div. 1, 5) held, that the natural influence of the parent or guardian over the children, or husband over wife, or attorney over client, may lawfully be exerted to obtain a will or a legacy as long as the testator thoroughly understands what he is doing and is a free agent, citing *Brick* v. *Brick*, 66 N. Y. 144; *Matter of Liddy*, 5 N. Y. Supp. 636; *Matter of Bedlow*, 67 Hun, 408.

Where the will is shown clearly to have been prompted by gratitude, e. g., for saving testator's life, *Matter of Cleveland*, 28 Misc. 369, even though all the testator's property is left away from the natural objects of his bounty, there is no presumption of undue influence in the absence of fraud,

imposition or coercion. The Court of Appeals so held in a case where the testator who had lived upon unfriendly terms with his wife or rather apart from her, left all his property to a woman with whom it was claimed he had for several years meretricious relations. *Matter of Mondorf*, 110 N. Y. 450. Judge Earl remarked: "This will was prompted by gratitude, and a will thus induced cannot in the case of a perfectly competent testator be said to have been obtained by what in the law is styled, 'undue influence,'" and he adds, "Even if his relations with Mrs. Schaumburg were meretricious the law does not on that account condemn a will made in her favor. Where such relations exist, all the circumstances attending the execution of a will which may be shown to have been induced thereby will be carefully scrutinized; but the right of a competent testator to make any disposition of his property which pleases him although it may be unjust and unnatural will not be curtailed." *Id.*, at page 456, citing *Seguine* v. *Seguine, supra; Horn* v. *Pullman, supra; Marx* v. *McGlynn*, 88 N. Y. 357; *In re Will of Martin*, 98 N. Y. 193; *Scott* v. *Barker*, 129 App. Div. 241; *Heyzer* v. *Morris*, 110 App. Div. 313. See also *Matter of Rand*, 28 Misc. 465; *Matter of Westerman*, 29 Misc. 409, 411; *Matter of Evans*, 37 Misc. 337; *Demmert* v. *Schnell*, 4 Redf. 409. This was a case where the testator who was dying of a very painful disease was a tenant of the respondent, occupying part of her house and absolutely dependent upon her in his last illness for care, attention and even the necessaries of life. He was married, but his wife had not lived with him for nine years. While in health he had repeatedly expressed the intention of leaving his property to his brothers in Germany. The respondent had often asked him in jest to make his will in her favor, but there was evidence that he had stated the idea to be preposterous inasmuch as he had brothers living. One will had already been executed by him at the beginning of his illness, leaving a legacy of one-third of his property to the respondent. A few days later his attorney was called in to make a second will in which, aside from a conditional bequest to his wife, the respondent was made residuary legatee. The Surrogate observed at page 412: "The will was made at a time when the testator was seriously ill, suffering from a painful disease; so weak physically that he had to be assisted out of bed, and when his complete dependency upon Mrs. Schnell readily subjected him to her control. Here we have all the facts and circumstances by which the courts say that undue influence may be proved." *Rollwagen* v. *Rollwagen*, 63 N. Y. 504, 519; *Horn* v. *Pullman*, 72 *id*, 269, 276; *Forman* v. *Smith*, 7 Lans. 443; *Marvin* v. *Marvin*, 3 Abb. Ct. App. 192; *Children's Aid Society* v. *Loveridge*, 70 N. Y. 387, 403; *Reynolds* v. *Root*, 62 Barb. 250; *Mowry* v. *Silber*, 2 Bradf. 133.

"It does not appear that the testator gave any reason for this sudden change in the disposition of his property, and the circumstances under which it was made required that Mrs. Schnell should show that the complete dependence of this dying man upon her had not been taken advantage of in any way . . . . should in fact, repel the presumption arising from the facts proved that the change was brought about by undue influence.

1 Wms. on Exrs., p. 48, note; *Mowry* v. *Silber*, 2 Bradf. 133; *Tyler* v. *Gardiner*, 35 N. Y. 559; *McLaughlin* v. *McDevitt*, 63 *id.* 213, 220; *Forman* v. *Smith*, 7 Lans. 443; *Lee* v. *Dill*, 11 Abb. Pr. 214; *Matter of Welsh*, 1 Bradf. 238; *Kinne* v. *Johnson*, 60 Barb. 69.

"In *Matter of Brough*, 41 Misc. 263, the testatrix's gratitude was evoked by help given her in resisting proceedings to have her adjudged insane. Marcus, Surr., writes a convincing opinion on this typical case.

"In *Matter of Eddy*, 41 Misc. 283, a will to a paramour was upheld, disinheriting children, on proof that the woman had in fact exercised no influence whatever in the premises. The Surrogate notes the only statutory limitation on disinheritance which is as to 'Exempt property.' The rule to be deduced from the decisions on the subject is this: that where a person enfeebled by old age or illness makes a will in favor of another person upon whom he is dependent, and that will is at variance with a former will made, or intentions formed when his faculties were in their full vigor, and is opposed to the dictates of nature and justice, the presumption is that such a will is the result of undue influence, unless that presumption is satisfactorily rebutted by other evidence in the case." See also *Crispell* v. *Du Bois*, 4 Barb. 393; *Limburger* v. *Rauch*, 2 Abb. N. S. 279. Where testatrix took care of her nurse by will (*Matter of King*, 29 Misc. 268), cutting off a husband from whom she had been for seventeen years separated, it was held valid. Similarily where a legacy to a nurse was increased, it appearing the relatives had not been denied free access to the decedent. *Matter of Lacy*, 35 Misc. 581.

§ 374. **Same subject.**—Under the definition above given it is manifest that unless a relative of the decedent or one to whom he is under some debt of gratitude, deprives others by means of fraud or imposition of an interest in the testator's estate which by reason of proven declarations or of their actual claims upon him it appears they would have been entitled to, the courts will allow what has been called reasonable or decent importunity; but when a relative sustains such relations to a testator who is ill or aged or weak-minded as to procure the execution of a will where none was intended to be made in his favor or in favor of one in whom he is peculiarly interested or procures the making of a will under which he is the chief beneficiary, a presumption of undue influence is raised; this presumption, however, is one of fact, and where the evidence introduced by the proponent tends to show that the will was nevertheless the voluntary deliberate act of a person having testamentary capacity, prompted by affection and without improper persuasion, probate must be granted. *In re Soule's Will*, 3 N. Y. Supp. 259, 267. In *Marx* v. *McGlynn*, 88 N. Y. 357, the testator had made "a will in favor of his religious advisor," and the question as to presumption of undue influence was raised. The court held that it is not sufficient to show that the will is the result of affection or gratitude or the persuasion of a friend or relative, which he may legitimately use, but the influence must be such as to overpower the will, producing a disposition of the property which the testator would not have made if left free to act.

The case of the *Will of Martin*, 98 N. Y. 193, was one where the testator left three sons, one of whom was named executor of the will, but it was shown that he had communicated to the scrivener the provisions to be inserted in the will and was himself a beneficiary. It appeared that the testatrix not only had testamentary capacity but also a present knowledge of the contents of the will; it was held that it could not be avoided except by proof of influence amounting to force or coercion.

Generally speaking the rule has been properly stated in the following words: "*Qui se scripsit hæredem*, or whoever draws a will in his own favor, does a thing which ought to excite the suspicion of a court, and call upon it to jealously examine the evidence, and be judicially satisfied that the paper propounded expresses the true will of the deceased, before admitting it to probate. (See *Matter of Thompson*, 50 Misc. 222.) The fact that the testator had full testamentary capacity and knew the contents of the will, is sufficient to remove such suspicions, and to place the burden upon the contestants of proving undue influence." *In re Soule, supra*, page 268. See opinion in *Matter of Elster*, 39 Misc. 63, citing *Lee* v. *Dill*, 11 Abb. Pr. 214. Also *Matter of Egan*, 46 Misc. 375, Thomas, Surr. See also opinion by Beckett, Surr., *Matter of Lamport*, N. Y. L. Journal, June 2, 1908.

§ 375. **Same subject.**—Where the draughtsman of the will has been an agent or attorney of the testator or testatrix, and is made a beneficiary by the will which he draws, the courts will scrutinize the circumstances, but no presumption of undue influence necessarily arises. (See case of an attorney, *Matter of Gallup*, 43 App. Div. 437. Also *Lake* v. *Ranney*, 33 Barb. 49; *Matter of Murphy*, 28 Misc. 650, and cases on page 651.) Also *Matter of Marlor*, 121 App. Div. 398, and *Matter of Thompson*, 121 App. Div. 470. Thus where the will of a testator was drawn by one who had been for many years her agent in another State for the management of certain of her property, he being also her nephew, and he was made an executor of and legatee under the will, which was, however, in all of its provisions just and fair and recognized the claims of the various relatives of the testatrix, it was held there was no presumption of undue influence. *In re Sheldon's Will*, 16 N. Y. Supp. 454. In this case the contestants claimed that, under such circumstances, the proponent must give other than the usual evidence of the witnesses to the will, before it can be admitted to probate; that it must be shown the testatrix gave directions for its drafting which were obeyed, or that it was read to or by her before its execution; and based this proposition of law upon the ground that, where the writer of a will has confidential relations with the testator, and the will makes him an executor or legatee thereof, such a presumption of fraud and undue influence arises that the ordinary proof of the execution of the will thus made does not rebut or outweigh such legal presumptions; that the proponent must show, in addition thereto, that the will was made freely, without fraud and undue influence; and that the proponent should establish by affirmative evidence that none of the provisions of the will were dictated, suggested, or brought about by his instigation. The court held, however, that "The rule of law which the

contestant invokes applies only to the class of cases where, by reason of sickness, old age, mental and physical condition, or other circumstances, the testator had not that health, intellectual vigor, independence of character, freedom of action and judgment to guard his rights, and protect himself and his estate from the stealthy tread of those who would illegally take what he has designed for others. We shall hold that, where a testator has that mental and physical vigor which is essential to make a valid will, it is not the law that the drawer of a will, even if he holds confidential relations to the testator, cannot be his executor or take a legacy thereunder; nor is the law that, if the attorney, physician, or priest of the testator draws a will in which there is a legacy to himself, such will or such legacy is presumed to be fraudulent, nor in such a case is fraud presumed in aid of those who seek to overthrow the will; nor does this fact, in the absence of evidence, warrant the presumption that the testatrix was unduly influenced, or was improperly or fraudulently controlled, in making her will. All that can be legally claimed for such a state of facts is that it may or may not be a suspicious circumstance; but whether it is or not depends upon the facts of each case.

"The fact that a beneficiary is the attorney, guardian, or trustee of a decedent does not of itself alone create a presumption against a testamentary gift; neither is it presumed to have been procured by fraud and undue influence in every case and under all circumstances; nor does that single act call upon courts to pronounce against a will thus executed unless additional evidence is produced to prove knowledge of its contents by the deceased. It is only in that class of cases where the testator excludes the natural objects of his bounty that a will in favor of his attorney, physician, priest," (see *Matter of Johnson*, 28 Misc. 363) "is looked upon by courts with suspicion. To invalidate a will on the ground of undue influence, there must be affirmative evidence of the facts from which such influence can be inferred. It is not sufficient that the party benefited by a will had the motive to exert such influence. There must be evidence that he did exert it, and so control the actions of the testator, either by importunities which he could not resist, or by deception, fraud or other improper means, that the instrument is not really the will of the testator. If a contestant alleges fraud and undue influence, or any other defense, it is his duty to prove it, because fraud is never presumed from the existence of an opportunity to commit it. It must be established by such evidence that the inference of wrongdoing follows as a natural and unavoidable result, and it is only so established when such facts are proven that no other legitimate, conclusion can be drawn. Justice to testators, heirs, and legatees does not command such a rule of law as the contestant seeks to maintain, nor is there any necessity for its existence. If such were the law, testators would, many times, be debarred the aid of an attorney, relative, or other person in whom they had the must implicit confidence, and whose legal ability, knowledge of the testator's affairs, or other circumstances made it especially necessary to have such person draw the will, provided he desired to

remunerate him for services rendered or to be rendered, or for faithfulness to his interest, or from any other proper motive, wished to give him a legacy. To say that every lawyer, doctor, minister, or other person holding confidential relations with a testator, who draws a will with a legacy to himself, is, from that simple fact alone, presumptively dishonest, his motives and his acts presumptively fraudulent and wicked, and the will presumptively the product of undue influence, is to assert a proposition of law which is not now, never has been, and probably never will be the law of the State." But, in *Matter of Bedell*, 107 App. Div. 284, the circumstances were such (*q. v.*) as to show that the decedent had no intelligent knowledge of the will in favor of his legal adviser. And in *Matter of Marlor*, 52 Misc. 263, the survey of the testamentary transaction providing for the lawyer to the exclusion of husband and sons *named in prior wills*, led the surrogate to deny probate.

§ 376. **Same Subject.**—Where one who has acted as attorney or legal adviser for a testator drafts a will in which he is indicated as executor or made a legatee and is accused of exerting undue influence, it will be sufficient to meet the case if it can be shown that the will drawn was in substantial compliance with the testator's testamentary scheme known to have been entertained by him for some time. *In re Carver's Will*, 23 N. Y. Supp. 753. In this case Surrogate Davis says in respect to the influence which must be proved in order to avoid a will upon the ground of undue influence: "It must not be the promptings of affection, the desire to gratify the wishes of another, the ties of attachment arising from consanguinity, or the memory of kind acts or friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear. . . . It is undoubtedly true that the law looks with a jealous eye upon the acts of one who, standing in a relation of trust or confidence, is instrumental to any extent in procuring a testamentary provision in his own favor; and, while such circumstance does not in and of itself invalidate the bequest, it does call for satisfactory explanation, and imposes upon him claiming under such provision the burden of showing that it was in all respects fair and honest." See *Post* v. *Mason*, 91 N. Y. 539. That the will is holographic may be a material point in this connection. *Matter of Smith*, 36 Misc. 128, 131. While it is important in such cases to show knowledge of the contents by a testator, which will be discussed later, it has been held that where a will was drawn by the principal beneficiaries under it, and the testator was able to read writing, and of sufficient capacity to transact business, and yet did not read the will it may nevertheless be inferred from the circumstances that the testator was acquainted with its contents. *Nexsen* v. *Nexsen*, 3 Abb. Dec. 360; *In re Smith*, 95 N. Y. 516, 523. In the case last cited it was held that the fact that the attorney of the deceased was the principal beneficiary under the will does not alone create a presumption that the testamentary gift was procured by fraud or undue influence, but that in a case where the testator was of ad-

vanced years, infirm mentally and physically, and made his attorney his principal beneficiary, contrary to previously expressed testamentary intentions, and where such attorney was the draughtsman of the will, and took an active part in procuring its execution, and that the testator acted without independent advice, the burden is imposed upon the attorney of showing that the will was the free and untrammeled expression of the testator's intentions. See *Matter of Rintelen*, 37 Misc. 462, aff'd 77 App. Div. 142.

§ 377. **Undue influence by relatives.**—The courts have almost uniformly held except in very unusual cases that a wife or a child of a testator by virtue of their relationship to him have the right to exert any legitimate influence in their own favor in regard to the testamentary disposition in their behalf. The limitation upon this rule is consistent with the limitations already noted, that is to say, the influence exerted by the wife or child must not be of such a character as to overbear the will of the testator. For example, where a daughter by constant teasing, fretting and annoying her father so distressed and importuned him that he made his will in the form desired by her, the court held that it was not the will of the testator and that the influence shown to have been exerted by the daughter was undue influence. See *Matter of Bishop*, 10 N. Y. Supp. 217.

Where undue influence is charged against a relative, resulting in an unfair disposition of the estate as to other relatives, it is held to be proper to inquire into the condition and value of the estate. *Matter of Woodward*, 167 N. Y. 28.

The General Term in the First Department (*In re Liddy's Will*, 5 N. Y. Supp. 639) held: "The mere fact that a wife has exercised influence upon her husband in relation to the disposition of his property by will or otherwise, in no way supports the proposition that undue influence has been exercised. Influence may always be exercised, and it is proper that it should be exercised; but it only becomes improper when it becomes undue, and it becomes undue when it substitutes the will of the person exercising the influence for the will of the person who is to do the act. Arguments, persuasions, and suggestions may be made so long as the person who is to do the act, can weigh the suggestion and has the ability of mind to resist the influence, then there is nothing undue in regard to it although he may yield to it." See also *Mason* v. *Williams*, 53 Hun, 398.

In the *De Baum* case, 2 Connoly, 304, a testator and his second wife executed mutual wills, and it was shown that the testator while possessed of testamentary capacity was a man of very weak will and completely under the domination of his second wife. Surrogate Rollins says in his opinion, "She was coarse, selfish, mercenary, exacting, indifferent to her own kindred, and possessed of an unyielding will." She seems to have controlled every action of her husband. "If her wishes mildly expressed were not complied with, she commanded; if commands failed she used threats, and he submitted for the sake of peace. In all important matters his free agency seems to have been overcome." At the time the mutual

wills were made she had a property very much larger than his. The Surrogate held that although the testamentary scheme of both wills was concocted by the wife, the testator acquiesced in it intelligently, understandingly, and voluntarily under the selfish belief at the time that it would be greatly to his advantage if he survived his wife. And although the will was unjust and inequitable in its provision towards the sons of the testator, the actual objects of his bounty, one of whom was the helpless imbecile, the will must be allowed probate. See also *Matter of Bedell*, 2 Connoly, 328, where a mother and daughter made mutual wills excluding a second daughter with whom they had quarreled.

378. **Opportunity.**—Where a testator has been for years dependent in respect of his comfort and home upon persons whom he makes chief or exclusive beneficiaries under his will, and it is shown that their influence over him was great, and even where it is shown that they requested or urged the making of the testamentary provisions which appear in his will, the courts will not refuse it probate on the ground of undue influence unless it clearly appear that some fraud, imposition or coercion, was exercised; or, as Van Brunt, P. J., observes (*Matter of Bedlow*, 67 Hun, 408, 413): "The mere fact that the opportunity of exercising undue influence has been afforded and that benefits have resulted to those who had the opportunity of exercising such influence by no means raises a presumption that such influence was exercised." See *Matter of Munger*, 38 Misc. 268—all estate to grandniece, in token of gratitude for nursing him while long separated from wife and married daughter. There was proof of declarations of affection and of intent to reward. In other words, the exercising of undue influence must be proved as a fact and will not be inferred, nor will it arise as a presumption merely from opportunity and interest. *Matter of Murphy*, 41 App. Div. 153; *Matter of Keefe*, 47 App. Div. 214; *Matter of Lowman's Estate*, 1 Misc. 43, 46, citing *Gardiner* v. *Gardiner*, 34 N. Y. 155; *Seguine* v. *Seguine*, 4 Abb. Ct. App. Dec. 191; *Kinne* v. *Johnson*, 60 Barb. 69; *Cudney* v. *Cudney*, 68 N. Y. 148. So in the *Seagrist* case, 11 Misc. 188, where it was claimed that undue influence had been exerted by a niece who was the principal legatee, and it was shown that she had ample opportunity under her relations to the decedent to exert such influence, Surrogate Fitzgerald observes at page 191, "Though his favored niece had the opportunity and even the motive to secure the largest benefaction, the fact does not import the exercise by her and her husband of undue influence. Those who raise the issue must prove it affirmatively." Opportunity coupled with motive does not prove it was exercised. It must also appear that such influence was *in fact exercised* and was *sufficient to overcome the will* of testator. *Matter of Hawley*, 44 Misc. 186.

§ 379. **Opportunity continued.**—Where an attorney who draws a will benefits by its provisions, and there is evidence of such circumstances as to the testator's health, and as to the attorney's relation to him as to indicate improper motive on the part of the attorney, the court will require

some affirmative proof that the testator knew the contents of the will and that there was no undue influence.

The case of *Post* v. *Mason*, 26 Hun, 187, seems to be authority to the effect that where a legacy is left to the draughtsman of a will, who is at the time and for many years prior thereto has been legal advisor of the testator, it rests upon him to establish affirmatively that the testator acted with full knowledge of all the surrounding circumstances, to show that the transaction was free from all fraud or undue influence on his part. See headnote and opinion at page 181, citing *Crispell* v. *Du Bois*, 4 Barb. 393; *Evans* v. *Ellis*, 5 Denio, 640; *Nexson* v. *Nexson*, 2 Keyes, 229; *Davoue* v. *Fanning*, 2 Johns. Ch. 252; *Robertson* v. *Caw*, 3 Barb. 415, opinion of Willard, J., and cases there cited; *Newhouse* v. *Godwin*, 17 Barb. 236; *Whitehead* v. *Kennedy*, 69 N. Y. 466; *Wilson* v. *Moran*, 3 Bradf. 172.

It has been more recently held by the Court of Appeals (*Matter of the Will of Smith*, 95 N. Y. 516), that the mere fact that a proponent of a will, a chief beneficiary thereunder, was the attorney or agent, does not create any presumption against the validity of the legacy. See also *Matter of Dixon*, 42 App. Div. 481, 487. The burden imposed upon the attorney of satisfying the court that the will is the free, untrammeled, intelligent expression of the intention of the testator is imposed only where the circumstances are such as to show either that the testator was infirm or weak, or peculiarly susceptible to, or where there is direct proof of declarations by such testator as to the testamentary intention wholly different from those expressed in the will. See also *Clarke* v. *Schell*, 84 Hun, 28; *Matter of Suydam*, 84 Hun, 514. If, however, the attorney who draws a will appears to be the sole beneficiary thereunder the court will require proof of knowledge of its contents by the testator and affirmative evidence that there was no fraud or undue influence. *Matter of Westurn*, 60 Hun, 298.

§ 380. **Weakness of testator.**—The rules above stated as to the creating of presumption in certain cases may be materially modified in any given case by proof that the testator while possessed of testamentary capacity in the eyes of the law was nevertheless so aged or infirm as to be peculiarly susceptible to importunities or influence alleged to have been asserted by some beneficiary under the will. *Matter of Hurlbut*, 26 Misc. 461.

For example, the rule as to there being no presumption that the attorney who drew a will under which he is a beneficiary exerted any undue influence merely from the fact that he was legal adviser of the testator, may be completely nullified, if it appear that the testator was in such condition of health as either not to have been fully capable or not to understand what was being done, or if capable of understanding would yield readily to any influence which the attorney by reason of his fiduciary relation might be able to exert.

Thus in the *Soule* case, 3 N. Y. Supp. 259, the testator died at the age of ninety-two years, having made a will and four codicils, and in his last codicil gave a legacy of $30,000 to his legal adviser, the draughtsman of the will, the Surrogate held that the presumption of undue influence by the draughts-

man was completely rebutted and the burden upon the draughtsman to show the absence of undue influence removed by proof of the affection entertained for him by the testator, the fact that the legacy was only about six per cent of the whole estate, in regard to which the testator had for years consulted him professionally, that the codicil was read aloud by the draughtsman in the testator's hearing at the time of execution, and it was clear that the testator had full testamentary capacity and knowledge of the contents of the will and codicils. See discussion of cases in Surrogate Teller's opinion, pages 260 to 274. Where a testator is on his deathbed and induced to make a will in favor of a relative who threatens and reproaches him, the will will be invalidated for undue influence. *Holcomb* v. *Holcomb*, 95 N. Y. 317. The rule in this connection has already been quoted above, to wit: That where a person, enfeebled by old age, or illness, makes a will in favor of one upon whom he is dependent, which is at variance with some former will made, or intentions declared, when in full vigor of health, and such later will is unjust, the presumption is created that the will is the result of undue influence. See *Demmert* v. *Schnell*, 4 Redf. 409, and cases cited. So where relatives discharged the regular physician in charge of the aged testator, suffering from paresis, and later got him to execute a will in their favor, held to justify a finding of undue influence. *Matter of Miller*, 36 Misc. 310.

§ 381. **Same subject.**—Where the person who is alleged to have procured by undue influence the will, under which he is chief or sole beneficiary, has been the medical attendant of the decedent, who is shown to have been aged or infirm, the court will scrutinize the circumstances with great care, and require him to sustain the full burden of showing that the will was indeed the free, independent, testamentary act of the decedent. But where it appears the will was drawn pursuant to testator's instructions, and the medical attendant was not present at time of execution, held, no presumption of undue influence. *Matter of Cornell*, 43 App. Div. 241, 245, aff'd 163 N. Y. 608, citing *Matter of Will of Smith*, 95 N. Y. 516; *Matter of Spratt*, 4 App. Div. 1, 5. See also *Matter of Small*, 105 App. Div. 140. The rule in this class of cases has been stated by Surrogate Rollins as follows: "Where a will has been prepared or procured by one interested in its provisions, an additional burden is imposed upon those who seek to establish it; the circumstance is regarded by the court with suspicion and jealousy, and there must be stronger proof than would else be required that the paper propounded expresses the free, unbiased testamentary purpose of the alleged testator, and not merely the wishes of the interested beneficiary. Moreover, the existence of a confidential relation, such for example as subsists between physician and patient, implies of itself peculiar opportunities for the exercise by the former over the latter of influence and authority, so that if he had been instrumental in procuring from his patient a will containing provisions greatly to his advantage, 'fraud and undue influence will readily be inferred unless all jealous suspicion is put to rest,' by satisfactory testimony," citing Schouler on Wills,

256; *Newhouse* v. *Godwin*, 17 Barb. 236; *Wilson* v. *Moran*, 3 Bradf. 172; *Crispell* v. *Du Bois*, 4 Barb. 393; *Kinne* v. *Johnson*, 60 Barb. 69; *Post* v. *Mason*, 91 N. Y. 539. See *Matter of Keefe*, 27 Misc. 618.

In the *Lowman* case, 1 Misc. 43, one of the residuary legatees was a nephew of the testator and attended him as a physician. Others of the persons interested in the estate alleged undue influence on the part of this nephew, predicated first upon his opportunity as such attending physician, and second upon the fact that he had professionally prescribed morphine to the testator for the purpose of allaying pain; it was held that there being no proof that at any time or at the time of the execution of the will, the testator was under the influence of the drug to the extent of impairing his mind or his will, and there was not the slighest evidence of any bad faith on the part of the nephew, no presumption would be entertained adverse to the will or in favor of the undue influence. In a case where a will was made by a patient in favor of his physician who had only attended him for comparatively a brief period, and it appeared that the testator was broken in mind and body by indulgence in vicious habits, and it also appeared that the will was made under an insane delusion respecting relatives of the decedent, it was held that there was a strong presumption against its validity, which was not met by the circumstance and proofs, but that fraud and undue influence were inferable from, and established by, all the facts in the case, and the will was denied probate. *Calhoun* v. *Jones*, 2 Redf. 34. See *Matter of Rintelen*, 37 Misc. 462, where confirmed inebriate made will in favor of an attorney, citing *Matter of Westurn*, 60 Hun, 298; *Peck* v. *Belden*, 6 Dem. 299; *Turhune* v. *Brookfield*, 1 Redf. 220.

§ 382. **Effect of character of the will combined with age or weakness of the testator.**—Where the evidence shows that the will propounded ignores or disinherits those remembered by the testator in prior wills or who were dependent upon the testator or whom the testator has previously regarded with affection, or where the will is at variance with the repeated testamentary declarations of the testator, and the will contested was made by the testator in a last illness or under circumstances of great bodily weakness, or infirmity, in favor of the person accused of exerting undue influence, the Surrogate will require explicit affirmative proof of the absence of fraud or imposition. Thus where it appeared that the testatrix had often said that she would make no will but did make a will before her death, when she was so weak that she could neither speak nor sign her name, that the directions in regard to the will were given by one who had never been particularly intimate with the testatrix or liked by her, and it appeared that this person went to the house three days before her death for the purpose of getting her to make a will and superintended its execution, it was held a sufficient proof of undue influence. In this case, however, it was also held, that the will was signed by the testatrix's mark, and that when asked if she acknowledged her signature she said, she did not know whether she did or not. *Matter of Hopkins*, 6 N. Y. St. Rep. 390. See also *Matter of Stewart*, 10 N. Y. Supp. 744. So where a testator

having made previously wills in favor of his family executed a subsequent will at the house of a friend, substantially in favor of that friend and his wife, and it was shown that the testator was illiterate, intemperate and infirm, probate was denied on the ground of undue influence. *Matter of Liney*, 34 N. Y. St. Rep. 700. See also *Matter of Dwyer*, 29 Misc. 382. So in a case where a testator was seventy-nine years old, who had been strong and vigorous all his life until he was attacked by a serious illness during which in expectation of death he made his will, and it appeared that one of his daughters was disinherited by this will as the result of letters written by one of the sons containing accusations against the daughter which alienated her father's affection, it was held that a verdict that the will was procured to be executed by undue influence, was proper if the jury were satisfied that the son wrote the letter knowing its statement to be untrue, with the design that it should reach his father and influence him in the disposition of his property, and with the result that it did in fact influence him to disinherit the sister. *Matter of Will of Budlong*, 126 N. Y. 423, 431.

§ 383. **Summary.**—From the cases discussed it is clear that the presumption of undue influence arises first in cases of confidential or fiduciary relationship as where a patient makes a will in favor of his physician, a client in favor of his lawyer, a ward in favor of his guardian, or any person in favor of his priest or religious adviser.

Second, this presumption is strengthened where the contents of the will are unjust, or at variance with the declared testamentary intentions of the testator.

And third, the presumption may arise where in addition it appears that the will was executed by a testator so infirm by reason of age or weakness as to be peculiarly susceptible to importunities or other influences, particularly when the person benefiting by the will then made has motive and opportunity to exert influence and appears to have profited thereby.

If in any particular case such a presumption is created by the facts, it may be met as to the first class of cases by proof of such consanguinity or nearness of relation as to warrant the person sustaining the confidential or fiduciary relation in exerting that degree of persuasion, urging or decent importunity, which the courts permit, or by any affirmative proof showing that undue influence was not in fact exerted. The presumption in the second class may be met by proof that the testator having testamentary capacity had full knowledge of the contents of the will, unless of course it appear that the making of the particular will was induced by false representations actually affecting the testamentary disposition. The presumption in the third class of cases may be met by affirmative proof of testamentary capacity and by showing that undue influence was not in fact exerted.

§ 384. **Change of testamentary intention.**—The fact that testator has made other wills prior to the one objected to, making entirely different

disposition of his property, particularly where the prior will is equitable and provident, is a material inquiry upon the issue of undue influence. *Calhoun* v. *Jones*, 2 Redf. 34; *Matter of Dwyer*, 29 Misc. 382. So also may it be material to show that the testator had repeatedly declared his intention of making no will, yet this fact if proved is not at all conclusive but should be viewed in connection with other circumstances in the case. *Matter of White*, 5 N. Y. Supp. 295. And particularly material will be proof that the will is completely at variance with the testator's repeated declaration as to his testamentary intentions. See *Matter of Phelps*, 19 Weekly Dig. 293.

§ 385. **Knowledge of contents.**—The ordinary presumption as to the knowledge by a person who has executed a document, of the contents of such document, does not arise in case of wills where there is proof that the testator was suffering from some physical infirmity or defect, or where the will was executed under any of the conditions above noted, and presents either in connection with the circumstances surrounding its execution or in its very provisions any suspicious feature such as to require the court to inquire narrowly into the facts. Conceding testamentary capacity to exist, and the only objection to be that of undue influence, it is a most important inquiry for the court to make, whether the testator really knew the contents of the will he was signing. It is true that among the four statutory requirements above discussed there is no provision that the will must be read by or to the testator before its execution. However, the courts have frequently intimated the wisdom of such a precaution in cases where it appeared that the testator was illiterate, infirm, or extremely aged. Thus it has been observed judicially: "We think it is the duty of witnesses of wills to know, by inquiry of the testator or otherwise, whether or not he has personal knowledge of the contents of the paper he is about to sign as his last will and testament. Unless this is done, there might not be any evidence that the will had been read to or by him; no evidence that he ever had knowledge of its contents, and thus opportunity would be afforded to take advantage of his confidence or carelessness, to impose a will upon him not in accordance with his directions or intentions; especially would this be so in the case of the aged, sick, or infirm, who might be powerless to protect themselves from being surrounded by those who would not hesitate to benefit themselves by fraud, coercion or undue influence, and possibly crime." *Matter of White*, 15 N. Y. St. Rep. 753. See also *Will of Crumb*, 6 Dem. 478. The Court of Appeals held, in a case where a decedent was shown to have mental capacity but to have been undoubtedly impaired in mental power, and his will enfeebled by paralysis and disease, that a party who offered an instrument for probate as a will, must show satisfactorily that it is the will of the alleged testator, and upon this question he has the burden of proof. *Rollwagen* v. *Rollwagen*, 63 N. Y. 540, 517. And Judge Earl observes: "Ordinarily, when a testator subscribes and executes a will in the mode required by law, the fact of such subscription and execution are sufficient proof that the instrument speaks his language

and expresses his will; but when a testator is deaf and dumb, or unable to read or write and speak, something more is demanded. There must then not only be proof of the factum of the will, but also that the mind of the testator accompanied the act, and that the instrument executed speaks his language and really expresses his will."

§ 386. **Proof of knowledge of contents.**—If it appear in evidence that the will was read to the testator before execution prior to his publication of the same as his will, this will generally be considered sufficient proof that he understood the contents thereof. And even where the testator is an illiterate person, if it is proven that the will was read aloud in her presence, the court will assume in the absence of allegations of evidence of fraud on part of the person so reading it, that the whole will was read and read correctly. *Matter of Murphy*, 15 Misc. 208, 211, Lansing, Surr. See opinion at page 212 *et seq.*, and question of undue influence between servant and master.

Where, however, the decedent is shown to have been at the time of execution a person of business capacity, prudence, and full testamentary capacity, the court cannot require proof that the will was read but will infer knowledge of contents from the circumstances of the execution. See *Matter of Smith*, 24 N. Y. Supp. 928; *Matter of Metcalf*, 16 Misc. 180; *Hagan* v. *Yates*, 1 Dem. 584; *Matter of Sheldon*, 40 N. Y. St. Rep. 369.

So knowledge of contents may be proved by evidence that the testator subsequently made declarations indicating recognition of the will or that the testator prior to its execution expressed testamentary intentions which appeared to be carried out in the will. See *Wightman* v. *Stoddard*, 3 Bradf. 393; *Ewen* v. *Perrine*, 5 Redf. 640, Alton B. Parker, Surr.

This is not to be taken as indicating that undue influence may be proved merely by declarations of the testator, for it has been held in that respect, that there must be independent proof of efforts so to influence him. See *Cudney* v. *Cudney*, 68 N. Y. 148.

Knowledge of contents of the will, however, may be proved circumstantially, the court may infer it from all the circumstances attending the execution and it may be established by the testimony of the subscribing witnesses, or by the testimony of one witness in opposition to that of the other or others, or it may be established by independent testimony, even against that of the subscribing witnesses. See *Theological Seminary* v. *Calhoun*, 25 N. Y. 422.

§ 387. **Undue influence in destroying a will.**—Undue influence may be exerted not only to procure a will, but also to procure the destruction or revocation of a will. In this latter case a court may admit to probate a will destroyed in the lifetime of the testator as the result of undue influence. In such a case, however, not only must the undue influence be proven resulting in the destruction of the will but it must first be shown that the will existed and that it had been duly executed. See *Voorhees* v. *Voorhees*, 39 N. Y. 463.

§ 388. **Mistake.**—It is not sufficient ground for refusing probate of a

will that error as to any matter of fact has been made by the testator, unless it appear, that the mistake embodied in the will has been of such a character as to nullify or materially to affect his testamentary intentions. *Boell* v. *Schwartz*, 4 Bradf. 12. It has, however, in another connection been already pointed out that proof of mistake on the part of the testator, will not invalidate the will where it does not amount to an insane delusion. See cases cited *supra*. Thus a mistake as to the person named as executor, is no ground for refusing probate. *Matter of Finn*, 1 Misc. 280. And it has been held proof that the omission of a beneficiary in part or all of the will was the result of mistake is inadmissible. *Matter of Forbes*, 60 Hun, 171, where the General Term observes:

"There are many reported cases where proof has been introduced in controversies over wills of the expression of testamentary intentions which were not carried out in the instrument. Such testimony has usually been introduced upon the question of undue influence, but we find no case where such proof has been received to destroy a will on the ground of mistake alone . . . . such a doctrine would be fraught with danger." This of course does not affect the rights of courts in construing wills to receive evidence that statements or provisions therein contained are void for uncertainty or mistake. See, for example, *Kalbfleisch* v. *Kalbfleisch*, 67 N. Y. 356, 360. However, where the will in question appears to be in direct controversion of the testator's known testamentary intentions, and the question of his knowledge of the contents of the will is in issue, the court may very properly take into consideration the variance of the written will upon the question whether the will was the will of the testator or the will of someone else imposed upon him by force or fraud. See *Matter of Westurn*, 60 Hun, 298.

So in *Matter of Tousey*, 34 Misc. 363, Thomas, Surr., held: "The doctrine of dependent relative revocation includes as one of its branches, and applies to, an attempted revocation of a testamentary provision which upon some ground of mistake is held inoperative. If applicable to a will it must appear clearly from the will itself, not only that there has been a mistake made by the testator, but also just what he would have done in case there had been no mistake. *Gifford* v. *Dyer*, 2 R. I. 99. Where a legacy was made by a will and in a codicil revoking it was recited that the legatee was dead, such revocation was held inoperative on proof that the legatee survived the testator (*Campbell* v. *French*, 3 Ves. 321), but even in case of revocation by codicil the rule has been applied with caution, and the mistake must appear on the face of the codicil as the sole moving cause to induce the revocation. *Skipwith* v. *Cabell*, 19 Gratt. 758. An apparent mistake as to a matter of fact as to which the testator must have had full knowledge is not sufficient. *Mendinhall's Appeal*, 124 Penn. St. 387. In no case which has been brought to my notice has a will been refused probate, or has any attempt been made to correct or change its provisions on proof extraneous to the document of a mistake by the testator as to a fact which might possibly have led him to do something different from

what he has done. On the contrary, the cases in the courts of this State which require the testator's directions to be followed, even though it may be made quite clearly to appear that he was actuated by erroneous opinions on questions of fact, are quite numerous. *Matter of Bedlow*, 67 Hun, 408; *Clapp* v. *Fullerton*, 34 N. Y. 190; *Matter of Harris*, 19 Misc. Rep. 388; *Creeley* v. *Ostrander*, 3 Bradf. 107.

CHAPTER V

ADMITTING THE WILL TO PROBATE

§ 389. Will, when sufficiently proved.

If it appears to the surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make a will, and not under restraint; it must be admitted to probate, as a will valid to pass real property, or personal property, or both, as the surrogate determines, and the petition and citation require, and must be recorded accordingly. The decree admitting it to probate must state whether the probate was or was not contested. **§ 2623, Code Civil Proc.**

The wording of this section indicates that the admission of the will to probate is a judicial act and involves a determination by the Surrogate whether the will, execution of which he declares by his decree to have been in compliance with the statute, is a will valid to pass real, or personal, or real and personal property; but this does not involve necessarily any determination by the Surrogate as to the validity of the bequests or devises in the will contained. Where there has been a failure to comply with the statutory provisions relative to the execution of wills, a will must be denied probate. Public policy requires it. *Matter of Kivlin*, 37 Misc. 187, and cases cited. The intent of the testator may be clear; it may, e. g., be a holographic will; but that cannot be paramount to the intent of the legislature. *Matter of Andrews*, 162 N. Y. 1. In *Matter of Babcock*, 42 Misc. 235, Silkman, Surr., held that in view of the difficulties inherent in appeals from a decree refusing probate in a close case (referring to *Matter of Beck*, 6 App. Div. 211) he would decree probate where the *factum* was established satisfactorily unless lack of capacity, or fraud, or undue influence be established beyond a reasonable doubt. But this means there must be some evidence that the person who made the will was competent, and not under restraint. This is usually done by the subscribing witnesses. *Matter of Schreiber*, 112 App. Div. 495, citing *Miller* v. *White*, 5 Redf. 321. If there be no such proof, probate must be denied. *Ibid.*, citing *Matter of Goodwin*, 95 App. Div. 183; *Matter of Ramsdell*, 117 N. Y. 636. The presumption of sanity is not alone sufficient to underlie a finding to sustain the judicial act called for by § 2623 in the words "if it appears to the Surrogate." The judicial action of the Surrogate in a probate proceeding must be confined to a determination of the question of the due execution of the will, and whether the testator had sufficient testamentary capacity, and was not under any restraint. He has also power, under the provisions of the Code, § 2624 (see ch. VIII) to pass on the validity of a bequest of personalty as incidental to the probate of the will unless probate is denied; but the

words "a will valid to pass real property" mean solely a will duly executed which undertakes in terms to convey that species of property.

But, probate logically precedes any power to construe. Upon due proof of statutory execution he must admit to probate. On its validity in the other sense the Surrogate can then pass. *Matter of Davis*, 182 N. Y. 468, 475, aff'g 105 App. Div. 221, and 45 Misc. 554. This Davis case was peculiar in that sole legatee, devisee and executrix did not survive testatrix. See also *Matter of Pilsbury*, 50 Misc. 367. The Surrogate does not decide in admitting a will to probate, that the instrument in fact passes title to any real estate, he passes on the factum of the will alone; and the description of the wills as wills of real or personal property, relate to the manner in which they have been executed. For example under § 2611, now Dec. Est. Law, §§ 23–25, there are wills which while they may purport to devise real estate can only be admitted to probate as wills of personal property, such, for example, are wills executed without the State in the manner prescribed by the laws of the State or county where executed, or the will of a nonresident executed according to the laws of his residence, but not as prescribed by the laws of this State; and a decree admitting a will to probate as a will valid to pass real property gives in the first place, to the decision of the Surrogate, no effect as an adjudication as to the validity of the devises in the will (see *Matter of the Will of Merriam*, 136 N. Y. 58, 61), and, in the second place, prejudices no one interested in the property sought to be bequeathed or devised, because the statute expressly limits the conclusive effect of a probate decree in the case of wills of real and of personal property, by §§ 2626 and 2627 of the Code already quoted (in the chapter on decrees and orders) but here repeated for purposes of clearness.

Probate, how far conclusive as to personalty.

A decree admitting to probate a will of personal property, made as prescribed in this article, is conclusive, as an adjudication, upon all the questions determined by the surrogate pursuant to this article, until it is reversed upon appeal, or revoked by the surrogate, in an action brought under section 2653*a* to determine the validity or invalidity of such will; and except that a determination, made under section 2624 (*that is where a party puts in issue the validity, construction, or effect of provisions in the will*) of this act, is conclusive only upon the petitioner and each party who was duly cited, or appeared, and every person claiming from, through, or under either of them. **§ 2626, Code Civil Proc.**

This conclusiveness extends into collateral proceedings. *Vanderpoel* v. *Van Valkenburgh*, 6 N. Y. 190; *Wetmore* v. *Parker*, 52 N. Y. 450.

Probate, how far conclusive as to realty.

A decree, admitting to probate a will of real property, made as prescribed in this article, establishes, presumptively only, all the matters determined by the surrogate, pursuant to this article, as against a party who was duly cited, or a person claiming from, through, or under him; or upon the trial of an action, or hearing of a special proceeding, in which a controversy arises concerning the will. Where the decree is produced in evidence, in favor of or against a person, or in a case, specified in this section, the testimony taken in the

special proceeding, wherein it was made, may be read in evidence, with the same force and effect, as if it were taken upon the trial of the action, or the hearing of the special proceeding, wherein the decree is so produced. **§ 2627, Code Civil Proc.**

Now it is manifest under these two sections that as far as personal property goes, the probate decree becomes conclusive after a year has elapsed from the time of its entry, that being the period within which an appeal should be taken or a petition filed to revoke probate (see *Post* v. *Mason*, 91 N. Y. 539; *Smith* v. *Hilton*, 19 N. Y. St. Rep. 340); and consequently, if the time to appeal or to apply for revocation of probate has expired, there is no remedy unless it is possible to make out a case of fraud in procuring probate under which the decree could be attacked. It appears also that so far as realty is concerned, the decree has no conclusive effect but establishes presumptively only the matters determined by the Surrogate, that is to say, the sufficiency of the facts proved to establish due execution. See *Matter of Gilman*, 38 Barb. 364. In *Matter of Maccafil*, 127 App. Div. 21, a will disposing of realty only but appointing an executor was admitted on the latter ground as a will of personalty, although the husband claimed *jure mariti*, as in intestacy. See opinion of Jenks, J., and cases discussed.

So far as rights in the property thereby devised go, the probate decree concludes no one. So it has been held (*Baxter* v. *Baxter*, 76 Hun, 98), that a Surrogate's decree admitting a will to probate as a will of real property was presumptive evidence,

(*a*) Of the facts as to proper execution (see also *Van Rensselaer* v. *Morris*, 1 Paige, 13);

(*b*) As to the competency of the testator (see also *Howard* v. *Moot*, 64 N. Y. 262);

(*c*) That he was not under restraint;

(these being the facts covered by § 2623); and accordingly one claiming under a deed, made by the testator of a will refused probate by the Surrogate on the ground of incompetency of the testator, was held not to be in any way concluded as to his rights under the deed from proving the grantor's competency to convey, although it appeared that the deed and the will were made upon the same day, and, moreover, it was held that the claimant under the deed having been a party to the probate proceedings in which the will had been rejected made no difference in this regard. *Baxter* v. *Baxter*, *supra*. And as it may be that a will purporting to pass real estate may not be admissible to probate as a will of real property but may be admitted as a will of personal property, so it may be that a will invalidated as to personalty, as for example, the will of a testator domiciled in another State at the time of his death, and held in that State by a competent court to have been revoked by the subsequent birth of a child, may while invalidated in this State as to personalty, still be valid in this State as to realty. See *Bloomer* v. *Bloomer*, 2 Bradf. 336. And where the decree has no conclusive effect, the Surrogate may refuse to open the probate on petition of one not concluded thereby. *Bailey* v. *Stewart*, 2 Redf. 212.

The Code provides, § 2625, that,

> Where the surrogate decides against the sufficiency of the proof, or against the validity of a will, or upon the construction, validity, or legal effect of any provision thereof, he must make a decree accordingly; and, if required by either party, he must enter in the minutes, the grounds of his decision.

But, where a Surrogate has refused to probate a will upon the ground that the proof of its execution is insufficient and the testator incompetent to make it, his powers over it are ended and he cannot go further and admit it to probate, with a statement of the executor and chief beneficiary to the effect that the direct bequest to him of realty and personalty was in fact made for the children of the testator, that the testator considered them incompetent to manage the property and that the executor holds it in trust for them. *Matter of Eckert*, 36 Misc. 610 (headnote).

The form of a decree refusing probate, on the ground of insufficiency of proof, or invalidity of any of the grounds upon which the Surrogate has jurisdiction to deny probate, can readily be adapted from the form of the decree below suggested. It will be noted in the precedent under § 390 below, that provision is made for a clause in which may be incorporated the determination of the Surrogate with respect to the construction, validity, or legal effect of any provision in the will expressly put in issue by a party to the proceeding. The object of § 2625, particularly in respect to its last provision, is to add to the probative effect of the decree in subsequent proceedings. For example, if a will is sought to be established by an action, subsequent to its rejection by the Surrogate, the decree duly recorded or certified is admissible in evidence; and while having no conclusive effect upon the rights of the devisees, it is conclusive upon the matters, and in the respects touching which the Surrogate had jurisdiction. See *Corley* v. *McElmeel*, 87 Hun, 13. In affirming the case last cited, the Court of Appeals (149 N. Y. 228) said, in this connection (see opinion of Gray, J., at page 245):

"The jurisdiction of the Surrogate is only such as is conferred by the statute, and though a scheme for the determination of the factum of wills of real property, as well as those of personal property, is provided by the Code of Civil Procedure, it is not to be regarded as exclusive of the right, which existed at common law, in favor of heir and of devisee, to a trial by jury of the question of the title to the testator's real property. The Surrogate's decree, as to a will of personalty, is made conclusive by force of the statutory provision (Code, § 2626), giving it such effect, if favorable to the will; and if unfavorable, it is, in fact, conclusive; because the transmission and distribution of the property bequeathed are checked. It was always considered, when the provisions of the Revised Statutes were the source of the Surrogate's authority, that his decree did not, and could not, conclude the question of the validity of a testamentary devise of real property, in a subsequent litigation involving the title thereto. *Bogardus* v. *Clark*, 4 Paige, 623; *Harris* v. *Harris*, 26 N. Y. 433. We think that it is true now under the Code. That the Surrogate's admission to probate of a will of

real property has its advantages, is, of course, plain enough. In the first place, it entitles the will to be recorded as a proved will, and, in the second place, in a subsequent litigation over the real property devised, the devisee defending his title has the benefit of the presumption arising from the production of the Surrogate's decree and the testimony upon which it was rendered. Also, the devisee is protected against the claim of a purchaser in good faith from the heir-at-law. (Code, § 2628.) These are manifest advantages and render the admission of the will to probate a desirable thing; but they are only advantages and nothing more. The title of the devisee is still open to litigation at the instance of the heir-at-law, who is not concluded by anything which has taken place in the Surrogate's Court."

Where the parties required to be cited are of full age and desire to expedite the probate of the will, they may do so by means of the subjoined waiver and consent, duly acknowledged and filed.

Waiver and consent.

Surrogate's Court,
Kings County.

In the Matter of the Probate of the Last Will and Testament of
Deceased.

the undersigned, being of full age, heir and next of kin of deceased, named in the petition herein, do hereby appear in person and waive the issuance and service of a citation in the above entitled matter and consent that the last Will and Testament of deceased, bearing date be admitted to probate forthwith.

(Signature.)

Note. If acknowledgment be taken outside of County, County Clerk's certificate of Notaryship must be attached.

Note.

Or where the citation is served, they may, if of full age, consent to the probate as follows:

Admission of service of citation and consent.

Surrogate's Court,
Kings County.

In the Matter of the Probate of the Last Will and Testament of
Deceased.
as a Will of Real (or of Personal) Property (or of both).

the undersigned, heir and next of kin of

deceased, named in the annexed citation, being of full age, do hereby admit due and timely personal service of the said citation upon on the day of 190 at in the State of and do hereby appear in person in the above-entitled matter and consent that a decree be entered therein admitting to probate the last Will and Testament of deceased, bearing date the without further notice to

(Signature.)

§ 390. **Procedure where there is no contest.**—Where all have waived citation or consented and there is no contest, the subscribing witnesses being examined as outlined in a preceding chapter, their depositions are taken (reduced to writing) and sworn to before the Surrogate or his assistant substantially in the following form:

Surrogate's Court,
County of New York.

In the Matter of Proving the Last Will and Testament of Deceased, as a Will of Real and Personal Property.

State of New York
County of New York, } ss.:

of being duly sworn as a witness in the above-entitled matter, and examined on behalf of the applicant to prove said will, says: I was well acquainted with now deceased; I knew the above-named decedent for more than years before h death. The subscription of the name of said decedent to the instrument now shown to me and offered for probate as h last will and testament, and bearing date the day of in the year one thousand nine hundred and was made by the decedent at the City of New York, on the day of in the year one thousand nine hundred and in the presence of myself and the other subscribing witness. At the time of such subscription the said decedent declared the said instrument so subscribed by h to be h last will and testament; and I thereupon signed my name as a witness at the end of said instrument, at the request of said decedent, and in h presence.

The said decedent at the time of so executing said instrument, was upwards of the age of twenty-one years, and in my opinion of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a will. I also saw said the other subscribing witness sign h name as witness at the end of said will, and

know that he did so at the request, and in the presence of said decedent.

Witness sworn and examined before me this day of 190

Assistant to the Surrogate,
New York County.

If there has been an infant represented by special guardian the special guardian should file a report substantially as follows:

Surrogate's Court,
Westchester County.

In the Matter of Proving a Paper Writing Purporting to be the Last Will and Testament of Deceased.

I, Attorney and Counsellor at Law, heretofore appointed the special guardian of the infant for the purpose of appearing for herein and protecting rights and interests, in this proceeding do hereby report that the interests of said infant are that I have examined the said paper writing dated purporting to be the last Will and Testament of said deceased, the petition for probate thereof, citation and proof of service, depositions of the subscribing witnesses to said Last Will and Testament, all other papers in this proceeding, and have examined the witnesses produced by the proponent; I further report that there is no valid objection to the probate of said paper writing on the part of said infant, or any of them.

(Dated.)

Special Guardian.

When the depositions have been made and filed, and the special guardian if any has made his report stating that there are no objections to the probate of the will, the papers are marked for decree, and a decree granting probate is handed down by the Surrogate substantially in the following form:

Decree granting probate.

Surrogate's Court
Caption.

Present:

Hon.
Surrogate.

In the Matter of the Probate of the Last Will and Testament of late of Deceased, as a Will of Real (or) (and) Personal Property.

Satisfactory proof having been made of the due service of the citation herein upon, or of the due appearance herein by, all persons entitled to notice of this proceeding and,

Esq., special Guardian for an infant 14 years of age having appeared in person

And the witnesses to said last Will and Testament having been sworn and examined, their examination reduced to writing and filed, and it appearing by such proofs that the said Will was duly executed, and that the Testat at the time of executing it, was in all respects competent to make a will, and not under restraint; and this Court being satisfied of the genuineness of the will, and the validity of its execution; and the probate thereof not having been contested,

It is Ordered, Adjudged and Decreed, that the instrument offered for probate herein be, and the same hereby is, admitted to probate as the last Will and Testament of the said deceased, valid to pass Real and Personal property, and that the said Will, with the proofs thereof, and this Decree be recorded, and that Letters Testamentary be issued to the Execut who may qualify thereunder, and that said Execut pay to Esq., special Guardian, the sum of dollars as and for his costs and allowance herein.

Surrogate.

§ 391. **Admitting will after contest.**—The following precedent for a decree admitting to probate a will to which objections have been filed indicates the various matters to be covered by the decree, the form being readily adaptable by omission or amplification to meet any ordinary cases.

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Decree granting probate after contest.

In the Matter of Proving the Last Will and Testament of Deceased, as a Will of Real and Personal Property.

Satisfactory proof having been made of the due service of the citations heretofore issued in this matter, requiring all persons entitled to notice of this proceeding to be and appear before one of the Surrogates of the county of New York to attend the probate of the last will and testament of late of deceased, bearing date the day of 19 and [here recite all the appearances, as for example, and one of the executors named in said will, the petitioner herein, having appeared, in person or by attorney as the case may be, in support of said probate; and (add other parties appearing and contesting) and infants over (or under) the age of 14 years having appeared by a guardian *ad litem* duly appointed by the surrogate and filed an answer in opposition to said probate; and a per-

son named as executor in another paper purporting to be the last will and testament of the above named decedent having appeared herein by his attorney in pursuance of an order of this court duly made upon his petition permitting him to intervene as a party upon this proceeding, and no other person having appeared];

And witnesses having been examined and proofs taken (by and on behalf) of the proponent and the contestants touching the facts and circumstances attending the execution of said will, and the competency of the testator to make the same, and his freedom from restraint, and the Surrogate having heard such proofs and the allegations of the respective parties, and due deliberation having been thereupon had, it is

Ordered, Adjudged and Decreed—

I. That the instrument in writing bearing date the day of 19 propounded as and for the last will and testament of the said deceased, in this proceeding, is the last will and testament of the said deceased, and was duly executed as required by law. That the said the testator at the time of executing it was, in all respects, competent to make such will and not under restraint.

II. (If the validity, construction or effect of any disposition of personal property contained in the will was put in issue before the Surrogate add here the determination of the Surrogate as to the true construction and legal effect of the clause, reciting it.) *Note.*

Note. No such disposition can be put in issue under section 2624, excepting

(*a*) It be of personal property.

(*b*) The will be of a resident of the State.

(*c*) The will was executed within the State.

III. And it is further Ordered, Adjudged and Decreed, that the said instrument offered for probate herein be, and the same hereby is admitted to probate as the last will and testament of the said deceased, valid to pass (real, *or* personal, *or* real and personal) property; and that the said will with the proofs thereof, together with this decree, be recorded; and that letters testamentary issue to the executor (s) named in said will, who may qualify thereunder.

IV. (It is proper to add a further direction dismissing as unproved and unsustained the objections, if any, that may have been filed and not substantially disposed of by the determinations as to testamentary capacity and undue influence.)

V. (Here incorporate directions as to the payment of costs to the proponent and to special guardians, and whatever provisions for taxable disbursements that may be necessary, specifying whether the costs are to be paid out of the estate or to be imposed upon the contestants personally.)

(Signature.)

Surrogate.

Where the Surrogate, however, refuses probate it is proper to follow the foregoing form substantially as far as paragraph I. only, at which point the determination of the Surrogate as to the particular ground for the rev-

ocation of the will, should be incorporated. For example, if due execution has been proven but the exercise of undue influence established, the decree may read:

> It is Ordered, Adjudged and Decreed, that the paper writing purporting to be, and offered for probate as, the last will and testament of deceased, is not the last will and testament of the said deceased, the execution thereof by said having been procured while he was under restraint and undue influence upon him exercised by and it is
>
> Further Ordered, Adjudged and Decreed, that the said instrument offered for probate herein be and the same hereby is, denied probate as the last will and testament of the said deceased, and (here add a further clause granting costs to the successful contestants and providing for taxable disbursements out of the estate).

The grounds of his decision must be entered in the minutes by the Surrogate, if required by either party. Code Civ. Proc. § 2625, *ante*, p. 394.

§ 392. **The Surrogate's certificate of probate.**—After the decree admitting the will to probate has been made, the Surrogate must make a certificate under § 2629 of the Code, which is as follows:

> The surrogate must cause to be indorsed upon, or annexed to, the original will admitted to probate, or the exemplified copy, or statement of the tenor of a will, which was admitted without production of an original written will, a certificate, under his hand, or the hand of the clerk of his court, and his seal of office, stating that it has, upon due proof, been admitted to probate, as a will valid to pass real or personal property, or both, as the case may be. The will, or the copy or statement, so authenticated, the record thereof, or an exemplified copy of the record, may be read in evidence, as proof of the original will, or of the contents or tenor thereof, without further evidence, and with the effect specified in the last three sections. **§ 2629, Code Civil Proc.**

The certificate should read substantially as follows:

Certificate of probate.

> Surrogate's Court,
> Kings County.
>
> In the Matter of the Probate of the last Will and Testament of Deceased.
>
> State of New York } ss.:
> County of Kings, }
>
> Be it remembered, That, in pursuance of section 2692 of the Code of Civil Procedure, I hereby certify that on the day of the date hereof, the last Will and Testament of deceased, being the annexed written instrument, was upon due proof duly admitted to probate by the Surrogate's

Court of the County of Kings and by the Surrogate of said County, as and for the last Will and Testament of said deceased, and as a Will valid to pass Real and Personal Property.

Said Last Will and Testament and proofs are recorded in the office of said Surrogate, in Liber of Wills, page

In Testimony Whereof, I have hereunto subscribed my name and affixed the Seal of Office of the Surrogate of said County, this day of one thousand nine hundred and

{ L. S. }

Clerk of the Surrogate's Court.

§ 393. **Decree where will is not produced having been lost or destroyed.** —Where probate is sought of a lost or destroyed will under §§ 2621 and 1865, it will be recalled that due execution and the existence of the will at the time of the testator's death, or its fraudulent destruction in his lifetime must be clearly proven; and the provisions of the will must be established in the way prescribed by the Code.

The decree admitting such a will or establishing such a will, should contain similar formal recitals as to the citation and its due service as the foregoing decree and, after reciting further the appearances in the proceeding, may proceed as follows:

and the Surrogate having inquired particularly into all the facts and circumstances; and witnesses having been examined and proofs taken on behalf of the several parties hereto; and due deliberation having been thereupon had, whereby it appears, to the satisfaction of the Surrogate, that the said deceased, did, on or about the day of duly execute a last will and testament in the manner required by law; and that the said will was in existence at the time of the said testator's death (*or* was fraudulently destroyed in his lifetime) and that it has been lost; and it further appearing to the satisfaction of the Surrogate that the provisions of said will so lost as aforesaid have been clearly and distinctly proved by at least two credible witnesses; (*Note*)

Note. That under section 1865 a correct copy or draft is made equivalent to one witness; if such a draft has been made use of, it may be specified in the decree although it is not absolutely essential that this be done.

Now, on motion of the counsel for the petitioner herein, it is

Ordered, Adjudged and Decreed, that late of deceased, did on the day of 19 make and execute in the manner prescribed by law, his last will and testament containing substantially the following provisions: (*here embody the provisions in the words in which they have been proven by the witnesses; or where there is a draft proven to have been embodied in the will, incorporate the same verbatim*); and it is further Ordered, Adjudged and Decreed, that the said last will, containing the aforesaid provisions be and the same hereby is admitted to probate as the last will and testament of the said deceased, valid to pass real and personal prop-

erty; and that the said will containing the said provisions with the proofs thereof, together with this decree, be recorded, and that letters testamentary issue to the executors (who are proved to have been named therein; or where the witnesses have been unable to prove any executor named in the will provide for letters of administration with the will annexed) who may qualify thereunder.

(Add the necessary provisions as to costs.)

(Signature.)
Surrogate.

§ 394. **Prompt entry of decree.**—The danger of not promptly entering a decree admitting a will to probate, is, that the time is thereby set running within which an adverse title might be started by an heir conveying to a purchaser in good faith, and for a valuable consideration, property otherwise disposed of by the will. The danger is a remote one, but the statute provides for a validation of such a *bona fide* purchaser's title in case the will is not admitted to probate within the time thereby limited, which is four years; the section is as follows:

When purchaser from heir protected notwithstanding a devise.

The title of a purchaser in good faith and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise of the property made by the latter, unless within four years after the testator's death, the will devising the same is either admitted to probate and recorded, as a will of real property, in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent jurisdiction of the state, in an action brought for that purpose. But if, at the time of the testator's death, the devisee is either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or without the state, or, if the will was concealed by one or more of the heirs of the testator, the limitation created by this section does not begin until after the expiration of one year from the removal of such a disability, or the delivery of the will to the devisee or his representative, or to the proper surrogate. **§ 2628, Code Civil Proc.** Now Dec. Est. Law, § 46.

The words "if at the time of the testator's death, the devisee is . . . . within the age of twenty-one years," have been held not to refer to unborn children. *Fox* v. *Fee*, 167 N. Y. 44, 46. And the concealment of the will by heirs of the testator is such concealment as leaves the devisees ignorant of their rights under the will, and deprives them of knowledge of its existence. *Ibid.*, and *Cole* v. *Gourlay*, 79 N. Y. 527, 533.

The Surrogate has of course in a proper case power to enter the decree *nunc pro tunc*. But this power must be carefully exercised. So, where, by a peculiar error, an administrator took out letters under a will where no probate decree was entered, and acted thereunder, Surrogate Rollins, upon an application to revoke the letters of administration with the will annexed, which he denied as being made by one having no standing in the

proceedings, passed also upon the administrator's application that a decree be entered *nunc pro tunc* admitting the will to probate. This he denied on the ground that the failure to obtain it earlier was attributable to the negligence of the applicant and not to an act or omission of the court. *Staples* v. *Hoffman*, 1 Dem. 63, 66.

§ 395. **Additional provisions as to record of wills.**—The following sections of the Code contain miscellaneous provisions with regard to the record of wills:

Recording wills proved elsewhere within the state.

A transcript of a will of real property, proved and recorded in any court of the state, of competent jurisdiction, and of all the notices, process, and proofs relating to the same, must, when duly exemplified, be recorded, upon the request of any person interested therein, in the surrogate's court of any county, in which real property of the testator is situated. **§ 2630, Code Civil Proc.**

Records of certain wills heretofore proved; how far evidence.

The exemplification of the record of a will, proved before the judge of the former court of probates, and recorded in his office before the first day of January, in the year 1785, certified under the seal of the officer having custody of the record, must be admitted in evidence in any case, after it has been made to appear that diligent and fruitless search has been made for the original will. **§ 2631, Code Civil Proc.**

The "record" must include the "proofs," or its exemplification will not make it evidence. *Hill* v. *Crockford*, 24 N. Y. 128, citing *Morris* v. *Keyes*, 1 Hill, 540.

§ 396. **Records of certain wills heretofore proved; how far evidence.**

An exemplified copy of the last will and testament of any deceased person, which has been admitted to probate, whether as a will of real or personal property, or both, and recorded in the office of the surrogate in any county of this state, shall be admitted in evidence in any of the courts of this state, without the proofs and examination taken on the probate thereof, and whether such proofs shall have been recorded or not, with like effect as if the original of such will had been produced and proven in such court, when thirty years have elapsed since the will was admitted to probate and recorded. And the recording of such will shall be evidence that the same was duly admitted to probate. The exemplification of the record of a will which has been proved before the surrogate or judge of probate, or other officer exercising the like jurisdiction of another state must, when certified by the officer having by law, when the certificate was made, custody of the record, be admitted in evidence as if the original will was produced and proved, when thirty years have elapsed since the will was proved. **§ 2632, Code Civil Proc.**

§ 397. **Records of certain wills, how far evidence; as to wills of real property.**

A will of real property, which has been, at any time, either before or after this chapter takes effect, duly proved in the supreme court, or the court of chancery, or before a surrogate of the state, with the certificate of proof thereof annexed thereto or endorsed thereon, or an exemplified copy thereof, may be

recorded in the office of the clerk or the register, as the case requires, of any county in the state, in the same manner as a deed of real property. Where the will relates to real property, the executor, or administrator with the will annexed, must cause the same, or an exemplified copy thereof, to be recorded, in each county where real property of the testator is situated, within twenty days after letters are issued to him. An exemplification of the record of such a will, from any surrogate's or other office where the same has been recorded, either before or after this chapter takes effect, may be in like manner recorded in the office of the clerk or register of any county. Such a record or exemplification, or an exemplification of the record thereof, must be received in evidence, as if the original will was produced and proved. **§ 2633, Code Civil Proc.** Now Dec. Est. Law, § 42.

Index and fees.

Upon recording a will or exemplification, as prescribed in the last section, the clerk or register must index it in the same books, and substantially in the same manner, as if it was a deed recorded in his office. Dec. Est. Law, § 43.

An executor, or administrator with the will annexed, who causes a record of a will or exemplification to be made as prescribed in section forty-two of the decedent estate law, must be allowed, in his account, the fees paid by him therefor. **§ 2634, Code Civil Proc.**

§ 398. Wills to be returned after probate.

Except where special provision is otherwise made by law, or where the surrogate sends a will into another state or territory, or into a foreign country, or delivers it to a party in interest, as provided in section 2620 of this act, a written will, after it has been proved and recorded, must be retained by the surrogate, until the expiration of one year after it has been recorded, and, if a petition for the revocation of probate thereof is then filed, until a decree is made thereupon. It must then be returned, upon demand, to the person who delivered it, unless he is dead, or a lunatic, or has removed from the state; in which case, it may, in the discretion of the surrogate, be delivered to any person named therein as devisee, or to an heir or assignee of a devisee; or, it relates only to personal property, to the executor, or administrator with the will annexed, or to a legatee. **§ 2635, Code Civil Proc.**

§ 399. Recording will proved in other states, or abroad.

Where real property situated within this state, or an interest therein, is devised, or made subject to a power of disposition, by a will, duly executed in conformity with the laws of this state, of a person who was, at the time of his, or her death, a resident elsewhere within the United States, or in a foreign country, and such will has been admitted to probate within the state or territory, or foreign country, where the decedent so resided, and is filed or recorded in the proper office as prescribed by the laws of that state or territory, or foreign country, a copy of such will or of the record thereof and of the proofs or of the records thereof or, if the proofs are not on file or recorded in such office, of any statement, on file or recorded in such office, of the substance of the proofs, authenticated as prescribed in section forty-five of this chapter, or if no proofs and no statement of the substance of the proofs be on file or recorded in such office, a copy of such will, or of the record thereof, authen-

ticated as prescribed in said section forty-five, accompanied by a certificate that no proofs or statement of the substance of proof of such will, are or is on file, or recorded in such office, made and likewise authenticated as prescribed in said section forty-five, may be recorded in the office of the surrogate of any county in this state where such real property is situated; and such record in the office of such surrogate, or an exemplified copy thereof, shall be presumptive evidence of such will, and of the execution thereof, in any action or special proceeding relating to such real property. **§ 2703, Code Civil Proc.** Now Dec. Est. Law, § 44.

See also Laws 1894, ch. 731.

See ancillary administration, *post*, as to how foreign wills and records are to be authenticated for use in this state under **§ 2704, Code Civ. Proc.** Now Dec. Est. Law, § 45.

A will, to be entitled to record here, for the evidential purposes indicated in this section, must have been executed "in conformity with the laws of this State." Any defect in the proof of that fact, or of the other essential facts prescribed, destroys the utility of the record here. *Estate of Shearen*, 1 Civ. Proc. Rep. 455; *Estate of Langbein*, 1 Dem. 448. Such defect, if discovered when the papers are offered for record, is warrant for refusing record. *Ibid.* See also *Lockwood* v. *Lockwood*, 21 N. Y. St. Rep. 93. So, in the proofs of due execution, if but one witness prove to have been examined, and no reason why the other was not examined is shown by the record, the papers will be rejected. *Matter of Hagar*, 48 Misc. 43, citing above cases and *Meiggs* v. *Hoagland*, 68 App. Div. 182; *Matter of Nash*, 37 Misc. 706.

Millard, Surr., in *Matter of Coope*, 53 Misc. 509, limited the *Hagar* case and ordered record under §§ 2703–04 (now §§ 44–45, Dec. Est. Law) of a will shown to have been executed as required by New York law, but actually probated in Michigan on testimony of but one witness of the two.

The object of this section is limited. It does not purport to authorize the issuance of letters testamentary on a will so recorded. *Pollock* v. *Hooley*, 67 Hun, 370; *Matter of Langbein*, *supra*. See provisions of L. 1894, ch. 731, *ante*, as to issuing letters on probate of a will on record of probate elsewhere of will of United States citizen, dying domiciled anywhere in the British Empire, leaving property in this State.

The record of the foreign probate is made equivalent to proving the will here. *Bromley* v. *Miller*, 2 T. & C. 575; *Matter of Langbein*, 1 Dem. 448. A deed, therefore, executed by the executor conveys title by force of the will, though no letters have issued here. *Pollock* v. *Hooley*, *supra*.

The application to the Surrogate should be made by duly verified petition, which should set forth the preliminary facts which authorize the action of the Surrogate in spreading the exemplified copy of will and proofs upon the records of the Surrogate's Court. Such petition should show that there is real property situated within the county of the Surrogate which is devised or made subject to a power of sale in a will duly executed in conformity to the laws of this State, by a person who was at the time of death

a nonresident, stating place and date of death, alleging original probate with date and place, together with other facts necessary and proper to be brought to the attention of the Surrogate. *Matter of Nash*, 37 Misc. 706, 709, citing *Matter of Shearer*, 1 Civ. Proc. 455.

In *Meiggs* v. *Hoagland*, 68 App. Div. 182, it appeared (see headnote) that the will of a testator, who died seized of a burial plot situated in the State of New York, was executed in Philadelphia, Pennsylvania, and was admitted to probate in that city by a deputy register of wills. The witnesses did not testify that they had become such at the request of the testator, but they subsequently appeared before another deputy register of wills in Philadelphia and so testified.

An exemplified copy of the probate proceedings, including those had before the second deputy register, was filed in the office of the Surrogate of Kings County in November, 1872. Chapter 680 of the Laws of 1872, which was then in force, provided that where any real estate located in the State of New York should be hereafter devised by any person residing out of the State of New York and the will had been admitted to probate in such other State, an exemplified copy of such will and of the proofs might be recorded in the office of the Surrogate of the county where the real estate was situated and should be presumptive evidence of the will and its due execution.

Held, that assuming that all the proceedings in the Register's Court of Philadelphia, including the second deposition made by the subscribing witnesses, were properly incorporated in the exemplified record, such record was only presumptive evidence of the will and its due execution and that this presumption was overcome by the fact that at the time the will was admitted to probate it had not been shown that the subscribing witnesses became such at the request of the testator. See also *Matter of Nash*, 37 Misc. 706, where proof of execution was defective.

CHAPTER VI

REVOCATION OF PROBATE AND DETERMINING VALIDITY OF A WILL

§ 400. Persons interested may apply to revoke probate.

A person interested in the estate of the decedent may, within the time specified in the next section, present to the surrogate's court, in which a will of personal property was proved, a written petition, duly verified, containing allegations against the validity of the will, or the competency of the proof thereof; and praying that the probate thereof may be revoked, and that the persons, enumerated in the next section but one, may be cited to show cause why it should not be revoked. Upon the presentation of such a petition, the surrogate must issue a citation accordingly. **§ 2647, Code Civil Proc.**

A petition must be presented, as prescribed in the last section, within one year after the recording of the decree admitting the will to probate; except that, when the person entitled to present it is then under a disability, specified in section 396 of this act, the time of such a disability is not a part of the year limited in this section, unless such person shall have appeared by general or special guardian, or otherwise, on said probate. But this section does not affect an application made pursuant to subdivision sixth of section 2481 of this act. **§ 2648, Code Civil Proc.**

Section 2514, subd. 11 (see introductory definitions, *ante*), defines who are "persons interested." For the purposes of § 2647 the definition must be limited in contemplation of the general intent of the provision. Thus the administrator of a sister having life estate under her brother's will is not within the intent of the statute a person interested in the decedent's estate. *Matter of Milliken*, 32 Misc. 317. So, although the life tenant had commenced a proceeding to revoke probate, his application to be substituted in her stead upon her death was denied. See, relating to action under § 2653*a* of the Code, decision in *Wells* v. *Betts*, 45 App. Div. 115, as to husband's right as tenant by curtesy, and as beneficiary under a previous will. So such a "person interested" does not forfeit his rights by having signed a waiver and consent in the original probate proceedings. *Matter of Albert*, 38 Misc. 61.

§ 401. **Grounds for application to revoke probate.**—Section 2647 indicates that the application to revoke probate must be made upon allegations

(*a*) Against the validity of the will, or

(*b*) The competency of the proof thereof.

The words, "validity of the will," relate to the will considered as a duly executed instrument valid to pass real and personal property as stated in ch. V; they do not relate to the validity of the bequests or devises con-

tained in the will. Therefore, if after a will has been admitted to probate, a later will is discovered it is evident that this fact affects the validity of the will already probated as the last will and testament of the decedent, and presents a proper case for an application under § 2647. *Cunningham* v. *Souza*, 1 Redf. 462; *Canfield* v. *Crandall*, 4 Dem. 111. Where it appears, however, subsequent to the probate of a will, that it was in fact a will executed in duplicate, the omission of the probate decree to recite this fact is a mere irregularity and affords no ground for an application to revoke probate. *Matter of Crossman*, 2 Dem. 69; *Crossman* v. *Crossman*, 95 N. Y. 145, 150; *Roche* v. *Nason*, 185 N. Y. 128, 135.

The proceeding provided for by these sections cannot be resorted to as a cover for an attempt to open, vacate, modify or set aside a probate decree, or for an attempt to obtain a new trial, or a new hearing for fraud, newly discovered evidence, clerical error, or other like sufficient cause. Such a proceeding is provided for (*Pryer* v. *Clapp*, 1 Dem. 387) by § 2481, subd. 6, which contains this qualifying clause, "The powers conferred by this subdivision must be exercised only in a like case and in the same manner as a court of record, and of general jurisdiction exercises the same power."

The application under § 2647, is an application made as a matter of right. An application under subd. 6 of § 2481 is addressed to the favor and sound discretion of the court.

If a decree has been made admitting a will to probate, it would be proper to apply to open the decree, the application being addressed to the discretion of the Surrogate (see *Boughton* v. *Flint*, 74 N. Y. 476), for causes coming clearly under the language of subd. 6. For example, to allow a witness to correct his testimony (*Martinhoff* v. *Martinhoff*, 81 N. Y. 641), or to permit an heir to come in, discovered after the decree has been made and not cited in the probate proceedings (*Bailey* v. *Hilton*, 14 Hun, 3; also *Matter of Harlow*, 73 Hun, 433); to take newly discovered evidence, or to correct palpable error. And, in such cases, it is proper for the Surrogate to reopen the decree *pro tanto*, that is, only in so far as is necessary for the re-examination of new evidence, or to correct the error. See *Matter of Dey Ermand*, 24 Hun, 1. So the Court of Appeals held, that it was proper to open the proceedings and allow an heir to come in and contest probate, where it was proved that he had been forcibly prevented from appearing on the proceedings. *Hoyt* v. *Hoyt*, 112 N. Y. 493. Where the Surrogate has power to open the decree for fraud or other like cause, it has been held, that the power is not limited as respects the time within which it must be exercised by §§ 1282 and 1290 of the Code of Civil Procedure. See *Matter of Flynn*, 136 N. Y. 287. This further emphasizes the distinction between the remedies under §§ 2481 and 2647, for § 2648 expressly limits the time within which an application to revoke probate must be made to one year after the recording of the decree admitting the will to probate. It has been held (see *Matter of Hamilton*, 20 N. Y. Supp. 73), in view of the fact that § 2647 limits proceedings to revoke probate to wills of personal property (*In re Kellum*, 50 N. Y. 298. See also *Matter of Donlon*, 66 Hun, 199),

that an application to set aside a decree probating a will of real and personal property, must be made under § 2481, subd. 6. Surrogate Coffin who emphasized this rule, declared the proper practice under such subdivision to be upon affidavit, praying for an order, that the decree be vacated or opened, and that all persons interested might be cited to show cause why such order should not be made; and in the case before him he directed that the citation should issue not only to the heirs-at-law and next of kin who were cited to attend the probate, but also the legatees, if any, who did not belong to either class and were thus not required to be cited. This was a case where a later will had been discovered, and Surrogate Coffin remarked (*Matter of Hamilton, ibid.*, page 74):

"On the return day of the citation, if there were no opposition, or if there were, and the proper facts stated in the petition and affidavits were established and deemed sufficient to justify it, an order would be made setting aside the decree provided the later will should be sufficiently established to warrant its admission to probate. Then, in case it would not be, the original decree would stand. If the order prayed for were granted as suggested, then the usual proceedings would be had to revoke the later will. If successful, it would, as above stated, operate to make the decree of revocation final. If, on the contrary, it failed, the original decree would remain of full force." In *Matter of Gaffney*, 116 App. Div. 583, it was held that an application under § 2481, subd. 6, could not be used to review any erroneous decision on a mixed question of law and fact in the original probate, which had been acquiesced in without appeal or other attack for two years. Kruse, J., dissented.

§ 402. **Same subject.**—On the other hand, it is manifest that the application for the revocation of probate must be made for reasons coming within the meaning of § 2647. Thus where an application was made to revoke probate on the ground that the Surrogate making the decree had no jurisdiction to take proof of the will, Surrogate Coffin denied the application, pointing out, that the allegations of the petition were neither against the validity of the will, nor the competency of proof, so that the only remedy could be under subd. 6 of § 2481. *Heilman* v. *Jones*, 5 Redf. 398.

The person interested, contemplated by § 2647, must be a person coming within the limitation of the definition in subd. 11 of § 2514; this, it will be recalled, expressly excludes creditors. The petition should expressly describe the applicant as a person interested, specifying his exact relationship to the decedent, whether as heir-at-law or next of kin, devisee, legatee, etc. See *Matter of the Will of Bradley*, 70 Hun, 104, 108. See also *Matter of James*, 87 Hun, 57. The Surrogate has power upon this proceeding, as in other proceedings, to determine primarily whether the petitioner is a person interested in the estate of the decedent as required by this section. See *Matter of Peaslee*, 51 N. Y. St. Rep. 134. Accordingly, if the applicant is shown to have accepted benefits under the will he is estopped from attacking the probate of the will and cannot maintain the proceedings *Matter of Peaslee, supra; Matter of Richardson*, 81 Hun, 425. But mere

consent to probate, as already noted, will not estop him. *Matter of Albert*, 38 Misc. 61.

§ 403. **Object of the application.**—The Court of Appeals (*Matter of Gouraud*, 95 N. Y. 256, 260, 262) has held, that the Code substantially re-enacts the former provisions of the Revised Statutes (2 R. S. 61, §§ 29, 30, 31, 32, 33, 34, 35), and in a previous case the court had held (*Matter of Will of Kellum*, 50 N. Y. 298), that it was in consequence of the conclusive effect of the probate of a will of personal property that the provisions were adopted which admitted the next of kin, within one year thereafter, to contest the will by filing allegations against the validity of the will or the competency of the proof thereof. It will be noted that the language was identical with that of § 2647, and in the case cited Judge Rapallo said:

"These provisions are an important safeguard against imposition or mistake, and afford the next of kin a whole year after the probate, to investigate the circumstances attending the execution of the will." And he adds, that "no such provisions are necessary as to wills of real estate, as the probate may be repelled at any time by contrary proof."

And so, in the *Gouraud* case, *supra*, Judge Earl held, that those seeking the revocation of the probate of a will were not confined in their allegations to such matters merely as were not investigated and tried when the will was admitted to probate. He says:

"The adjudication admitting the will to probate is not *res adjudicata* upon the hearing of the allegations filed for a revocation of the probate. For that purpose the whole case is left open, and a party desiring to contest the probate in that way has the right to try over again, upon the same, or other additional evidence, the very questions which were litigated when the will was first proposed for probate."

And he points out that while this double litigation of the same questions upon merely the same evidence and before the same tribunal may in some cases operate very inconveniently, yet the design of the statute is clear; and he alludes to the nonconclusiveness of a decree admitting a will of real estate to probate, observing, "Whenever title to real estate is attempted to be made under it, its validity may be resisted on precisely the same grounds that were litigated when it was admitted to probate, or upon any other grounds."

Consequently it was held in that case, that the Surrogate could not refuse to entertain the application for the revocation of probate merely because the allegations filed therein were substantially filed against the original probate. *Ibid.* See opinion of Earl, J., at p. 261. See also *Matter of Liddington*, 20 N. Y. St. Rep. 610.

§ 404. **Time within which application must be made.**—Section 2648 above quoted requires the petition to be presented within one year after the recording of the decree admitting the will to probate.

In the *Gouraud* case, 95 N. Y. 256, 262, it was held that the presentation of the petition to the Surrogate under § 2648 corresponded to the filing of allegations under § 31, 2 R. S. 61, under the former practice. This, there-

fore, means the time when the petition is filed in the office of the Surrogate (*Matter of Layton*, 15 Misc. 660), and not, as has been in other connections held, the time when it comes up before the Surrogate for his judicial action. If, therefore, the petition is presented within the year the proceeding is deemed to have commenced within the meaning of § 2517. But in that case it is essential that § 2517 be fully complied with in its further provisions in order to entitle the petitioner to the benefit of that section. Accordingly, the citation issued upon the presentation of such petition, must within sixty days thereafter be served as prescribed in § 2520 upon the adverse party, or upon two or more adverse parties who are jointly liable or otherwise united in interest, or within the same time the first publication of the citation must be made pursuant to an order made as prescribed in § 2522 of the Code. See § 2517 and *Matter of Bennett*, 9 N. Y. Supp. 459. If the citation is not so served within these sixty days, the Surrogate loses his jurisdiction. *Pryer* v. *Clapp*, 1 Dem. 387. It has been held that sixty days, within which the citation must be served, run from the issuance of the citation and not the presentation of the petition. See *Matter of Bradley*, 70 Hun, 104, 109, referring to § 2519 of the Code. If the petition, however, is duly presented and the citation issued within the statutory time and properly served, irregularity or mistake in the citation is amendable so long as the court has acquired jurisdiction of the parties. See *Matter of Soule*, 6 Dem. 137. But the citation must be served upon all the parties to the proceeding, except in the case covered by § 2517, where several of them are united in interest. Consequently where in a proceeding to revoke probate, the petition having been presented in time, and the citation duly issued and served upon the executor, but no service made upon other necessary parties, it was held that the proceeding must be dismissed. *Fountain* v. *Carter*, 2 Dem. 313. See also *Bonnett's Will*, 1 Connoly, 296. See also *Matter of Phalen*, 6 Dem. 446, and reporter's note, pages 448 to 453.

It is further apparent from § 2648, that the year within which the petition must be presented runs, in the case of a person under any disability specified in § 396 of the Code, only from the time the disability ceases or is removed. So where an infant not appearing by general or special guardian or otherwise upon the probate of the will, desires to apply for the revocation of its probate, he is not debarred by §§ 2647 and 2648 until a year has expired from the time he attains his majority. See *Matter of Becker*, 28 Hun, 207. But if it appear that the infant has accepted benefits under the will after he became of age, this will be deemed to be a ratification of the probate on his part sufficient to estop him from maintaining the proceeding. See *Matter of Richardson*, 81 Hun, 425.

The time from which the year begins to run, within which application to revoke probate of the will must be made, is stated in § 2648 to be "the recording of the decree admitting the will to probate." Confusion, however, is likely to arise where the will is admitted to probate after a trial by jury in the Supreme Court, or as formerly in the Court of Common Pleas. In

such a case it has been held, that the date which sets the year running, is the day of the recording of the decree in the court where the proceedings for the proof of the will were had. *Matter of Ruppaner*, 9 App. Div. 422. In the case cited the petition for the revocation of probate was presented to the Surrogate of New York County on the 3d of March, 1894. The proceedings for the probate of the will had been taken in the Court of Common Pleas under § 2486 of the Code as it stood prior to the amendment of 1895, and judgment was entered in that court admitting the will to probate November 2, 1892. The judgment and will were not filed in the office of the Surrogate until January 19, 1893, and they were not recorded until after the 3d of March, 1893. The Surrogate dismissed the petition as not having been presented in time and the Appellate Division, Rumsey, J., writing the opinion, affirmed his decree.

§ 405. **The petition and citation.**

Citation, to whom to be directed.

A petition, presented as prescribed in the last two sections, must pray that the citation may be directed to the executor, or administrator with the will annexed; to all the devisees and legatees named in the will; and to all other persons, who were parties to the special proceeding in which probate was granted. If a legatee is dead, his executor or administrator must be cited, if one has been appointed; if not, such persons must be cited as representing him, as the surrogate designates for the purpose. **§ 2649, Code Civil Proc.**

The following is suggested as a precedent for a petition in this proceeding:

Petition for revocation of probate under § 2647, C. C. P.

Surrogate's Court,
County of

In the Matter of the Application of a person interested in the estate of Deceased, to revoke the probate of his alleged Last Will and Testament.

To the Surrogate's Court of the County of

The petition of respectfully shows to the court and alleges:

I. That your petitioner is a person interested in the estate of late of deceased, being (here state relationship to decedent).

II. That on the day of 19 a decree was recorded in the office of the Surrogate of the county of (*note*) admitting to probate as a will of personal property an instrument in writing bearing date the day of 19 as and for the last will and testament of the decedent above named.

Note. If will was established after trial in Supreme Court note the fact and the

date the judgment of that court was entered.

III. And your petitioner further shows on information and belief that the said instrument so admitted to probate as and for the last will and testament of deceased, was not in fact his last will and testament, and was not entitled to probate as such, for the following reasons: (here insert, "allegations against the validity of the will or the competency of the proof thereof" as required by section 2647). *Note.*

Note. The allegations against the validity of the will may be worded substantially as if the applicant were filing objections with a view to contesting probate (*Henry* v. *Henry*, 3 Dem. 322), addressing the allegations to any matter touching which he would have a right to oppose the original probate of the will. *It seems*, however, that section 2647 does not authorize the applicant to put in issue the validity, construction, or effect of any disposition of personal property contained in the will, under section 2624, as he could upon the original contest. *Matter of Ellis*, 22 St. Rep. 77, Ransom, Surr. See, however, *Matter of the Will of Gouraud*, 95 N. Y. 256, 260. If the allegations are addressed to the competency of the proofs either exclusively or in addition to the question of the validity of the will, the petition should specify concisely the respects in which the proofs taken in the probate proceedings are alleged to have been incompetent to prove due execution, testamentary capacity and freedom from restraint and undue influence.

IV. And your petitioner further alleges that under the said decree admitting said will to probate and recorded as aforesaid on the day of 19 letters testamentary were issued to one of the executors therein named, who qualified according to law; and said executor is now administering the estate of the said decedent by virtue of such letters.

V. That all the devisees and legatees named in the said last will, and all other persons who were parties to the special proceeding in which probate was granted as aforesaid are set forth in the following schedule showing their names, ages and addresses together with the capacity in which they are severally entitled to be made parties to this proceeding. *Note.*

NAME	AGE	ADDRESS	RELATIONSHIP

Note. Section 2649 provides that if a legatee is dead his executor or administrator must be cited if one has been appointed, if not, such person must be cited as representing him, as the Surrogate may designate for the purpose. Consequently if any legatee be dead the fact of his death and of the appointment of an executor or administrator must be alleged in addition.

Wherefore, your petitioner prays for a decree revoking the probate of said alleged last will and testament of deceased, and that a citation issue directed to the said (here specify the executor or administrator with the will annexed, devisees, legatees and other persons specified in the foregoing schedule, describing each) requiring them to show cause why said decree should not be revoked, and why your

petitioner should not have such other and further relief in the premises as may be just.

(Dated.) (Signature.)

(Verification.)

Upon the presentation of such a petition the surrogate must issue a citation accordingly. § **2647, Code Civil Proc.**

The citation will follow the usual form, citing the persons to whom it is addressed, "to show cause why the probate of the alleged last will and testament of late of deceased, admitted to probate by a decree recorded in the office of the Surrogate in the county of on the day of 19 should not be revoked."

It is manifest that it would not be proper to commence proceedings to revoke probate of a will, while the decree admitting it to probate is suspended as to its operation by an appeal duly perfected. This, however, would not be true, if the appeal is not from that part of the decree which admits the will to probate, but merely from some incidental provision thereof, such as the determination of the Surrogate, where some party has put in issue the validity, construction, or effect of a testamentary disposition of personal property contained in the will. For whether the Appellate Court should affirm or reverse that decision it will in nowise affect the question, whether the will was executed in pursuance of the statutory requirements by a person having testamentary capacity and whether or not he was unduly influenced, which are the only questions involved *de novo* in the proceedings for revocation of probate. On the other hand, if on the proceedings to revoke probate, the will should be declared invalid, the final determination of the question of construction will become of mere academic interest; while if the probate should be sustained, the decision on the appeal would furnish a guide to the Surrogate upon the accounting of the executor and in framing the decree directing the distribution of the estate. *In re Bonnett*, 9 N. Y. Supp. 459, 460.

§ 406. **Effect of pendency of proceeding.**—The effect of the pendency of proceedings to revoke probate is to relegate the executor, from the time the citation is served upon him, practically to the position of a temporary administrator; this is by virtue of § 2650, which is as follows:

Executor, etc., to suspend proceedings.

After service upon him of a citation, issued as prescribed in the last three sections, the executor, or administrator with the will annexed, must suspend, until a decree is made upon the petition, all proceedings relating to the estate; except for the recovery or preservation of property, the collection and payment of debts, and such other acts as he is expressly allowed to perform, by an order of the surrogate, made upon notice to the petitioner. **§ 2650, Code Civil Proc.**

This section is intended to prevent any acts by the executor, which might, in the event of probate being revoked, result in placing any of the

property of the estate beyond the reach of the heirs and next of kin. The section has been declared to be intended to restrict the powers of the executor, not to enlarge the powers of the Surrogate. See *Matter of McGowan*, 28 Hun, 246; *Matter of Hoyt*, 31 Hun, 176.

This section should be considered with § 2582, by which the powers of executors are defined during the suspension of the probate decree by virtue of an appeal duly perfected. See *Bible Society* v. *Oakley*, 4 Dem. 450; *Matter of Van Voorhis*, 1 N. Y. St. Rep. 306.

The words, "such other acts as he is allowed to perform by an order of the Surrogate," must be construed with the whole context so that the acts, which the Surrogate will be justified in permitting him to perform under this section, must be such as look to the recovery or preservation of property, or the collection and payment of debts. Therefore in the cases above cited, it was held, that the Surrogate was without power to direct any distribution of the estate or even the advance of parts of legacies. See *Matter of McGowan*, and *Matter of Hoyt*, *supra*; *La Bau* v. *Vanderbilt*, 3 Redf. 384, 418, 419.

In the *Meyer* case, 131 N. Y. 409, where proceedings had been begun for the revocation of the probate of the testator's will, by his brother, who with two sisters, were the only heirs-at-law of the decedent, it was held, by the Court of Appeals, that the pendency of the proceedings in nowise affected the liability of the executors to pay interest upon the funds of the estate, intermediate the death of the testator and the ultimate probate of his will, which funds it appeared were being held by them and used in their business as a firm.

The question arose in the *Stewart* case, 131 N. Y. 274, whether the suspension of the powers of the executor under § 2650 operated so as to prevent the imposition of interest in favor of the State upon the unpaid succession tax imposed by the collateral inheritance act of 1885. The legacy in this case amounted to $74,914.42, which tax was by the decree of the Surrogate made to bear interest at six per cent from April 25, 1888, a date eighteen months after the death of the testatrix. Prior to that date proceedings were duly instituted for the revocation of the will of Cornelia N. Stewart, which proceedings did not terminate until January 16, 1890, and it was claimed that interest should not be charged upon the unpaid taxes during this period. The Court of Appeals, however, held that it should, basing their decision upon the provision of the statute which enacted, that a modified rate of interest must be charged where, "by reason of claims made upon the estate, necessary litigation, or other unavoidable cause of delay, the estate of the decedent cannot be settled. *Matter of Stewart*, *supra*, page 285.

§ 407. **The hearing.**—The hearing in a proceeding to revoke probate is substantially the same as if the will were offered for probate *de novo*,

> Upon the return of the citation, the surrogate must proceed to hear the allegations and proofs of the parties. The testimony, taken upon the application of probate, of a witness who is dead, or without the state, or who, since

his testimony was taken, has become a lunatic or otherwise incompetent, must be received in evidence. **§ 2651, Code Civil Proc.**

except as to such statutory rights as are expressly limited to probate proceedings, such as the right under § 2618 to an order requiring the examination of the subscribing witnesses. See *Hoyt* v. *Hoyt*, 112 N. Y. 493, affi'g 9 N. Y. St. Rep. 731.

The situation of the proponents of the will practically does not differ from that which they would occupy if the issues involved in the proceeding had been made by objections duly filed at the time the paper in dispute was originally offered for probate. *Hoyt* v. *Jackson*, 2 Dem. 443, Surrogate Rollins, citing Code Civil Procedure, § 2652; *Collier* v. *Idley's Executor*, 1 Bradf. 94. In the case cited by Surrogate Rollins, Surrogate Bradford held, that the proponent would be obliged to prove the will by original proof independently of the proofs first offered; that the probate decree could not be offered in evidence nor even the deposition of any of the witnesses taken on the first proof be read in evidence except in the precise contingencies pointed out by the statute. *Collier* v. *Idley's Executor*, *supra*, page 99. The precise contingency pointed out by § 2651 in this regard is, that the testimony, taken upon the first probate, of a witness who upon the proceedings to revoke probate proves to be dead, without the State, or to have become a lunatic, or otherwise incompetent, must be received in evidence; otherwise the testimony must all be taken *de novo*, the proponent sustaining the same burden, and the contestant being as free in regard to the scope of his investigation as if no adjudication had been made in the premises. See *Matter of Gouraud*, 95 N. Y. 256; *Matter of Soule*, 19 N. Y. St. Rep. 532; *Hoyt* v. *Hoyt*, 112 N. Y. 493, 511, 512. In the case last cited Judge Gray observed: "The proceeding taken below was, within the terms and purview of § 2647, for the revocation of a will of personal property, and was so recognized by all parties. The effect of presenting the petition was to procure a re-examination of the case and to have proofs taken *de novo*. The executors, as proponents, proceeded to prove the will by original proof, independently of the first proof, and the practice was right and such as is contemplated by § 2651. That section was a re-enactment of a provision of the Revised Statutes (2 R. S. 61, § 28) and necessarily implies that the only evidence, which need not be taken anew, is in the case of witnesses dead, without the State, or insane."

§ 408. **The decree.**

Decree.

If the surrogate decides that the will is not sufficiently proved to be the last will of the testator, or is, for any reason, invalid, he must make a decree revoking the probate thereof; otherwise, he must make a decree confirming the probate. **§ 2652, Code Civil Proc.**

Section 2652 must be read in connection with § 2622, which provides that "before admitting a will to probate, the Surrogate must inquire particularly into all the facts and circumstances, and must be satisfied of the gen-

uineness of the will and the validity of its execution." Surrogate Rollins (*Cooper* v. *Benedict*, 3 Dem. 136) held that the same doctrine is applicable to proceedings to revoke probate as to a proceeding for probate, and that the principle enunciated in *Delafield* v. *Parish*, 25 N. Y. 9, held good in both; the principle being, "In all cases the party propounding the will is bound to prove to the satisfaction of the court, that the paper propounded in question declares the will of the deceased, and that the supposed testator at the time of making and publishing the document was of sound and disposing mind and memory. . . . If upon a careful and accurate consideration of all the evidence on both sides, the conscience of the court is not judicially satisfied that the paper in question contains the last will of the deceased, the court is bound to pronounce its opinion that the instrument is not entitled to probate."

It is the duty of the Surrogate to revoke probate wherever upon the same testimony it would be his duty originally to deny probate. For example, if it is not clear from the testimony that the testator was physically and mentally competent at the time of execution, probate should be revoked. See *Knapp* v. *Reilly*, 3 Dem. 427.

But where, on the contrary, there is nothing in the records or proofs on the proceedings to revoke probate to lead the Surrogate to doubt the genuineness of the will or its validity, the proceedings to revoke must be dismissed. *Matter of Walther's Will*, 7 N. Y. Supp. 417; *Matter of Johnston*, 1 Connoly, 518.

Where a will of which probate was revoked as to personalty alone, upon the ground that it was not the will of testator in respect thereto, contained a clause revoking all former wills, it was held that this revocation clause fell with the will, and could not, at least as to personalty involved, be invoked to defeat a prior valid will. *Matter of Miller*, 28 Misc. 373.

§ 409. **No power to construe.**—There is no power to construe a will in a proceeding to revoke probate. *Matter of Wilcox*, 55 Misc. 170, citing *Bevan* v. *Cooper*, 72 N. Y. 317, 329; *Matter of Ellis*, 22 N. Y. St. Rep. 77. The reason is that the power to construe given by § 2624 in probate proceedings is limited by the words "unless the decree refuses to admit the will to probate." Revocation of probate proceedings contemplate just such a refusal. They are governed by a separate article of the Code giving no express power to construe.

§ 410. **Notice of decree of revocation.**

> Where the decree revokes the probate of a will, as prescribed in this article, the surrogate must cause notice of the revocation to be immediately published, for three successive weeks, in a newspaper published in his county. **§ 2653, Code Civil Proc.**

The form of the decree may be substantially as follows:

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Decree revoking probate.

Title. }

a person interested in the estate of late of deceased, having on the day of 19 presented to this Surrogate's Court, in which the will of said decedent was proved as a will of personal property, a written petition duly verified containing allegations against the validity of said will and the competency of the proofs thereof; and praying that probate thereof be revoked; and that the executor of said will, the devisees and legatees named therein, and also the persons who were parties to the special proceeding in which probate was granted, might be cited to show cause why it should not be revoked; and a citation having accordingly issued directed to the executor (s) under said will, to all the devisees and legatees therein named, and to all other persons who were parties to the special proceeding in which probate was granted requiring them to appear before the Surrogate of the county of and show cause why the probate of said will should not be revoked.

Now, the said citation having been returned, on reading and filing proofs of due service thereof on all the persons to whom it was directed, and on the return day of said citation, there having appeared (recite appearances in detail including appearances by special guardian, reciting due appointment thereof); and witnesses having been examined and proofs taken touching the facts and circumstances attending the execution of said will and the competency of said testator to execute the same, and his freedom from restraint or undue influence; and due deliberation having been had upon the allegations and proofs of the parties, whereby it appears to the satisfaction of the Surrogate that the said will is not sufficiently proved to be the last will of the testator (*note*) (or if the Surrogate decides that it is for any reason invalid state the fact and the reason concisely);

Note. See language of § 2652, C. C. P.

It is accordingly on motion of attorney for

Ordered, Adjudged and Decreed, that the instrument heretofore admitted to probate by a decree of this Surrogate, recorded on the day of 19 is not sufficiently proved to be the last will of said testator (or if he has decided that it is for any reason invalid state the reason concisely);

And it is further Adjudged and Decreed, that the probate of said alleged last will and testament of deceased, together with the letters testamentary issued thereon, on the

day of to and as executors of said alleged last will and testament be and the same hereby are revoked. *Note.*

Note. The wording of article 2d of title 3 of chapter 18, does not apparently contemplate the revocation of the decree as would be necessary in case the proceeding were to vacate or set aside the decree. The decree was valid when made and stands in the records of the court, but the probative effect of the decree is revoked and the letters testamentary issued thereunder are revoked. It is accordingly unnecessary and would perhaps be irregular to incorporate in the decree revoking probate, a revocation of the decree granting probate; that is merely rendered nugatory by the decree revoking probate.

If the Surrogate affirms instead of revoking probate, the form of the decree can be readily adapted from the foregoing, and in either case it is proper to insert the necessary directions as to the payments of costs and taxable disbursements, as well as the publication required by § 2653.

§ 411. **Determining validity of a will.**—It is proper in this chapter to discuss § 2653*a*, of the Code of Civil Procedure, by which a new remedy is provided capable of being exercised within a longer period than that for revocation of probate; but which remedy must be exercised by means of an action in the Supreme Court for the county in which probate of the will was had. The section as now amended is as follows:

Determining validity of a will.

Any person interested as devisee, legatee or otherwise, in a will or codicil admitted to probate in this state, as provided by the code of civil procedure, or any person interested as heir-at-law, next of kin or otherwise, in any estate, any portion of which is disposed of, or affected, or any portion of which is attempted to be disposed of, or affected, by a will or codicil admitted to probate in this state, as provided by the code of civil procedure (chap. 701, Laws, 1897, inserted here "within two years prior to the passage of this act, or any heir-at-law or next of kin of the testator making such will,") may cause the validity (same act inserted here, "or invalidity") of the probate thereof to be determined in an action in the supreme court for the county in which such probate was had. All the devisees, legatees and heirs of the testator and other interested persons, including the executor or administrator must be parties to the action. Upon the completion of service of all parties, the plaintiff shall forthwith file the summons and complaint in the office of the clerk of the court in which said action is begun and the clerk thereof shall forthwith certify to the clerk of the surrogate's court in which the will has been admitted to probate, the fact that an action to determine the validity of the probate of such will has been commenced, and on receipt of such certificate by the surrogate's court, the surrogate shall forthwith transmit to the court in which such action has been begun a copy of the will, testimony and all papers relating thereto, and a copy of the decree of probate attaching the same together, and certifying the same under the seal of the court. The issue of the pleadings in such action shall be confined to the question of whether the writing produced is or is not the last will and codicil of the testator, or either. It shall be tried by a jury and the verdict thereon shall be conclusive, as to real or personal property, unless a new trial be granted or the judgment thereon be reversed or

vacated. On the trial of such issue, the decree of the surrogate admitting the will or codicil to probate shall be prima facie evidence of the due attestation, execution and validity of such will or codicil. A certified copy of the testimony of such of the witnesses examined upon the probate, as are out of the jurisdiction of the court, dead, or have become incompetent since the probate, shall be admitted in evidence on the trial. The party sustaining the will shall be entitled to open and close the evidence and argument. He shall offer the will in probate and rest. The other party shall then offer his evidence. The party sustaining the will shall then offer his other evidence and rebutting testimony may be offered as in other cases. If all the defendants make default in pleading, or if the answers served in said action raise no issues, then the plaintiff may enter judgment as provided in article two of chapter eleven of the code of civil procedure in the case of similar defaults in other actions. If the judgment to be entered in an action brought under this section is that the writing produced is the last will and codicil, or either, of the testator, said judgment shall also provide that all parties to said action, and all persons claiming under them subsequently to the commencement of the said action, be enjoined from bringing or maintaining any action or proceeding, or from interposing or maintaining a defense in any action or proceeding based upon a claim that such writing is not the last will or codicil, or either, of the testator. Any judgment heretofore entered under this section, determining that the writing produced is the last will and codicil, or either, of the testator, shall, upon application of any party to said action, or any person claiming through or under them, and upon notice to such persons as the court at special term shall direct, be amended by such court so as to enjoin all parties to said action, and all persons claiming under the parties to said action subsequently to the commencement thereof, from bringing or maintaining any action or proceeding impeaching the validity of the probate of the said will and codicil, or either of them, or based upon a claim that such writing is not the last will and codicil, or either, of the testator, and from setting up or maintaining such impeachment or claim by way of answer in any action or proceeding. When final judgment shall have been entered in such action, a copy thereof shall be certified and transmitted to the clerk of the surrogate's court in which such will was admitted to probate. The action brought as herein provided shall be commenced within two years after the will or codicil has been admitted to probate, but persons within the age of minority, of unsound mind, imprisoned, or absent from the state, may bring such action two years after such disability has been removed. **§ 2653a, Code Civil Proc.**

Note. The words "absent from the state" held not to mean one permanently a non-resident, *e. g.*, a foreigner. *Bell* v. *Villard*, 48 Misc. 587.

§ 412. **What remedy the section affords.**—Section 2653*a* furnishes a new remedy being incorporated into the Code of Civil Procedure by ch. 591 of the Laws of 1892 which purported in terms to amend art. 2, of title 3, of ch. 18 (which relates to revocation of probate), by adding thereto a new section to be known as § 2653*a*.

"At the time of the adoption of this amendment the probate of a will was conclusive as to personal property unless revoked by the proceeding in Surrogate's Court as above stated, but the probate was only *prima facie* conclusive as to the real estate devised by the will so that the heir could

bring ejectment after probate not barred by the Statute of Limitations. A great necessity, therefore, existed of further limiting the right of the heir to contest the devises of a will in order to quiet titles to real estate, and in the light of this necessity we will consider the effect of § 2653*a*. The purpose of this amendment is manifest. It is to provide a procedure by an action in the Supreme Court to determine the validity of the probate of any will, whether of real or personal property or of both, and requiring such an action to be commenced within two years after the will has been admitted to probate, and the question to be tried is whether the writing produced is or is not the last will of the decedent, and that question is to be tried by a jury and the procedure upon the trial is pointed out, and it provides that the verdict of the jury shall be 'conclusive as to real or personal property unless a new trial be granted or the judgment thereon be reversed or vacated.' The amendment does not affect the remedy provided in the Surrogate's Court by special proceedings under the title amended, but only provides an additional remedy by action." *Snow* v. *Hamilton*, 90 Hun, 157, 161.

The section originally read, "any person interested in a will or codicil," and it was at first contended that this language precluded persons not named in a will from bringing the action contemplated by the section. It was held, however (*Snow* v. *Hamilton*, 90 Hun, 157, 161), that devisees, legatees, heirs and next of kin, were persons interested within the meaning of the section, citing *Wager* v. *Wager*, 89 N. Y. 161. And the section has since been amended so as to read in its present form, "any person interested as devisee, legatee or otherwise in a will or codicil," with the additional provision, "or any person interested as heir-at-law, next of kin or otherwise in any estate, any portion of which is disposed of or affected, or any portion of which is attempted to be disposed of or affected, by a will or codicil." . . . (The words "or any heir-at-law, or next of kin of the testator making such will," were put in by ch. 701 of 1897, in effect May 22, 1897, the effect on which of ch. 104 of the same year is commented upon, *post*), thus embodying in the statute the rule already laid down by the courts. It will be noticed further that the section furnishes a remedy applicable to all wills, whether of real, or of personal property, and enables the plaintiff in the action to secure a trial before a jury of the issue, whether the writing produced is, or is not, the last will of the testator, which is made to include any codicil probated therewith; but the provision while intended to insure a trial by jury as to the validity of the will or codicil goes no further than to provide that the plaintiff should be entitled to pursue this inquiry in the Supreme Court, in which court he is entitled to a trial by jury as distinguished from a trial at special term, but his right to go to the jury is conditioned as it would be in the trial of any other action in that court. The court has the same power, therefore, to direct a verdict that it has in any other case. *Hawke* v. *Hawke*, 82 Hun, 439; *Katz* v. *Schnaier*, 87 Hun, 343, 346.

In *Brinkerhoff* v. *Tiernan*, 61 Misc. 586, it was held that § 448 as to one

suing for benefit of others similarly situated is not applicable to this section. (This is a special term decision sustaining a demurrer on additional grounds.)

In view of the fact, however, already pointed out, that § 2653*a* was expressly enacted as an amendment to art. 2, relating to the revocation of probate, it must be construed with reference to the practice and procedure in the Surrogates' Courts; *Shea* v. *Bergen*, 59 Misc. 294; and especially in connection with the other sections of art. 2; accordingly it has been held that the section provides merely an additional remedy being supplementary to, and not intended to repeal the other sections of art. 2; and that consequently since "a person interested in the estate must apply for revocation within one year after the recording of a decree admitting to probate a will of personal property," under § 2648 in default of which, as to such property, the probate concludes all mankind (see *Hoyt* v. *Hoyt*, 112 N. Y. 493, 505), the intent of the legislature was to afford equal relief where relief was needed, namely, with regard to real estate, and the object was to expedite, and not to protract the settlement of estates. See *Long* v. *Rodgers*, 79 Hun, 441. Judge Barrett in his opinion at page 443 remarked:

"It is clear, therefore, that the intention was in adding this section to embrace it within the existing system, not to substitute it therefor. And there is no inconsistency or irreconcilable repugnancy between the two systems, when the mischief aimed at is advisedly considered. As to the personalty, the functions of the existing statutes continue and the effect of probate after lapse of a year remains unaltered. This function does not conflict with the function of the new section, which operates upon real estate, and which affords a practical method of making that conclusive which otherwise would remain indefinitely presumptive.

"There is nothing in the phraseology of the new section which militates against this construction. It is true that we find these words therein: 'It shall be tried by a jury, and the verdict thereon shall be conclusive as to real *or personal property*,' etc. But this does not say that 'a person interested in the estate of the decedent' shall not be otherwise concluded. Nor does it limit the effect of his failure to apply for revocation under §§ 2647 and 2648 within the year. It may entitle 'a person interested in the will'—which is the phrase used in the new section to indicate the persons who may proceed thereunder—as distinguished from 'a person *interested in the estate*, (which is the phrase used in § 2647), to bring the action to validate the will, even during the running of the year. But it certainly does not authorize a person who has omitted to apply for revocation within the year, and as against whom the probate has become conclusive, to inaugurate a fresh contest thereafter." *Long* v. *Rodgers*, 79 Hun, 441, 443.

The effect of this decision was merely to prevent a person, who could have brought proceedings to revoke probate, from bringing an action to determine the validity of a will, unless he brought such action before he was concluded by the lapse of time, by the decree admitting the will to probate. But in view of the drastic amendment of 1897 designating the persons enti-

tled to bring the action under § 2653*a*, it is clear that the rule laid down in *Long* v. *Rodgers* has been obviated. The language contrasted in Judge Barrett's opinion to the words, "a person interested in the estate of the decedent" found in § 2647 being now not "person interested in a will," but "*any* person interested as devisee, legatee or *otherwise* in a will . . . . or *any* person interested as heir-at-law, next of kin, or *otherwise* in any estate. . . ."

§ 413. **Effect of amendments of 1897.**—The peculiar tinkering by the legislature with § 2653*a* in 1897 was confusing. The Court of Appeals in *Lewis* v. *Cook*, 150 N. Y. 163, had held that the language of the section as it then existed contemplated an action, to be brought by some person interested in sustaining the will to which all persons interested in the disposition of the testator's estate should be made parties; and that the action should be one wherein the validity of the probate of the will might be determined conclusively as against them; and Judge Gray called attention in that case (see page 165) to the fact that, under §§ 2647 and 2648 authority already existed for the maintenance of a proceeding by a person interested in the estate of the decedent, to revoke the probate of a will at any time within one year after the decree admitting the will to probate; and he says (at page 166) that such person had the opportunity of contesting before the Surrogate, the validity of the testator's will, and that he had the right to continue the contest through the appellate courts, and moreover that by reason of § 2647 he had also a year from the recording of the final decree within which he might revive the contest and secure a trial of the matter *de novo* (citing *Hoyt* v. *Hoyt*, 112 N. Y. 493, 506). "There is no way, however," says Judge Gray, "by which the validity of a will and its probate could be once and for all established and placed beyond attack by the heirs-at-law until the enactment of § 2653*a*. They could put the validity of the will of the decedent in question in an action involving title to real property, but a person taking an interest under the will was without remedy to establish his title and to prevent such actions." See *Anderson* v. *Anderson*, 112 N. Y. 104.

§ 414. **Same.**—Shortly after this decision appeared in the reports, the legislature passed two acts amendatory to the section. The first, L. 1897, c. 104, was passed March 23, 1897, and was to take effect on September 1, 1897. Two months later, May 22, 1897, L. 1897, c. 701, another act was passed to *take effect immediately*.

Chapter 701 amended the act so that it read, "Any person interested . . . . may cause the *validity or invalidity* of the probate . . . . to be determined in an action," limiting the action to one under a will or codicil "admitted to probate in this State as provided by the Code of Civil Procedure, *within two years prior to the passage of this act*," and added to the description of persons who could bring such an action involving the validity or invalidity of the probate, "Any heir-at-law or next of kin of the testator making such will."

Chapter 701 did not expressly repeal ch. 104.

But, there have been three decisions since the amendment, which indicate that the Supreme Court takes the view that ch. 701, legislating as it does upon the whole subject and being a later explanation of the legislative will, supersedes ch. 104. See *Reid* v. *Curtin* (1st Dept.), 51 App. Div. 545, 548; *Ocobock* v. *Eeles* (4th Dept.), 37 App. Div. 114, 118; *Wells* v. *Betts* (3d Dept.), 45 App. Div. 115, 117.

The case first cited did not necessarily involve the determination of this question, although it is carefully reasoned out in the opinion. The other two cases assume without discussion that the effect of ch. 701 was to supersede ch. 104. These cases control the practice.

The reasoning of Mr. Justice Patterson in *Reid* v. *Curtin* is wholly satisfactory. He points out, at page 548, "It is to be noticed that all that can be done under the amendment of March may still be done under that passed in May. There is inserted in the May amendment only a provision with reference to an heir-at-law or next of kin of a testator making a will admitted to probate within two years prior to the passage of the act, causing the validity or invalidity of the probate to be determined. As the May amendment is general legislation covering the whole subject-matter of antecedent legislation as to the same subject-matter, the only inference would seem to be that the legislature intended the May enactment to be a complete substitute for that of March."

It is clear, therefore, that *Lewis* v. *Cook*, 150 N. Y. 163, forbidding the maintaining of this action by one claiming in hostility to the will no longer controls, because both of the acts of 1897 added to the class of persons who could maintain the action, "any persons interested as heir-at-law or next of kin or otherwise *in any estate.*" So that it is plain that the legislature must have intended to make a change which would give to the heir-at-law *as such*, and independently of his interest or lack of interest under the will, the right to sue which, prior to the amendment, he did not possess. *Reid* v. *Curtin*, *supra*, at page 548. See also *Wells* v. *Betts*, *supra*, at page 118.

This latter case passed also upon the provision of the amendment limiting it to wills admitted to probate "within two years prior to the passage of this act." The act was passed May 22, 1897, and the will in suit probated February 14, 1898. Landon, J., observes: "A literal reading might restrict the remedial provision in behalf of persons interested in the estate disposed of by the will or attempted to be disposed of, to such wills and codicils as were admitted to probate during the two years prior to May 22, 1897, but such a narrow construction would, no doubt, impute to the legislature an intention contrary to the fact. That intent, doubtless, was to give the act a retroactive effect for the two years prior to its passage. The final paragraph of the section provides that 'the action brought as herein provided shall be commenced within two years after the will or codicil has been admitted to probate.'

"The limitation of two years certainly extends to wills admitted to probate after the passage of the act, and there seems to be no doubt that the limitation was intended to apply in like manner to wills admitted to pro-

bate before its passage." In *Miller* v. *Maujer*, 82 App. Div. 419, it is held that the interest must be an enforceable one. Thus, where, assuming the will were set aside, there survives a husband or wife who would take the estate anyhow, it would be idle to suppose the next of kin are to be allowed to bring an action which if successful would result in no distributive benefit to them.

It seems unnecessary to discuss, in view of this amendment, such cases as *Wallace* v. *Payne*, 9 App. Div. 34; 14 App. Div. 579; *Seagrist* v. *Sigrist*, 20 App. Div. 336, inasmuch as they dealt with the situation developed by the decision in *Lewis* v. *Cook*, 150 N. Y. 163.

§ 415. **Proceedings under § 2653a.**—The directions of § 2653*a* as now amended as to who should be parties to the action and as to the manner in which the action must be tried, are so explicit as to require little discussion. The words "including the executor or administrator," as being necessary parties, contemplate, of course, only such as may have qualified. *Timpson* v. *Lorsch*, 50 Misc. 398. Attention may be called to one or two points: For example, it has been held that a temporary injunction may be granted without undertaking restraining the executors under the will, the validity of the probate of which is sought to be determined under this section, from conveying, disposing of, delivering or incumbering any of the property mentioned in the will during the pendency of the action. *Matter of Hughes*, 41 Misc. 75; *Shea* v. *Bergen*, 59 Misc. 294; *Hawke* v. *Hawke*, 74 Hun, 370. And in this last case it was held that as the real property amounted to more than sufficient to afford abundant security for the share which the plaintiff would be entitled to if he succeeded in having the will adjudged to be invalid, the injunction should be modified so as to restrict its restraining effect to the real property only.

If an injunction be granted, the jurisdiction of the Surrogate's Court is *pro tanto* suspended. *Shea* v. *Bergen*, 59 Misc. 294, 296.

It has also been held that the provisions of this section, as to filing the summons and complaint in the office of the clerk of the court in which the action is begun, and as to the prompt certifying by the clerk to the clerk of the Surrogate's Court, where the will was probated, the fact that an action to determine the validity of the probate of a will has been commenced, and as to the subsequent transmission by the Surrogate to the court in which the action has been begun of a copy of the will, testimony, and all papers relating thereto with a copy of the decree of probate duly attached together and certified under the seal of the court, were directory merely; that the acts required were not jurisdictional and that it was error to dismiss the complaint upon the ground that these provisions had not been complied with. *Johnson* v. *Cockrane, No.* 2, 91 Hun, 165. And Brown, P. J., said (at page 168) that none of these acts required by the section were jurisdictional and none of them were required to be set forth in the complaint, and that the motion was not properly made at the trial, and had no relation to any of the issues raised by the pleadings. "If the statute had not been complied with, the motion should have been addressed to the special term

to have the omission corrected." See, also, *Smith* v. *Holden*, 116 App. Div. 867.

It has also been held (*Johnson* v. *Cockrane, No.* 1, 91 Hun, 163), that the effect of the provision in § 2653*a*, to wit: "The issue in such action shall be confined to the question, whether the writing produced is or is not the last will of the testator," etc., limited the court in the exercise of its ordinary powers so that it was without power to appoint a receiver after final judgment to preserve the real property pending an appeal. The court says at page 165, "Such power can be exercised only in cases where the property is the direct subject of the action, and where the judgment to be granted will act upon the specific property. . . . The subject of this action was the validity of a will . . . . and while the judgment is conclusive as to the title to the real and personal property of the testator, it does not deal with or relate to the possession of any specific property of which the decedent died seized, and the plaintiff could not, under any process that could be issued to enforce the judgment, obtain possession of the real estate in question." And Brown, P. J., adds: "The effect of the judgment upon the rights of the parties is to leave them in the same situation they would have occupied if the decedent had died intestate. The title of the property passed to the heirs-at-law, and possession must be recovered in the proper form of action for the recovery of the possession of real estate. Neither can the land be sold under the judgment in this action and the proceeds distributed." See *Le Brantz* v. *Conklin*, discussed below.

It has also been held that one who has elected to take under the provisions of a will, is estopped from maintaining an action under this section. *Katz* v. *Schnaier*, 87 Hun, 343.

In *Le Brantz* v. *Conklin*, 39 Misc. 715, three wills were involved. A trust company had been appointed temporary administrator. The special term enjoined proceedings in the Surrogate's Court under the two wills not sought to be established in the Supreme Court, to abide the event of the trial there. But, secondly, as the relief prayed in that action did relate to property, the court held that a receiver *could* be appointed and accordingly the same trust company was made receiver under an order limiting its accountability to the Supreme Court to its acts and conduct as such receiver.

§ 416. **Futility of appeal from decree probating will.**—In *Matter of Beck*, 6 App. Div. 211, 216, Judge Cullen called attention to the practical operation of § 2653*a* of the Code. The appeal was from a decree of the Surrogate's Court of Kings County admitting a will to probate. Judge Cullen says: "We think it proper to call the attention of the parties to the consideration, whether it is now worth while to prosecute such appeals as the present one. By § 2653*a* of the Code of Civil Procedure (added in 1892), any person interested in a will may cause the validity of the probate thereof to be determined by a jury, in an action brought in the Supreme Court for that purpose. Should we reverse the decree of the Surrogate on the questions of fact in this case, the only relief we could grant the appellants would be to direct the trial of the issues by a jury (§ 2588, Code). This relief or

review the parties can obtain as a matter of right, under the section of the Code first cited, without an appeal. In fact, it can still be had in this case, as two years have not elapsed since the decree admitting the will to probate. It would seem that now an appeal from a decree of the Surrogate, probating a will, is only profitable where the appeal is based solely on questions of law."

§ 417. **Burden of proof.**—Ordinarily, the burden of proof is upon the party propounding a will, but § 2653*a* places the burden upon the party who contests the validity of the will of establishing the testamentary incapacity of the testator or other reason of invalidity. *Dobie* v. *Armstrong*, 160 N. Y. 584, 590; *Scott* v. *Barker*, 129 App. Div. 241. The probate of the will by the Surrogate is made *prima facie* evidence of its due execution and validity. See *Ivison* v. *Ivison*, 80 App. Div. 599, citing *Cook* v. *White*, 43 App. Div. 388; *Heath* v. *Koch*, 173 N. Y. 629; *McGown* v. *Underhill*, 115 App. Div. 638.

Thus it is clear that, if one claiming in hostility to the will brings an action under the section, as now amended, to determine such invalidity, it is for the defendants, claiming that the will is valid, to open and close. They accordingly offer in evidence the will in probate and rest (*Hagan* v. *Sone*, 68 App. Div. 60, rev'd 174 N. Y. 317, but not on this point), whereupon the plaintiff sustains the burden of proof formerly laid upon the defendants contesting the validity of the will. See also *Mock* v. *Garson*, 84 App. Div. 65.

It is for the court to say whether a contestant, be he plaintiff or defendant, has adduced sufficient evidence to warrant the submission of the case to the jury. *Dobie* v. *Armstrong*, at page 594. The court may direct a verdict, *Ibid.*, and see *Cook* v. *White*, 43 App. Div. 388; *Haughian* v. *Conlan*, 86 App. Div. 290; *Hawke* v. *Hawke*, 146 N. Y. 366. In *Hagan* v. *Sone*, *supra*, the Court of Appeals reversed a judgment entered on such direction on the ground that, as defendant had merely offered the will and probate proceedings and rested, and plaintiff had adduced some testimony of incompetency and undue influence, it was for the jury, and not the court, to pass on the questions of fact.

So the direction of a verdict will not stand if there be any question of fact, e. g., proof of mental weakness coupled with unnatural disinherison of an infant child. *Byrne* v. *Byrne*, 109 App. Div. 476. See *Shayne* v. *Shayne*, 54 Misc. 474, 480.

The general rule that the party upon whom rests the burden of proof has the right to open is thus changed by virtue of the express provision of the statute by which the decree of the probate is made *prima facie* evidence of the due attestation, execution and delivery of the will, and imposes, therefore, upon the party attacking it, the burden of proving that the instrument is not the last will and testament of the decedent. *Ibid.*

§ 418. **Form of verdict.**—It is clear from the entire section that this is an action *in rem*. That is, the purpose of the statute is to determine finally whether the writing in question *is* or *is not* the last will of the testator, and

thus to enable those interested, either under the will or in the estate, to have the question set at rest. *Delmar* v. *Delmar*, 65 App. Div. 582, 584. The plaintiff seeking to avoid a will cannot by defaulting upon the trial, deprive the defendant of his right to affirmative relief, because the answer does not contain a counterclaim. The defendant's rights in such case are given by the statute; and if the answer prays for the relief provided by the section, the court may, upon such default, direct a verdict in favor of the defendant and against the plaintiff, sustaining the will and with the injunctive relief permitted by the section. *Ibid.* In this case it was held proper also that an extra allowance be granted to the defendant within the sound discretion of the trial justice.

It should be noticed that for purposes of a possible appeal, the case should be submitted to the jury on specific questions framed according to the character of the objections to the validity of the will. Even if a general verdict be entered in favor of the parties seeking to invalidate the instrument, the Appellate Court may hold that as a verdict may have been rendered on *any one* of the grounds upon which the will was assailed, it should not be permitted to stand if any of these grounds was insufficient to nullify the instrument. *Buchanan* v. *Belsey*, 65 App. Div. 58, 60.

§ 419. **Costs and allowances.**—The court has power, in awarding costs, to grant an extra allowance. *Haughian* v. *Conlan*, 86 App. Div. 290; *Seagrist* v. *Sigrist*, 20 App. Div. 336; *Delmar* v. *Delmar*, 65 App. Div. 582.

But the action is one at law; hence the unsuccessful party may not be given costs or allowance. *Carolan* v. *O'Donnell*, 105 App. Div. 577, 1st Dept. But, in the opinion, this case intimates that, assuming the action as equitable, then the discretionary award to an *unsuccessful* party is reviewable in the Appellate Court. In *Larkin* v. *McNamee*, 2d Dept., 109 App. Div. 884, it was held that the action is one in which costs are discretionary, under § 3230, and does not come under §§ 3228 or 3229.

CHAPTER VII

PROBATE OF HEIRSHIP

§ 420. **Probate of heirship.**—The somewhat valueless and rarely resorted to practice of establishing the heirship of the heirs of an intestate is the subject of art. 3, of title 3, of ch. 18 of the Code, being §§ 2654 to 2659, both inclusive. The remedy is seldom resorted to, chiefly because of its inconclusiveness, since a petition to vacate or modify a decree establishing the right of inheritance of the petitioner, may be presented to the Surrogate's Court, at any time within ten years after the decree has been made; and it is in addition a proceeding which the Surrogate is required to dismiss in case the heirship which the petitioner desires to establish and his interest or share in the decedent's real property is put in issue and contested.

§ 421. **The application.**—The application to establish the right of inheritance of a person claiming to be an heir of a person dying, seized in fee of real property within the State, either wholly intestate or without having devised his real property to specific persons, must be made to the Surrogate's Court, (*a*) which has acquired jurisdiction of the estate, or, (*b*) if there is no such court, to the court of the county where the real property or any part thereof is situated.

Section 2654 provides as follows:

> Where a person, seized in fee of real property within the state, dies intestate, or without having devised his real property to specific persons, his heirs, or any of them, or any person deriving title from or through such heirs, or any of them, may present to the surrogate's court which has acquired jurisdiction of the estate, or, if no surrogate's court has acquired such jurisdiction, then to the surrogate's court of the county where the real property, or any part thereof, is situated, a written petition, duly verified, describing the real property, setting forth the facts upon which the jurisdiction of the court depends, and the interest or share of the petitioner, and of each other heir of the decedent, in the real property, and praying for a decree establishing the right of inheritance thereto, and that all the heirs of the decedent may be cited to attend the probate of that right. Upon the presentation of such a petition, the surrogate must issue a citation accordingly. **§ 2654, Code Civil Proc.**

The provisions of this section clearly imply, that this application may be made, regardless of whether application for letters testamentary or letters of administration are pending, so long as the will, under which letters are being sought, does not specifically devise the property in question as contemplated by the section. It is manifest that proceedings under this article are likely to be taken only as incidental to other proceedings and for the

purpose of securing a judicial determination amounting to presumptive evidence of the facts adjudged in the decree. The proceedings would be of value, in enabling one seeking to bring an action involving title to real property, to specify all the persons having an interest or right therein by means of this proceeding. The amendment to § 2654, made in 1892, permits "any-person deriving title from or through the heirs of the intestate," to make this application. This article provides a speedy and inexpensive method of ascertaining these facts, and while doubtless affording no protection to any one relying upon the adjudication as against persons whose rights as heirs might not be discussed or discovered in the proceeding, nevertheless has, in the few occasions in which it has been resorted to, sufficed to meet the particular exigencies involved.

The reports appear to contain no adjudications upon these sections of the Code, in which respect they may therefore be said to enjoy an enviable notoriety. The provision by which the proceeding dies the moment contest is made, explains the entire absence of appeals from the few decrees made under this article which are recorded in the offices of the Surrogates of this State.

§ 422. **The petition.**—The petition to initiate these proceedings should be substantially in the following form:

Petition under § 2654, C. C. P.

Surrogate's Court,
County of

In the Matter of the Probate of Heirship of claiming to be an Heir of late of Deceased.

To the Surrogate's Court of the County of

The petition of of respectfully shows to this court as follows:

I. That your petitioner resides in and is years of age and is one of the heirs-at-law (or if petitioner is a person deriving title from or through an heir, state the fact) of late of deceased.

II. That said departed this life on the day of 19 seized in fee of real property within this state situated in and described as follows (here insert description as in a deed).

III. And your petitioner further shows on information and belief that said deceased, left no will devising his real property to specific persons, and no Surrogate's Court has acquired jurisdiction of his estate; and that the above described real property (or some part thereof) is situated within this county (*if jurisdiction of the estate has already been acquired by any Surrogate's Court to which court in that event the application must be made, say instead, e. g.:* that on the day of proceedings were commenced in this court on petition of for letters of adminis-

tration of the goods, chattels and credits of said deceased, and citation duly issued thereon whereby this court has acquired jurisdiction of the estate of said decedent).

IV. And your petitioner further shows that he is interested in the said real property of the decedent being entitled, as your petitioner is informed and verily believes, to a $\frac{1}{10}$ share thereof under the statute of descent and distribution being the (state relationship to decedent) of the said deceased.

V. And your petitioner further shows, upon information and belief, that all the other heirs of the decedent entitled to share in his said real property so far as they are known or can be ascertained by your petitioner are as follows:

NAME	AGE	RESIDENCE	RELATIONSHIP

Wherefore, your petitioner prays for a decree of this court establishing your petitioner's right of inheritance in the property above described, and that a citation issue directed to all the heirs of the decedent to attend the probate of that right.

(Date.) (Signature.)

(Verification.)

§ 423. The citation.

Citation; appearance of persons interested.

The citation must set forth the name of the decedent and of the petitioner, the interest or share which the petitioner claims, and a brief description of the real property. Any heir of the decedent, who has not been cited, may nevertheless appear at the hearing, and thereby make himself a party to the special proceeding. But this section does not affect a right or interest of such a person, unless he becomes a party. **§ 2655, Code Civil Proc.**

The form of the citation should be substantially as follows:

THE PEOPLE OF THE STATE OF NEW YORK

To A. B., C. D., and E. F., heirs of late of deceased, send GREETING:

Whereas of has lately applied to our Surrogate's Court of the county of to have his right of inheritance in the real property of late of deceased, situated in are bounded and described as follows (here insert brief description of the real property).

Now, therefore, you and each of you are hereby cited personally to appear before our said Surrogate at his office in

on the day of 19 at o'clock in the noon of that day, then and there to attend the probate of heirship of the heirs of said deceased, in the real property aforesaid.

§ 424. **Extent of the inquiry.**—Section 2656 regulates the nature and extent of the inquiry to be made by the Surrogate and the facts to be covered by the decree.

> Upon the return of the citation, the surrogate must hear the allegations and proofs of the parties. If it appears that there is a contest, respecting the heirship of a party, or respecting the share to which a party is entitled, as an heir of the decedent, the surrogate must dismiss the proceedings. If there is no such contest, he must inquire into the facts and circumstances of the case. The petitioner must establish, by satisfactory evidence, the fact of the decedent's death; the place of his residence at the time of his death; his intestacy, either generally or as to the real property in question; the number of heirs entitled to inherit the property in question; the name, age, residence and relationship to the decedent of each, and the interest or share of each in the property. The surrogate, where these facts are established, must make a decree, describing the property and declaring that the right of inheritance thereto has been established to his satisfaction, in accordance with the facts, which must be recited in the decree. **§ 2656, Code Civil Proc.**

The decree should be substantially as follows:

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Decree under § 2656, C. C. P.

Title.

On reading and filing the petition of of one of the heirs-at-law of late of deceased, praying for a decree establishing the right of inheritance of the heirs of said decedent in the real property within the state of which he died seized in fee, together with due proof of the service of the citation issued thereon upon all the heirs of the decedent to whom it was directed and (here note the appearances upon the hearing), and there being no contest respecting the heirship of any party or the share to which any party is entitled as an heir of the decedent; and the Surrogate having inquired into the facts and circumstances of the case and the petitioner having established by satisfactory evidence

(*a*) The fact of the decedent's death on the day of 19

(*b*) The place of his residence at the time of his death in in the state of

(*c*) His intestacy (or his intestacy as to the real property described in the petition).

(*d*) The number of heirs entitled to inherit the property in question as (four).

(*e*) The name, age, residence and relationship to the decedent of each as follows:

NAME	AGE	RESIDENCE	RELATIONSHIP

(*f*) The interest or share of each in the property, as follows:

it is now, on motion of attorney for the said petitioner,

Ordered, Adjudged and Decreed, that the said late of deceased, died on the day of seized in fee of the following real property situated in the State of New York and bounded and described as follows: (here give description) that the said left no will (or will devising his said real property to specific persons); and it is further

Ordered, Adjudged and Decreed, that the right of inheritance of and the heirs of said deceased, has been established to the satisfaction of the Surrogate in accordance with the facts above recited and that said heirs above named are severally entitled to the following interests or shares in such property, to wit:

That C. D., E. F., G. H., and I. K., the children of said decedent, are entitled severally to one undivided fourth part or share of such real property.

(Signature.)
Surrogate.

It is manifest that the decree, which can only be made where there is no contest, being to all intents and purposes a decree upon consent, will not award costs to any of the parties as against any of the others.

§ 425. **Effect of decree.**—Practically the only object of this proceeding, namely, to get presumptive evidence of the facts established thereby, is provided for by § 2657, which is as follows:

Decree to be recorded; effect thereof.

An exemplified copy of a decree, made as prescribed in the last section, and of the proofs taken thereupon, may be recorded in the office of the clerk, or of the register, as the case requires, of each county in which the real property is situated, as prescribed by law for recording a deed, and, from the time when the exemplifications are so recorded, the decree, or the record thereof, is pre-

sumptive evidence of the facts so declared to be established thereby. **§ 2657, Code Civil Proc.**

§ 426. Petition to vacate or modify the decree.

Any person, other than a party to a special proceeding, instituted as prescribed in this article, or the heir, devisee, or assignee of such a party, may, at any time within ten years after a decree establishing the right of inheritance is made therein, present to the court a written petition, duly verified, showing that he has a right, title, or interest in the real property, or a part thereof, which is injuriously affected by the decree; stating that the decree is erroneous in some material particular, specified therein; and praying that the decree may be set aside or modified in that particular, and that all the persons, whose heirship was established by the decree, may be cited to show cause, why the prayer of the petition should not be granted. If an heir has since died, or has conveyed the share or interest so established, by a deed duly recorded in the county, the petition must state that fact; and must pray that the persons, who have succeeded to his interest, may be also cited. Upon the presentation of such a petition, the surrogate must issue a citation accordingly. **§ 2658, Code Civil Proc.**

This section, the provisions of which may be available any time within ten years after the decree has been made, has undoubtedly operated to dissuade practitioners from resorting to the provisions of this article except incidentally. However, it must appear upon an application to vacate or modify the decree, that the applicant's interest is:

(*a*) Injuriously affected by the decree;

(*b*) That the decree is erroneous, in some material specified part.

Upon an application, therefore, to vacate or modify such a decree, the Surrogate has the usual preliminary jurisdiction to determine whether the applicant has "a right, title, or interest in the real property, or a part thereof" or that such right, title, or interest is injuriously affected by the decree; and then if upon the hearing the decree is proved erroneous, it may be vacated or set aside. That the error must be shown to be material is apparent from the provisions of § 2659, which is as follows:

Petition to vacate or modify decree; when granted.

Where a petition is presented as prescribed in the last section, and it appears, upon the hearing, that, if the petitioner, or his ancestor, testator, or grantor, had been a party to the special proceeding, the decree or a part thereof could not have been legally made, as prescribed in this article, the surrogate must vacate or modify the decree accordingly. An exemplified copy of the decree or order, so vacating or modifying the original decree, may be recorded in the office of any clerk or register, where a copy of the original decree was recorded. **§ 2659, Code Civil Proc.**

It is clear from this section that the error must be such that had the attention of the court been called to it in the original proceedings, the decree could have been legally made in the form in which it was made.

CHAPTER VIII

THE CONSTRUCTION OF WILLS

§ 427. **The Surrogate's right to construe wills.**—The power of a Surrogate to construe wills is derived from two sections of the Code. The only express power given is by virtue of § 2624, which is as follows:

> *Validity and construction of testamentary provisions.*
>
> But if a party expressly puts in issue, before the surrogate, the validity, construction, or effect of any disposition of personal property, contained in the will of a resident of the state, executed within the state, the surrogate must determine the question upon rendering a decree; unless the decree refuses to admit the will to probate, by reason of a failure to prove any of the matters specified in the last section. **§ 2624, Code Civil Proc.**

It will be noted, from this section, that the right which it confers is limited to making a determination upon:

(*a*) The validity, construction or effect,
(*b*) Of a disposition of personal property,
(*c*) In a will executed within the State,
(*d*) By a resident of the State,
(*e*) Provided the will is probated.

The advantages of securing a construction on probate of a will, not explicit and clear, are obvious, but the words "must determine" are not mandatory, in the sense that all questions possible or even likely to arise may be required to be determined in advance. The Surrogate may reserve or postpone the consideration of questions so presented to him until they are of practical import or until their disposition is necessary. *Matter of Mount*, 185 N. Y. 162, 166.

§ 428. **The incidental power.**—The incidental power of the Surrogate is derived from the provisions of § 2472 of the Code of Civil Procedure, which provides, that the Surrogate has jurisdiction "to direct and control the conduct, and settle the accounts of executors, administrators and testamentary trustees. . . . To enforce the payment of debts and legacies, the distribution of the estate of decedents, and the payment or delivery by executors, administrators and testamentary trustees, of money or other property in their possession, belonging to the estate. . . . To administer justice in all matters relating to the affairs of decedents according to the provisions of the statutes relating thereto." And in § 2481 it is provided, among other things, that "the Surrogate may exercise such incidental powers as are necessary to carry into effect the powers expressly conferred." The Surrogate has jurisdiction over the settlement of accounts of ex-

ecutors and administrators; and in § 2743 it is provided, that, "when an account is judicially settled, as prescribed in this article, and any part of the estate remains, and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the person so entitled, according to their respective rights." As incident to the duty thus cast upon the Surrogate, he must have jurisdiction to construe wills, as far as needful, at least to determine to whom legacies shall be paid; and this, it is believed, is a power which the Surrogates of this State have always exercised. . . . They possessed such a power under the provisions of the Revised Statutes before the Code of Civil Procedure, and it was clearly not the intention of the Code to narrow or diminish the jurisdiction of Surrogates, but rather to enlarge it. See *Matter of Verplanck*, 91 N. Y. 439, 449.

§ 429. **The right of construction a limited one.**—It is very clear then that the Surrogate has now no general jurisdiction in the construction of wills. So, where the record shows that the construction was neither necessary nor incidental to the exercise of a conceded power, it is void, and will be disregarded. *Matter of Burdick*, 98 App. Div. 560.

So also where it affects rights of persons not parties to the proceeding. *Matter of Mount*, 185 N. Y. 162, aff'g 107 App. Div. 1. It is equally clear that on accountings and in decreeing distribution Surrogates have exercised the power to construe testamentary dispositions of property under the broad grant of powers incidental to those conferred by § 2472, Code Civ. Proc., and formerly involved in § 71, 2 R. S. 95.

There have been many cases in the Court of Appeals on appeal from decisions of Surrogates on final accountings which involve the interpretation and construction of wills and the determination of which involved and recognized the power of the Surrogate to construe a will when necessary to such accounting and distribution. See *Riggs* v. *Cragg*, 89 N. Y. 480, 492, citing *Stagg* v. *Jackson*, 1 N. Y. 206; *N. Y. Institution, etc.*, v. *How's Exrs.*, 10 *id.* 84; *Parsons* v. *Lyman*, 20 *id.* 103; *McNaughton* v. *McNaughton*, 34 *id.* 201; *Bascom* v. *Albertson*, 34 *id.* 584; *Whitson* v. *Whitson*, 53 *id.* 479; *Cushman* v. *Horton*, 59 *id.* 149; *Hoppock* v. *Tucker*, *id.* 202; *Teed* v. *Morton*, 90 *id.* 502; *Lawrence* v. *Lindsay*, 68 *id.* 108; *Luce* v. *Dunham*, 69 *id.* 36; *Wheeler* v. *Ruthven*, 74 *id.* 428; 30 Am. Rep. 315; *Ferrer* v. *Pyne*, 81 N. Y. 281. And the Court of Appeals held (*Garlock* v. *Vandervort*, 128 N. Y. 374, 378), "Though a judicial officer with limited and prescribed jurisdiction and powers, yet it is not open to question that in a proceeding before him, having for its object the settlement of an executor's accounts and to obtain a decree directing the distribution of the fund in his hands, and with all the parties in interest present, the Surrogate may construe the provisions of the will and determine the meaning and validity of them, whenever such a determination is necessary in order to make his decree as to distribution. Such a jurisdiction is, of course, not general; but it is one which is incidental to his office, and which flows clearly from the authority conferred upon him by the statute. See § 2472 of the Code of Civil Procedure.

"Subdivisions 3, 4 and 5 of the section of the Code cited would have little meaning and force, if such a judicial exercise of the Surrogate's authority were not impliedly granted." See also *Purdy* v. *Hayt*, 92 N. Y. 446, and *Cahil* v. *Russel*, 140 N. Y. 402; *Matter of Bolton*, 149 N. Y. 257; *Baldwin* v. *Smith*, 3 App. Div. 341; *Matter of Young*, 17 Misc. 680, 684.

§ 430. **Exercise of the express power to construe—It is limited to personalty.**—The language of § 2624 above quoted is unambiguous. There is no existing provision of law giving the Surrogate authority upon probate to inquire into the validity of a devise of real estate. *Matter of Will of Merriam*, 136 N. Y. 58, 59; *Prive* v. *Foucher*, 3 Dem. 339; *Matter of Schweigert*, 17 Misc. 186, 193; *Matter of Wilcox*, 55 Misc. 170. If both real and personal estate is involved the Surrogate's power extends only so far as relates to personalty. *Matter of Davis*, 59 Misc. 310.

In 1870 (ch. 359, Laws of 1870), power was given to the Surrogate of the county of New York, which the Surrogates in the State at large did not possess, to pass upon and determine the true construction, validity and legal effect of any disposition contained in a will of real or personal estate. The provision was as follows: "In any proceeding before the said Surrogate (that is, before the Surrogate of the county of New York) to prove the last will and testament of any deceased person, as a will of real or personal estate, in case the validity of any of the dispositions contained in such will is contested, or their construction or legal effect are called in question by any of the heirs or next of kin of the deceased, or any legatee or devisee named in the will, the Surrogate shall have the same power and jurisdiction as is now vested in and exercised by the Supreme Court, to pass upon and determine the true construction, validity and legal effect thereof."

Section 2624 is now substituted for this section of ch. 359 of the Laws of 1870 as appears from the annotations in Throop's Code, where he says under § 2624:

"This section has been taken from L. 1870, ch. 359, § 11, which confers such a power upon the Surrogate of the city and county of New York. It has been so framed as to confine its application to a strictly domestic will, ... and to a will of personal property. . . . *As thus amended*, the provision has been extended to all Surrogates' Courts."

Since the adoption, therefore, of § 2624, Surrogates throughout the State have power to construe wills in probate cases provided they are strictly domestic wills of personal property.

We have in another connection noted the limitation which Judge Rollins (*Jones* v. *Hamersley*, 4 Dem. 427) laid down as to what persons were entitled to insist that the court should exercise the power possessed by it under § 2624. The Surrogate held that no one had a right to raise academic issues under this section, and that the Surrogate would not exercise the power except at the instance of a party whose actual rights under the will would be affected one way or another by the determination. And so where Surrogates have been called upon to exercise this express power they have limited themselves or been limited by the Appellate Court to the clear in-

tent of the section. And in a recent case (*Matter of Robertson*, 23 Misc. 450, 452) it has been held that an executor was not such a party as is contemplated by the section. Surrogate Ingalsbe interpreting § 2624, says, "under the reading of this clause it is claimed that Mr. Reid (the executor) can present this issue, for he is a party to the proceeding. But he is one of the proponents. He is not a legatee or next of kin. His primary duty is to see that the will is probated, and not that it is declared invalid either in whole or in part. He has no interest in the estate except as an executor of the will." And the Surrogate adds (page 453): "It would seem on general principles of interpretation that no person should be entitled to an adjudication under this section as to the validity of a will, unless he claims some interest under it, in the personalty bequeathed, or, that by reason of some invalid disposition of such personalty, he is entitled to a share of the same under the statute of distributions. . . . Mr. Reid occupies neither of those positions. . . . He has no such interest as to enable him to invoke the jurisdiction of this court under § 2624."

Surrogate Sherman in *In re Marcial's Estate*, 15 N. Y. Supp. 89, derived in an elaborate opinion a jurisdiction in Surrogates' Courts to give construction to wills on probate relating to both real and personal property. He derived his conclusion from § 1866, providing for an action to determine the validity, construction or effect under the laws of the State of a testamentary disposition of real property situated within the State, the provision being as follows:

"This section does not apply to a case where the question in controversy is determined by the decree of the Surrogate's Court duly rendered upon allegations for the purpose as prescribed in art. 1, of title 3, of ch. 18, of this act, where the plaintiff was duly cited in the special proceeding in the Surrogate's Court before the commencement of the action."

Section 2624 is certainly contained in art. 1, of title 3, of ch. 18. But the language of § 2624 is as certainly explicit. The decision in the *Marcial* case does not appear to have been followed or approved except by the same Surrogate in a case decided in the same year (*In re Smith's Estate*, 18 N. Y. Supp. 174), where he remarks, "It has been held that §§ 2622, 2623, 2627, 2629, 2481, subd. 11, and 2482, give Surrogates' Courts authority to construe wills on probate relating to real estate." To this proposition he cites the *Marcial* case and *Matter of Look*, 5 N. Y. Supp. 50, affirmed without opinion in 125 N. Y. 762. But upon examination the latter case decided by the same Surrogate seems to be a construction of a bequest and not of a devise and its affirmance in the Appellate Courts does not appear to have involved the extreme principle to support which it is cited. It doubtless, however, does seem anomalous that the Surrogates should be denied the right to exercise a jurisdiction for which their judicial experience ought especially to fit them; and if those seeking the office of Surrogate were required by law to have the same preliminary professional experience as is expected in the case of a justice of the Supreme Court, it might not prove unwise to extend the jurisdiction of Surrogates' Courts in

this respect so as to make their determination on questions of testamentary construction conclusive; although it might be necessary still to continue the provisions of the Code in regard to the partial conclusive effect otherwise of decrees admitting to probate wills of real property in respect of questions as to which it is proper to preserve for parties their right to a trial by jury in an action. See *Cooley* v. *McElmeel*, 149 N. Y. 228, 237.

§ 431. **Same subject.**—If the intent of the *Marcial* case above referred to, was merely to hold that the fact that a will purported to dispose of real property as well as of personal, does not divest the Surrogate of jurisdiction, it would undoubtedly embody the correct rule; but whatever the provisions of the will the construction by a Surrogate is *brutum fulmen* as to any devise of real property. It is undoubtedly true that devises disposing of real property, and bequests disposing of personal property, may be precisely similar in their wording, and the determination by the Surrogate, that the bequest of personal property is invalid for whatever reason, would naturally, if his reasoning were sound and his conclusions correct, be pertinent in passing on the devises; but practically it can have no such effect under the limitations imposed upon the Surrogate's jurisdiction; and this principle is carried to this extent, that where the bequests and devises are not clearly distinct, or distinguishable, one from the other, the Surrogate will not have power to construe. Thus, where there is no disposition of personal property except as it is connected with the disposition of real estate so that it would be impossible to separate the disposition of the personal property from that of the real estate and they are essentially connected and not separable, it was at first held that the Surrogate is without power to construe. See *Matter of Shrader*, 63 Hun, 63, where Macomber, J., says, "We are of opinion, under § 2624 of the Code, and under the common-law limitation of the power of the Surrogate's Court, that the Surrogate has no jurisdiction to make a construction of this will, or pass upon the validity of any of its parts, because there was no disposition of personal property independent of and separate from the disposition of the real estate." But in the recent case of *Matter of Trotter*, 182 N. Y. 465, a trust was created in which realty and personalty were inseparably blended. Held, Surrogate could declare it void as to personalty. As the *Shrader* case was cited by appellant it is thus overruled. Similarly the *Matter of Morgenstern*, 9 Misc. 198; *Matter of Bogart*, 43 App. Div. 583, 586; *Matter of Austin*, 35 App. Div. 278. See also *Matter of Davis*, 59 Misc. 310, and cases cited at p. 314.

The rule thus is not to exclude jurisdiction where the exercise of such power by the Surrogate as to the validity of a bequest does not necessarily (even though there be such a blending as Surrogate Coffin described in the *Morgenstern case*) involve real estate. See *Matter of Vowers*, 113 N. Y. 569, 573, rev'g 45 Hun, 418. And whatever the effect of his decree may be, into which is incorporated his decision, whether as to the personal property or as to the parties to the proceeding interested therein, those interested in the real property are not concluded thereby but may pursue their reme-

dies in the Supreme Court in regard to the same in the manner provided by law, the effect of the probate decree being limited by § 2627 above discussed. See *Corse* v. *Chapman*, 153 N. Y. 466, 475; *Cooley* v. *McElmeel*, 149 N. Y. 228. Attention is called to the important rule No. 5, adopted in the Surrogate's Court of the County of New York, which embodies a wise principle, and provides a reasonable and necessary safeguard. The rule is as follows:

> "Wherever a party shall put in issue on probate the validity, construction, or effect of any disposition of personal property under § 2624 of the Code, if it shall appear that all persons interested in such construction are not before the court, the determination of such question shall be suspended until such persons shall be made parties; and the executor named in the will shall not be held to represent the legatees therein for the purpose of such construction."

This rule was laid down by Surrogate Calvin (*Currin* v. *Fanning*, 13 Hun, 458, at page 465) in an opinion adopted by the General Term of the First Department, where he says: "I entertain no doubt of my authority, as an incident to the performance of that duty, to bring in all the parties interested for that purpose; but I am equally clear in the opinion, that, when a case has been submitted to me without such parties being called in, I should refuse to exercise the jurisdiction, except so far as it may become necessary for the purpose of passing upon the probate of the instrument in question, as a will of real and personal property, until such parties shall be brought in." If the will deals with real and personal property, and upon probate it is construed as wholly invalid as to personalty, it must be, nevertheless. upon proof of due execution, admitted to probate as a will of real property, *Matter of DeWitt*, 113 App. Div. 790.

§ 432. **Same—Further limitation.**—The power to construe a will is also conditioned on its being probated (see § 426, *ante*). Probate logically precedes construction. *Matter of Davis*, 182 N. Y. 468, aff'g 105 App. Div. 222. Houghton, J., in the opinion below well states the rule. This case was peculiar in that the sole legatee, devisee and executrix predeceased testatrix. Hence it was claimed the paper was a nullity. Held (*a*) it must be probated on due proof of the *factum*. (*b*) The question who would take the property was not incidental to probate. (*c*) Therefore the Surrogate had at that time no power to construe it.

§ 433. **Same—Extent of power.**—When the power exists its extent is adequate. Thus, it is proper to ask on probate a determination as to the validity of a bequest alleged to be in violation of § 6, ch. 319, Laws 1848 (see Laws 1903, ch. 623, § 1) now § 19 of Decedent Estate Law. *Matter of Cooney*, 112 App. Div. 657; *Pearson* v. *Collins*, 113 App. Div. 657. This statute prohibits devises or bequests to (as it now reads) "any institution or corporation formed under Laws of 1848, ch. 319," of more than half the estate of a person leaving "a wife, or child, or parent." Such devise or bequest is valid to the extent of such one-half, but only if made "at least two months before the death of the testator." But if the conditions con-

templated by the statute do not exist, the power to construe may not be invoked. *Matter of Talmage*, 59 Misc. 130.

§ 434. **Summary statement.**—The decisions in respect to the exercise of the express power granted by § 2624, may be thus briefly summarized:

1. It is limited to dispositions of personal property. See *Matter of Schrader*, 63 Hun, 36; *Seaman* v. *Whitehead*, 78 N. Y. 308; *Matter of Trotter*, 182 N. Y. 465.

2. The provisions to be construed must be contained in the will of a resident of the State, executed within the State, for a Surrogate has no jurisdiction in probate proceedings, to pass upon the validity of dispositions of personal property, contained in a will executed without the limits of this State. *Tiers* v. *Tiers*, 2 Dem. 209. See also *Smith* v. *Central Trust Co.*, 12 App. Div. 278.

3. The usual rules as to what constitutes residence will govern so far as they are not limited by express statutory provisions. For example, the provisions of § 2611, which provide that the validity of the execution of a will, or the validity or construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will.

4. This express power can be exercised in probate proceedings only, and proceedings to revoke probate are not to be included thereunder. *Bevan* v. *Cooper*, 72 N. Y. 317; *Matter of Ellis*, 1 Connoly, 206; *Matter of Wilcox*, 55 Misc. 170.

5. The issue must be raised by a party to the proceedings, that is to say, a person duly cited whether by original or supplemental citation. See § 2624, Code Civ Proc.; *Jones* v. *Hamersley*, 4 Dem. 427.

6. And the power will be exercised only at the instance of a person whose rights will be affected by the adjudication of the Surrogate (*Matter of Robertson*, 23 Misc. 450, 452; *Matter of Campbell*, 88 Hun, 374), such as, a widow (*Matter of Vowers*, 113 N. Y. 569), or a residuary legatee, or any heir entitled to a share in the estate, in the case of the entire or partial invalidity of the will. See *McKeown* v. *Officer, etc.*, 25 N. Y. St. Rep. 319. See also *Harris* v. *Am. Bible Society*, 4 Abb. N. S. 421.

7. The question of construction must be raised by "expressly putting in issue" the validity of the provision; that is to say, the party must file an answer with distinct and specific allegations, that certain provisions of the will are illegal and void; this raises an express issue, and calls for the determination of the Surrogate. See *Matter of Fuller*, 20 N. Y. St. Rep. 352. See *Matter of Will of Keleman*, 126 N. Y. 73, 78; *Matter of Talmage*, 59 Misc. 130. It was expressly held by Surrogate Rollins, that no such issue was raised as required by § 2624, where, upon probate, the testatrix's husband filed a petition, asserting his claim and title to the property of which she died possessed, and asking that no disposition of such property be made as expressed in the will offered for probate. The learned Surrogate ignored this paper in admitting the will to probate. *McClure* v. *Wooley*, 1 Dem. 574.

8. And the Surrogate is confined to the distinct issue raised by such answer and cannot pass upon any questions other than those involving the validity, construction or legal effect of the dispositions above described. Thus for example in *Matter of Walker*, 136 N. Y. 20, 24, the Court of Appeals held that the investigation which the Surrogate was empowered to make under § 2624 was limited to questions arising out of the terms of the will, and expressly denied him the right to pass upon the questions submitted to him for adjudication, as to the ownership by the testator of certain funds, as to his indebtedness to one of the heirs in a given amount, and other like questions. And it has been held that the mere fact, that the parties had consented to this improper exercise of jurisdiction could not confer jurisdiction. *Matter of Walker, supra,* at page 29, citing *Chemung Canal Bank* v. *Judson*, 8 N. Y. 254.

§ 435. **Exercise of implied power to construe.**—Much of the confusion which has appeared in the cases involving the right of the Surrogate to construe wills, has arisen from the failure to emphasize the clear distinctions made in the Code. The express power is limited to probate proceedings, and is subject to the limitations already noted. The incidental power (see § 2 above) is a power which must be exercised as any other incidental power, that is to say, only in so far as it is necessary in order to carry out the express power to which it is incidental. See *Baldwin* v. *Smith*, 3 App. Div. 350, 353; *Garlock* v. *Vandevort*, 128 N. Y. 374; *Purdy* v. *Hayt*, 92 N. Y. 446; *Matter of Merriam*, 136 N. Y. 58.

It is clear from what has been already stated, that the power to construe a will upon accounting and decreeing distribution, is necessarily incident to the exercise of those powers. The Court of Appeals has extended this incidental power of the Surrogate to construe wills, to cases arising under the provisions of the Collateral Inheritance Tax Law. *Matter of Ullmann*, 137 N. Y. 403, 407. This power, Judge O'Brien says in his opinion, is incidental to that provision of the statute, under which the tax was assessed which provides that, "The Surrogate's Court in the county of which the decedent at the time of his death was a resident shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act . . . . " and he accordingly observes: "The Surrogate must decide *whether any property of a deceased person has passed* to another under a will or under the laws of intestacy, before he can perform the duty imposed upon him. It may sometimes happen that the property of the deceased passes in both ways. The fact that there is a will, and that it has been admitted to probate, does not necessarily determine the ownership or the transmission of the property. When the Surrogate looks into the will some of its dispositions may be so clearly void as to warrant him in holding that nothing has passed by virtue of them, but that the property embraced therein has passed to heirs or next of kin under the statutes of descent or distribution. In the numerous cases that have been passed upon by this court recently, arising under the statute, we have held that the Surrogate was clothed with power, and that it was his duty to decide ques-

tions arising under wills or under the statutes quite as intricate and important as those arising out of the residuary clause of the will in this case, citing *In re McPherson*, 104 N. Y. 306; *In re Enston*, 113 *id.* 174; *In re Sherwell*, 125 *id.* 379; *In re Romaine*, 127 *id.* 80; *In re Stewart*, 131 *id.* 274; *In re Wolfe*, 137 *id.* 205; *In re Prime*, 136 *id.* 347; *In re Swift*, 137 *id.* 77.

"In the settlement of the accounts of executors and the distribution of the personal estate under a will, the Surrogate is empowered to determine the validity of testamentary provisions under statutes that are not more explicit or comprehensive than the one now under consideration. Code, §§ 2472, 2481, 2743; *In re Verplanck*, 91 N. Y. 439; *Purdy* v. *Hayt*, 92 *id.* 446; *Riggs* v. *Cragg*, 89 *id.* 479; *Garlock* v. *Vandevort*, 128 *id.* 378; *In re Wagner*, 119 *id.* 32; *In re Cager*, 111 *id.* 343.

"The jurisdiction conferred by the statutes upon the Surrogate to hear and decide all questions in relation to the tax imposed by its provisions upon persons to whom property has passed from a decedent is, we think, broad enough to warrant the Surrogate in holding, in a case like this, that the property which is the subject of the tax has not passed to the legatees or devisees under the will, but the heirs-at-law or next of kin." However, it was held by the Court of Appeals in the *Fayerweather* case (*Amherst College* v. *Ritch*, 151 N. Y. 322, 343), that the adjudication by a Surrogate in transfer tax proceedings, in this connection, must be limited with reference to the object for which it is made, and merely amounts to an adjudication, that, for the purpose of taxation under the act in question, a certain amount of property actually passed to specific persons by virtue of the will; and Judge Vann writing the opinion of the court says, that the Surrogate's legitimate inquiry necessarily stopped at that point; that, "the adjudication was necessarily limited to the subject of taxation, and if conclusive at all, was not conclusive upon the rights of the parties arising from matters outside of the will," citing *Matter of Wolfe*, 137 N. Y. 205, 211; *Matter of Ullmann*, 137 N. Y. 403, 407.

§ 436. **Same subject.**—The exercise of this implied power to construe wills, has been held to be proper in *any* proceeding where it may become necessary in order to enable the Surrogate to carry out powers expressly conferred on him. See *Kelsey* v. *Van Camp*, 3 Dem. 530, 534. See also *Matter of Owens*, 33 N. Y. Supp. 422. Subject to the limitations indicated, this is unquestionably true. *Matter of Bruchaeser*, 49 Misc. 194.

These limitations, apart from express statutory provisions, such for example as those in § 2624, have been stated by the Court of Appeals in the form of a general rule (*Washbon* v. *Cope*, 144 N. Y. 287, 295), where Peckham, J., observes:

"As a general rule, the Surrogate has no jurisdiction to construe the provisions of a will excepting so far as it may be necessary for him to do so in order that he may properly perform some other duty which has been imposed upon him by law. There is no general and inherent power vested in him or in his court to construe devises or bequests as a distinct and independent branch of his or its jurisdiction. Even a court of equity vested

with general jurisdiction over equitable subjects has no such inherent power as that, and its only power to construe the provisions of a will is based upon, and is incident to, its jurisdiction over trusts. *Mellen* v. *Mellen*, 139 N. Y. 210, and cases cited in the opinion of Andrews, Ch. J. The statute itself provides for the effect of a judicial settlement of the accounts of the executors. See §§ 2742 and 2743, Code Civ. Proc." See, as to effect of decree improperly made, *Pfiester* v. *Writer*, 33 Misc. 701.

Sometimes it may be necessary for the Surrogate to construe the provisions of the will in order that upon the final accounting of the executors thereof he may decree distribution to those who, by the provisions of the will, are entitled to any portion of the proceeds remaining undistributed, or where distribution by the executors has already been made, may, upon their accounting, determine whether they have or have not, erroneously and improperly made distribution of some of the estate, and if they have, the Surrogate may hold them liable in their accounts. But generally it is for the purpose of determining the correctness of the accounts of the executors or of decreeing the proper distribution of the estate, that this jurisdiction to construe the terms of a will becomes necessary, and may be exercised for the purpose of carrying out the jurisdiction actually conferred upon the Surrogate.

There is no question as to the Surrogate's power within the limitations noted, to construe a will upon an accounting for the purpose of properly determining questions necessarily arising thereon. *Garlock* v. *Vandevort*, 128 N. Y. 374, 378, citing *Matter of Verplanck*, 91 N. Y. 439, 449; *Riggs* v. *Cragg*, 89 N. Y. 179. See *Matter of Young*, 17 Misc. 680, 684; *Will of Hövens*, 8 Misc. 574; *Matter of Metcalf*, 6 Misc. 524; *Matter of French*, 52 Hun, 303. And it must be noted that, if the Surrogate has rightly assumed jurisdiction, and undertaken to construe a provision in a will, in a proper case, the jurisdiction of the Surrogate being equal to and concurrent with that of the Supreme Court, the rule is applicable that the Surrogate's Court, as the tribunal which first obtains jurisdiction of the subject-matter and of the persons, retains and exercises the jurisdiction to the exclusion of the Supreme Court, that is to say, that while it is not an exclusive jurisdiction on the part of the Surrogate to start with, the Supreme Court will not, when he has rightly assumed jurisdiction in a given case, entertain an action involving the same questions brought in the Supreme Court. *Schuehle* v. *Reiman*, 86 N. Y. 270; *Garlock* v. *Vandevort*, *supra*, page 379.

If the construction of a will is necessary to determine questions arising on the accounting, jurisdiction to construe attaches as incident to the proceedings, and it is not only proper for the Surrogate to entertain jurisdiction to construe the will but it will be held error if he refuses to do so. See *Purdy* v. *Hayt*, 92 N. Y. 445, 446, 450. The same rules of law must be applied by him as would govern the Supreme Court. In ruling on the passing of property he must distinguish between *lex fori* and *lex rei situs* as applicable to personalty or realty. Thus in *Mount* v. *Tuttle*, 40 Misc. 456, the testatrix (New York) made a will creating a trust of personalty to be executed

in a foreign State. Held, the law of that State must govern, and that the trust being defective thereunder a curative New York statute would not save it. This was a special term case.

§ 437. **Same subject.**—The power of the Surrogate to construe the provisions of a will and determine their meaning and validity, in order to make a decree of distribution, after judicially settling the accounts of an executor, or administrator with the will annexed, is thus very clear under the decisions. See *Matter of Vandevort*, 8 App. Div. 341, 353, citing *Purdy* v. *Hayt*, 92 N. Y. 446; *Garlock* v. *Vandevort*, 128 N. Y. 374; *Cahill* v. *Russell*, 140 N. Y. 402; *Matter of Bolton*, 146 N. Y. 257; *Baldwin* v. *Smith*, 3 App. Div. 350. Whether this accounting by the executor is voluntary or compulsory, makes no difference as to the power of the Surrogate (see *Estate of Metcalf*, 6 Misc. 524); while the Surrogate has power to make such construction on settling the accounts of an administrator with the will annexed, he has not that power upon the original application for such letters of administration. See *Matter of Smith*, 18 N. Y. Supp. 174, 175; *Du Bois* v. *Brown*, 1 Dem. 317, and *Matter of Thompson*, 5 Dem. 117. This power to construe a will for the purpose of making the distribution, requires a passing reference to § 2743, which permits a Surrogate upon the judicial settlement of an account, where the validity of the debt, claim, or distributive share, is admitted, or has been established upon the accounting, or other proceeding in the Surrogate's Court, or other court of competent jurisdiction, to determine by the decree, to whom it is payable, the sum to be paid by reason thereof and other questions concerning the same. This section, as will be noted later on, contains the sole statutory authority whereunder the Surrogate has jurisdiction to determine disputes as to third parties' demands; but incidental to this power it may be absolutely essential for the Surrogate to construe the will for the purpose of determining to whom legacies shall be paid. See *Verplanck's Estate*, 91 N. Y. 439; *Tappen* v. *M. E. Church*, 3 Dem. 187, 191. Where the right to a legacy depends upon a question of construction, it must be determined before a decree for distribution can be made, and the Surrogate has jurisdiction to determine such construction as incident to the authority to make the distribution. See *Riggs* v. *Cragg*, 89 N. Y. 479.

§ 438. **When exercise of incidental power denied.**—The exercise of this incidental power has also been denied in the following cases:

Upon an application to compel payment of a legacy under § 2722 (former § 2717). *Rank* v. *Camp*, 3 Dem. 278, Rollins, Surr. And the Court of Appeals (*Riggs* v. *Cragg*, *supra*, 480, 492) has intimated that the reason for a denial of the power in such a case was that the application for payment of a legacy was in the nature of a special accounting to which all parties interested in the estate are not necessarily cited, and that it would not be proper for the Surrogate to proceed to a determination which might affect the rights of other legatees, or persons interested in the estate, without the presence of all such parties to be affected by such adjudication, and that therefore the final accounting, when the right of the Surrogate in this

regard was fully recognized, was the proper occasion for the exercise of the power to construe.

The power has also been denied upon an application requiring an executor to show cause why he should not make, file and return an inventory and an account of his proceedings under the statute, and in default thereof to show cause why he should be attached and removed from office. *Wilde* v. *Smith*, 2 Dem. 93, 96.

Where the Surrogate, however, does exercise the power to construe the will, this construction should be embodied in some directory clause of the decree, otherwise, as was held by the Court of Appeals (*Washbon* v. *Cope*, 144 N. Y. 287, 296), his decision will be nothing more than an opinion as to the proper construction of the will upon which he bases no action and makes no decree.

§ 439. **Construction by the Surrogate.**—It is impracticable in a work of this character to discuss at length the rules of law governing the Surrogate as a judicial officer in exercising his power to construe wills. This subject has been elaborately discussed in text-books devoted specially to the subject. The Surrogate is of course bound by the same rules of construction and interpretation, which would govern the Supreme Court in the exercise of similar power, with the limitation, however, that in the exercise of the power as incidental and necessary to effectively exercise an express power conferred upon him by law, the incidental power should be exercised only to the extent of enabling him to perform the express power; this is illustrated by the limitation placed by the Court of Appeals upon the right of the Surrogate to construe a will in proceedings under the transfer tax law. See § 435, *supra*, where the adjudication of the Surrogate was held to be necessarily limited to the subject of taxation, and to have a conclusive effect only, in so far as that matter was involved.

However, an effort has been made to condense and set in compact form with adequate references the principal rules of construction as they have been formulated and developed by the courts. This is shown here as elsewhere throughout this work largely in the very words of the cases.

§ 440. **Multiplicity and confusion of precedents.**—Confusion exists among the vast multitude of cases relating to the construction and interpretation of wills. To a very large extent this confusion may be considered as the natural result of the policy of the law in refusing to subject this class of instruments to as rigid rules of construction as are applied to deeds and other instruments affecting the property of living persons, wherein we find a more precise terminology and forms of expression, whose well-established meaning is clearly adhered to by the courts. "To lay down any positive and definite rules of universal application in the interpretation of wills, must continue to be as it has been, a task, if not utterly hopeless, at least of extraordinary difficulty. The unavoidable imperfections of human language, the obscure and often inconsistent expressions of intention, and the utter inability of the human mind to foresee the possible combination of events, must forever afford an ample field for doubt and discussion, as long

as testators are at liberty to frame their wills in their own way, without being tied down to any technical and formal language." Mr. Justice Story in *Sisson* v. *Seabury*, 1 Sumn. 235.

§ 441. **Testator's intention the primary guide.**—Where a will is the subject of construction, it is the manifest intention of the testator and not any rule of construction which is to govern, when they come in conflict. *Matter of James*, 146 N. Y. 78; *Miller* v. *Gilbert*, 144 N. Y. 68, 70; *Delaney* v. *Van Aulen*, 84 N. Y. 16. Any other rule "is subordinate to this primary canon of construction, that the intent, to be collected from the whole will, must prevail." *Matter of Brown*, 154 N. Y. 313; *Goebel* v. *Wolf*, 113 N. Y. 405.

Where the language is plain and the intention of the testator is clearly expressed, the court will not look into extraneous circumstances in giving its construction. *Champlin* v. *Champlin*, 58 N. Y. 620. (Full report in 1 Sheld. 355.) Thus, in such a case it will not inquire into testator's *motives* (*Howland* v. *Union Theological Seminary*, 5 N. Y. 193), nor into the *reasonableness* of the provisions if they violate no principle of law or morality. *Bolton* v. *De Peyster*, 25 Barb. 539; *Watson* v. *Donnelly*, 28 Barb. 653.

So also, when the language is unskillful or inaccurate, but the intent can be clearly collected from the writing, it is the duty of the court to give effect to that intent. *Masterson* v. *Townsend*, 123 N. Y. 458; *Roe* v. *Vingut*, 117 N. Y. 204; *Bliven* v. *Seymour*, 88 N. Y. 469.

§ 442. **Of the canons of construction.**—It follows from what has been said that the courts will strive as far as possible to carry out the real objects of the testator, limiting themselves, however, to the intention deducible from the words of the will, but in no cases exceeding or amplifying such intention. Whatever rules may be formulated as guides in testamentary construction are of limited scope and validity, and are applicable only to particular words, phrases and testamentary provisions, in the absence of a contrary intention appearing in the will. Canons of construction may, therefore, be viewed as means of collecting a testator's intention, where there is a doubt or uncertainty as to the meaning of any expression or provision contained in his will. Without them the courts would be free to resort to conjectural interpretations, unfettered by any fixed principles or established precedents, and a latitude would thus be given to the judicial imagination, inconsistent with the stability of the law.

GENERAL RULES OF CONSTRUCTION

I. Intention is to be collected from the whole will taken together and not from any detached portions alone, and such a construction given, if possible, as to form one consistent whole. *Norris* v. *Beyea*, 13 N. Y. 273; *Roe* v. *Vingut*, 117 N. Y. 204, 212; *Taggart* v. *Murray*, 53 N. Y. 236; *Trask* v. *Sturges*, 170 N. Y. 482, 496; *Kelley* v. *Hogan*, 71 App. Div. 343.

This rule is extended to cover, (1) introductory terms (*Clark* v. *Jacobs*, 56 How. Pr. 519; *Youngs* v. *Youngs*, 45 N. Y. 254); (2) a codicil taken with the will as part of the same instrument (*Wescott* v. *Cady*, 5 Johns. Ch. 334;

Crozier v. *Bray*, 120 N. Y. 366, 374); (3) those portions admittedly void or inefficient to dispose of property. *Tilden* v. *Green*, 130 N. Y. 29, 55; *Morton* v. *Woodbury*, 153 N. Y. 243; *Kiah* v. *Grenier*, 56 N. Y. 220.

II. Where the intention is left uncertain or doubtful, that construction should be adopted which is nearest in accord with public policy and with the law. *Chwatal* v. *Schreiner*, 148 N. Y. 683; *Crooke* v. *County of Kings*, 97 N. Y. 421; *Manice* v. *Manice*, 43 N. Y. 305; *Hopkins* v. *Kent*, 145 N. Y. 363.

III. Where a particular intent is inconsistent with a general intent, the latter is subordinated to the former. *Spofford* v. *Pearsall*, 138 N. Y. 57, 68; *Hoey* v. *Gilroy*, 129 N. Y. 132, 138.

IV. An intent, inferable from the language of a particular clause of a will, may be qualified or changed by other clauses thereof, evincing a different intent. *Hoppock* v. *Tucker*, 59 N. Y. 202; *Moffet* v. *Elmendorf*, 152 N. Y. 475, 484. So where the primary devise is to A, and B is to take in case A die, the presumption is that testator meant "if A die before me." *Matter of Cramer*, 170 N. Y. 275. But if a life estate intervene ahead of A's fee there is room to consider whether the contingency of A's death may not relate to the end of the life estate and not to testator's death. *Matter of Denton*, 137 N. Y. 433; *Matter of Baer*, 147 N. Y. 354; *Coon* v. *Coon*, 38 Misc. 693, and cases cited.

V. Where two clauses are so inconsistent and irreconcilable that they cannot possibly stand together, the one that is posterior in position will prevail, as indicating a subsequent intention. *Van Nostrand* v. *Moore*, 52 N. Y. 12; *Vechten* v. *Keator*, 63 N. Y. 52; *Sweet* v. *Chase*, 2 N. Y. 79.

This rule, of course, will not apply when the later provision is void. *Austin* v. *Oakes*, 117 N. Y. 577. It has frequently been criticised as not founded on a very satisfactory reason and is not to be blindly followed unless the court can find nothing else to aid it in ascertaining the testator's intention. *Ogsbury* v. *Ogsbury*, 45 Hun, 388; *Covenhoven* v. *Shuler*, 2 Paige, Ch. 123.

VI. Where of several provisions in a will, some are lawful and others unlawful, each being complete in itself, and independent of and separable from the others, the legal provisions will be preserved, if not inconsistent with the manifest intent of the testator, and if they would not lead to a result contrary to the purpose of the will or work injustice among the beneficiaries. *Tilden* v. *Green*, 130 N. Y. 29; *Van Schuyver* v. *Mulford*, 59 N. Y. 426; *Kalish* v. *Kalish*, 166 N. Y. 368.

But where material provisions of a will are illegal and cannot be separated from the other parts, without defeating the testator's general intention, the legal provisions must fail with the illegal. *Hafner* v. *Hafner*, 62 App. Div. 316; *Benedict* v. *Webb*, 98 N. Y. 460; *Harris* v. *Clark*, 7 N. Y. 242.

VII. Such a construction as will prevent partial intestacy will be favored, the law presuming that a testator did not intend to die intestate as to any of his property. *Schult* v. *Moll*, 132 N. Y. 122; *Kelley* v. *Hogan*, 71 App. Div. 343; *Byrnes* v. *Baer*, 86 N. Y. 218.

VIII. The law favors that construction which permits descent to remain

in the line of ancestral blood. *Knowlton* v. *Atkins*, 134 N. Y. 313, 321; *Quinn* v. *Hardenbrook*, 54 N. Y. 83; *Matter of Boyce*, 37 Misc. 146.

IX. Express words, or necessary implication, are requisite in order to disinherit an heir-at-law. *Haxtun* v. *Corse*, 2 Barb. Ch. 521; *Chamberlain* v. *Taylor*, 105 N. Y. 185; *Scott* v. *Guernsey*, 48 N. Y. 106; *Brown* v. *Quintard*, 177 N. Y. 75.

Mere words of disinheritance, without devise to others, are insufficient to effect that purpose. *Gallagher* v. *Crooks*, 132 N. Y. 338, 342, and cases cited; *Lynes* v. *Townsend*, 33 N. Y. 558, 561.

X. The law favors equality among children of the testator and their issue, in the distribution of estates, and in cases of doubtful construction it selects that which would lead to such a result. *Stokes* v. *Weston*, 142 N. Y. 433; *Matter of Miller*, 18 App. Div. 211, aff'd on opinion below, 155 N. Y. 646; *Brown's Estate*, 93 N. Y. 295; *Button* v. *Button*, 57 App. Div. 297.

XI. Provisions for the benefit of a wife are construed liberally in her favor. *Moffat* v. *Elmendorf*, 152 N. Y. 475; *Thurber* v. *Chambers*, 66 N. Y. 42, 48; *Stimson* v. *Vrooman*, 99 N. Y. 74, 80.

XII. The law favors the vesting of estates at the earliest time. *Stokes* v. *Weston, supra; Byrnes* v. *Stilwell*, 103 N. Y. 453; *Trask* v. *Sturges*, 170 N. Y. 482; *Campbell* v. *Beaumont*, 91 N. Y. 464.

XIII. Where an interest is given or an estate conveyed in one clause, it cannot be cut down or taken away by raising a doubt from other clauses, but only by express words or clear implication. *Freeman* v. *Coit*, 96 N. Y. 63; *Banzer* v. *Banzer*, 156 N. Y. 429; *Trask* v. *Sturges*, 170 N. Y. 482, 492.

XIV. A will speaks as of the date of the testator's death. *Brundage* v. *Brundage*, 60 N. Y. 544; *Lynes* v. *Townsend*, 33 N. Y. 558, 564.

But when a testator refers to an actually existing state of things, his language should be understood as referring to the date of the will and not that of his death. *Rogers* v. *Rogers*, 153 N. Y. 343, and cases cited. See *Matter of Hopkins*, 102 App. Div. 458.

XV. An expressed intention in a codicil to make a change in a will in one particular negatives, by implication, an intention to alter it in any other respect. *Redfield* v. *Redfield*, 126 N. Y. 466; *Wetmore* v. *Parker*, 52 N. Y. 450.

§ 443. **Interpretation of words and phrases.**—In addition to the foregoing general rules the courts have enunciated a number of rules of lesser scope, applicable to individual words and phrases. Of these, the more important are the following:

I. Words in general are to be taken in their plain, usual and primary sense, unless a clear intention to use them in another sense can be collected, and that sense ascertained from the instrument. *Carpenter* v. *Carpenter*, 2 Dem. 534; *Harvey* v. *Olmstead*, 1 N. Y. 483, 489; *Matter of Woodward*, 117 N. Y. 522; *Wylie* v. *Lockwood*, 86 N. Y. 291.

II. Technical words are presumed to have been used in their technical sense, but when it appears from the context or from extraneous facts, that the testator used them in their common and popular sense, this overcomes

the presumption. *Lawton* v. *Corlies*, 127 N. Y. 100; *Luce* v. *Dunham*, 69 N. Y. 36; *Cushman* v. *Horton*, 59 N. Y. 151.

III. The natural sense in which words are used, always prevails over both punctuation and capitals. *Kinkele* v. *Wilson*, 151 N. Y. 269; *Arcularius* v. *Sweet*, 25 Barb. 406.

IV. Rules of grammar are considered and will be followed, excepting when they contravene the clear intendment. *Staats* v. *Staats*, 11 Johns. 337; *Abbey* v. *Aymar*, 3 Dem. 400; *De Notteback* v. *Astor*, 13 N. Y. 98.

V. Words may be transposed, rejected or supplied so that the will may express the intention of the testator (*Starr* v. *Starr*, 132 N. Y. 154, 158; *Phillips* v. *Davies*, 92 N. Y. 199), but not so as to devise a new scheme or to make a new will. *Tilden* v. *Green*, 130 N. Y. 29.

See, as to words *transposed*, *Wager* v. *Wager*, 96 N. Y. 164, 172; *Covenhoven* v. *Shuler*, 2 Paige's Ch. 122. Words *rejected*, *Walter* v. *Ham*, 68 App. Div. 381; *Benjamin* v. *Welsh*, 73 Hun, 371. Words *supplied*, *Roseboom* v. *Roseboom*, 81 N. Y. 356; *Mumford* v. *Rochester*, 4 Redf. 451; *Matter of Schweigert*, 17 Misc. 186. Words *changed*, *Roome* v. *Phillips*, 24 N. Y. 463; *Miller* v. *Gilbert*, 144 N. Y. 68, 74.

VI. Where certain things named are followed by a phrase which need not but might be construed to include other things, it will be confined to articles of the same general character as those enumerated. *Matter of Reynolds*, 124 N. Y. 388, 397.

VII. Precatory words and expressions, accompanying a devise or a bequest are *prima facie* obligatory, and create a trust, unless the intention is clearly apparent that they are to be regarded as advisory or recommendatory only. *Bliven* v. *Seymour*, 88 N. Y. 469; *Manice* v. *Manice*, 43 N. Y. 305; *Matter of Gardner*, 140 N. Y. 123.

VIII. Particular words or clauses may, in the light of other words or clauses, be so construed as to mean more or less than they import considered singly or by themselves. *Freeman* v. *Coit*, 96 N. Y. 63.

IX. The construction given to a word or phrase in one will is no positive criterion for construing the same expression occurring in another (*Smith* v. *Bell*, 6 Pet. 68, per Marshall, C. J.); and the same word may be construed in different senses in the same will. *Morrow* v. *McMahon*, 35 Misc. 348, construing "issue" variously as to their interest in income and principal of estate.

§ 444. **Interpretation of particular words and phrases.**—As may be readily inferred from the last rule above mentioned, there are a very large number of decisions defining the meaning of certain words and expressions as they are used in the particular instruments under consideration. In them, various shades of meaning, often widely divergent, will be found. But the same word or expression in different wills may require essentially different constructions; so unless two wills can be found approximately identical, disposing of similar property under similar circumstances, such precedents lose much of their force. Convenient lists of adjudged cases, containing such verbal interpretations, will be found in the digests.

§ 445. **Admissibility of extrinsic evidence.**—When there is no ambiguity in a will, extrinsic evidence is inadmissible to show the testator's intention, for plain and unambiguous language leaves no room for construction. *Bradhurst* v. *Field*, 135 N. Y. 564; *Sanford* v. *Sanford*, 58 N. Y. 69. It is only when the testator's meaning is doubtful, after a critical scrutiny and comparison of the several provisions of his will, that external assistance may be accepted and collateral facts and surrounding circumstances may be inquired into, to elucidate what is uncertain, and assist in the construction of the instrument. *Lefevre* v. *Lefevre*, 59 N. Y. 434. In *Mann* v. *Mann*, 1 Johns. Ch. 231, which is often referred to as the leading New York case on this subject, the rule is stated by Chancellor Kent, as follows: "Parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specified cases: (1) where there is a latent ambiguity, arising *dehors* the will, as to the person or subject meant to be described; and (2) to rebut a resulting trust." While this rule has generally been followed, it may be remarked, in this connection, that the distinction between patent and latent ambiguities is no longer considered by the courts. In either case, where the instrument itself appears ambiguous or where collateral facts and circumstances give rise to the ambiguity, the court will seek, by an inquiry into all the material facts, to place itself as nearly as possible in the position of the testator, when the will was made. *Lefevre* v. *Lefevre, supra; Fisk* v. *Hubbard*, 21 Wend. 651, 659, opinion by Cowen, J., commenting on the rule of Lord Bacon, that "*ambiguitas patens* is never holden by averment" and qualifying it. Extraneous circumstances may be considered in aid of the terms of the will. *Hoyt* v. *Hoyt*, 85 N. Y. 142, 146. The language of the will is the basis of the inquiry, but extrinsic circumstances which aid in the interpretation of that language, and help to disclose the actual intention, may also be considered. *McCorn* v. *McCorn*, 100 N. Y. 511, 513, citing *LeFevre* v. *Tool*, 84 N. Y. 95; *Hoyt* v. *Hoyt, supra; Scott* v. *Stebbins*, 91 N. Y. 605. But, it cannot be received to interpret anything not written in the will, e. g., where a will makes no disposition of real estate, extrinsic parol evidence cannot be used to bolster a construction that testator intended to charge his realty with the payment of legacies. *Fries* v. *Osborn*, 190 N. Y. 35.

§ 446. **Evidence of intention.**—The intent of the testator must be found in the will, either expressed or implied in its terms, or drawn by fair inference from other manifest intentions expressed in the will. *Lippen* v. *Eldred*, 2 Barb. 130. Extrinsic evidence of whatever kind, whether it bear directly or indirectly on the testator's intention, must be considered as merely subsidiary to the language of the instrument and received only as an aid in disclosing its real purpose. It cannot be used to put new language in the will, to the extent of interpolating a provision or materially qualifying its terms. *Matter of Wells*, 113 N. Y. 396; *Stimson* v. *Vrooman*, 99 N. Y. 74, 79; *Armstrong* v. *Galusha*, 43 App. Div. 248, 262. Thus it may be stated as a general rule that declarations of a testator, before, contemporaneously

with, or after the making of a will, are inadmissible to affect its construction. *Williams* v. *Freeman*, 88 N. Y. 561. And it has been held that parol evidence of the intention of a testator is not admissible to fortify a legal presumption raised against the apparent intention, or to create a presumption contrary to the apparent intention where no such presumption is raised by law. *Reynolds* v. *Robinson*, 82 N. Y. 103. An apparent exception to this rule with respect to direct evidence of the testator's declarations of his intention is found in a class of cases where there are several persons or things to which the terms of the will might apply with equal certainty. In these cases, such evidence is received; but its purpose then is not primarily to affect the intention, but to disclose, if possible, what the intention really is. *Matter of Wheeler*, 32 App. Div. 183, 187, aff'd 161 N. Y. 652; *St. Luke's Home* v. *Ass'n for Indigent Females*, 52 N. Y. 191, 198; *Gallup* v. *Wright*, 61 How. Pr. 286. It seems also that when an attack upon the will is made by the introduction of extrinsic evidence to affect its construction or application, the scope of the defense is enlarged, and evidence of the testator's declarations may be given in rebuttal, in order to show that the intention is correctly expressed on the face of the will. *Tillotson* v. *Race*, 22 N. Y. 122; *Matter of Wheeler, supra.*

§ 447. **Unattested writings and memoranda.**—The statute which requires wills to be expressed in writing, attested in a prescribed form, precludes any other proof of them except the writing, and such facts and circumstances as are necessary to its intelligent reading. An unattested paper of a testamentary nature cannot be taken as part of the will, even though referred to by that instrument. *Booth* v. *Baptist Church*, 126 N. Y. 215, 246, and cases cited; *Vogel* v. *Lehritter*, 139 N. Y. 223. It was held in *Tonnele* v. *Hall*, 4 N. Y. 140, that a map appearing after the signature upon a will and which was referred to in the body of the will, did not require the signature to follow it in order to make it a part of the will. But it is to be observed that the will in that case was complete without such addition, the map being referred to merely to identify the subject devised, and not as containing a testamentary provision. An interesting discussion of the law as to the incorporation of extrinsic writings in wills will be found in *Dyer* v. *Erving*, 2 Dem. 160, wherein the Surrogate summarizes his conclusions as follows: "First. That words of reference in a will will never suffice to incorporate the contents of an extraneous paper, unless it can be clearly shown, that at the time such will was executed, such paper was actually in existence. Second. That an extraneous paper produced as and for a paper so referred to in a will and shown to have been in existence when such will was executed, may be adjudged to form part of such will and be admitted to probate as such, under these circumstances and no others, to wit: When, by satisfactory and conclusive evidence, it has been proved to be the selfsame paper which the testator by his words of reference designed to indicate." See also *Matter of Reins*, 59 Misc. 126.

§ 448. **What may be shown by extrinsic evidence.**—It may be stated as a broad and general rule that evidence which is admissible in explanation

of a will may relate to every material fact, which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument, and to identify the persons and things to which it refers. These may be considered under the general heads of *explication*, referring to the reading of the verbal text of the will, and *application*, showing its applicability to the subject or the object of the devise or bequest.

§ 449. **Explication.**—If the instrument is written in a foreign language or in shorthand, a competent witness may translate it, and whatever is necessary to possess the court of an understanding of the language or character in which the will is written may be supplied by extrinsic evidence. Abb. Trial Ev., 2d ed., p. 169. A nickname or a name by reputation given by the testator and current in his family or neighborhood may be thus explained; or terms with which, as a member of a particular trade or calling, the testator is familiar. In all such cases persons acquainted with the meaning of the words may be called as witnesses to translate or define them. *Ryerss* v. *Wheeler*, 22 Wend. 148, and cases cited. So also obvious clerical errors appearing on the face of the will may be corrected (*Dubois* v. *Ray*, 35 N. Y. 162; *Paige* v. *Bergh*, 10 Paige's Ch. 140); and evidence *aliunde* is allowable to aid in determining the real name of a beneficiary in cases of misnomer. *Leonard* v. *Davenport*, 58 How. Pr. 384; *Gallup* v. *Wright*, 61 How. Pr. 286; *Lefevre* v. *Lefevre*, 59 N. Y. 434. All such evidence is received, however, not for the purpose of showing the intent in the particular case, but in order to enable the court by inference from the facts thus established, to correctly read the will. It would appear that technical terms of known legal import present an exception to this general rule. They must have their legal effect, unless it is perfectly clear from the context that the testator did not mean to use them in their technical sense. Then they can only be construed in the light of the other parts of the instrument. Rule II, *ante*, and cases cited; *Moore* v. *Lyons*, 25 Wend. 119, 154; *Campbell* v. *Rawdon*, 18 N. Y. 412, 417.

§ 450. **Application.**—In applying the will the court may consider all the circumstances surrounding the testator when he made the will. *Stimson* v. *Vroman*, 99 N. Y. 74, 79; *Williams* v. *Jones*, 166 N. Y. 522, 533. The intent thus existing, when ascertained, must have effect, and may not be varied by after-occurring events. While a will is in some sense ambulatory as to the objects and subjects with which it deals, yet it is not ambulatory as to the meaning of the language used by the testator when he executed the will. *Morris* v. *Sickley*, 133 N. Y. 546. But in order to ascertain the intention and purpose existing at the time of the execution of the will, the court may inquire into the situation of the testator's family and the nature and value of his estate (*Bumpus* v. *Bumpus*, 79 Hun, 526; *Matter of Woodward's Will*, 167 N. Y. 28); his education and intelligence (*Lytle* v. *Beveridge*, 58 N. Y. 592); his business transactions (*Tillotson* v. *Race*, 22 N. Y. 122); his religious affiliations, his charitable benefactions and zeal for certain charitable agencies. *Hornbeck* v. *Am. Bible Society*, 2 Sand. Ch. 133; *Lefevre* v. *Lefevre*, 59 N. Y. 434. In short, it may resort to

extraneous evidence of such facts or circumstances as will enable it to identify the person sought to be designated or the property to which the language of the will is to be applied. Thus a beneficiary need not be described by name, if any other designation or description be given, by which he can be clearly identified with the aid of parol evidence. *Holmes* v. *Mead*, 52 N. Y. 332; *Lefevre* v. *Lefevre*, *supra*. Parol proof may in like manner be resorted to in order to identify property which is described in the will in such meager, ambiguous or uncertain terms, that it cannot be exactly located. *Ryerss* v. *Wheeler*, 22 Wend. 148. But on the other hand, the courts are firm in excluding extrinsic evidence when it seeks to change or enlarge a specific and explicit designation of the property. *Waugh* v. *Waugh*, 28 N. Y. 94; *Mann* v. *Mann*, 1 Johns. Ch. 231.

CHAPTER IX

ESTABLISHING WILL BY ACTION

§ 451. **How a will may be proved outside the Surrogate's Court.**—Wills may be divided into three classes as regards the Surrogate's jurisdiction to grant letters testamentary under them.

In the first class are the wills which may be proved in a Surrogate's Court.

Such wills, it is prescribed by former § 2611 (now §§ 23–25 of Dec. Est. Law), include:

(*a*) A will of real or personal property executed as prescribed by the laws of the State.

(*b*) A will of personal property executed without the State but within the United States, the Dominion of Canada, or the Kingdom of Great Britain and Ireland, as prescribed by the laws of the State or the country where it is or was executed.

(*c*) Or a will of personal property executed by a person not a resident of this State according to the laws of his residence.

There is a fourth kind, namely, wills of United States citizens dying while domiciled or resident, in the Kingdom of Great Britain and Ireland or any of its dependencies. Chapter 731, Laws, 1894, provides that if such will has been probated at the place of domicile and affects property in this State, it may be admitted to probate in a Surrogate's Court here on notice merely to the beneficiaries named in the will. (Quoted *ante*, § 27.)

In the second class are wills specified in § 2621 as lost or fraudulently destroyed upon their having been established as provided by § 1865.

And in the third class are wills of personal property made by a person a nonresident at the time of executing it, or a nonresident at his death, the will being duly executed according to the laws of the State or country where it was executed, or of the State or country where the testator resided at the time of his death but not coming within the permissive provisions of § 2611 and consequently not provable before a Surrogate.

The foregoing proposition must be clearly understood to be limited to a statement of the Surrogate's right to issue letters testamentary. The jurisdiction in this regard is exclusively confined to the Surrogate's Court; but, it will be noted that as to the three classes of wills above described a further differentiation can be made. As to the first the Surrogate has exclusive jurisdiction to admit the same to probate. As to the second (lost or fraudulently destroyed wills) the Surrogate has power to admit the same to probate under § 2621, in a case where a judgment establishing the will could be rendered by the Supreme Court as prescribed in § 1865. Thus the Supreme Court and the Surrogate's Court both have jurisdiction,

the one of the proceeding for probate, the other of the action to establish, but in this case the jurisdiction of the Supreme Court is limited to entering the judgment establishing the will, while the issuing of letters thereupon remains with the Surrogate. See § 1864.

As to the third case, the jurisdiction is exclusively committed to the Supreme Court with the same limitation, to wit: that its power ceases with the entry of judgment, the letters testamentary issuing under § 1864 by the Surrogate only.

§ 452. **Establishing a will by action.**—The jurisdiction of the Supreme Court over a civil action to establish a will is defined by § 1861 of the Code. This section is as follows:

> An action to procure a judgment, establishing a will, may be maintained by any person interested in the establishment thereof, in either of the following cases:
>
> 1. Where a will of real or personal property, or both, has been executed, in such a manner and under such circumstances, that it might, under the laws of the state, be admitted to probate in a surrogate's court; but the original will is in another state or country, under such circumstances that it cannot be obtained for that purpose; or has been lost or destroyed, by accident or design, before it was duly proved and recorded within the state.
>
> 2. Where a will of personal property, made by a person, who resided without the state, at the time of the execution thereof, or at the time of his death, has been duly executed, according to the laws of the state or country in which it was executed, or in which the testator resided at the time of his death, and the case is not one, where the will can be admitted to probate in a surrogate's court, under the laws of the state.

§ 453. **Subdivision 1.**—Subdivision 1, it will be noted, requires for its full understanding, reference to former § 2611, the provisions of which have been recited above. If it appears that the will is one coming within the purview of § 2611, and it appears in addition that the original will is in another state or country, and in addition that it cannot be obtained for the purpose of probate here by reason of its having been lost or destroyed by accident or design, a clear case would then be made for an action under subd. 1. The wills, therefore, which could be established under this subdivision come under two classes: first, wills remaining in another jurisdiction so that they cannot be brought here for probate. Second, lost or destroyed wills. The case covered by Laws, 1894, ch. 731 (quoted, *ante*, in § 27 under "Jurisdiction") would be an exception to the first class. In that case, though the will cannot be brought here, a copy, with consular certificate, together with the proofs similarly certified can be probated, and letters issued thereunder without resort to an action in the Supreme Court.

In *Matter of Law*, 80 App. Div. 73, Hatch, Surr., points out the difference between the probating of a resident's will and its establishment by action. Comparing §§ 1861 and 2620 it is clear that when the will cannot be produced before the Surrogate, but was executed in this State, by a resident, before New York witnesses, and is shown to be in existence the Surrogate

is powerless to probate it. *Ibid,* citing *Matter of Cameron,* 47 App. Div. 120, aff'd 166 N. Y. 610.

§ 454. **Wills retained in another jurisdiction.**—The case of *Younger* v. *Duffie,* 28 Hun, 242, aff'd 94 N. Y. 535, illustrates a case under subd. 1. The action was brought under this section, and the complaint averred that the testator, a United States consul in Spain, temporarily residing at Cadiz, but being an inhabitant of and domiciled in the county of Richmond and State of New York, died on the 8th day of November, 1880, in Cadiz, being possessed at the time of his death of personal property in the State of New York. The plaintiff was a legatee under the will, which it was alleged had been executed in the city of Cadiz, signed, published, declared and executed before a notary and three witnesses, and containing similar allegations respecting the subsequent execution of a codicil to the will, a copy of which will and codicil were annexed to the complaint. The complaint further alleged that the original will and codicil were in the Spanish language, were duly executed in conformity with the Spanish law, and were actually on file among the archives of the notarial office of the city of Cadiz, from which they could not be removed for the purpose of being admitted to probate under the laws of the State of New York, or for any other purpose whatsoever, by reason of the laws of Spain. This complaint was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled at a special term, and the action of the special term affirmed at the General Term and in the Court of Appeals.

The General Term held that the allegations of the complaint were broad enough to admit proof at the trial of all the surrounding circumstances required by our statutes, and that the will was one which could be admitted to probate in the Surrogate's Court if the circumstances that it could not be obtained for that purpose did not exist. And Davis, P. J., adds in his opinion (28 Hun, 245): "That where such circumstance does exist, the Code expressly provides that the action may be maintained for the purpose of establishing the will," citing *Russell* v. *Hartt,* 13 N. Y. Weekly Digest, 309, January 6, 1882; *Caulfield* v. *Sullivan,* 85 N. Y. 153. In the Court of Appeals Judge Earl (95 N. Y. at page 540) also held that the will alleged was one provable in the Surrogate's Court of Richmond County, but for the fact that it could not be procured for that purpose and hence was a case under § 1861. It will be noted that the unquestionable jurisdiction of a Surrogate to grant probate of a will not actually produced before him except in the form of an exemplified copy thereof, provided that it is executed as prescribed in § 2611, is not interfered with by this section. *Matter of De Laplaine,* 45 Hun, 225; *Russell* v. *Hartt,* 87 N. Y. 19 (see opinion of Judge Finch); *Caulfield* v. *Sullivan,* 85 N. Y. 153. But this section does not authorize the bringing of an action to prove and establish the will of a resident of another State which has been duly probated therein. This section is a re-enactment of §§ 63, 64, 67 and 68 of title 1, ch. 6, part 2, of the Revised Statutes by which it appears that

the term "establishing a will" means the same as proving a will, and such is the obvious meaning of the term as used in the section of the Code referred to, which has no relation to wills which have been duly proved. Article 7, of title 3, of ch. 18 of the Code of Civil Procedure provides a complete scheme for establishing and giving effect within this State to wills duly probated in other States. *Clark* v. *Poor*, 73 Hun, 143, 144.

§ 455. **Lost or destroyed will.**—Subdivision 1 provides that the action may be brought to establish a will, which could have been admitted to probate in a Surrogate's Court, where it "has been lost or destroyed by accident or design before it was duly proved and recorded within the State." In connection with this, § 1865 provides as follows:

> But the plaintiff is not entitled to a judgment, establishing a lost or destroyed will, as prescribed in this article, unless the will was in existence, at the time of the testator's death, or was fraudulently destroyed in his lifetime; and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness.

It must be at the outset noted, that the provisions of this section which embody the former provisions of the Revised Statutes (2 R. S. 67, § 67*b*) do not affect the rule of evidence formerly obtaining and still obtaining in actions in which it might become necessary to prove a lost will or lost deed. The rule in such actions remains the same, namely, that such a lost will can be proved by a single credible witness. See *Jackson* v. *La Grange*, 19 Johns. 386; *Dan* v. *Brown*, 4 Cowen, 483; *Jackson* v. *Betts*, 6 Cowen, 377.

The additional requirement as to proof has been held to be limited to the direct proceeding or action contemplated by §§ 1865 and 2621, and the intent of the legislature has been said to be only to provide a rule of evidence applicable to the proceedings thereby authorized to prove and establish a lost or destroyed will; and the rules of evidence in relation to proving the execution and contents of lost instruments, upon trials at law or in equity, remain unaffected; and parties acquiring rights under a lost or destroyed will, may establish those rights by the same kind of evidence as was allowed prior to the enactment providing for the probate of such wills. See *Harris* v. *Harris*, 26 N. Y. 433, 439, approved in *Matter of Kennedy*, 167 N. Y. 163, 172. (See § 457, below.)

The importance of this distinction will be seen from the fact that it has been held that if parties bring a suit in which they seek to establish a will lost or destroyed, and are dismissed, they are not concluded by the dismissal of this suit from setting up and establishing their title, in another action involving their rights, by sufficient common-law evidence of the existence or fraudulent destruction of the will. See *Harris* v. *Harris*, *supra*. An action had been brought for the purpose of having a will proved as a lost and destroyed will; this action was duly tried and judgment entered therein dismissing the complaint. An action was subsequently brought for the partition of the real property which the plaintiff in the former

action had claimed an interest in, by virtue of the alleged lost will; this interest was alleged in the answer in the partition suit. And the provisions or contents of the will and the factum of the will were proved distinctly and clearly by one credible witness. The Court of Appeals held that the defendants were not concluded by the former decree from setting up this right and that the evidence was sufficient to prove as well the existence as the destruction and contents of the alleged will. See opinion of Wright, J., in *Harris* v. *Harris*, at page 437 *et seq.*

§ 456. **Procedure in the action.**—The complaint in an action under § 1865 should contain distinct averments of all the necessary facts warranting the plaintiff in invoking the jurisdiction of the court. (See below.) It has been distinctly held that if the plaintiff is without knowledge sufficient to enable him to frame his complaint he is entitled to an order for the examination of the defendant to take his deposition for the purpose of enabling him to frame his complaint. *Blatchford* v. *Paine*, 24 App. Div. 140, 143.

§ 457. **Nature of proof required.**—Section 1865, it has been held, should be liberally construed. See *Early* v. *Early*, 5 Redf. 376, 380, following *Hook* v. *Pratt*, 8 Hun, 102, 109; *Will of De Groot*, 9 N. Y. Supp. 471, 473. Judge Beekman stated this rule (*Kahn* v. *Hoes*, 14 Misc. 63) with its proper limitations, as follows:

"While the statutory provisions under which such an action is maintainable are remedial in their nature and benignant in their purpose, and should, therefore, be liberally construed and applied, still it is not to be forgotten that the law has in this State always exacted great particularity of proof in respect to testamentary acts and the observance of formalities intended to make the proof as nearly as may be a demonstration that the testator was capable and fully concious of the nature of his act. This extreme caution obviously arises from the essential privacy of the act itself, which does not become the subject of proof until the mouth of the chief actor is closed by death, and the consequent ease and safety with which fraudulent wills might be concocted and maintained. As little as possible is left to the uncertainty of recollection or the operation of fraudulent design in the requirements that the will should be in writing, subscribed and published by the testator and authenticated by two witnesses, selected by him and subscribing their names in his presence in attestation of due execution. It will be seen that the chief value of these precautionary requirements rests upon the production of the document itself when rights are asserted under it, and that its absence opens the door to the uncertainties and fraudulent designs against which the statute was intended to provide. Experience, however, has demonstrated the necessity of providing for the cases where wills which had been duly executed were lost or fraudulently destroyed, and could not, therefore, be produced for probate, and in order that the rigor of the statute should not defeat a duly executed testamentary act, or in its operation to prevent one kind of fraud work another, provision has been made for the establishment of wills where,

through loss or destruction by accident or design, the paper cannot be produced. But in so doing the legislature has also sought in some measure to provide against the dangerous consequences imminent upon this relaxation of the rule by prescribing a special quality of proof in such cases." After quoting § 1865 of the Code of Civil Procedure he continues as follows:

"The burden of proof rests upon the plaintiff, and reason as well as the policy of the law demands that the proof should be clear and convincing, not only in respect to the provisions of the will, but as well that it was in existence at the time of the testator's death. The plaintiff is confronted at the outset by the presumption of revocation in which the law indulges where a will shown to have been made cannot be found after decease, a presumption which he must overcome by evidence satisfactorily accounting for the absence of the paper upon some other theory."

§ 458. **Two witnesses necessary only as to contents, not factum.**—The provision of § 1865 as to proof by two credible witnesses is distinctly limited thereby to the *provisions of the will.* The other necessary facts can be proved by any competent evidence.

By "provisions of the will" is meant those which affect the disposition of property. *Early* v. *Early, supra.*

But as to these the statute has been strictly construed to mean, that each of the witnesses must be able to testify to all of the disposing parts of the will; it will not suffice to prove one provision by two or more witnesses and another provision in the same way by others, nor can the proven declaration of its contents by the testator be regarded as of any weight. *Matter of Ruser,* 6 Dem. 31, 33, citing *Collyer* v. *Collyer,* 4 Dem. 53. And consequently the evidence of a witness who is shown not to have read the entire will or otherwise to have known all its provisions is of no appreciable value. *Ibid.* See headnote and opinion at page 34.

The *Ruser* case was peculiar in that counsel on both sides sought to cure the uncertainty in the testimony as to the contents of the will by stipulating its provisions; this stipulation was very properly disregarded by the court.

The words, "two credible witnesses," have apparently been construed, further, to mean two independent witnesses, each testifying to the main facts and to all of such facts. Surrogate Lapham held that a witness who was merely a supporting witness corroborating another witness who alone could be properly called an independent witness in regard to details of his testimony, was not one of such two credible witnesses as is contemplated by the section. *Matter of Waldron,* 19 Misc. 333, 337. The Surrogate observes, " the two credible witnesses which the statute requires respecting the contents of a lost will need not necessarily have been witnesses also to the execution of the will. But it is reasonable to read the statute as meaning that they must both be able to speak of an actual will from personal knowledge and not of a possible will. . . . If two reliable persons had become possessed of the contents without any part in the execution of the instrument, they might equally well constitute such witnesses. But could

they be such witnesses if their knowledge of the contents of the instrument was limited to what they supposed or believed it contained only because somebody had told them that a draft they had seen of a will, had been executed thereafter and had become a will?" The Surrogate properly held that this was not sufficient, citing *McNally* v. *Brown*, 5 Redf. 372; *Collyer* v. *Collyer*, 4 Dem. 53; *Sheridan* v. *Houghton*, 6 Abb. N. C. 234. And the usual rule as to credibility, of course, will obtain; and if the will depends upon the plaintiff's testimony in whose favor the will is claimed to have been made, the court will subject his testimony to a most critical examination. *Kahn* v. *Hoes*, 14 Misc. 63, 67.

This same rule, of course, applies where the existence of the will at the testator's death depends upon the same kind of testimony. *Ibid.* The facts as to the execution, the existence at the testator's death, or the fraudulent destruction, must all be clearly established to the satisfaction of the court although the only expressed limitation as to character of proof is in regard to the disposing provisions of the will. See *Kerry* v. *Dimon*, 37 N. Y. Supp. 92; *Kahn* v. *Hoes*, *supra*.

In *Matter of Hughes*, 61 Misc. 205, it was held a will was not "destroyed" when although testator had directed its being torn up, the tearing of his signature had not been done in his presence, and the will was actually in testator's custody at his death and was produced for probate.

This fact of existence at the testator's death is most important, for the presumption is a proper one and will usually be entertained that a will was destroyed by the testator *animo revocandi*, if the only facts shown are that the decedent made a will which was last seen in his possession or under his control, and which after his death cannot be found upon proper search. See *Hard* v. *Ashley*, 88 Hun, 103, 107, citing *In re Florence*, 2 Bradf. 281; *Idley* v. *Bowen*, 11 Wend. 227.

The Court of Appeals in the *Collyer* case, 110 N. Y. 486, stated the rule as follows: "There is no direct proof that Mrs. Collyer destroyed her will; but the proof that the will was not found after her death is sufficient proof that she destroyed it *animo revocandi*. When a will previously executed cannot be found after the death of the testator there is a strong presumption that it was revoked by destruction by the testator, and this presumption stands in place of positive proof. *Betts* v. *Jackson*, 6 Wend. 173; *Knapp* v. *Knapp*, 10 N. Y. 276; *Schultz* v. *Schultz*, 35 *id.* 653; *Hatch* v. *Sigman*, 1 Dem. 519. He who seeks to establish a lost or destroyed will assumes the burden of overcoming this presumption by adequate proof. It is not sufficient for him to show that persons interested to establish intestacy had an opportunity to destroy the will. He must go further, and show by facts and circumstances that the will was actually, fraudulently destroyed. In *Loxley* v. *Jackson*, 3 Phill. Rep. 126, the will was last seen in a small box in the bedroom of the deceased, but was not found after her death, and it was held that the presumption of law was that the testatrix destroyed it *animo revocandi;* that the law did not presume fraud, and that the burden of proof was on the party claiming under the will.

In *Knapp* v. *Knapp, supra,* it was held that proof that a will executed by a deceased person was said by him a month previous to his death to be in his possession in a certain desk in his house, and that he was then very aged and feeble, that his housekeeper was a daughter having an interest adverse to the will and that the same could not be found on proper search three days after his death, is not sufficient evidence of its existence at the testator's death or of a fraudulent destruction in his lifetime, to authorize parol proof of its contents. The authorities are uniform, and no further citations are needed."

In *Hard* v. *Ashley, supra,* being, however, an action for partition, Judge Ward observes (at page 105), "It is true that proof of a lost will is necessarily secondary, and the law accepts the best evidence that the nature of the case admits of as to its valid execution and contents, and in such a case as this the defense may establish the will by a single credible witness," citing *Harris* v. *Harris et al.,* 26 N. Y. 433, yet it must be shown that the will was executed with all the formalities required by the statute, and that the testator was of sound mind and under no restraint.

§ 459. **Who may bring the proceeding.**—It is very clear from § 1861 that only a person interested in the establishment of a will may bring this action. See *Matter of Hamersley,* 7 N. Y. St. Rep. 292.

The Court of Appeals in *Anderson* v. *Anderson,* 112 N. Y. 104, held that a devisee of the legal estate in possession of the property devised could not maintain an action to establish the will against the heirs-at-law. See headnote at page 104.

§ 460. **Fraudulent destruction.**—Where the plaintiff relies upon fraudulent destruction of a will in the testator's lifetime, the evidence by which it is sought to establish such a destruction must be substantially clear and convincing; such a destruction would be a crime, and a person should not be convicted of such an act upon suspicion or surmise. *Hard* v. *Ashley,* 88 Hun, 103, 107. See also *Matter of De Groot,* 2 Connoly, 210; *Perry* v. *Perry,* 21 N. Y. Supp. 133.

§ 461. **The complaint.**—In view of the wide diversity of opinion among practitioners as to matter of form and allegations in pleading, it hardly seems necessary to suggest the form of a complaint in an action brought under § 1861. It is merely necessary to lay stress upon the fact that the practitioner having determined whether the facts of the case bring him within subd. 1 or sudb. 2 of the section, and that the plaintiff is a person interested in the establishment of the will sought to be established, should concisely allege every jurisdictional fact required by the particular subdivision.

The following skeleton is suggested for a complaint under subd. 1:

I

First. Allege the execution of a will of real or personal property, stating date, place and circumstances of such execution, bearing in mind that they must be such as would sustain its probate in a Surrogate's Court in this

State; give also name of testator and allege his residence at the time of executing the will, as well as the time and place of his death; state what property, whether real or personal, belonged to the testator at his death, within the county in which the action is brought.

Second. Allege that the will cannot be obtained for the purpose of probate in a Surrogate's Court, stating the circumstances why it cannot be so obtained.

Third. Allege that the plaintiff is a person interested in the establishment of such will, showing his rights or claims, under the will, and if necessary state why it is necessary for him to bring the action.

Fourth. Allege facts showing that the will is a live will, by allegations showing that it has never been revoked or canceled, either by act of the testator, or by operation of law.

Fifth. Allege that the will has not yet been proved or admitted to probate.

II

Where the will sought to be established is lost or fraudulently destroyed, the allegations should be substantially as follows:

First. Allege the execution of the will, describing it, stating facts sufficient as to the manner and circumstances of its execution as would be necessary in a petition for its probate in a Surrogate's Court.

Second. Give the name of the testator, allege his residence at the time of execution, and the fact of his death, giving date and place.

Third. Allege the interest of the plaintiff in the establishment of the will and his rights or claims thereunder.

Fourth. Allege concisely the facts as to the loss or fraudulent destruction of the will. The words in subd. 1 of § 1861, "has been lost or destroyed by accident or design," are covered by the phrase "fraudulently destroyed," for the destruction of the will without the testator's consent or direction is, as to the testator, fraudulent, within the meaning of the statute whether such destruction were by accident or design.

It is proper to add to this paragraph of the complaint a positive allegation, that the will was not in fact revoked, canceled or annulled, by any act of the testator or by operation of law.

Fifth. Allege the failure to prove or to offer to prove the said will on the part of the executor claimed to have been named therein.

The prayer for relief in either of these complaints will demand judgment that the will alleged in the complaint be established and proved as the last will of the testator named, and that the will be admitted to probate as a will of real or personal property or both.

It is not essential that the prayer for relief should pray for the issuance of letters testamentary, for § 1863 provides that the final judgment establishing the will must, in a proper case, direct that an exemplified copy thereof be transmitted to the Surrogate having jurisdiction and be recorded in his office, and further that letters testamentary or letters of administration with the will annexed be issued thereupon from the Surrogate's Court

in the same manner and with like effect as upon a will duly proved in that court, but it is usual to insert in the prayer such a request, naming the executors to whom letters are prayed to be issued, and particularly if there is uncertainty as to the executor's name in the alleged lost or destroyed will, in which case the plaintiff may ask for letters of administration with the will annexed and should pray for their issuance "to the plaintiff or to the person entitled thereto." See *post*, part IV, ch. II, § 473.

§ 462. **Judgment.**—The provision, as to the form and contents of the judgment establishing the will, is contained in § 1862, which is as follows:

> If, in such an action, the facts necessary to establish the validity of the will, as prescribed in the last section, are satisfactorily proved, final judgment must be rendered, establishing the will accordingly. But where the will of a person, who was a resident of the state at the time of his death, is established as prescribed in the last section, the judgment establishing it does not affect the construction or validity of any provision contained therein; and such a question arising with respect to any provision, must be determined in the same action, or in another action or a special proceeding, as the case requires, as if the will was executed within the state. **§ 1862, Code Civil Proc.**
>
> Where the parties to the action, who have appeared or have been duly summoned, include all the persons, who would be necessary parties to a special proceeding, in a Surrogate's Court for the probate of the same will and the grant of letters thereupon, *if the circumstances were such that it could have been proved in a surrogate's court;* the final judgment, rendered as prescribed in the last section, must direct, that an exemplified copy thereof be transmitted to the Surrogate having jurisdiction, and be recorded in his office; and that letters testamentary, or letters of administration with the will annexed, be issued thereupon from this court, in the same manner, and with like effect, as upon a will duly proved in that court. **§ 1863, Code Civil Proc.**
>
> A copy of the will so established, or, if it is lost or destroyed, the substance thereof, must be incorporated into a final judgment, rendered as prescribed in the last section; and the Surrogate must record the same, and issue letters thereupon, as directed in the judgment. **§ 1864, Code Civil Proc.**

§ 463. **Action for construction of a will relating to real property.**—It will have been noted under § 1862, that the judgment establishing a will in an action brought under § 1861, does not affect the construction or validity of any provision contained in the will, and that such questions with respect to the disposing provisions of the will must be determined,

(*a*) In the same action, or,

(*b*) In another action or special proceeding as the case requires "as if the will was executed within the State."

Section 1866 contains the provisions of the Code whereunder to secure the interpreting of wills relating to real estate to determine whether provisions therein are valid or invalid, and to determine also the nature and extent of the interest in the property thereby devised which various parties interested would take if the devise is sucessfully impeached. The section is as follows:

The validity, construction or effect, under the laws of the state, of a testamentary disposition of real property situated within the state, or of an interest in such property, which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed, purporting to convey land, may be determined. The judgment in such an action may perpetually enjoin any party, from setting up or from impeaching the devise, or otherwise making any claim in contravention to the determination of the court, as justice requires. But this section does not apply to a case, where the question in controversy is determined by the decree of the Surrogate's Court, duly rendered upon allegations for that purpose, as prescribed in article first of title third of chapter eighteenth of this act, where the plaintiff was duly cited, in the special proceeding in the Surrogate's Court, before the commencement of the action. **§ 1866, Code Civil Proc.**

This section, it has been held, extends the remedy previously provided for the construction of wills so as to include suits for the construction of devises in behalf of heirs claiming adversely to a will. *Read* v. *Williams*, 125 N. Y. 566. And the Court of Appeals in the case last cited held that it would not be consistent with the spirit of the legislation embodied in this section, to narrow the jurisdiction in cases of bequests of personalty. Judge Andrews remarks at page 566:

"The jurisdiction of a court of equity to entertain an action in behalf of the next of kin of a testator for the construction of a will disposing of personal estate where the disposition made by the testator is claimed to be invalid or inoperative for any cause was asserted by the chancellor in *Bowers* v. *Smith*, 10 Paige, 200, and was maintained in *Wager* v. *Wager*, 89 N. Y. 161, and in *Holland* v. *Alcock*, 108 N. Y. 312. And he adds:

"In such cases the next of kin claim in hostility to the will, but the executors, in case the disposition made by the testator is invalid or cannot take effect, hold the personalty upon a resulting trust for those entitled under the Statute of Distribution, and thereby the jurisdiction to bring an equitable action for construction and to have the resulting trust declared by the court attaches as incident to the jurisdiction of equity over trusts."

§ 464. **Who may bring action.**—The power to construe devises is not inherently vested in courts of equity as a distinct and independent branch of jurisdiction, only as incident to their jurisdiction over trusts. *Mellen* v. *Mellen*, 139 N. Y. 210, citing *Bowers* v. *Smith*, 10 Paige, 193; *Monarque* v. *Monarque*, 80 N. Y. 320; *Wager* v. *Wager*, 89 N. Y. 128; *Kalish* v. *Kalish*, 166 N. Y. 368, 371, citing *Brady* v. *McCosker*, 1 N. Y. 214; *Read* v. *Williams*, 125 N. Y. 560; *Voshall* v. *Clark*, 123 App. Div. 136.

A, a testamentary trustee, died. His executor, becoming possessed of the trust fund, was held entitled to bring an action to construe the will creating the trust, in which action direction of court could be secured as to his proper disposition of the fund. *Leggett* v. *Stevens*, 185 N. Y. 70.

The cases of *Chipman* v. *Montgomery*, 63 N. Y. 221, and *Horton* v. *Cantwell*, 108 N. Y. 255, in which the right to bring the action was denied, were cases where the plaintiffs had no interest in the property disposed of by the

will, whether the clauses challenged were valid or invalid. Section 1866 of the Code has been repeatedly declared to enlarge the previous powers of the courts. Sections 1866 and 1867 now furnish the whole statutory law upon the subject of which they treat. *Anderson* v. *Anderson*, 112 N. Y. 104, 111. In the case last cited, Judge Peckham draws a helpful distinction. He points out that where the Code provides for an inquiry into the question of the proper execution of the testamentary instrument by a competent testator, i. e., for an inquiry into the factum of the will, the court describes the instrument as a "will," but, when the validity of the will, etc., separate from the instrument which creates it, is alone to be inquired into, "the testamentary disposition of real property" is the expression used.

PART IV

LETTERS AND BONDS

CHAPTER I

LETTERS TESTAMENTARY

§ 465. **Executors.**—An executor is he to whom another man commits by will the execution of his last will and testament. 2 Bl. Comm. 494. Usually every will designates some one or more persons to whom the testator entrusts the carrying into effect of his testamentary desire; and papers have been upheld as wills and deemed entitled to probate which have merely named an executor without making any disposition of property whatever. See 19 Am. & Eng. Encyclopedia of Law 178; *Matter of Davis*, 45 Misc. 306, aff'd 182 N. Y. 465. But the mere failure to designate any executor in a will does not affect the validity of the will; for, as will be seen below, the court has power to grant letters of administration with the will annexed. Blackstone's definition may be modified to read: "An executor is he who, nominated by a testator to carry out his will, receives from a court of probate jurisdiction letters of authority so to act."

For the testamentary act is statutory. It differs from a vested property right. Hence the testator is limited by law as to substance, form, beneficiaries even. So, while the courts respect testamentary wishes as to choice of an executor, the statutory rules will override them if they conflict.

And, if testator names one whom the statute says is not competent, letters will be denied; or, if inadvisedly granted, they will be revoked. *Matter of Davis, supra.*

So, in *Matter of Avery*, 45 Misc. 529, a foreign trust company, named in a will, was held incompetent to receive letters. See opinion.

§ 466. **Powers of executor prior to letters.**—The authority of the executor is derived from the will, and not from the letters testamentary, issued by the Surrogate. *Hartnett* v. *Wandell*, 60 N. Y. 346, 350. The letters give him his status and ratify the testator's selection. And the Code provides: "No executor named in a will shall, before letters testamentary are granted, have any power to dispose of any part of the estate of the testator except to pay funeral charges, nor to interfere with such estate in any

manner further than is necessary for its preservation." 3 R. S. 71, § 16, and Code Civ. Proc. § 2613, in part; *Matter of Marcellus*, 165 N. Y. 68, 77.

§ 112 of the Decedent Estate Law reads: "EXECUTORS DE SON TORT ABOLISHED: No person shall be liable to an action as executor of his own wrong, for having received, taken or interfered with, the property or effects of a deceased person; but shall be responsible as a wrongdoer in the proper action to the executors or special administrators of such deceased persons, for the value of any property or effects so taken or received, and for all damages caused by his acts, to the estate of the deceased."

The letters are merely the authenticated evidence of the power conferred by the will and are founded upon the probate of that instrument. The Code section just quoted does not affect the character of the office or detract from the efficacy of the will as the source of his power; the executor derives his office from the testamentary appointment as an administrator derives his from the appointment of the Surrogate. *Hartnett* v. *Wandell*, 60 N. Y. at p. 350, citing 1 Williams on Executors, 239. Since the interest of the executor in the estate is derived from the will itself, the subsequent issuance of letters relates back to the time of the testator's death. *Pearsall* v. *Elmer*, 5 Redf. 181, 186, Calvin, Surr., citing Willard on Executors, 147. See also *Humbert* v. *Wurster*, 22 Hun, 405; *People* v. *Commissioners*, 31 Hun, 235, 237, citing *Matter of Greeley's Will*, 15 Abb. N. S. 395; *Valentine* v. *Jackson*, 9 Wendell, 302; Williams on Executors, 239; Dayton on Executors, 232; *Priest* v. *Watkins*, 2 Hill, 225; *Ex parte Faulkner*, 7 Hill, 181; *Vroom* v. *Van Horne*, 10 Paige, 549, 559. The section above cited does not prohibit such possession of the property under the will as may be necessary for its safety until the probate of the will, but merely inhibits the exercise of any power of disposition over the estate or any interference with the estate. But, if it were necessary, for example, to take actual possession of the personal estate for its protection in any respect, the executors would be justified in doing it as the legal effect of their appointment, in the absence of any proof showing their intention not to act or qualify as executors. *People* v. *Commissioners*, *supra*, opinion of Brady, J., at page 237. See also *Van Schaack* v. *Saunders*, 32 Hun, 515, 520. It has, however, been held (*Matter of Flandrow*, 28 Hun, 279, Daniels, J.), that the statute deprives a person named as executor in a will from so acting as to become the *representative* of the deceased person. In this case a special administrator had been appointed, pending the issuance of letters testamentary or of administration. In such a case, of course, for the time being, the person named in the will as executor would have no right to interfere in any manner with the estate, for the purpose of the statute is obviated by the appointment of the temporary administrator. It has been held, where the testator was a partner at the time of his decease and the partnership agreement provided for an election by the surviving partner within a given time after the decease of the other partner within which to acquire title by purchase of the interest left by his deceased partner in the firm property, that, in case the will should not have been probated and letters issued within the

period limited by the partnership agreement, the executors named in the will of the deceased partner had the power to accept the offer, or to take security for its performance, by virtue of their appointment under the will, and that such an act would be for the preservation of the estate of the decedent, within the meaning of § 2613 of the Code. *Hull* v. *Cartledge*, 18 App. Div. 54, 61, 62, Bradley, J., citing *People* v. *Commissioners*, 31 Hun, 235; *Hartnett* v. *Wandell*, 60 N. Y. 350; *Matter of Murray*, 40 Misc. 433; *People ex rel. Gould* v. *Barker*, 150 N. Y. 52. So the Court of Appeals, in the case last cited, held that, for the purpose of an assessment for taxation on the personal estate of a decedent, such an estate was to be deemed in the possession and control of the person designated in the will as executor from the death of the decedent, and the court remarked, per O'Brien, J.:

"The executor derives his appointment and his title to the estate from the will, though he is without any substantial power of disposition or administration until the probate court grants him authenticated evidence of his title and of his right in the form of letters testamentary upon proof of the will.

"The will is the source of the executor's title and general powers. The letters testamentary, founded upon the probate of the will, do not create the executor nor confer title upon him, but are the authentic evidence of the power conferred by the will and which existed before they were granted. *Hartnett* v. *Wandell*, 60 N. Y. 346. The property of the testator is in the legal custody of the executor appointed by the will, before the probate, and he may exercise many of the powers of an owner over it. He cannot dispose of it, but he may take it into his manual possession for safekeeping. *Van Schaack* v. *Saunders*, 32 Hun, 515; *Smith* v. *Northampton Bank*, 4 Cush. 1.

"In this case, after the death of the testator, no one had in fact or in law any possession or control of the personal estate except the relators. It consisted of certain securities which were deposited in a vault in the city to which they had access. They could exercise every power over the property that is conferred upon executors by the will or by law before probate and no one else could. The probate of the will and letters testamentary removed the prohibition of the statute against disposing of the property or interfering with it except for its preservation, but in all other respects the rights and powers of the relators were the same before as after the probate, though in some respects they may have been held in abeyance by force of the statute. The title, possession and control, which the deceased owner had, passed from him at the moment of his death, under and by virtue of the will, to the executors and beneficiaries. The temporary restrictions upon the power of disposition, imposed by the statute for the protection of the estate had no effect upon the actual possession and custody of the property. They had all the possession and control that was usual under such circumstances and reasonably possible, considering the great magnitude of the estate and the nature and character of the property. The possession and custody which the testator had was continued in the relators by force of his will for every purpose of taxation as well as protection. Any other conclu-

sion would involve the anomaly that seventy millions of property could exist in full view of the commissioners without any power on their part to include it in the assessment rolls." See *Matter of Brintnall*, 40 Misc. 68; Heaton, Surr., and *Matter of Murray*, 40 Misc. 433, both cases of attack on executors for acts done pending letters.

§ 467. **Executor acting before letters cannot later set aside his act unless inequitable.**—Where the act done before the issuing of letters by an executor or administrator is an equitable one, and done in good faith, such executor or administrator cannot, after qualifying, set aside the settlement or transaction on the mere ground of his own lack of power; it must clearly appear that the act was prejudicial to the estate. Consequently, where it was manifest that the settlement or adjustment was not attended by any fraud or deceit, and that it was equitable, and that the creditor obtained no more than was her due from the intestate under the contract had by such creditor with the intestate, the Appellate Division refused to allow the administratrix "to overhaul the settlement which she deliberately made without any fraud." *Bennett* v. *Lyndon*, 8 App. Div. 387, 389, Hardin, P. J., citing *Vroom* v. *Van Horne*, 10 Paige, 549, 557; *Priest* v. *Watkins*, 2 Hill, 225. In *Packard* v. *Dunfee*, 119 App. Div. 599, before probate the one nominated as executor ill-advisedly indorsed a note "as executor." Held, he could not bind the estate, citing *Schmittler* v. *Simon*, 101 N. Y. 554.

§ 468. **Letters testamentary.**

> Where a will, which is admitted to probate, names one or more persons to be executor or executors thereof, upon a contingency, the surrogate must inquire into the facts, and, if the contingency has happened, that fact must be recited in the decree. Immediately after a will has been admitted to probate, the person or persons named therein as executors, who are competent by law to serve, and who appear and qualify, are entitled to letters testamentary thereupon; unless, before the letters are granted, a creditor of the decedent, or a person interested in the estate, files an affidavit, specifying his demand, or how he is interested, and either setting forth specifically one or more legal objections to granting the letters to one or more of the executors, or stating that he is advised and believes that there are such objections, and that he intends to file a specific statement of the same. Where such an affidavit is filed, the surrogate must stay the granting of letters, at least thirty days, or until the matter is sooner disposed of. A specification or statement of an objection, made as prescribed in this section, must be verified by the oath of the objector, or his attorney, to the effect that he believes it to be true. **§ 2636, Code Civil Proc.**

The Surrogate, under the qualifications of this section, must issue letters testamentary to the persons named as executors; and, as appears from the wording of the section, if one or more persons are designated in the will or codicil to act upon a certain contingency, the Surrogate must before he issues letters be satisfied that the contingency has or has not happened. Inquiry on this point may be had before the Surrogate or before a referee

appointed for the purpose. The fact of the happening of the contingency will appear in the decree which fixes by express designation the persons who are entitled to letters. If it appear that the contingency named has happened, the Surrogate must issue letters to such person. The contingency that is quite frequently provided for in wills is to designate an executor to act in case of the death of the person first named as executor. Where a testator appoints an executor and so provides that, in case of his death, another should be substituted, if it appear to have been the testator's intention that the substitution should take place on the death of the original executor whether happening in the testator's lifetime or afterwards, the executor so substituted may be admitted to the office even though the original executor has proved the will and qualified. Dayton on Surrogates (3d ed.), p. 209; *Matter of Cornell*, 17 Misc. 468; *Matter of Alexander*, 16 Abb. Pr. N. S. 9; *Hartnett* v. *Wandell*, 60 N. Y. 346.

§ 469. **Effect of appeal from probate decree.**—Where appeal is taken from a decree admitting a will to probate or granting letters testamentary, the appeal does not stay the issuance of letters if, in the opinion of the Surrogate, manifested by an order, the *preservation of the estate* requires that the letters should issue. See § 2582, quoted and discussed, *ante*, ch. 5, "Appeals"; *Matter of Gihon*, 48 App. Div. 598, and *post*, under temporary administration. We merely requote the language (discussed under "Appeals"):

> Letters, so issued, confer upon the person named therein all the powers and authority, and subject him to all the duties and liabilities of an executor . . . . in an ordinary case, except that they do not confer power to sell real property by virtue of a provision in the will, or to pay or to satisfy a legacy, or distribute the unbequeathed property of the decedent, until after the final determination of the appeal. **§ 2582, Code Civil Proc.**, in part.

If letters actually issued *before* the appeal was taken the Surrogate may, by order, give the executor similar limited control, pending the appeal.

§ 470. **Who entitled to letters.**—Section 2636 provides that the person or persons named in a will, which has been admitted to probate, as executors are entitled to letters testamentary, provided, first, that they be competent by law to serve; and second, that they appear and qualify. Any person is qualified to serve as executor who is not disqualified by the provisions of § 2612, which provides:

> No person is competent to serve as an executor who, at the time the will is proved, is:
>
> 1. Incapable in law of making a contract.
> 2. Under the age of twenty-one years.
> 3. An alien not an inhabitant of this state; or
> 4. Who shall have been convicted of an infamous crime; or
> 5. Who, on proof, is found by the surrogate to be incompetent to execute the duties of such trust by reason of drunkenness, dishonesty, improvidence or want of understanding. If any such person be named as the sole executor

in a will, or if all the persons named therein as executors be incompetent, letters of administration with the will annexed must be issued as in the case of all of the executors renouncing. A surrogate, in his discretion, may refuse to grant letters testamentary or of administration to a person unable to read and write the English language. **§ 2612, Code Civil Proc.**

Under this section there have been few cases where a Surrogate has exercised his discretion in excluding a person named as executor or applying for letters for illiteracy; and it is a difficult question to determine just how far an inability to read or write would necessarily disqualify from performing the duties of executor or administrator, and consequently the discretion of the Surrogate is largely invoked by such an application, particularly where the person applying for letters of administration is entitled under the statute; for the statute makes it the duty of the Surrogate to issue letters to persons in the order named therein if they are by law competent to serve. The general rule seems to be that every person is competent unless declared to be incompetent by statute, and that no new cause of disqualification may be added to those prescribed by statute. Where the widow of an intestate decedent applied for letters of administration, and the Surrogate found that she was unable to read or write the English language, that "her illiteracy was further burdened by a density hard to comprehend," and that she was unable even to count money, it was held that such a person was deficient in capacity to manage, or ability to perform the duties that would be incumbent upon her, and that it was a proper case for her exclusion by the Surrogate. *Matter of Haley*, 21 Misc. 777, 779, Marcus, Surr.

§ 471. **Same subject.**—It seems hardly necessary to add that the one applying must identify himself with the one designated in the will. Yet such a case arose in Westchester County. *Matter of Stikeman*, 48 Misc. 156. Testator named as his executor a banking corporation. Later this corporation was merged in a "title guarantee and trust" company and went out of business. Held, this new company was not the one in testator's mind and could not receive letters. See § 473, below.

§ 472. **Same subject.**—So the appointment of a minor, or a person incapable in law of making a contract, is void. *Knox* v. *Nobel*, 77 Hun, 230. So where objection is made to the appointment of an executor or administrator on the ground of the existence of a disqualification specified in §§ 2612 or 2661, as the case may be, the courts in construing the statute have determined that not every degree and grade of vice or defects mentioned will disqualify. See below.

In *Matter of Avery*, 45 Misc. 529, letters were inadvisedly issued to a foreign trust company, and revoked on discovery of the fact.

In *Emerson* v. *Bowers*, 14 N. Y. 449, the Court of Appeals says: "All departures in conduct from the principles of rectitude, including all abuses of trust, are unwise and inexpedient, and, therefore, in a certain sense improvident, but they do not constitute the kind of improvidence which the legislature had in view in these enactments; a very careful, shrewd

and moneymaking person may be guilty of negligence or abuse in a fiduciary capacity, but such a person is not improvident in the sense of the statute; the words with which the term is associated, 'drunkenness,' 'want of understanding,' are of some importance in arriving at its true construction; the term evidently refers to habits of mind and conduct which become a part of the man and render him generally and under all ordinary circumstances unfit for the trust or employment in question."

In case of *Coope* v. *Lowerre*, 1 Barb. Ch. 45, it appeared that the applicant had shortly before applied for a discharge under the Insolvent Act; that he was grossly negligent in the management of his property and affairs, and in contracting debts, and in indorsing for parties without responsibility; that he had had a verdict against him in an action for seduction, and other serious imputations were made against his moral character; but the chancellor, upon appeal from the decision of the Surrogate appointing the applicant, held that no degree of moral guilt or delinquency would be sufficient to exclude him, unless he had been actually convicted of crime. This case is cited and approved in *Emerson* v. *Bowers*. In *Matter of Raynor*, 48 Misc. 325, Belford, Surr., held that the pardon of one, convicted of an infamous crime, removed the disability. He cites *Matter of Deming*, 10 Johns. 232: "The effect of the pardon was to acquit the offender of all the penalties annexed to the conviction, and to give him a new credit *and capacity*." See other cases in opinion. It has been held that vicious conduct, improper and dishonest acquisitions of property, and even loose habits of business, did not constitute "improvidence" within the meaning of the statute; nor the fact that the petitioner was indebted to the estate. *Coggeshall* v. *Green*, 9 Hun, 471. Improvidence and lack of understanding, in order to disqualify, must amount to a lack of intelligence. *Shilton's Estate*, 1 Tucker, 73. Habits of intemperance do not disqualify unless they amount to habitual drunkenness in the legal sense of the term. *Elmer* v. *Kechele*, 1 Redf. 472; *Matter of Manley*, 12 Misc. 472, 474, Davie, Surr.

§ 473. **The word "executor" not essential.**—To entitle a person to qualify as executor he need not be so described in the will. It is not necessary that the appointment should name a person in so many words as executor of the will, but any provision in the will showing that the testator intended that the duties of executor should be discharged by the person named is sufficient to constitute such person an executor according to the tenor thereof, and to entitle him to letters testamentary thereon. *Matter of Blancan*, 4 Redf. 151, Calvin, Surr. In this case the will was substantially as follows: "Wishing to give to my husband a proof of my sincere affection I constitute him *my general and universal legatee*, and I dispense with his giving security for the possession of my property in which he shall have only a life interest." It appeared that the will was executed in France and that by the use of the words, "general and universal legatee," the law of France devolved upon such a legatee both the rights and duties of an executor, and the Surrogate held that it was manifest from the wording of the will that the testatrix intended her husband to perform the

duties of executor because she dispensed with his giving security for the estate, showing conclusively that she contemplated and intended that he should have the possession, control and management thereof. So in another case (*Ex parte McDonnell*, 2 Bradf. 32) Judge Bradford held where the brother of a testator was directed by the will to convert the property into cash, to invest the proceeds and transmit the interest to the testator's father, that this was a sufficient designation of the brother as executor and that the use of the word "executor" was not essential to the appointment and that letters testamentary should issue. See also *Ex parte McCormick*, 2 Bradf. 170. It is not necessary that the testator should designate his executor or executors by particular names so long as his designation is sufficiently definite to be capable of being made certain. Thus, in *Matter of Hardy*, 2 Dem. 91, the Surrogate of Kings County upheld a designation appointing "The trustees for the time being of Magnolia Lodge No. 166, Independent Order of Odd Fellows to be executors of this my last will and testament." All that is necessary in such case is that the Surrogate be able to ascertain who are the persons corresponding to the designation. In the case cited, the practice indicated was that the persons constituting the trustees for the time being of the society named, should make written application for letters upon which the Surrogate could take proof in the premises, and having ascertained that they were the persons claimed, letters were issued accordingly. Surrogate Rollins expressed a doubt (*Stolzel* v. *Cruikshank*, 4 Dem. 352) as to the effect of the designation of a sole executor in a codicil to a will which in turn named an independent sole executor. The will having been proved, the Surrogate declined to withhold the issuance of letters testamentary to the executor named in the will on the ground that the codicil might never be proved, but intimated a doubt as to whether in case of its probate and the issuance of letters to the person named in such codicil the functions of the executor already qualified would cease or whether both executors would act jointly. See cases cited in opinion.

§ 474. **Oath of executor.**—By the word "qualify" used in § 2636 ("executors who appear and qualify") is meant the taking of the official oath required by law. This oath must be filed with the Surrogate before letters are issued. The character of the oath is prescribed by the Code.

> The official oath or affirmation of an executor, administrator, or guardian, to the effect that he will well, faithfully and honestly discharge the duties of his office, describing it, must be filed with the surrogate before letters are issued to him. The oath may be taken before any officer, within or without the state, who is authorized to take an affidavit, to be used in the supreme court. Where it is taken without the state, it must be certified as required by law, with respect to an affidavit to be used in the supreme court. **§ 2594, Code Civil Proc.**

Surrogate's Court,
County of

Oath of executor. In the Matter of the Probate of a paper writing purporting to be the Last Will and Testament of Deceased.

County, } ss.:

I, of the of County of Execut named in the last will and testament of late of the of County of deceased, do solemnly swear and declare that I will well, honestly and faithfully discharge the duties of Execut of said last will and testament according to law.

Sworn to before me this day of 19

(Post-office address.)

There is a time specified, see § 488 below, within which executors must qualify just as there is, for example, in the case of testamentary guardians, who are directed to qualify within thirty days, unless for good cause their time be extended to 3 months by the Surrogate. In the case of such an officer, he must qualify within the time limited or extended or he will be deemed to have renounced the appointment under § 2852. And accordingly it was held by Ransom, Surr., that where the appointment of a testamentary guardian was conditioned to take effect upon the happening of a certain contingency, such as the attaining by a person named of his majority, the 30 days or 3 months would begin to run from the date of the happening of the contingency. *Matter of Constantine*, 5 N. Y. Supp. 554. It is important that executors should qualify as promptly as possible. And it may be said to be their duty, in cases of contests which appear to promise a long deferring of the issuing of letters testamentary, to secure the appointment of a temporary administrator. This rule is suggested for the reason that contracts may be extant made by the deceased under which his representative may be required to do some particular act within a time therein specified. This is particularly true in regard to policies of insurance under which a loss may occur at any time. For the courts have most strictly upheld the rights of the insurer to hold the assured to the terms of the contract of insurance in respect of the time within which proofs of loss must be submitted. And the court will not write into the contract of insurance where the time is limited from the occurrence of the fire such words as, "*within sixty days*," or whatever the time may be, "*after letters testamentary are issued.*" There is no question, however, that an executor would have the power (and his exercise thereof would be upheld by the courts) if he presumed to act although letters have not been issued, in furnishing necessary proofs of loss under a policy of fire insurance. The rule in such a case would seem to be as follows:

First. To make an application for letters of temporary administration.

Second. If they are granted, promptly to file proofs of loss in his capacity as temporary administrator.

Third. If his application is denied, he should assume the responsibility of furnishing proofs under his qualified power under § 2613 to preserve and protect the estate and the interest of creditors, legatees and all others whom by the will he is designated to represent. See *Matthews* v. *American Central Insurance Co.*, 9 App. Div. 339, opinion of Green, J., at page 344.

§ 475. **Renunciation.**—A person named in a will as executor may be perfectly competent to serve but cannot be compelled to serve. Provision is made by the Code in this connection as follows:

> A person, named as executor in a will, may renounce the appointment by an instrument in writing, signed by him, and acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, or attested by one or more witnesses, and proved to the satisfaction of the surrogate. Such a renunciation may be retracted by a like instrument, at any time before letters testamentary, or letters of administration with the will annexed, have been issued to any other person in his place: or, after they have been so issued, if they have been revoked, or the person to whom they were issued has died, or become a lunatic, and there is no other acting executor or administrator. Where a retraction is so made, letters testamentary may, in the discretion of the surrogate, be issued to the person making it. An instrument specified in this section must be filed and recorded in the surrogate's office. **§ 2639, Code Civil Proc.**

This section is clear. But it has been held that an oral renunciation made in open court, and in person, by the executor is valid, and cannot be orally recalled. *Matter of Baldwin*, 27 App. Div. 506, 509. If he changes his mind he must petition the Surrogate for leave to retract. *Ibid.* The Surrogate is permitted to exercise his discretion in issuing letters to an executor who has renounced but revoked his renunciation. The rule is a sound and just one and enables the Surrogate to consider in determining whether a person so renouncing and retracting his renunciation is a fit person to administer the estate regardless of the disqualifications imposed by § 2612. So where a widow of testator was 70 years of age, had twice been stricken with paralysis, was bedridden, and obliged to expend large sums of money for medical care and physicians' attendance, the Surrogate held that it would be an improper exercise of his discretion to place her as executrix in charge of a large estate involving railroad, banking, and real estate interests, after she had once renounced. *Matter of Cornell*, 17 Misc. 468, 471, Betts, Surr.

§ 476. **Renunciation not a resignation.**—The renunciation contemplated by § 2639 is a renunciation of the appointment and not of the office. That is to say, one named in a will as executor may file a formal document of renunciation waiving the right to administer the estate and decline to receive letters testamentary.

The following precedents amplify the text:

Renunciation by executor.

Court.
Title.

I, of the of New York, Execut appointed in and by the Last Will and Testament of late of the of County of Erie, New York, deceased, do hereby renounce said appointment and all right and claim to letters testamentary of and under said Last Will and Testament, or to act as Execut thereof.

Dated this day of 19

.....
2 Witnesses.

.....
Person renouncing to sign here.

Acknowledgment.

AFFIDAVIT OF IDENTIFICATION

State of New York, County of Erie. } ss.: (*Note.*)

of the county of New York, being duly sworn deposes and says that he is well acquainted with the person mentioned in the foregoing Renunciation, and with h manner and style of handwriting, having often seen h write, and that deponent verily believes that the signature purporting to be the signature of the aforesaid person signed to the said Renunciation, is the true and genuine handwriting and signature of the aforesaid person.

(*Note.*)

Sworn to before me, this day of 19

.....
Person making affidavit to sign here.

.....
Officer taking affidavit to sign here.

Note. This is required in Erie County and seems to be a precautionary requirement only.

Note. This Renunciation must be acknowledged or proved, and certified in like manner as a deed to be recorded in the county, or attested by one or more witnesses and proved to the satisfaction of the Surrogate by affidavit. If taken before an officer residing in another county, attach certificate of county clerk.

Retraction of a Renunciation.

Court.
Title.

I of the city of New York, one of the executors named and appointed in and by the last will and testament of late of the city of New York, deceased, (*note*) do hereby retract the Renunciation of my said appointment, and of the right and claim to letters testamentary on said will *or*

Note. Where the right to administer has been renounced,

the retraction should specify the relationship and priority of right of the one retracting.

of administration, *as the case may be*), and the right to act as one of the executors thereof, which was by me made and acknowledged on the day of 19 and filed in the office of the Surrogate of county; and pray that letters testamentary (*or* letters of administration) may be granted to me, according to law, as one of such executors thereof.

(Date.) (Signature.)

This retraction must be acknowledged or proved and certified in like manner as a deed to be recorded in the county, or attested and proved to the satisfaction of the Surrogate by affidavit. (Procure county clerk's certificate when necessary.)

§ 477. **Resignation contrasted with renunciation.**—But once letters have been issued and an executor has qualified, the only way in which he can be relieved of the duties of the office is by a resignation which must be acted upon by the Surrogate. The word resignation is here used in the sense of an application by an executor for a revocation of his letters under § 2689 hereinbelow discussed, for it has been held that an executor or administrator has no power to resign. *Matter of Curtiss*, 9 App. Div. 285, 295, aff'g 15 Misc. 545, upon opinions of Silkman, Surr. So in the case of *Tilden* v. *Fiske*, 4 Dem. 357, Judge Rollins held that, where a will provided for the filling of vacancies that might be caused by death, neglect to qualify, disqualification, *resignation* or removal, that the resignation contemplated was practically the qualified right which any executor has to the revocation of his letters upon compliance with the statute under §§ 2689 and 2690, Code Civ. Proc. There is no other way in which an executor can be relieved of the duties of his office. It is manifest that this is the meaning of the Code because of the provision that the renunciation allowed by § 2639 might be retracted any time before letters testamentary or letters of administration with the will annexed shall have been issued to any other person in his place, or where after they have been so issued they have been revoked, or the incumbent has died and there is no other acting executor or administrator. Surrogate Rollins declared, in the *Matter of Suarez*, 3 Dem. 164, 167, that in no reported case had the right to retract a renunciation been recognized by the courts save where the retractor had renounced absolutely, that is, had rejected his title of executor and refused to take and receive letters, citing *Judson* v. *Gibbons*, 5 Wend. 224; *Robertson* v. *McGeoch*, 11 Paige, 640. Therefore one who has become invested with the office of executor cannot renounce the appointment. *Matter of Suarez, supra.* Moreover, one who has resigned and been discharged cannot retract his resignation. *Matter of Beakes*, 5 Dem. 128. It appears, therefore, that the renunciation must be made before the issuance of letters; resignation may only be made after qualifying. Resignation may not be retracted, renunciation may be retracted in one of the cases provided for in § 2639, Code Civ. Proc. (Note that a retraction of renunciation must be executed with the same formality as the renunciation itself.) So where

there were two executors named in a will and before letters were issued one renounced and the other qualified, and the latter was subsequently removed for cause, it was properly held that the former executor could retract his renunciation and ask for letters. *Codding* v. *Newman*, 63 N. Y. 639. But leave of the court must be obtained to retract a renunciation. *Matter of Treadwell*, 37 Misc. 584; *Matter of Haug*, 29 Misc. 36; *Matter of Clute*, 37 Misc. 710. The Surrogate has discretion to grant or withhold his permission. *Matter of Cornell*, 75 N. Y. St. Rep. 664; *Matter of Baldwin*, 27 App. Div. 506; *Matter of Sanford*, 100 App. Div. 479. The renunciation is thus a mere waiver, subject to a legal right of retraction at any time prior to rights having vested on the faith of it. *Casey* v. *Gardiner*, 4 Bradf. 13; *Matter of Wilson*, 92 Hun, 318, 322. When one renounces and then asks leave to retract, the Surrogate in his discretion may take all the circumstances into consideration, and is not limited, in refusing his consent, to the existence of statutory reasons for refusing letters. Thus, where A renounced, and coincidently assigned all his interest in the estate to B, it was held the Surrogate might decline to grant him leave to retract and take letters. *Matter of Clute*, 37 Misc. 710. On the other hand, revocation of letters completely terminates the functions of the executor. In such case he cannot be rehabilitated. The decree of revocation must be regarded as conclusive and final, unless obtained fraudulently or on some other ground which would warrant the court in setting aside or vacating it. Thus, where there were two executors named in a will and one alone qualified and was subsequently adjudged to be a lunatic, whereupon the Surrogate made a decree revoking his letters, after which the second executor applied for letters which were accordingly issued to him, held, that although it subsequently appeared that the former executor had regained his sanity and had been judicially declared sane, there was no power in the Surrogate to reappoint this executor, and that even in case the executor then acting should for any reason cease to act, the only proper practice would be to have an administration with the will annexed. *Matter of Dearing*, 4 Dem. 81. The rule being that where letters have once been revoked the appointment of the executor ceases to exist just as completely as if he had never been named by the testator. So, if one of several refuses to act, the will should be read as if only those qualifying were named in it. In *Draper* v. *Montgomery*, 108 App. Div. 63, the will named three executors and trustees and the power of sale was to them "and to any two of them." Two renounced and refused to act. A deed by the only one who qualified was rejected as insufficient to give title. On an agreed statement the court held the deed good under § 2642 of the Code, which provides, in case of neglect of executors or trustees to qualify, that "all sales, mortgages and leases, under said powers, made by the executors who shall qualify, shall be equally valid, as if the other executor or trustees had joined in such sale." Smith, Surr., says of the will, "there is no clearly indicated intention to make inapplicable the provisions of § 2642.

§ 478. **Executor need not be named in the will.**—A will need not nec-

essarily designate an executor by name; it may authorize someone designated in the will to select an executor, in which case the procedure to be followed is distinctly regulated by the Code.

> Where the will contains a valid power, authorizing the selection, as executor thereof, of a person not named therein, the selection must be made, by the person appointed for that purpose, within thirty days after making the decree admitting the will to probate; in default whereof, the power of selection is deemed to have been renounced. Such selection must be made by an instrument in writing, designating the person selected, signed by the proper person, and acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, or proved to the satisfaction of the surrogate, and filed in the surrogate's office. Where the will authorizes the person, so to be selected, to act with the executor or executors named therein, the issuing of letters must be delayed until the expiration of the period, fixed in this section for the exercise of the power of selection, and, if the selection is so made, for five days thereafter. **§ 2640, Code Civil Proc.**

The dictum of the Court of Appeals in *Hartnett* v. *Wandell*, 60 N. Y. 346, at page 356, that, where a testator constituted his wife executrix and requested, "that such male friend as she may desire shall be appointed with her as executor," she could take no measures for the designation and commissioning of a coexecutor until she had qualified as executrix, must be deemed to be superseded by the language of § 2640, which regardless of the persons by whom the designation must be made prohibits the issuing of letters until the expiration of thirty days within which the selection is required to be made. The opinion of Judge Grover at page 357 (in which Judge Folger joined), pointed out the danger in such cases before the Code, that the selecting of an executor under a power after the will had been probated and other executors had qualified, took away from those who otherwise might have a right to object to the qualifications of the persons so selected; this is completely met by the following provision:

> Within five days after a selection is made, as prescribed in the last section, any person may file an affidavit, verified as prescribed in section 2636 of this act, showing that he is a creditor of the decedent, or a person interested in the estate, and setting forth specifically one or more legal objections to granting letters to the person selected. The proceedings to be taken thereupon are the same as prescribed in sections 2637 and 2638 of this act. If letters are not issued to the person so selected, the power of selection is deemed to be exhausted. **§ 2641, Code Civil Proc.**

§ 479. **Objections.**—It has already been noted in § 2636 that a creditor of the decedent or a person interested in the estate may before letters testamentary are granted file an affidavit specifying his demands or how he is interested in the estate, and either setting forth specifically one or more legal objections to granting letters to one or more of the executors, or stating that he is advised and believes that there are such objections and that he intends to file a specific statement of the same. It will have been noted

that the provisions of § 2641 as to objections which may be filed to a person designated under a power are identical with these and they may be considered together.

In the first place, any party interested may file such objections. *Ferris's Estate*, 1 Tucker, 15. But whether he be a creditor or a party interested, he must satisfy the Surrogate as to the particulars of his claim or the nature of his interest as the Surrogate is entitled to determine the question of interest in advance of passing on the objections. *Burwell* v. *Shaw*, 2 Bradf. 322. The objections must be specific, must state some legal reason why letters should not issue, such as that the person named in the will or designated under the power is a minor, or *non compos mentis*, or an alien, or a nonresident, or has been convicted of an infamous crime, or is an habitual drunkard, or so dishonest, ignorant or improvident as to be incapable of executing the trust, or that his circumstances are such that they do not afford adequate security for the creditors or persons interested in the estate for the due administration of the estate. The affidavit whether containing the objections or a statement that the objector is advised and believes that there are such objections, must be verified by the oath of the objector or his attorney to the effect that he believes it to be true. § 2636, Code Civ. Proc. The effect of the filing of this affidavit is to stay the granting of letters for at least 30 days or until the proceedings initiated by the affidavit are disposed of.

The following precedents explain themselves:

Affidavit of intention to file objections against grant of letters.

Surrogate's Court,
County of

Title. }

State of New York }
County of } ss.:

of the city of being duly sworn, says:

I. I am (state relationship to decedent) whose last will and testament was, on the day of 19 duly admitted to probate by the Surrogate of the county of and of which said will is named one of the executors.

II. I am a legatee under the said last will (*or say* I am a creditor of the said decedent, *or if a person interested state nature of interest*), and am advised and believe that there are one or more legal objections to granting the letters testamentary thereon to the said and I intend to file a specific statement of the same.

(*Note.*) (Signature.)

Note. Section 2636 requires this statement to be verified by the oath of the objector or his attorney to the effect that he believes it to be true.

Objections against the granting of letters testamentary.

Surrogate's Court,
County of

Title. }

To Hon. Surrogate of the county of

of the city of a legatee under the last will and testament of late of the city of deceased, (*or* a creditor of said decedent, *or* state nature of interest) objects to the granting of letters testamentary of the said last will and testament to one of the executors therein named, and specifically sets forth as and for his objections thereto as follows: (here state in order objections under section 2612, or section 2638, subdivision 1).

(Date.) (Signature.)

(Verify as required by section 2636.)

Answers to objections.

Surrogate's Court,
County of

Title.

one of the executors named in the last will and testament of deceased, in answer to the objections filed by in this matter, respectfully says: (here answer objections filed categorically and concisely).

Wherefore, he prays that said objections be overruled and that letters testamentary be duly issued to him under the said will.

(Verification.) (Signature.)

Surrogate's Court
Caption.

Order for inquiry and stay.

Title.

On reading and filing the objections of the of late of the city of deceased, and a legatee under his last will and testament (*or* a creditor of said decedent, *or* state nature of interest) against the granting of letters testamentary of the said last will and testament of to one of the executors therein named:

It is Ordered that the said (name person objected to) personally appear before the Surrogate of the county of at his office in the city of on the day of at 10.30 o'clock in the forenoon of that day, and attend the inquiry by the Surrogate (*note*) into the said objections;

And it is further Ordered that the granting of letters testamentary under the last will and testament of deceased, be and it hereby is stayed until the day of (at least thirty days) or until the further order of the court herein.

(Signature.)
Surrogate.

Note. Section 2637 says that the Surrogate must inquire into the objection filed. The objector is really the moving party; if he fail to attend and substantiate his objections they must be overruled.

Surrogate's Court
Caption.

Order on objections.

Title.

On reading and filing the objections of the late of the city of deceased, and a (state nature of interest objecting), against granting letters testamentary of the said last will and testament of to one of the executors therein named; and the answer thereto of such so objected to, and due inquiry thereinto and deliberation thereupon having been had by the Surrogate; and it appearing to the satisfaction of the Surrogate that there are (no) legal objections to granting letters testamentary to said

Now, on motion of of counsel for said (name prevailing party), it is

Ordered, that the objections to said on the ground of (state objections established, if any) are established (or say that the objections to said have not been established and are hereby overruled).

Note. If this clause be omitted the executor may, nevertheless, under § 2638 "entitle himself to letters" by giving the requisite bond.

(*Where objection established is one of those specified in* § 2638 *of the Code, add* and letters testamentary ought not to be granted to said unless within five days he shall execute and file a bond, as prescribed by law) (here add details of bond to be required). *Note.*

(Signature.)

§ 480. **Same subject—Surrogate's action.**

The surrogate must inquire into an objection, filed as prescribed in the last section; and, for that purpose, he may receive proof, by affidavit or otherwise, in his discretion. If it appears that there is a legal and sufficient objection to any person, named as executor in the will, letters shall not be issued to him, except as prescribed in the next section. **§ 2637, Code Civil Proc.**

The proceedings are addressed to the Surrogate's discretion. The proof must clearly point to some incompetency fixed by statute or to some personal qualities of the executor named such as to satisfy the Surrogate that it would be unsafe to put the estate in his hands. See *Matter of Bennett*, 60 Misc. 28, where Surrogate Ketchum overruled the objection that if letters issued to A and B they might have parental bias that would affect their executorial conduct. Executors are not "to be set aside merely in order that they may not be led into temptation." The theory upon which the Surrogate proceeds was outlined by Chancellor Walworth long before the Code (see *Mandeville* v. *Mandeville*, 8 Paige, 476), where, in construing a similar provision of the Revised Statutes (2 R. S. 72, § 18), he said: "It certainly could not have been the intention of the legislature, to prohibit the granting of letters testamentary to any executor except such as are possessed of property of their own, to the full value of the estate which the testator has authorized and appointed them to ad-

minister; or that an executor should be superseded in his trust, or required to find security, whenever his property was reduced below that of the decedent. Such a construction of the statute would render it almost impossible for a man of a large property to select an executor who would be both able and willing to assume the execution of the trust. The obvious meaning of the statute is, that an executor may be required to give security, whenever the Surrogate is satisfied that his circumstances are such as to render it doubtful whether the property will be safe in his hands, to be disposed of, or administered, as directed by the will."

The statute in question construed by the chancellor was one authorizing the Surrogate to require an executor to give security, "where his circumstances *have become so precarious* as not to afford adequate security for the due administration of the estate." For this statute the present provision of the Code has been substituted and it has been held (*Martin* v. *Duke*, 5 Redf. 597, 600, approved in 36 Hun, 122, 127, Rollins, Surr.), to have been designed to give the Surrogate power to refuse letters whenever under all the circumstances of the case he should be of the opinion that such a course was proper for the protection of the rights and interest of the beneficiaries under the will. Thrift, integrity, good repute, business capacity and stability of character, for example, are circumstances which may be very properly considered in determining the question of adequate security.

§ 481. **Same.**—Where the objections alleged are those specified in § 2612, the Surrogate has no discretion but must refuse to issue letters. And where, having all the facts before him, he finds a person to be incompetent under subd. 5 of § 2612, as, for example, by reason of drunkenness, his finding will usually not be disturbed. *Matter of Cady*, 36 Hun, 122, 125, where Hardin, P. J., observes that it was the intention of the legislature to provide in § 2637 a somewhat speedy and summary determination of the questions raised by objections made to the competency of a person to serve as executor, and the learned justice cited with approval certain language of Judge Denio (*McGregor* v. *Buel*, 24 N. Y. 169), "The propriety of issuing or withholding such letters," i. e., in this case special letters of administration, "is plainly dependent upon the exigencies of the estate, the amount and situation of the estate, and other circumstances which require to be judged of summarily and are not suitable to be litigated through the courts upon appeal. The determination of the Surrogate upon such questions is as it should be summary and exclusive." The improvidence contemplated by subd. 5 of § 2612, is that want of care or foresight in the management of property which would be likely to render the estate and effects of the decedent unsafe and liable to be lost or diminished in value by improvidence in case administration thereof should be committed to such improvident person. *Matter of Cady, supra.* A man who is careless and improvident or who is wanting in ordinary care and forecast in the acquisition and preservation of property for himself cannot with safety be entrusted with the management and preservation

of the property of others. *Coope* v. *Lowerre*, 1 Barb. Ch. 45. So it has been held that the fact that the man was a professional gambler is presumptive evidence of such improvidence as to render him incompetent to discharge the duties of executor or administrator (*McMahon* v. *Harrison*, 6 N. Y. 443), and the Court of Appeals (*Emerson* v. *Bowers*, 14 N. Y. 449), in defining improvidence says: "The term evidently refers to habits of mind and conduct which become a part of the man and render him generally and under all circumstances unfit for the trust or employment in question." See also *Freeman* v. *Kellogg*, 4 Redf. 224; *Matter of Cady*, 36 Hun, 122. See also *Matter of the Administration of the Goods of Daniel C. Shilton*, 1 Tucker, 73.

§ 482. **Same; where executor is also trustee.**—It is often the fact that the person to whom objections are filed as executor is constituted by the will testamentary trustee as well; in such case the Surrogate has jurisdiction to remove the person so objected to in both capacities at the same time by virtue of § 2817 of the Code which authorizes the Surrogate to remove a testamentary trustee where, "If he were named in a will as executor letters testamentary would not be issued to him by reason of his personal disqualification or incompetency." See *Matter of Cady*, 36 Hun, 122, 128, citing *Savage* v. *Gould*, 60 How. 254, and cases cited, and opinion of Boardman, J.

§ 483. **Obviating objection by security.**—There are two objections which although substantiated to the satisfaction of the Surrogate may nevertheless be obviated by the filing of security; they are covered by § 2638.

> In either of the following cases, a person named as executor in a will, may entitle himself to letters testamentary thereupon, by giving a bond as prescribed by law, although an objection against him has been established to the satisfaction of the surrogate:
>
> 1. Where the objection is, that his circumstances are such, that they do not afford adequate security to the creditors, or persons interested in the estate, for the due administration of the estate.
>
> 2. Where the objection is that he is not a resident of the state; and he is a citizen of the United States.
>
> But a person against whom there is no objection, except that of non-residence, is entitled to letters testamentary, without giving a bond, if he has an office within the state, for the regular transaction of business in person; and the will contains an express provision, to the effect that he may act without giving security. **§ 2638, Code Civil Proc.**

This section is not to be confused with § 2685, subd. 5, which has been referred to above, which provides for the revocation of letters where it is made to appear to the Surrogate that the executor's "circumstances are such that they do not afford adequate security to the creditors or persons interested for the due administration of the estate." Where it appears in such a case that the executor has already given a bond under § 2638, the Surrogate may, if he chooses, decline to entertain the application

(Code Civ. Proc. § 2686, *q. v.*); but, if no such bond has been given, he may allow the letters to remain unrevoked upon the filing by the executor of a proper bond within a reasonable time not exceeding five days. Section 2687, Code Civ. Proc. See *Matter of O'Brien*, 19 N. Y. Supp. 541.

§ 484. **Effect of testator's dispensing with security.**—Of course, where a testator has chosen his executor and has expressly provided that he shall serve without bond, the court will not be likely to disregard his wishes, but will rather indulge in the presumption that the testator had just grounds for his confidence in the integrity of the executor; but if there is palpable proof showing that the testator has made an injudicious and unsafe selection, the court has full power to interfere. *Ballard* v. *Charlesworth*, 1 Dem. 501. Still, if nonresidence is the only objection, then § 2638 controls and "if he has an office within the state, for the regular transaction of business in person" *and* "the will contains an express provision" dispensing with security the executor named "is *entitled* to letters."

§ 485. **What is adequate security?**—The words "adequate security" used in § 2638 are in a context more favorable to the executor than the language of the former statute, which reads, "that his circumstances are so precarious" instead of as at present, "his circumstances are such." *Hovey* v. *McLean*, 1 Dem. 396, 398, citing *Shields* v. *Shields*, 60 Barb. 56. And the words "adequate security" do not refer primarily to pecuniary responsibility but to the executor's "habits of husbandry whether provident or improvident, whether reckless or careful." *Mandeville* v. *Mandeville*, 8 Paige, 475; *Shields* v. *Shields*, *supra*; *Ballard* v. *Charlesworth*, 1 Dem. 501. So security will not be required merely because the executor does not own property to the full value of the estate. *Mandeville* v. *Mandeville*, *supra*. Nor on the other hand "because he has an ill-regulated temper or lacks self-control" or has eccentricities of character. *McGregor* v. *McGregor*, 1 Keyes, 133. But if a person is not only insolvent but pressed by his creditors, is known to be dishonest, or to have resorted to the trust funds to relieve his personal obligations although under the guise of loans, or even where he is shown to be too intemperate and too infirm to attend to the duties of the estate, or is a nonresident, a Surrogate may properly reject him. *Matter of Cady*, 36 Hun, 122; *Goodenough* v. *DeGroot*, 3 Law Bulletin, 35; *Estate of Petrie*, 5 Dem. 352; *Matter of Smith*, 16 Weekly Dig. 472. Mere poverty, it is manifest, is no reason for requiring a bond. *Ballard* v. *Charlesworth*, *supra*.

§ 486. **Details of the bond.**—The form of the bond, should one be required, is similar to that which would be required of an administrator. See ch. X. It must run in the name of the people (*Haight* v. *Brisbin*, 7 Civ. Pro. Report, 152; *People* v. *Struller*, 16 Hun, 234), must be a joint and several bond of the executor and two or more sureties, or a surety company, approved by the Surrogate, in a penalty fixed by the Surrogate not less than twice the value of the personal property of which the decedent

died possessed and of the probable amount to be recovered by reason of any right of action granted to the executor by special provision of law. Where there is no personal estate and the executor is ordered to give security, the amount of the penalty of the bond is discretionary with the Surrogate, and may be merely nominal. *Matter of Hart*, 2 Redf. 156, 158, Coffin, Surr. In fixing the penalty of the bond of the executor, however, a Surrogate must take into consideration the value of the real property or of the proceeds thereof which may come into the hands of the executor by virtue of any provision contained in the will. Section 2645, Code Civ. Proc. But, in such case, the Surrogate may, considering the fact that he can, as frequently as the exigency of the case may require, compel the executor to account, fix his penalty in view of the amount to be received within a reasonable time and not necessarily during the whole period of his administration. Thus, in a case (*Matter of Hart*, 2 Redf. 156) where the yearly income from the realty was about $30,000, Surrogate Coffin required a bond of $50,000. The bond must be conditioned that the executor will faithfully discharge the trust reposed in him as such and obey all lawful decrees and orders of the Surrogate's Court touching the administration of the estate committed to him. See ch. X. See § 2664, Code Civ. Proc.; *Holmes* v. *Cock*, 2 Barb. Ch. 426.

§ 487. **Excepting to the sureties.**—When the bond has been filed, the usual practice obtains, in the absence of special rules, with regard to excepting to the sufficiency of the sureties. In New York County there is a special rule—Rule 17—which is as follows:

"Wherever a bond with sureties shall be executed by an executor, administrator, guardian or other trustee, any person interested in the estate or in behalf of such guardian, may apply to the Surrogate for an order requiring the sureties in said bond to appear before him, or his chief clerk, and submit to an examination under oath as to their sufficiency as such sureties. If it shall appear to the satisfaction of the Surrogate that such examination is necessary, he will make an order, prescribing the time and place where such examination shall take place, a copy of which order shall be served upon such executor, administrator, guardian or trustee at least five days before the time fixed for such examination. If on such examination the Surrogate shall be satisfied of the sufficiency of such surety he will endorse his approval upon the bond or a copy thereof; and in case such surety on such examination shall not, in the opinion of the Surrogate, be sufficient, the Surrogate will make an order requiring the substitution of new sureties, within five days after the service of a copy of said order upon the executor, administrator, guardian or other trustee, or his attorney if he shall have appeared by attorney on such examination."

§ 488. **Failure of executor to qualify or renounce.**—The bond required must be filed within 5 days after the objection has been established to the satisfaction of the Surrogate. This necessarily must be manifested by an order whereupon the executor may entitle himself to letters testamentary by giving a proper bond as prescribed by law; his failure to do so operates

just as his failure to qualify after the probate of the will or after his selection under a testamentary power. It operates as an implied renunciation. The Code covers three cases when an executor fails to renounce or qualify, and fixes the time within which he must qualify.

> If a person, named as executor in a will, does not qualify or renounce within thirty days after probate thereof; or if a person, chosen by virtue of a power in the will, does not qualify or renounce within thirty days after the filing of the instrument designating him; or, in either case, if objections are filed, and the executor does not qualify or renounce, within five days after they are determined, in his favor, or, in a case specified in section 2638 of this act, within five days after an objection has been established; the surrogate must, upon the application of any other executor, or any creditor, or person interested in the estate, make an order requiring him to qualify within a time therein specified; and directing that, in default of so doing, he be deemed to have renounced his appointment. Where it appears, by affidavit or other written proof to the satisfaction of the surrogate, that such an order cannot, with due diligence, be served personally within the state upon the person therein named, the surrogate may prescribe the manner in which it must be served, which may be by publication. If the person, so appointed executor, does not qualify within the time fixed, or within such further time as the surrogate allows for that purpose, an order must be made and recorded, reciting the facts, and declaring that he has renounced his appointment as executor. Such an order may be revoked by the surrogate in his discretion, and letters testamentary may be issued to the person so failing to renounce or qualify, upon his application, in a case where he might have retracted an express renunciation, as prescribed in section 2639 of this act. And where any powers to sell, mortgage or lease real estate, or any interest therein, are given to executors as such, or as trustees, or as executors and trustees and any of such persons named as executors shall neglect to qualify, then all sales, mortgages and leases under said powers made by the executors who shall qualify, shall be equally valid as if the other executors or trustees had joined in such sale. **§ 2642, Code Civil Proc.**
>
> See *Draper* v. *Montgomery*, 108 App. Div. 63, discussed in § 477, *ante*, as to final clause of § 2642.

§ 489. **Qualifying.**—Section 2645 provides for the next step prior to the issuing of letters in case a bond has been required of the executor and is as follows:

> An executor from whom a bond is required, as prescribed in this article, or an administrator with the will annexed, must, before letters are issued to him, qualify as prescribed by law, with respect to an administrator upon the estate of an intestate; and the provisions of article fourth of this title, with respect to the bond to be given by the administrator of an intestate, apply to a bond given pursuant to this section; except that, in fixing the penalty thereof, the surrogate must take into consideration the value of the real property, or of the proceeds thereof, which may come to the hands of the executor or administrator, by virtue of any provision contained in the will. **§ 2645, Code Civil Proc.**

For fuller discussion of bonds, see ch. X, *post.*

§ 490. **Requisites of letters.**

> Letters testamentary, letters of administration, and letters of guardianship must be in the name of the people of the state. Where they are granted by a surrogate, or by an officer or person appointed by the board of supervisors, temporarily acting as surrogate, they must be tested in the name of the officer granting them, signed by him, or by the clerk of the surrogate's court, and sealed with the seal of the surrogate's court. Where they are issued out of another court, they must be tested in the name of the judge holding the court, signed by the clerk thereof, and sealed with its seal. **§ 2590, Code Civil Proc.**

As has already been observed letters are the authenticated evidence of the executor's title; a failure therefore to comply with the formalities required by statute may vitiate them. Hence where a Surrogate's clerk, without the knowledge of the Surrogate, using a blank to which the Surrogate's name had been signed, issued letters upon the estate of a person who it afterward appeared was not even dead, and the Surrogate not only had no jurisdiction but no knowledge of the proceedings, it was held by the Court of Appeals (*Roderigas* v. *East Riv. Sav. Inst.*, 76 N. Y. 316, 324, Church, Ch. J.), that the letters were void, and that the person to whom they were issued was not even a *de facto* administratrix. On the other hand, it has been held that, while it is essential that letters must be sealed with the seal of the Surrogate's Court, yet there is no time fixed at which the seal is necessarily to be affixed. *Prima facie*, of course, the intent of the statute is that the instrument, in order to serve the person to whom it is issued as authority for his subsequent acts, should be in due legal form when issued. But in view of the fact that letters are rarely produced except for the purpose of their evidential value to prove the authority of the person to whom they were issued, the courts have held, if, at the time they are offered in evidence, the seal is affixed, the statute is sufficiently complied with. It was so held in a case where, a trial being in progress in which an administrator was plaintiff, his letters were offered in evidence and were objected to on the ground that they were not sealed; they were thereupon presented to the Surrogate who affixed his seal and then offered anew in evidence. The letters were received by the trial judge, and, on appeal, his act was affirmed by the General Term. *Maloney* v. *Woodin*, 11 Hun, 202.

The form of letters testamentary is substantially the same in all Surrogates' offices. They are never prepared by counsel unless where "limited" and the nature and extent of the limitation requires his attention.

§ 491. **Letters testamentary, how far conclusive evidence.**—This is regulated by the Code as follows:

> Subject to the provisions of the next section, regulating the priority among different letters, letters testamentary, letters of administration, and letters of guardianship, granted by a court or office, having jurisdiction to grant them, as prescribed in this chapter, are conclusive evidence of the authority of the persons to whom they are granted, until the decree granting them is reversed

upon appeal, or the letters are revoked, as prescribed in this chapter. **§ 2591, Code Civil Proc.**

This section is a re-enactment of the former provisions of the Revised Statutes (2 R. S. 80, § 56), that letters testamentary or of administration or guardianship when granted by a court or officer having jurisdiction, cannot be collaterally attacked in another court. *Power* v. *Burmester*, 34 N. Y. St. Rep. 716; *Lowman* v. *Elmira, C. & N. R. R. Co.*, 85 Hun, 188; *More* v. *Finch*, 65 Hun, 404; *Roderigas* v. *East Riv. Sav. Inst.*, 63 N. Y. 460. Nor can they be attacked collaterally before another Surrogate. *Matter of Harvey*, 3 Redf. 214, 216, citing *Bolton* v. *Brewster*, 32 Barb. 390. The presentation by the person to whom letters are issued of such letters establishes *prima facie* their validity and his authority. *Belden* v. *Meeker*, 47 N. Y. 307. But the wording of § 2591 makes it evident that if the court or officer had no jurisdiction to grant the letters they are not to have the conclusive effect prescribed by the Code. Therefore the jurisdiction of the Surrogate to issue them may be attacked collaterally. *Crosier* v. *Cornell Steamboat Co.*, 27 Hun, 215, aff'd 92 N. Y. 626. E. g., if they were granted on a false statement of a jurisdictional fact they can be attacked collaterally. That is, if the holder of the letters sues, a denial that letters were "duly" issued will support such attack. *Ziemer* v. *Crucible Steel Co.*, 99 App. Div. 169, citing *Hoes* v. *N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 435. See also *McCarthy* v. *Supreme Court of Foresters*, 107 App. Div. 185. But this does not mean that an improper exercise of jurisdiction can be attacked where the action of the Surrogate, although irregular or deficient, is upon a subject-matter clearly within his jurisdiction. His determination and decree cannot be disregarded collaterally because of these defects. So, where a Surrogate had clear jurisdiction to grant ancillary letters testamentary, or of administration, upon the estate of a deceased person, and he had evidence before him tending to establish the facts upon which his authority was by law required to be exercised, while his determination upon that proof might be reversed in an Appellate Court, yet the issuing of the letters cannot be disregarded nor collaterally attacked. *Brown* v. *Landon*, 30 Hun, 57, opinion of Daniels, J., at page 59, citing *Parhan* v. *Moran*, 4 Hun, 717. This conclusive character, as is stated in § 2591, continues until the decree granting letters is reversed on appeal or the letters are revoked. *Abbott* v. *Curran*, 98 N. Y. 665, affirming 20 Week. Dig. 334. See also *Leonard* v. *Columbia Steam Navigation Co.*, 84 N. Y. 48; *Bolton* v. *Schriever*, 135 N. Y. 65, 70, 74, 75, Peckham, J.; *Kelly* v. *Jay*, 79 Hun, 535, 540. See also *Taylor* v. *Syme*, 17 App. Div. 517, 520, Van Brunt, P. J.; *Matter of Patterson*, 146 N. Y. 327, 330, 331, citing *Porter* v. *Purdy*, 29 N. Y. 106.

§ 492. **Priority among several letters.**—It sometimes occurs that Surrogates in different counties, acting independently, grant letters of administration upon the same estate, or that a Surrogate may ignorantly grant letters testamentary upon an estate where another Surrogate has previously issued letters. Where this conflict of jurisdiction occurs the Code provides

for a priority of the letters issued first in point of time; safeguarding, however, those who may have acted in good faith with the person to whom the conflicting letters were issued. This is by § 2592, which is as follows:

> The person or persons, to whom letters testamentary, or letters of administration are first issued, from a surrogate's court having jurisdiction to issue them, as prescribed in article first of title first of this chapter, have sole and exclusive authority, as executors or administrators, pursuant to the letters, until the letters are revoked, as prescribed by law; and they are entitled to demand and recover from any person, to whom letters upon the same estate are afterwards issued, by any other surrogate's court, the decedent's property in his hands. But the acts of a person, to whom letters were afterwards issued, done in good faith, before notice of the letters first issued, are valid; and an action or special proceeding, commenced by him, may be continued by and in the name of the person or persons to whom the letters were first issued. **§ 2592, Code Civil Proc.**

§ 493. **Disability to receive letters in some cases may be removed—Supplementary letters.**—There are two disabilities which, while they operate to prevent a Surrogate from issuing letters, may nevertheless be removed before the estate is fully administered, in which case on proof of such facts the person then may become entitled to supplementary letters testamentary. The provisions of the Code are as follows:

> If the disability of a person under age, or an alien named as executor in a will, be removed before the execution of the provision of such will is completed, he shall be entitled, on application, to supplementary letters testamentary, to be issued in the same manner as the original letters, and authorized to join in the execution of the will with the persons previously appointed. A person named in a will as executor, and not named as such in the letters testamentary or in letters of administration with the will annexed, shall be deemed to be superseded thereby, and shall have no power or authority whatever as such executor until he appears and qualifies. **§ 2613, Code Civil Proc.,** first part.

The issuance of such letters relates back to the issuance of the first letters except in the cases specified in § 2593, which is as follows:

> Where it is prescribed by law, that an act, with respect to the estate of a decedent, must or may be done within a specified time after letters testamentary or letters of administration are issued, and successive or supplementary letters are issued upon the same estate, the time so specified must be reckoned from the issuing of the first letters, except in a case where it is otherwise specially prescribed by law; or where the first or any subsequent letters are revoked, as prescribed in section 2684 of this act, or by reason of the want of power in the surrogate's court to issue the same, for any cause. **§ 2593, Code Civil Proc.**

See § 2682, Code Civ. Proc.

§ 494. **Revocation of letters.**—This subject is discussed fully in ch. IX below.

§ 495. **Surrogate's control of the executor.**—It has been noted, *ante*, that among the powers of Surrogates' Courts, they have under § 2472 the power "to direct and control the conduct . . . . of executors, administrators and testamentary trustees." In the same connection they are given power "to administer justice in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto." And again, in § 2481, subd. 5 (*ante*, page 35), the Surrogate may "require, by order, an executor, administrator, testamentary trustee, or guardian, *subject to the jurisdiction of his court* to perform any duty imposed upon him *by statute* or *by the Surrogate's Court*, under *authority* of a statute."

It is clear, therefore, that the Surrogate must exercise this power of control as incident to his control of the estates of decedents. He has this power, therefore:

(*a*) Over an executor, subject to the jurisdiction of his court.

(*b*) In respect to the affairs of a decedent's estate under the jurisdiction of his court.

(*c*) In respect of duties imposed by statute, or by the will.

(*d*) Or of duties imposed by the court under authority of the statute.

Thus, under § 2153 of the Code, the Surrogate, who granted the letters, may order an executor to become a "consenting creditor" to the discharge of an insolvent from his debts. In *Matter of Parker*, 1 Barb. Ch. 154, the chancellor reviewed this power of control vested by statute in the Surrogate and limited it to matters in which the executor was acting *as such* under the jurisdiction of the court. And he points out that if in another court or in matters outside the Surrogate's jurisdiction, his acts or neglects resulted in loss to the estate, the Surrogate had plenary power upon the accounting to call him to account.

In *Matter of McCabe*, 18 N. Y. Supp. 715, Surrogate Coffin held that he had no power to compel an executor to bring an action for any purpose in another court and that there was no statute conferring such power nor was there any principal power to which it might be regarded to be an incident.

But, it is clear that, if the action to be brought is one necessary to the preservation of the estate, the Surrogate's power to require the executor to protect those interests may be derived from § 2481, and enforced by reason of the additional power of the Surrogate to remove an executor for cause, including the wasting of the estate. In the case just cited, the learned Surrogate pointed out that he knew of no case in which any Surrogate had ever made such an order. But the Court of Appeals (*Lichtenberg* v. *Herdtfelder*, 103 N. Y. 302, 307), held expressly that the Surrogate had ample power to compel an executor to commence an action to obtain specific relief for the estate under § 2481 of the Code.

Unless such act outside of the Surrogate's Court is necessary to the preservation of the estate and the refusal to perform it would be such wasting of the estate as would warrant the removal of the executor, the Surrogate's power to direct it is questionable. In *Matter of Parker*, *supra*, the chancellor observed that the Surrogate had no power to prohibit the executor

from bringing an action in another court. From the limitations above noted it is clear further that if an executor deals with property to which *as such* he has no right or title, the Surrogate cannot control him in his dealing with the same, as, e. g., he cannot compel him to deliver it to the owner. *Marston* v. *Paulding*, 10 Paige, 40, followed in *Calyer* v. *Calyer*, 4 Redf. 304. See also *Case* v. *Spencer*, 86 App. Div. 454, and cases examined. See also *Shumway* v. *Cooper*, 16 Barb. 556, where it was expressly held that the statutory right to direct and control the conduct of executors did not give the Surrogate any power in respect to their dealings with property to which they had no right or title as executors or administrators.

So again if the executor's acts or neglect complained of to the Surrogate would necessitate, for its determination, his exercise of a power not vested in him by statute, he must decline jurisdiction until the question has been determined in a proper court. For example, it has been pointed out, *ante*, in ch. I, part I, and cases cited, that a Surrogate cannot set aside for fraud a release given by the party interested in an estate to an executor; neither can he pass upon the validity of a transfer of interest by one person interested to another (*Matter of Arkenburg*, 38 App. Div. 473; *Matter of Redfield*, 71 Hun, 344), and compel an executor to pay that interest to either of the rival claimants. *Matter of Randall*, 152 N. Y. 508. See also *Sanders* v. *Soutter*, 126 N. Y. 193; *Matter of Pruyn*, 141 N. Y. 544; *Matter of Monroe*, 142 N. Y. 484. And as the Surrogate cannot pass on a question such as is cognizable only in a court of equity, so he cannot treat as invalid a written agreement, having no power to adjudicate whether or not it was made in fraud. *Ibid.* So he cannot enforce a creditor's lien upon the proceeds of a life insurance policy in favor of decedent's wife, the annual premiums on which were over $500. *Matter of Thompson*, 184 N. Y. 36, where the development and limitations of the Surrogate's incidental powers are carefully reviewed.

§ 496. **Same subject—Control of executors disagreeing.**—The Surrogate's power of control of executors extends not only to compel them to perform duties imposed by statute or by himself under authority of statute, but further extends to protecting the executors in their rights, not only as representing the estate against third parties, but as against one another, if there be more than one. For example, § 2602 of the Code provides as follows:

> Where two or more co-executors or co-administrators disagree, respecting the custody of money or other property of the estate; or two or more testamentary trustees or guardians of the property disagree, respecting the custody of money or other property, belonging to a fund or an estate which is committed to their joint charge; the surrogate may, upon the application of either of them, or of a creditor or person interested in the estate, and proof, by affidavit, of the facts, make an order, requiring them to show cause, why the surrogate should not give directions in the premises. Upon the return of the order, the surrogate may, in his discretion, make an order, directing that any property of the estate or fund be deposited in a safe place, in the *joint*

custody of the executors, administrators, guardians or testamentary trustees, as the case requires, or subject to their *joint order;* or that the money of the estate be deposited in a specified safe bank or trust company, to their *joint credit,* and to be drawn out upon their *joint order.* Disobedience to such a direction may be punished as a contempt of the court. **§ 2602, Code Civil Proc.**

Thus the books of an estate belonging to the testator and containing entries in regard to his property are the *common property of all the executors,* and any one of them has an equal right to inspect and copy such books. Accordingly it has been held that where certain of the executors refused this right to another co-executor, he might apply for an order under this section of the Code to the Surrogate, directing the other executor to show cause why the Surrogate should not give appropriate direction in the premises. *Matter of Stern,* 33 Misc. 542 (see also *post,* as to testamentary trustees).

In the case just cited it was held proper to proceed on affidavit and order to show cause, and that there was no requirement in the section calling for the presentation of a petition and the issuance of a citation. The remedy is summary and enables the Surrogate to enforce the safeguarding of the estate or fund in that the section provides that disobedience to such direction as the Surrogate may make in the premises, which direction is discretionary, may be punished as a contempt of court.

§ 497. **Same subject.**—This power of control may be concisely said to comprehend the power to compel an executor to do whatever the law requires him to do. *Seaman* v. *Duryea,* 10 Barb. 523. Thus, as the law requires them to execute the testator's will, it is properly held that the Surrogate has power to compel executors to perform what is their manifest duty under said will. *Dubois* v. *Sands,* 43 Barb. 412. So, in *Wood* v. *Brown,* 34 N. Y. 337, the principle above noted is laid down that the Surrogate may interfere to control the conduct of an executor in case he refuses to perform the duties *which the law casts upon him and which are necessary to preserve the estate.* And in that case it is stated that this power can only be invoked in aid of some regular proceeding which the statute authorizes to be begun against executors and administrators, and the court proceeds, "The Surrogate cannot, for instance, prevent an executor from bringing or prosecuting a suit nor can he interfere with an executor to control him while in the orderly discharge of his duties." So in *Estate of Sarah Hastings,* N. Y. Law Jour., June 27, 1902, it was held that a Surrogate would not overrule the decision of an executor in good faith except upon proof that his conduct is inconsistent with the honest and faithful discharge of his duties. This case involved a refusal to satisfy a mortgage. The court referred to its power of removal if a proper case were made out, citing *Banning* v. *Gunn,* 4 Dem. 337, 339.

The question has usually arisen where the executor in the exercise of his right to control the assets and to dispose of them without the co-operation of his associate (*Douglass* v. *Satterlee,* 11 Johns. 16; *Arkenburg* v. *Arken-*

burg, 27 Misc. 760, 762; *Wheeler* v. *Wheeler*, 9 Cow. 34; *Hertell* v. *Bogert*, 9 Paige, 52; *Brennan* v. *Lane*, 4 Dem. 322, 328), is sought to be restrained at the instance of a co-executor. Section 2602 now provides what may be done in the cases specified therein in this regard, but even this section does not give the court a right to interfere with the "orderly exercise of his rights" by an executor. So in *Brennan* v. *Lane, supra*, Rollins, Surr., says at page 328: "The general right of an executor or administrator to sell at his pleasure the personal property of his decedent's estate in order to provide means for the payment of debts and of legacies or of distributive shares, is, of course, well settled," citing *Rogers* v. *Squires*, 26 Hun, 388; *Bradner* v. *Faulkner*, 34 N. Y. 347; *Sherman* v. *Willett*, 42 N. Y. 146; and so in that case he held that the decision of the question whether an immediate sale of a livery stable property was advisable or whether it should be delayed for three months, involved "the exercise of ordinary administrative functions with whose orderly discharge the Surrogate is powerless to interfere."

In *Matter of Gilman*, 41 Hun, 561, the power of the Surrogate was upheld on the authority of *Wood* v. *Brown, supra*, and *Jenkins* v. *Jenkins*, 1 Paige, 243, to compel an executor to deposit securities in a trust company, on the ground that they were not entirely free of risk while remaining in his possession.

In *Chambers* v. *Cruikshank*, 5 Dem. 414, Rollins, Surr., construing § 2602 of the Code, which he intimated had been enacted as the result of the decisions in *Wood* v. *Brown*, 34 N. Y. 337, and *Burt* v. *Burt*, 41 N. Y. 46, passed upon this question of joint control of the securities of an estate and observes at page 419 *et seq.*

"It is a well known doctrine of the law that where there are two or more executors of an estate, they are regarded but as one person representing the testator, and therefore the acts done by any one of them, which relate either to the delivery, gift, sale, payment, possession or release of the testator's goods, are deemed the acts of all; for they have a joint and entire authority." One of them is as much entitled as any of the others, in the absence of specific directions to the contrary, either in the will of their testator, or in the lawful order, judgment or decree of a competent court, to collect the personal estate and to hold it in his own possession, apart from the control of his associates. *Murray* v. *Blatchford*, 1 Wend. 583, 616; *Hertell* v. *Bogert*, 9 Paige, 52; *Douglass* v. *Satterlee*, 11 Johns. 16; *Sutherland* v. *Brush*, 7 Johns. Ch. 17; *Brennan* v. *Lane*, 4 Dem. 322; *Hall* v. *Carter*, 8 Ga. 388; *Wheeler* v. *Wheeler*, 9 Cow. 34.

He continues: "But it seems to me that, in the enactment of the provision upon which the present application is based, it was the express purpose of the legislature to modify the rule of law, which, but for that provision, might make such an application, either to the Supreme Court or to the Surrogate, ineffectual.

"In *Burt* v. *Burt*, the court said that, as the relations of the plaintiff executor and the defendant executor had ceased to be amicable, 'it would have been altogether wise and suitable,' if they had of their own motion

made joint deposit of the funds which the testator had confided to their charge.

"This suggests what seems to me the most satisfactory test by which to determine, in any given case, whether the discretionary authority, now expressly conferred upon the Surrogate by § 2602 of the Code, should or should not be exercised. The occasion for enforcing a joint custody is found to have arisen, whenever the circumstances are such that joint custody, pursuant to an agreement of the executors themselves, would commend itself to the Surrogate as suitable and wise.

"Now, there is nothing in the will of this testator indicating that he reposed greater trust and confidence in one of the parties to this proceedings than in the other; there is nothing in the papers before me tending to show that it would impair the security of the property of the estate to take it from the sole custody of the respondent and place it in the joint custody of himself and his associate. For aught that appears, they can meet together without inconvenience whenever conference or combined action shall be necessary or desirable. It is not shown that the interests of the estate would be prejudiced by requiring a joint custody of its assets. And there are certain considerations which seem to make such joint custody desirable."

Applying this test, it is clear that it is not a matter of course to require the joint deposit of estate securities; the applicant must still make out a case calling for the Surrogate's interference and showing that the preservation of his rights and interests or of those of others require the favorable exercise of the discretion vested in the Surrogate. *Matter of Adler*, 60 Hun, 481. With the exercise of that discretion the Appellate Court will not interfere unless it is apparent that it has been abused. *Ibid.*

CHAPTER II

LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED

§ 498. **What is an administrator with the will annexed.**—Wherever there is a will duly admitted to probate its directions as to the administration of the estate thereby devised or bequeathed are controlling in so far as they are consistent with testamentary law. We have already discussed the cases in which an executor may renounce his appointment. We are later to discuss the instances in which an executor may be removed. Cases may thus exist where the will names no executor, or where, having named an executor, he has either died, renounced, or been removed. The Code provides for the carrying into effect of the directions of the will, notwithstanding the happening of any of these contingencies, by the appointment of an administrator, who unlike other administrators (who must act according to the statute in the distribution of the estate), takes the estate as administrator "with the will annexed" and administers or distributes it just as if he had been named as executor in the will. This distinction has been well defined by the Court of Appeals (*Casoni* v. *Jerome*, 58 N. Y. 315, at page 320), by Andrews, J., as follows: "The position of a general administrator and an administrator *cum testamentum* [sic] *annexo*, differ in this: that in the latter case, the will, so far as it is consistent with law, is the rule for the management and distribution of the estate, and in the former the ultimate right to the personal assets is regulated by the statute of distribution."

The provisions of the Code are as follows:

> If no person is named as executor in the will, or selected by virtue of a power contained therein; or if, at any time, by reason of death, incompetency adjudged by the surrogate, renunciation in either of the methods prescribed in section two thousand six hundred and thirty-nine and two thousand six hundred and forty-two of this act, or revocation of letters, there is no executor, or administrator with the will annexed, qualified to act; the surrogate must, upon the application of a creditor of the decedent, or a person interested in the estate of the decedent, or having a lien upon any real property upon which the decedent's estate has a lien and upon such notice to the other creditors and persons interested in the estate, as the surrogate deems proper, issue letters of administration with the will annexed, as follows:
>
> 1. To one or more of the residuary legatees, who are qualified to act as administrators. If any one of such legatees who would otherwise be so entitled is a minor, administration shall be granted to his guardian, if competent.
>
> 2. If there is no such residuary legatee or guardian, or none who will ac-

cept, then to one or more of the principal or specified legatees, so qualified. If any one of such legatees who would be otherwise so entitled is a minor, administration shall be granted to his guardian, if competent.

3. If there is no such legatee or guardian, or none who will accept, then to the husband, or wife, or to one or more of the next of kin, or to one or more of the heirs or devisees, so qualified.

4. If there is no qualified person, entitled under the foregoing subdivisions, who will accept, then to one or more of the creditors who are so qualified, except that in the counties of New York and Kings the public administrator shall have preference, after the next of kin, over creditors, and all other persons.

5. If there is no qualified creditor who will accept, then to any proper person designated by the surrogate. **§ 2643, Code Civil Proc.**

This section was amended, L. 1901, ch. 141, in respect of guardians of minors, otherwise entitled, taking the letters which the infants but for minority would have taken. This supersedes the rule laid down in such cases as *Matter of Milhau*, decided in 1899, 28 Misc. 366, where a general legatee was preferred to the corporate guardian of an infant residuary legatee.

In *Matter of Haug*, 29 Misc. 36, the executor of a sole legatee was preferred to a nephew of the testator, whose father died after the testator, his brother. This was on the ground that the son was not, under these circumstances, entitled *in his own right*, under the definition of next of kin in § 2514, subd. 12, "to share in the unbequeathed residue," etc.

This section should be read with § 2660, *post*. Subdivision 1 prefers the residuary legatee, as one obviously interested in an economical administration. *Matter of Lasak*, 121 N. Y. 706; *Matter of Goggin*, 43 Misc. 233. Hence, if such residuary legatee die, his executor should be preferred to next of kin who are not entitled to share in the distribution. *Ibid.*

Under subds. 3 and 4, reference should be had to the provisions of § 2660 giving certain priority in New York over public administrator to the executor or administrator of a deceased *sole* legatee. See *post*. See chapter on Parties as to who is "person interested." And see opinion of Ketcham, Surr., in *Matter of Brown*, 60 Misc. 628.

§ 499. **When the appointment of such an administrator c. t. a. is proper.** —This section discloses six cases in which an appointment of an administrator with the will annexed is proper:

(*a*) When no person is named executor in the will.

(*b*) When the will contains provision for the selection of the executor by virtue of a power and the power is not exercised within the time specified by § 2640, or in the manner required by that section.

(*c*) Where the executor named dies, either before or after receiving letters.

(*d*) Where objections to an executor, named in a will, or selected under a power, are made and sustained under §§ 2636, 2637 and 2641, Code Civ. Proc.

(*e*) Where the executor named renounces under §§ 2639 or 2642, Code Civ. Proc.

(*f*) Or where the executor having qualified has been guilty of such conduct as to require the Surrogate to revoke his letters. It might be added, as a seventh instance, where there has already been an administrator with the will annexed who has died or whose letters have been revoked, as of course he must be succeeded by a similar officer if his duties in regard to the estate have not been completed.

In *Matter of Maccaffil*, 57 Misc. 264, the application was for revocation of letters testamentary on the ground that the will failed to dispose of any personalty and the realty was given directly. Held, *if* such letters were to be revoked, letters c. t. a. would nevertheless issue, and not general letters of administration as the intestacy necessitating the latter was of the person and not as to specific property. See also *Matter of Haughian*, 37 Misc. 457.

§ 500. **Administrator with the will annexed not proper in certain cases of trust.—Power to sell.**—But it must be noted, at the outset, that an administration c. t. a. is not contemplated in cases other than those of mere administration of an estate. Such an administrator c. t. a. succeeds only to the powers which the executor had or would have had under the will. Consequently where the will creates certain trusts and appoints trustees, an administrator with the will annexed is not a proper officer to succeed to these trusts in the event of the removal or death or failure from any other cause to act, of the persons named as trustees. The mere fact that the executor is also designated trustee is immaterial in this connection, for, if his former duties as executor have terminated, and at the time of his death, removal, or cessation to act for any other cause he has entered already upon the execution of the testamentary trusts, he must be succeeded by a substituted or successor trustee, and not by an administrator c. t. a. So, where an executor had qualified and performed all the duties of his office up to the point of ascertaining the amount of the residuary estate which was left to him in trust, although such residuary estate had not already been sold, converted and reinvested, yet there only remained trust duties to be performed, it was held, by Surrogate Silkman (*Matter of Curtis*, 15 Misc. 545, 553, 554, aff'd 9 App. Div. 285, 294), that it was not a proper case for the appointment of an administrator with the will annexed. Therefore it is important to differentiate between those functions of a trust character or otherwise which vest in an executor and those which belong to a testamentary trustee. A person named in a will both as executor and trustee may be removed in one capacity and continue to exercise his functions in the other capacity. The acceptance of his resignation as trustee or even his removal as trustee will not have the effect to relieve him from the execution, so far as it remains unexecuted, of any duty devolved upon him by virtue of the office of executor. *Greenland* v. *Waddell*, 116 N. Y. 234, 243, citing 1 Perry on Trusts, § 281; *In re Van Wyck*, 1 Barb. Ch. 565; *Quakenboss* v. *Southwick*, 41 N. Y. 117. Take, for

example, a power to sell contained in a will. The Code provides by the latter paragraph of § 2613, that,

> Where letters of administration with the will annexed are granted, the will of the deceased shall be observed and performed; and the administrators, with such will, have the rights and powers and are subject to the same duties as if they had been named executors in the will.

This section is similar in wording to that of the Revised Statutes (2 R. S. 72, § 72), which has been frequently construed by the courts. *De Peyster* v. *Clendinning*, 8 Paige, 296; *Conklin* v. *Egerton*, 21 Wend. 430; 25 *id.* 224; *Roome* v. *Philips*, 27 N. Y. 357; *Bain* v. *Matteson*, 54 N. Y. 663; *Bingham* v. *Jones*, 25 Hun, 6. "The debate has turned mainly upon the inquiry what were the distinctive duties of an executor as such, and when they were to be regarded as not appertaining to his office, but as personal to the trustee. Where the will gives the power to the donee in a capacity distinctively different from his duties as executor, so that as to such duties he is to be regarded wholly as trustee and not at all as executor; and where the power granted or the duty involved imply a personal confidence reposed in the individual over and above and beyond that which is ordinarily implied by the selection of an executor, there is no room for doubt or dispute. In such case the power and duty are not those of executors, *virtute officii* and do not pass to the administrator with the will annexed. But outside of such cases the instances are numerous in which by the operation of a power in trust, authority over the real estate is given to the executor as such and the better to enable him to perform the requirements of the will." An executor is always a trustee for the personal estate for those interested under the will. *Wager* v. *Wager*, 89 N. Y. 161. But when a power of sale is given to an executor for the purpose of paying debts and legacies, or either, and, especially, where there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power of sale is *imperative*, and does not grow out of a personal discretion confided to the executor, such power belongs to the office of executor and must pass to and be exercised by an administrator with the will annexed, whose deed will be as effectual as would have been that of the executor had he survived. *Clifford* v. *Morrell*, 22 App. Div. 470; *Mott* v. *Ackerman*, 92 N. Y. 539, 554; *Carpenter* v. *Bonner*, 26 App. Div. 462. See also *McGarry* v. *McMahon*, 124 App. Div. 607. So that, where an executor has not executed his power, although he may have been removed as trustee, should his office as executor determine for any of the reasons specified in § 2643, the court cannot appoint a trustee to succeed him in the exercise of his functions as executor but must appoint an administrator with the will annexed. *Greenland* v. *Waddell*, *supra*, opinion of Bradley, J. But it is to be noted, in what has been stated above, that a discretionary power of sale cannot be executed by an administrator c. t. a. *Simmons* v. *Taylor*, 19 App. Div. 499, 503. Such a discretionary power can on the death or removal of the executor be executed only under the direc-

tion of the court by a trustee appointed for the purpose. *Cooke* v. *Platt* 98 N. Y. 35, 39, citing *Leggett* v. *Hunter*, 19 N. Y. 445, and cases cited; *Roome* v. *Philips*, 27 N. Y. 357. But it seems that where a testator conferred a power in trust or any other trust upon his executor adding words indicating his intention that such trust should be performed in case of his executor's death by such person as should succeed him as executor, in such case the administrator with the will annexed must execute such powers or trusts. So, while it is the rule that an administrator with the will annexed cannot in that character execute powers and trusts which were personal to his predecessor, the executor (*Beekman* v. *Bonsor*, 23 N. Y. 303, Comstock, Ch. J.), yet where a testator directed the execution of a certain trust by "my said executor or those administering my said estate," it was held (*Matter of Baker*, 26 Hun, 626, Hardin, J.) that this was a sufficiently definite designation of a person intended to administer the estate after the death of the designated executor with the rights and powers of an executor (citing *Holmes* v. *Mead*, 52 N. Y. 343), and, accordingly, an administrator with the will annexed succeeded to the trust and an application to appoint a trustee to administer the trust was denied. See *Matter of Post*, 9 N. Y. Supp. 449. It is important to reiterate in distinguishing between the powers of an executor and of an administrator with the will annexed that if such powers in regard to real estate which an executor is given by the will are in the nature of trust duties given to him not as executor but as an individual, they will not pass to an administrator with the will annexed. *Coann* v. *Culver*, 188 N. Y. 9. Such an administrator has no power to sell and dispose of real property under a will, nor to execute trusts relative to such real estate, but can only act under a naked power imperative in its terms to sell and convert into cash. *Mott* v. *Ackerman*, 92 N. Y. 539; *Dunning* v. *Ocean National Bank*, 61 N. Y. 497, 502; 6 Lansing, 296. See also opinion of Cowen J., in *Conklin* v. *Egerton's Administrator*, 21 Wend. 429, at pages 432, 439, 470, and cases examined. And see *Ayers* v. *Courvoisier*, 101 App. Div. 97, for illustration of *imperative words*. *Smith* v. *Bush*, 59 Misc. 648. The general rule, then, may be stated to be that, where the provision defining the trust, when considered separately, or in connection with the rest of the will is imperative (*Clifford* v. *Morrell*, 22 App. Div. 470), or evidences no intention on the part of the testator of reposing any such special or personal confidence or discretion in the executors as would dissociate the trust confided to them from their office as executors, or prevent them from fully administering it, an administrator c. t. a. will be entitled to complete the execution of the trust. *Matter of Post*, 9 N. Y. Supp. 449, opinion of Ransom, Surr., citing *Hood* v. *Hood*, 85 N. Y. 561, 571; *Mott* v. *Ackerman, supra; Bain* v. *Matteson, supra; Matter of Clark*, 5 Redf. 466. And see § 512 below.

§ 501. **Who may apply for appointment.**—Section 2643 names three classes of persons who may make the application to have an administrator with the will annexed appointed.

(*a*) Creditors of the decedent.

(*b*) Persons interested.

(*c*) A person having a lien upon any real property upon which the decedent's estate has a lien.

This must not be confused with "priority of claim to letters." That is discussed below.

Under the first head of creditors of the decedent, one who subsequently becomes a creditor to the estate in the hands of the executors is not included. *Fowler* v. *Walter*, 1 Dem. 240, 243, Rollins, Surr.

§ 502. **What confers jurisdiction on the Surrogate.**—The application for administration with the will annexed is usually made to the court of the Surrogate who issued the original letters testamentary or who had jurisdiction of the probate of the will. But there are cases where a will has been proved in a foreign judicatory, assets of the estate being in this State which have not been administered under the principal administration. In such a case a New York Surrogate would have power to entertain an application not only for ancillary administration such as is covered by art. 7, of title 3, of ch. 18, which is discussed hereafter, but for principal letters of administration with the will annexed. The practice existed before the enactment of the Code, and Surrogate Rollins held that it is not abolished by the Code. *Hendrickson* v. *Ladd*, 2 Dem. 402. In this case a will had been proved in California and letters granted thereon; exemplification of the will and of the proceedings for probate thereof in the Probate Court of the county of San Francisco were produced and filed, together with an instrument whereby the executors in California renounced their right to administer in the State of New York; the will was then recorded as a will of real and personal property; the petitioner, the widow of decedent and residuary legatee under his will, filed a petition alleging the facts as to the probate of the will and the qualifying of executors in the State of California and the existence of assets in the county of New York of the value of $400, which had not been administered upon. Letters of administration with the will annexed in the ordinary form of local or domiciliary letters (except that they purported to be issued upon an exemplified copy of the decedent's will and upon the renunciation of the executors) were issued to the petitioner; and subsequently, in proceedings to dispose of the decedent's real estate, and refusal by certain purchasers to take title on the ground that the administratrix must be held an ancillary administratrix and, therefore, prohibited by § 2702 of the Code from instituting proceedings to dispose of the real property of the decedent, Surrogate Rollins upheld the regularity of the practice in procuring the letters c. t. a., and held that the administratrix was a domiciliary administratrix with the will annexed, and was not within the prohibition contained in § 2702.

§ 503. **Same subject.**—It was held by Chancellor Kent in *Goodrich* v. *Pendleton*, 4 Johns. Ch. 549, that where a person died without the State the Surrogate had no power to grant letters of administration with the will annexed. This rule, however, no longer holds under the changes in the law

that have since taken place, for a Surrogate can now acquire jurisdiction by reason of other facts than the residence or place of death of the testator; and so, if there are assets within the State, such as a debt due the decedent or a chose in action, the Surrogate may assume jurisdiction. *Hayward* v. *Place*, 4 Dem. 487, aff'd 105 N. Y. 628, Rollins, Surr. So where the decedent resided in Hayti and his will, having been duly admitted to probate in that Republic, and authenticated copies thereof were produced, the Surrogate of New York assumed jurisdiction to admit the will on the authenticated copy and issued letters of administration with the will annexed on the ground that the decedent had left assets within that county. The assets in that case consisted of a claim against a third person with whom it was alleged the decedent had deposited moneys. The General Term upheld his action and said that "the claim itself, if made in good faith, is assets without reference to the final result of a suit upon it." *Sullivan* v. *Fosdick*, 10 Hun, 173, 180, Davis, P. J.

§ 504. **Practice upon application.**—Before discussing the question of right of priority to have letters of administration with the will annexed, it is proper to indicate more fully the practice in securing such letters.

> Where all the executors or all the administrators, to whom letters have been issued, die, or become incapable, as prescribed in section 2692 or the letters are revoked as to all of them; the surrogate must grant letters of administration to one or more persons as their successors, in like manner as if the former letters had not been issued; and the proceedings to procure the grant of such letters, are the same, and the same security shall be required, as in a case of intestacy, except that the surrogate may, in his discretion, in case where the estate has been partially administered upon by the former representative or representatives, fix as the penalty of the bond to be given by such successor or successors, a sum not less than twice the value of the assets of the estate remaining unadministered. **§ 2693, Code Civil Proc.**

Reference must, in this connection, be also had to § 2645, which provides that an administrator with the will annexed must qualify as prescribed in § 2664, but that, in case of an administrator with the will annexed, the Surrogate, in fixing the penalty of the bond, "must take into consideration the value of the real property, or of the proceeds thereof," which may come into such administrator's hands by virtue of any provision contained in the will. But the reference to § 2664 does not extend the power given to the Surrogate to accept reduced security in certain cases from administrators in chief, to administration with the will annexed. See *Estate of LeRoy*, 16 Civ. Proc. Rep. 343. On the other hand, while the sections above recited literally require an administrator c. t. a. to give a bond in a penalty of not less than twice the value of the personal property of which the decedent died possessed, yet if such administrator is also administrator *de bonis non*, these sections have been construed as fixing the minimum penalty of the bond as double the value of the property *left unadministered*. *Sutton* v. *Weeks*, 5 Redf. 353. See *Matter of Nesmith*, 6 Dem. 333.

The statement made above may be amplified by stating that any one of

the persons stated in § 2643, as entitled to letters of administration, may make the application. The proceedings to secure such letters must be initiated by petition in the case covered by § 2644, which is as follows:

> But where a person applies for letters of administration with the will annexed, as prescribed in the last section, *and another person has a right to the administration prior to that of the petitioner*, the application must be made by petition, unless a written renunciation of every person having such a prior right, is filed with the surrogate, and the execution thereof is proved to his satisfaction. The petition must pray that all the persons having a prior right, who have not renounced, be cited to show cause, why administration should not be granted to the petitioner. The proceedings thereupon are the same, as upon an application for administration upon the estate of an intestate. **§ 2644, Code Civil Proc.**

But the wording of § 2644 warrants the inference that in any other case, i. e., where the petitioner is the one having the prior right, his application may be informal, and the manner and form thereof and of the notice the Surrogate may direct him to give to other parties interested may be such as the Surrogate may direct. *Estate of Brooks*, 4 Law Bull. 8. The best practice is, however, in any event to file a petition containing allegations first establishing that occasion exists for the grant of such letters, defining the relationship of the petitioner, and stating whether there are, or are not, persons with a right to administer prior to that of the petitioner, and if there are, praying that the Surrogate make such direction in the premises as he deems necessary as to the manner and time of notice to be given the other parties interested if any be cited or alleging that they have renounced. Where there is an allegation of renunciation the written renunciation duly executed must be filed with the petition. The form of such petition is here indicated:

Petition for letters of administration with the will annexed.

Surrogate's Court,
County of Westchester.

In the Matter of Administration, with the Will annexed, of the Goods, Chattels and Credits left unadministered, which were of
Deceased.

To the Surrogate's Court of the County of Westchester:

The Petition of of the of respectfully shows that he a of late of the of said County, deceased, who departed this life in the of on the day in the year one thousand nine hundred and leaving a last Will and Testament, in and by which he appointed executor thereof. That the said last Will and Testament was duly admitted to probate by the Surrogate of the County of Westchester, on the day of 19 and LETTERS TESTAMENTARY thereon duly issued to the said

And your petitioner further shows that the said the executor named in said Will, ha departed (*note*) this life, leaving property and assets of the said testator unadministered. That your petitioner ha to the best of ability, estimated and ascertained the value of the real and personal estate of the said testator still unadministered, and that the same will not exceed in value the sum of personal property, and real property, that the value of the real property coming into the hands of the Administrat with the Will annexed of the said last Will and Testament will not exceed the sum of dollars, according to the best of your petitioner's information and belief.

Note. Or state other cause terminating his administration.

Your petitioner further shows that the said testat at or immediately previous to death, was a resident of the County of Westchester,

That your petitioner is of full age.

On information and belief that said testator left him surviving the following and only persons having (or claiming to have) a prior right to your petitioner, to letters of administration with the Will annexed, to wit:

(*If there are persons having such prior right and they have renounced, state the fact,* and that and have renounced such right by renunciation duly executed and intended to be filed herewith.)

That the following named persons have an equal right with your petitioner to letters of administration with the Will annexed, to wit:

(*Where there are persons having a prior right who have not renounced, the petition must pray that they be cited to show cause why administration should not be granted to the petitioner.*)

Your petitioner therefore prays that LETTERS OF ADMINISTRATION, with the Will annexed, of the goods chattels and credits of the said deceased, so left unadministered as aforesaid, may be granted to your petitioner in pursuance of the statute in such case made and provided.

Dated this day of 19

(*Add verification.*)

The oath required is substantially identical with that of an administrator.

§ 505. **Same subject.**—The real intent of § 2644 is to provide for the citation of certain parties who are thereby declared to be entitled to notice of the proceeding before the Surrogate. It has been held that where, for example, a residuary legatee qualified to act as administrator, that is to say, a person belonging to the class first in order of priority under § 2643,

applied for letters of administration c. t. a., he was under no obligation to cite any other person as there could be no other person having a right prior to his own not even a person who was also a residuary legatee. *Matter of Wood*, 17 N. Y. Supp. 354, Ransom, Surr.; *Matter of Richardson*, 8 Misc. 140. The Surrogate, however, has full power upon such an application to direct notice to be given to creditors or persons interested if he believes it necessary. § 2643, Code Civ. Proc. The proper form of petition as was indicated by Surrogate Rollins in *Batchelor* v. *Batchelor*, 1 Dem. 209, is one that prays for the issuance of letters of administration *to the petitioner*. The learned Surrogate held that a petition asking that letters should issue to some third person such as the public administrator was improper; but it is clear, in the first place, that the petitioner must either bring himself within § 2643 (*Matter of Allen*, 2 Dem. 203); or, in the second place, if there are those having prior right, their written renunciation should be filed; or, in the third place, if they are not so filed, the petitioner must pray that they be cited to show cause why administration should not be granted to the petitioner. Such citation having then been duly issued and served, upon the return day, if such person having a prior right appear, and insist upon that right, the Surrogate will have jurisdiction to appoint such person in lieu of the petitioner. Were it not for the high authority of the Surrogate who decided the *Batchelor* case it would be suggested as perfectly regular that a creditor, for example, desiring to facilitate the collection of his claim from the estate which was so circumstanced as to require the appointment of an administrator with the will annexed and not desiring such appointment himself should file a petition stating his interest and giving the names of persons having a prior right to administer if any, and praying for the appointment of such a person. But under the practice indicated by Surrogate Rollins the creditor must take the risk of being appointed the administrator, and of subjecting himself to the responsibility of distributing the estate in case none of the persons having a prior right appear and assert such right upon the return day.

§ 506. **Priority of claim to letters.**—Section 2643 defines the order of precedence in right in which various classes of persons interested in the estate of the decedent and creditors stand in relation to the right of administration c. t. a. This section is not to be confused with § 2660 which provides the order in which relatives of the decedent are entitled to letters of administration in cases of intestacy, which will be discussed later. The statute must be strictly followed, and if application be made by a person showing himself to have priority, letters must be issued by the Surrogate. *Matter of Manley*, 12 Misc. 472; *Matter of Place*, 105 N. Y. 629; *Matter of Davis*, 48 Misc. 489. The preferences among those belonging to the same class are not controlling in the same absolute sense, as one class has priority over those subordinated in the order of right. As to those in the same class, the preferences control where other things are equal. *Ibid.* See opinion by Thomas, Surr., in *Matter of Treadwell*, 37 Misc. 584. In a later case, *Matter of Ferguson*, 41 Misc. 465, Church, Surr., refused to follow Thomas; but

his selection was after all colored by an objection to the one rejected on the score of "improvidence," and the *Treadwell* case is authoritative by force of its reasoning. Letters of administration with the will annexed can only be denied to one otherwise entitled for some cause constituting a statutory disqualification. *Matter of Place*, 105 N. Y. 629, aff'g 4 Dem. 487. The nature of such disqualification has been held to be defined by § 2661, which defines the incompetency which will prevent letters of administration generally.

> Letters of administration shall not be granted to a person convicted of an infamous crime, nor to any one incapable by law of making a contract, nor to a person not a citizen of the United States, unless he is a resident of the state, nor to a person under twenty-one years of age, or who is adjudged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence or want of understanding. **§ 2661, Code Civil Proc.**

It will be noted that the disqualifications differ slightly from those contained in § 2612, relating to executors; the difference is merely formal, however; the grounds of objection are substantially identical and will be administered on the same principles. Thus, one pardoned after conviction of an infamous crime is recapacitated as noted above, in discussing *Matter of Raynor*, 48 Misc. 325. The clause contained in § 2612 and omitted in § 2661 is by its terms applicable to cases of administration, since it reads as follows: "A Surrogate in his discretion may refuse to grant letters testamentary or of administration to a person unable to read or write the English language." Care must be taken not to confuse the right of administration and priority fixed by the statute in case of administration c. t. a., with the rule which the statute provides (see § 2693, Code Civ. Proc.), regarding the preference of persons as ancillary administrators with or without the will annexed, where persons may be preferred who come into the courts of our State showing a right under judicial proceedings in a foreign country to the possession of the personal property of the decedent, or where they represent such a person by legal power.

§ 507. **Representative of one entitled to letters is entitled where decedent so entitled was sole legatee.**—It seems that the English rule has been and still is that where the residuary legatee survives the testator and has a beneficial interest, his representative has the same right of administration *cum testamento annexo* as the residuary legatee himself and is therefore entitled to administration in preference to the next of kin or to legatees. Williams on Executors, 465. At first, under the Code, the courts denied the right of the representative of such legatee to letters in preference to those named in the statute as entitled in case there be no residuary legatee or none who will accept. *Kircheis* v. *Scheig*, 3 Redf. 277; *Matter of Allen*, 2 Dem. 203; *Lathrop* v. *Smith*, 24 N. Y. 417; *Matter of Brown*, 2 Connoly, 386. But § 2660 of the Code, as now amended, has been held applicable in several respects to administration under a will. See *Matter of Moehring*, 24 Misc. 418; *Matter of Lasak*, 121 N. Y. 706; *Matter of Goggin*, 43 Misc. 233.

And so, in *Matter of Haug*, 29 Misc. 36, 38, Fitzgerald, Surr., held that it was similarly applicable in respect to the provision incorporated in it that "letters of administration shall also be granted to an executor or administrator of a deceased person named as *sole legatee* in a will." He pointed out that § 2660 gives "the public administrator in the city of New York preference, after the next of kin, and after an executor or administrator of a sole legatee named in a will, *whereby the whole estate* is devised to such deceased sole legatee, over creditors and all other persons." Accordingly he preferred the executor of such deceased sole legatee to the son of decedent's brother who died after testator, and revoked letters originally granted to such nephew. But he also held that as there was living a sister of testator, next of kin, she had a right under subd. 3 of § 2643 prior to that of the executor of the deceased sole legatee, and he granted her the right to retract a renunciation made by her when the nephew originally applied for letters. With this in mind, it is clear that § 2643 (*q. v.*, *ante*, in § 498), prescribes the order of priority, so if there are none of the first class available then the right passes to the next class and not to the representatives of the first class, and so on, until the case contemplated by subd. 4 is reached, which is applicable as it reads, unless the exceptional case covered by § 2660, above discussed, exists. Section 2693, which declares that the proceedings in procuring letters of administration c. t. a., for the successor of the original holder or holders of letters, shall be the same as in cases of intestacy does not change the order of priority established by § 2643, but simply indicates the practice which must be followed by the person entitled to letters in order to obtain their issuance. *Hayward* v. *Place*, 4 Dem. 487, 490, Rollins, Surr.

§ 508. **Priority among persons of the same class.**—Where several persons apply for appointment or are available, all belonging to the same class, there being none of a class priorily entitled, no one of such persons has an absolute legal right as against the others to receive such letters. *Quintard* v. *Morgan*, 4 Dem. 168. In such a case the Surrogate has a discretion in making his selection. *Matter of Beakes*, 5 Dem. 128; *Quintard* v. *Morgan*, *supra; Matter of Powell*, 5 Dem. 281; *Matter of Treadwell*, 37 Misc. 584, 586; *Matter of Davis*, 48 Misc. 489. But see *Matter of Ferguson*, 41 Misc. 465. The discretion is influenced by the nearness of relationship and by the *quantum* of interest. Nor need those having only equal claims be cited. *Ibid.*, citing Code, § 2644; *Matter of Wood*, 17 N. Y. Supp. 354; *Matter of Richardson*, 8 Misc. 140; *Matter of Lasak*, 8 N. Y. Supp. 740, aff'd 121 N. Y. 706. So under subd. 2, of § 2643, which provides, that "if there is no residuary legatee qualified to act or none who will accept, letters must be issued to one or more of the principal or specific legatees," it has been held that the words are not intended to indicate a preference of principal over specific legatees, nor is the word principal used as a synonym for chief or most important, but that it has the force and effect of the word "*general*" and is meant to be descriptive of all legatees who are neither specific nor residuary. *Quintard* v. *Morgan*, *supra*, Rollins, Surr. So that any person

belonging to the second class may be selected by the Surrogate, who will usually prefer that claimant who has the greater interest under the will. *Ibid.*, citing Schouler on Exrs. and Adms. § 123. So Surrogate Coleman held, similarly (*Matter of Beakes, supra*), in a case where there were six persons, belonging to what may be called, under § 2643, the second class. One lived in a remote State; another was a minor; three of the others had contingent legacies dependent upon the death of two of the other legatees without issue; the sixth had a vested life interest in one-half of the funds, and was accordingly selected; the Surrogate held that the interest of the minor did not pass to his guardian as against adult legatees, citing *Cottle* v. *Vanderheyden*, 11 Abb. N. S. 17, and *Quintard* v. *Morgan*, *supra*. In another case Surrogate Rollins held, that the selection of an administrator c. t. a., from among several persons having equal rights under the statute was not necessarily to be made to depend upon the declared preference of the testator such as, for example, the amount of the legacy indicated in the will, but that, other things being equal, such preference might properly be allowed to have some weight. *Matter of Powell*, 5 Dem. 281. And the Surrogate in that case selected of two legatees a resident of the State related to the testator as against a nonresident of the State not of decedent's blood. So in another case the same Surrogate held, that where a testator's residuary estate is held in trust and occasion arises for the appointment of an administrator c. t. a., the beneficiary of the trust is entitled to letters in preference to his trustee. *Matter of Roux*, 5 Dem. 523, citing *Matter of Thompson*, 33 Barb. 334, aff'd 28 How. Pr. 581. It has been held, moreover, as between parties having a similar interest, indebtedness to the estate, or personal interest in its administration, is not of itself ground for rejecting the applicant (*Churchill* v. *Prescott*, 2 Bradf. 304; *Quintard* v. *Morgan*, *supra*); nor that the applicant was engaged in a proceeding involving the construction or validity of the will. *Ibid.* What has been already intimated in regard to the guardian of an infant applies only to cases where there are others equally entitled with the infant. Where the infant is absolutely entitled as against all other parties but for his infancy, it is held that letters must issue to the guardian of such person; the provision was formerly incorporated in the Revised Statutes (2 R. S. ch. 6, title 2, § 33, vol. 4, Banks' 8th ed., p. 2553), and reads as follows:

"If any person who would otherwise be entitled to letters of administration as next of kin or to letters of administration with the will annexed as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons." This statute is now superseded by the provision of § 2660, which provides briefly that if a person entitled is a minor, administration must be granted to his guardian if competent, in preference to creditors or other persons. *Blanck* v. *Morrison*, 4 Dem. 297, Rollins, Surr.; so also *Matter of Lasak*, 8 N. Y. Supp. 740, aff'd 121 N. Y. 706; so also *Matter of Tyler*, 6 Dem. 48, 51, Coffin, Surr.

§ 509. **Miscellaneous cases.**—It is of course true in this case, as in all

others where a person claims as belonging to a class specified in the statute, that the Surrogate has power to inquire into and determine whether the claimant does or does not belong to such class; as for example in *Matter of House*, 2 Connoly, 524, where the decedent had been twice married, and his first wife Mary was a resident of the State of New York, but her husband, having left her, proceeded to Ohio where he commenced an action for divorce and obtained a judgment of the Ohio court, no process in said action having been personally served upon his said wife nor did she appear or authorize anyone to appear for her in said action; he subsequently remarried in the State of Michigan after which he returned with his second wife to the State of New York where he lived until his death. The decedent left certain household effects and a chose in action, a supposedly valid claim against a railroad company by reason of his having been accidentally killed upon its tracks. Both women forthwith applied to be appointed administratrix. The Surrogate asserted his power to inquire into the facts, declared the Ohio divorce illegal and void in the State of New York against the first wife, declared her to be the lawful widow of the decedent, and issued letters to her. So again where a party claimed to be a creditor, the Surrogate upon inquiry into the facts found him to be merely a claimant under a contract made with the executor and not with the decedent, and declared him consequently not to be a creditor of the decedent as required by the terms of § 2643. *Fowler* v. *Walter*, 1 Dem. 240, Rollins, Surr. So, also, where the facts are uncontroverted at the time, but subsequently application is made to have the letters revoked on the ground that the person did not sustain the relation alleged upon the application for letters, the Surrogate must examine the facts. Thus, where letters of administration had been granted to a petitioner as surviving husband of the decedent and proceedings went so far as that he administered the estate and rendered his account therefor, and payment was decreed of the whole surplus to him as such husband by the Surrogate, after which the next of kin appeared and filed a petition alleging that he had never been the husband of the decedent, and asked to have the decree on the accounting and for distribution vacated and set aside, and the assets paid over to the next of kin, the Surrogate inquired into the facts and determined that the administrator was not and never had been the husband of the intestate, but had lived with her only in a meretricious relation, and accordingly revoked the letters and vacated the decree on the ground of their having been obtained by fraud and falsehood. The General Term and Court of Appeals affirmed his determination. *Matter of Patterson*, 29 N. Y. Supp. 451; 79 Hun, 371, aff'd 146 N. Y. 327. In this particular case the petition asked for a vacating of the decree of distribution and the Surrogate not only vacated the decree but revoked the letters. The General Term denied the Surrogate's right to revoke the letters for the reason that the proceeding was not framed for such relief, but affirmed the vacating of the decree for distribution. On the appeal to the Court of Appeals, it was claimed that as long as the letters stood unrevoked there remained conclusive proof of the ad-

ministrator's title as husband until they were vacated in a proper and direct proceeding; the Court of Appeals held, however, that it could have no such effect, but that conceding that the letters should stand as of full force and effect, the vacating of a decree of distribution and the making of a new decree of distribution to the next of kin was perfectly proper, it being immaterial by whom distribution should be made. See opinion of Finch, J., pages 330 and 331.

§ 510. **Joining third party in administration.**—In *Matter of Moehring*, 24 Misc. 418, the petitioner, who was entitled to letters of administration, with the will annexed of the decedent, in making her application therefor asked and consented to have the letters issued jointly to her and to another person who, in his own right, would not be entitled to the same. Granting this application, Fitzgerald, Surr., observed: "Section 2643 of the Code of Civil Procedure which designates the persons to whom letters of administration c. t. a. may be issued and the order in which they are entitled to the same, makes no provision for issuing the letters to a person not otherwise entitled to them, in conjunction with one who is. Authority, however, for the granting of such letters was found in § 34, part 2, ch. 6, title 2, art. 2, of the Revised Statutes (vol. 4, 8th ed. p. 2553; *Matter of Morgan*, 4 Dem. 168). Section 34 declared that 'administration may be granted to one or more competent persons although not entitled to the same, with the consent of the person entitled to be joined with such person; which consent shall be in writing, and be filed in the office of the Surrogate.' This section continued in force until it was repealed by the abrogation by ch. 686 of the Laws of 1893 of the article of which it was a part. This act incorporated § 34 almost literally and nearly all the other provisions of art. 2 substantially under §§ 2660 and 2661 of the Code. These sections are part of art. 4, title 3, ch. 18, of the Code of Civil Procedure. This article previously to such incorporation related wholly and exclusively to the procedure in applications for letters of administration in cases of intestacy, and the insertion among its provisions of the sections of the Revised Statutes has created grave doubt as to whether the legislature intended that such of these sections as were applicable to administration in cases of testacy should continue so applicable after their inclusion in the Code. While the change thus effected coupled with the confusing manner in which the provisions of the Revised Statutes have been collated and consolidated in §§ 2660 and 2661 has involved the question in considerable obscurity and perplexity, still I think that upon a careful scrutiny of these sections, it will be discovered that they supply strong internal evidence that the provision in question was not intended to be limited in its application to administration in cases of intestacy. Section 2661 prescribes that 'letters of administration shall not be granted to a person convicted of an infamous crime, nor to anyone incapable by law of making a contract, nor to a person not a citizen of the United States, unless he is a resident of the State, nor to a person under twenty-one years of age, or who is adjudged incompetent by the Surrogate to execute the duties of such trust by reason of drunkenness, improvidence

or want of understanding.' This section is a substantial re-enactment of § 32 of the article of the Revised Statutes above mentioned, and it was the only provision of law prior to the enactment of § 2661 of the Code that prescribed the grounds of disqualification of a person to receive letters of administration, as § 2661 has since its adoption been the only existing provision of law on the same subject. Neither of these sections afford in themselves any indication that they relate to one sort of letters rather than another. The unrestricted nature of the language of the sections would seem to imply that they relate to both. The section of the Revised Statutes undoubtedly so applied (*Matter of Morgan*, 4 Dem. 168), and the section of the Code has been held to have a like application (*Estate of Nathaniel Manley*, 12 Misc., p. 472). The fact that the latter section, which is an embodiment of § 32 of the Revised Statutes, is applicable to letters of administration in cases of testacy is a strong reason for concluding that the provision in question which was transferred from the Revised Statutes at the same time and in the same manner was intended to be similarly applicable. This view appears to be countenanced by the notes of the commissioners of statutory revision and their remarks in reporting to the legislature for adoption the amendments to the Code effected by the act of 1893. They seem to indicate that the amendments were intended to re-enact, and so continue in operation the provisions which they had superseded (Report of Statutory Revision, 1891, pp. 1115, 1167)."

§ 511. **Removal of administrator with the will annexed.**—The rules in regard to the removal of an administrator with the will annexed are discussed below in the chapter on the revocation of letters.

§ 512. **Power and duties of administrators c. t. a.**—We have already noted in § 500 that an administrator with the will annexed may execute a power under a will which is imperative and not discretionary. *Carpenter* v. *Bonner*, 26 App. Div. 462; *Mott* v. *Ackerman*, 92 N. Y. 539; *Bennett* v. *Garlock*, 79 N. Y. 316; *Bain* v. *Matteson*, 54 N. Y. 663; *Simmons* v. *Taylor*, 19 App. Div. 499; *Clifford* v. *Morrell*, 22 App. Div. 470; *Fish* v. *Coster*, 28 Hun, 64. More generally speaking, however, § 2613 defines the powers granted to such administrators; it provides that where letters of administration with the will annexed are granted, the will of the deceased shall be observed and performed and the administrator with such will shall have the rights and be subject to the same duties as if he had been named executor in the will. It is therefore unnecessary to discuss these duties and powers at length here separately, save perhaps to observe that the conduct of an administrator with the will annexed is regulated as is that of executor by the terms of the will not as that of the administrator by the terms of the statute. *Matter of Allen*, 7 Civ. Proc. Rep. 159. It will be material, of course, where an administrator with the will annexed asserts his right to do a particular act, to inquire, if such right is controverted, whether the executor whom he succeeds had this right. So, for example, where an administrator with the will annexed had been appointed and had collected certain rents of real estate, which under the will should properly have been

collected by the guardian of testator's minor children, Surrogate Lansing held (*Matter of Blow*, 2 Connoly, 360, 365), that the executor not having such authority the administratrix could not acquire it. The General Term in the First Department, in another case, Judge Daniels writing the opinion, intimated a doubt as to whether an administrator with the will annexed had power to renew a lease, the estate of which he was administrator including a leasehold interest, or whether such renewal should be made by the tenants in common. *Walther* v. *Regnault*, 56 Hun, 560. But of course administrators with the will annexed must perform all the duties of the executor in regard to paying debts or legacies. *Bowers* v. *Emerson*, 14 Barb. 652. They will be held to strict accountability. Thus, where an administrator, who was appointed with the will annexed of a testator whose wife was declared insane on lunacy proceedings subsequent to his death, undertook to pay the expenses of such proceedings, Surrogate Calvin refused to approve the disbursements on the ground that the wife's interest in her husband's estate becomes hers at his death, that that interest was the measure of his obligation to support her and that such expenses were chargeable not to his estate but to hers, and that accordingly the administrator with the will of the husband annexed had no more right to charge these expenses to his estate than he would for a disbursement for the support of an entire stranger. *Underhill* v. *Newburger*, 4 Redf. 499. He is not chargeable with the misconduct of the executor he replaces, but that misconduct or negligence does not create a precedent he can rely upon to justify similar dealings. *Matter of Krisfeldt*, 49 Misc. 26, and cases cited at p. 30. He is not under the same liability as the *representative* of the executor he replaced. Such representative bears the statutory liability imposed by § 114, Dec. Est. Law, formerly 2 R. S., ch. 6, tit. 5, § 6. The general rule, then, may be said to be whatever the executor must do under the will, the administrator with the will annexed may do. Whatever the executor may or may not do under the will according to his discretion, or as his personal interest may be affected, the administrator cannot do. *Simmons* v. *Taylor*, 19 App. Div. 499, Landon, J., at page 503, citing *Mott* v. *Ackerman*, 92 N. Y. 539, 552; *Cooke* v. *Platt*, 98 N. Y. 35. So also *Fish* v. *Coster*, 92 N. Y. 627. An administrator of an intestate who was the executor of a will does not succeed by virtue of the administration to the duties of an administrator with the will annexed under the will of his intestate's testator. The mere fact that the assets of such testator properly pass into the administrator's hands is immaterial; he is merely the custodian of such assets until the appointment of an administrator with the will annexed. *Kilburn* v. *See*, 1 Dem. 353, Coffin, Surr.

§ 513. **Right to compel accounting.**—Where an administrator with the will annexed is appointed upon the removal of the executors to whom he succeeds, he has full power to compel them to account for the assets of the estate and may enforce all the necessary proceedings to that end. *Clapp* v. *Meserole*, 1 Abb. Ct. App. Dec. 362. So if the representative to whom he succeeds died, thus necessitating his appointment, it is his duty

to require the personal representative of his predecessor to render an account of the latter's proceedings. Section 2606 is his authority for so doing. *Matter of Richmond*, 63 App. Div. 488, 492, citing *Matter of Clark*, 119 N. Y. 427; *Matter of Wiley*, 119 N. Y. 642. See opinion as to what questions the Surrogate may determine upon such accounting. See Part VIII on Accountings, *post*.

CHAPTER III

TEMPORARY ADMINISTRATION

§ 514. **Definition.**—A temporary administrator is an officer appointed by the Surrogate (where the appointment of an executor, administrator with the will annexed or permanent administrator is for any reason delayed, or where the owner of property has disappeared), to take charge of a decedent's or absentee's estate until a final appointment can be made or until the owner return. In one sense, he is a receiver, appointed by the Surrogate.

But, the temporary administrator is not the Surrogate's officer in the sense that a receiver is the officer of the court appointing him. That is, his possession is not that of the Surrogate's Court so as to give it jurisdiction over controversies in which he is involved by third parties interfering with his possession. *Matter of Weisell*, 51 Misc. 325.

Prior to the Code such officers were called special administrators or collectors (*Berdell* v. *Schnell*, 2 Dem. 292. See § 2683, Code Civ. Proc.) and held "letters *ad colligendum.*" *Lawrence* v. *Parsons*, 27 How. Pr. 26. The collector derived his authority from the Revised Statutes (2 R. S. 76, § 2), which defined his authority to be, "To collect the goods, chattels, personal estate and debts of the deceased and secure the same and under the direction of the Surrogate to sell such goods as may be deemed necessary for the preservation and benefit of the estate after their appraisal," and by subsequent enactment (Laws of 1870, ch. 359, § 10), the Surrogate in New York County was given power to authorize such a collector to publish notice for claims and to direct the payment of debts in certain instances. Since the adoption of the Code the cases in which such an administrator will be appointed and the powers and duties of such an administrator are very clearly defined. It provides the cases when and the manner in which a temporary administrator may be appointed, as follows:

> On the application of a creditor, or a person interested in the estate, the surrogate may, in his discretion, issue to one or more persons competent and qualified to serve as executors, letters of temporary administration, in either of the following cases:
>
> 1. When, for any cause, delay necessarily occurs in the granting of letters testamentary or letters of administration, or in probating a will.
>
> 2. Where a person, of whose estate the surrogate would have jurisdiction, if he was shown to be dead, disappears or is missing, so that after diligent search, his abode cannot be ascertained, and under circumstances which afford reasonable ground to believe either that he is dead, or that he has become a lunatic or that he has been secreted, confined, or otherwise unlawfully made

away with; and the appointment of a temporary administrator is necessary for the protection of his property and the rights of creditors, or of those who will be interested in the estate if it is found that he is dead. **§ 2670, Code Civil Proc.**, first part.

§ 515. **Power to appoint, discretionary.**—It must be made to appear to the satisfaction of the Surrogate that the appointment of a temporary administrator is necessary for the protection of the property and the rights of creditors. The statute in terms makes the granting of such letters discretionary. The propriety of issuing or withholding them is plainly dependent upon the exigencies of the estate, the amount and situation thereof and other circumstances which require to be judged of summarily, and the determination of the Surrogate in such regard ought not to be reviewed upon appeal. *McGregor* v. *Buel*, 24 N. Y. 166, 169; *Matter of Chase*, 32 Hun, 318, 320. This discretion of the Surrogate extends by the terms of this section to the person whom he may appoint. If the person named in the will as executor is competent to qualify if the will should be probated, it is competent for the Surrogate to designate him as temporary administrator. *Matter of Ashmore*, 48 Misc. 312; *Jones* v. *Hamersly*, 2 Dem. 286; *Haas* v. *Childs*, 4 Dem. 138; *Matter of Bankard*, 19 Week. Dig. 452; *Matter of Hilton*, 29 Misc. 532; *Matter of Grant's Est.*, 49 N. Y. Supp. 574. It is in fact, as stated in *Jones* v. *Hamersley*, a reason for so doing. He may appoint "one or more persons competent and qualified to serve as executors." Nothing is said as to any priority of right among such persons, and while the Surrogate must choose from those who possess capacity and qualifications to act as executor, on the other hand anyone thus qualified may be appointed in the exercise of a judicial discretion, and he is not limited in making his selection to persons entitled to ordinary administration under the statute. *Matter of Plath*, 56 Hun, 223, 225. In this case Judge Bartlett observed: "It is important that the person entrusted with temporary administration should be not only competent and honest, but disinterested; and if he had to be either a relative or a creditor of the deceased it might often be very difficult to select a temporary administrator who should be indifferent as between the parties to a contest among applicants for permanent administration or a contest over the probate of a will." But the limitations provided by the Code are explicit and must be observed. It is customary to refuse to appoint a person who is interested in the litigation which is causing the delay in the administration in chief. In the case of *Crandell* v. *Shaw*, 2 Redf. 100, Surrogate Smith declined to appoint a party to the litigation as the collector, citing *Mootrie* v. *Hunt*, 4 Bradf. 173. So where the person named as executor in the will was the chief beneficiary thereunder or where he has any hostile interest to the heirs or next of kin he should not be appointed. *Howard* v. *Doughty*, 3 Redf. 535; *Matter of Eddy*, 10 Misc. 211, 214, Lansing, Surr., citing *Matter of Sterns*, 2 Connoly, 272; *West* v. *Mapes*, 14 Week. Dig. 92; *Matter of Plath*, 56 Hun, 223, 225. So where the person named as executor in the will is charged by the contestants

with having exercised undue influence upon the testator he will be rejected as temporary administrator. *Cornwell* v. *Cornwell*, 1 Dem. 1; *Matter of Sterns*, 2 Connoly, 272; *In re Wanninger's Estate*, 3 N. Y. Supp. 137, Ransom, Surr. The mere fact, however, that a person is named as executor is no ground for refusing temporary letters to him. See *Jones* v. *Hamersley*, 2 Dem. 286, 287, where Surrogate Rollins held that while the statute gave to one named as executor in the disputed will no priority of claim to the appointment, neither did it on the other hand subordinate his claim to that of any other person, and whether the Surrogate should appoint as the temporary administrator of a decedent's estate one who is named as executor in a disputed will or some other person, must be decided in each case that presents itself upon its own particular facts and circumstances.

"Where an application for the appointment of one named as an executor has been opposed on the ground of his unfriendly relations with contestants, or of his alleged undue influence in shaping the testamentary dispositions of the decedent, or for some like cause, such application has often been denied. . . . The bare fact that Mr. Williams will be entitled to testamentary letters if the paper in dispute shall be upheld as a will . . . . tends rather to support than to defeat the petitioner's contentions." *Ibid.*, at page 288. So in cases of small estates the court may be influenced by consideration of economy and appoint the person named as the executor, particularly if the charges of undue influence are vague and uncertain. *Haas* v. *Childs*, 4 Dem. 137. See *Matter of Bankard*, 19 Week. Dig. 452.

In *Matter of Hilton*, 29 Misc. 532, where the Surrogate appointed the executors named in the will temporary administrators, although they were charged with unduly influencing the testator in the execution of his will, because of economy, and because the allegations were "general, remotely inferential or conjectural" in character. He observes that the rule which would ordinarily require the court to refuse to appoint an executor the temporary administrator because charged with undue influence is not absolute and without proper exception. *Ibid.*, citing the cases just discussed.

§ 516. **Cases where appointment is proper.**—The language of § 2670 is so explicit as to need little comment in fixing the cases in which the Surrogate has power to appoint a temporary administrator. It is necessary, however, to note that, pending an application for limited letters under § 2664, where the fixing the amount of an administrator's bond is complicated by the existence of some right of action granted to the executor or administrator by special provision of law as covered by § 2664, *q. v.*, no temporary administrator shall be appointed except on petition of the next of kin as prescribed in that section. *In re Le Roy's Estate*, 5 N. Y. Supp. 555. The jurisdiction of the Surrogate to appoint a temporary administrator is not divested by his having transferred the proceedings for probate of a will to another court for a jury trial. *Matter of Blair*, 60 Hun, 523, where Judge Barrett points out that by such a transfer the Surrogate was divested of no powers except such powers as by force of the transfer

were expressly conferred upon the court to which the proceedings had been transferred. Moreover, the foundation of the power to appoint is that there is a proceeding pending to probate the will or to have letters of administration and that delay has occurred. *Tooker* v. *Bell*, 1 Dem. 52; *Saw Mill Co.* v. *Dock*, 3 Dem. 55, followed in *Matter of Hill*, 43 Misc. 583.

§ 517. **Not every delay a warrant for appointment of temporary administrator.**—The language of § 2670, "Where delay necessarily occurs in the granting of letters testamentary or letters of administration," is not to be taken as warranting the exercise of the power to appoint in every case of delay, or in every case of contest. For the condition of an estate may be such that no possible harm or inconvenience could result from the delay to the parties interested. Or the condition of the estate may be such as that the Surrogate would have no power to appoint such an administrator. For example, a decedent died intestate as to all her estate except the real property devised by her will which named no executor. It was manifest that no letters testamentary could issue, and that, as the will contained a simple and absolute devise of real estate, there would never be any occasion for an administrator. Surrogate Rollins accordingly vacated an order made by his predecessor which empowered a trust company to collect and receive the rents of the premises devised by the will pending a controversy over its probate, on the ground that such an order was unauthorized and void, and he accordingly refused to make an order directing the trust company to pay over the rents already collected under said unauthorized order. *Tooker* v. *Bell*, 1 Dem. 52. But where there are such conditions, or the estate is of such a character, that necessary delay in having some person authorized to take charge of the estate will necessarily or probably cause loss to the estate or be likely to impair rights or remedies of persons interested therein, a case is made out for the appointment of a temporary administrator. *Matter of Eddy*, 10 Misc. 211, Lansing, Surr. Customarily, where a contest occasions a delay in the issuance of letters a temporary administrator will be appointed for the purpose of getting in the assets and conserving the estate. *Matter of McGowen*, 36 N. Y. St. Rep. 689. It was held to be a clear case for the granting of such letters when there were outstanding numerous promissory notes, unsecured, to realize on which diligence in prosecuting the same would be required. *Matter of Eddy*, 10 Misc. 211. See also *Matthews* v. *Am. Cent. Ins. Co.*, 154 N. Y. 449, 461. The application cannot be made as an original application except under subd. 2, for, where the fact of death is uncontroverted, § 2670 assumes that an application is pending for letters testamentary or of administration in chief. And so, where petitioner alleged that the decedent was a resident of the city of Philadelphia leaving assets in this State unadministered upon, and that petitioner was a creditor of the estate, and letters of temporary administration were asked for to enable petitioner to collect its claim, Surrogate Bergen denied the application on the ground of total lack of power to grant it. *Saw Mill Co.* v. *Dock*, 3 Dem. 55.

§ 518. **Appointment in case of supposed death.**—What will authorize a Surrogate to appoint a temporary administrator under subd. 2 of § 2670 depends entirely upon the circumstances of the particular case. But, as a temporary administrator's function is merely to collect and preserve the estate, he may be appointed upon much weaker proof, raising a presumption of intestate's death, than could a permanent administrator. *Czech* v. *Bean*, 35 Misc. 729. See *Barson* v. *Mulligan*, 191 N. Y. 306, an ejectment suit, where A disappeared, unmarried, at age of 21 and was unheard of during the 37 years since elapsed. He was presumed to have died as of the end of the seventh year after disappearing and the Court say: "The death, being established, carried with it the presumption of intestacy," citing *Mitchell* v. *Thorne*, 134 N. Y. 541; *Terry* v. *Sampson*, 112 N. Y. 415. Where letters of administration in chief are issued upon the estate of one supposed to be dead and it subsequently appears that he was not dead at the time, this fact will in most jurisdictions avoid the grant of letters. 19 Am. & English Encyclopedia of Law, page 184 and cases cited. The Court of Appeals in this State (*Roderigas* v. *East Riv. Sav. Bank*, 63 N. Y. 460) laid down a rule to the effect that the letters so issued were not for that reason absolutely void, and that a person acting in good faith with the administrator so appointed would be protected. The subsequent decision in the same case (76 N. Y. 316), as has been elsewhere indicated, held merely that the letters were void *ab initio* because not issued by the Surrogate nor with his knowledge but only by the clerk. The case in 63 N. Y. was overruled in *Scott* v. *McNeal*, 154 U. S. 34, and *Matter of Killan*, 172 N. Y. 547, 557; *Marks* v. *Emigrant Industrial Sav. Bank*, 122 App. Div. 661, 664. If there was slight proof of death before the Surrogate when he made the appointment it cannot be questioned collaterally. *Czech* v. *Bean*, *supra*. These rules, however, are not controlling upon an application for temporary administration. The Surrogate is not required to *find the fact of death*, but is merely required to be satisfied that there are circumstances which afford reasonable ground to believe either that the absentee has become a lunatic, or that he has been secreted, confined or otherwise unlawfully made away with. So, where a young girl disappeared from home and her parents could find no trace of her, although they resorted to correspondence with all her known friends, as well as to advertising and to the employment of detectives, and there was no known reason why she should have been dissatisfied in her home, and no known attachment which could have lured her away from it, the Surrogate of New York County held that such a disappearance for a period of eight years presented a proper case for appointing a temporary administrator. *Matter of Cohen*, Law Bulletin, March 26, 1891. See § 841 of the Code, as to presumption of death in certain cases.

§ 519. **Effect of "for any cause."**—Section 2670, subd. 1, was amended, L. 1901, ch. 20. Prior to September 1, 1901, the subdivision read: "Where delay necessarily occurs in the granting of letters testamentary or letters of administration, in consequence of a contest arising on an application

therefor, or for probate of a will; or in consequence of the absence from the State of an executor named in the will; *or for any other cause.*" The words "for any other cause" originally coming at the end of the subdivision, had been held to qualify the first sentence "where delay necessarily occurs," and were held not to enlarge the field of the Surrogate's discretion. As amended, however, the subdivision is more explicit and may be held to give the Surrogate power to issue letters of temporary administration when for any cause delay necessarily occurs either in the granting of permanent letters or of probating a will, subject, however, to the limitations already pointed out. Where delay in the issuing of letters was caused by the necessity of serving the citation by publication and the estate was in such condition as to require the protection of temporary administration an application for such administration was granted. *Estate of Moesvyll*, 3 Law Bulletin, 80. A temporary administrator may be appointed in cases of appeal from the probate decree; such appointments were made before the Code where the appeal was from a decree admitting to probate, *Mootrie* v. *Hunt*, 4 Bradf. 173, as well as from a decree refusing probate. *Newhouse* v. *Gale*, 1 Redf. 217. In this case where the Surrogate had refused to admit a will to probate and issued letters of administration, and an appeal was taken from the decree refusing probate, Surrogate Smith held, that as the appeal stayed all proceedings in the administration, and as no letters of collection could issue while the letters of administration continued in force, it was proper for him to revoke the letters of administration and to issue letters of collection to protect the personal property pending the appeal. See, as to when appeal *does* stay proceedings, *Matter of Gihon*, 29 Misc. 273. So where letters testamentary have issued to an executor and he has removed from the State, it seems that a temporary administration cannot be had whilst the original letters testamentary stand unrevoked. *Matter of Sohn*, 1 Civ. Pro. Rep. 373.

§ 520. **Practice on appointment.**—The practice upon an application for the appointment of a temporary administrator is indicated by the second part of § 2670, which is as follows:

> An appointment of a temporary administrator in a case specified in subdivision first must be made by an order. At least ten days' notice of the application for such an order must be given to each party to the proceeding, who has appeared, unless the surrogate is satisfied by proof that the safety of the estate requires the notice to be shortened, in which case he may shorten the time of service to not less than two days.
>
> Application for such an appointment, in a case specified in subdivision second must be made by petition, in like manner as where an application is made for administration, in case of intestacy; and the proceedings are the same as prescribed in article fourth of this title, relating to such last-mentioned application. Such an application for the appointment of a temporary administrator may also be made, with like effect, and in like manner, as if made by a creditor, by the county treasurer of the county where the person whose estate is in question, last resided; or if he is not a resident of the state, of the county where any of his property, real or personal, is situated.

A temporary administrator must qualify as prescribed in article fourth of this title, with respect to an administrator-in-chief. **§ 2670, Code Civil Proc.**, second part.

These provisions distinguish between applications under subd. 1 and under subd. 2 of that section. Where the reason for the appointment is delay, necessarily or probably occurring or to occur in the granting of letters, the application for temporary administration should properly be made in the pending proceeding for probate of the will or for the granting of letters of administration. This is manifest from the wording of the statute which provides that the appointment must be by an order, ten days' notice of the application for which must be given "to each party to the proceeding who has appeared." *Matter of Ashmore*, 48 Misc. 312; *Crandall* v. *Shaw*, 2 Redf. 100. This notice may be shortened in urgent cases to not less than two days. In *Crandall* v. *Shaw*, no notice was served on the executor petitioning for probate. Held his petition was an "appearance."

Where the application is made in the case of disappearance or supposed abduction or death, § 2670 contemplates a separate proceeding similar to an ordinary proceeding for administration to be begun by petition, which special proceeding is the same as that prescribed in art. 4, of title 3, ch. 18, to wit: the article entitled, "The grant of letters of administration," including §§ 2660 to 2669. Application under the first subdivision must be made by a creditor or a person interested in the estate, but application under subd. 2 may be made not only by a creditor or a person interested but also by the county treasurer of the county where the person, who has disappeared and whose estate is in question, last resided, or, if he was a nonresident, by the county treasurer of the county where any of his property, real or personal, was situated. It is not essential that the order should recite the facts upon which the Surrogate has acted other than the jurisdictional facts, but it is suggested that in case temporary administration is granted under subd. 2 of § 2670, the order should recite the facts leading the Surrogate to exercise jurisdiction as nearly as possible in the language of the statute. Precedents in the proceedings for letters of temporary administration are suggested below.

§ 521. **Bond of temporary administrator.**—A temporary administrator must qualify as prescribed in the Code with respect to an administrator in chief, § 2670, last clause, formerly § 2671. These provisions are briefly that a person appointed administrator, before letters are issued to him, must file his official oath, execute to the people of the State, and file with the Surrogate, the joint and several bond of himself and two or more sureties, in a penalty fixed by the Surrogate, not less than twice the value of the personal property of which the decedent died possessed and of the probable amount to be recovered by reason of any right of action, granted to an executor or administrator, by special provision of law. The sum to be fixed as the amount of the penalty must be ascertained by the Surrogate, by the examination on oath of the applicant or any other person, or otherwise, as the Surrogate thinks proper. The bond must be conditioned that the ad-

ministrator will faithfully discharge the trust reposed in him as such, and obey all lawful decrees and orders of the Surrogate's Court touching the administration of the estate committed to him. Under ch. 720 of the Laws of 1893 all officers of the Surrogate's Court, such as executors, administrators, guardian or trustees, may use surety companies upon their official bonds. At first the various Surrogates disallowed disbursements made by an executor for premiums in securing the execution of such official bonds. Thus Surrogate Coffin (*Jenkins* v. *Shaffer*, 6 Dem. 59) held that a temporary administrator who had given a bond of the New York Bond and Indemnity Co., as his surety, to whom he had paid $45.00 as premium, was not entitled to be allowed this expenditure upon his accounting, it being neither in the line of his duty nor being necessary or reasonable under § 2652, Code Civ. Proc. The Surrogate remarked, "if he cannot furnish the necessary bond he cannot receive the appointment. The estate or persons in interest are under no obligation to refund to him the money he may have expended in procuring his sureties." The same Surrogate made a similar ruling in *Matter of Patterson*, 15 N. Y. Supp. 963, where a general guardian had given the bond of the Fidelity and Casualty Co., for which he had to pay a premium. But in 1892 an amendment was enacted to § 3320, Code Civ. Proc., relating in chief to receiver's commissions, but in which amendment the following provision was made relative to what is described in the title of the act, ch. 465, Laws of 1892, as the lawful expenses of persons required by law to give bonds.

This amendment reads as follows: "Any receiver, assignee, guardian, trustee, committee, executor, or administrator, required by law to give a bond as such, may include as a part of his lawful expenses such reasonable sum *not exceeding one per cent per annum upon the amount of such bond* paid his sureties thereon as such court or judge allows."

§ 522. **Powers and duties of a temporary administrator.**—A temporary administrator being a special officer appointed for a special and temporary purpose, his rights in regard to the estate which he is to conserve are expressly defined by the Code as follows:

> A temporary administrator, appointed as prescribed in this article, has authority to take into his possession personal property; to secure and preserve it; and to collect choses in action; and, for either of those purposes, he may maintain any action or special proceeding. An action may be maintained against him, by leave of the surrogate, upon a debt of the decedent, or of the absentee whom he represents, in like manner, and with like effect, as if he was an administrator in chief. The surrogate may, by an order, made upon at least ten days' notice to all the parties who have appeared in the special proceeding, authorize the temporary administrator to sell, after appraisal, such personal property, specifying it, of the decedent, or of the absentee whom he represents, as it appears to be necessary to sell, for the benefit of the estate, or, if it appears that the safety of the estate requires the notice to be shortened, the surrogate may shorten the notice to not less than two days. The surrogate may, also, by order, authorize him to pay funeral expenses, or any expenses of the administration of his trust, or stenographer's or referee's fees

on contest of a will or administration; and he may also direct the payment of a legacy or other pecuniary provision under a will, or a distributive share or just proportionate part thereof, according to section two thousand seven hundred and nineteen of this act, as though he were an executor or administrator. § **2672, Code Civil Proc.**

Note: § 2719, above referred to, is now § 2723.

The Surrogate cannot enlarge the powers given by the statute. The purpose of § 2672 is the preservation and not the administration of the estate. See *Riegelman* v. *Riegelman*, 4 Redf. 492, construing the prior statute. The duties and liabilities of temporary administrators appointed prior to the adoption of the Code and still acting thereafter are regulated as follows:

Each provision of this chapter, imposing a duty of liability upon a temporary administrator, appointed upon the estate of a decedent, or his sureties; or conferring upon the surrogate power or authority with respect to such a temporary administrator, or his sureties; applies to a collector or special administrator, appointed before this chapter takes effect, and his sureties; except so far as it is repugnant to the provisions of law in force, when the collector or special administrator was appointed, or to the letters issued to him. § **2683, Code Civil Proc.**

§ 523. **Same subject.**—Section 2672 was evidently intended to enlarge rather than restrict the powers of temporary administrators (*Berdell* v. *Schell*, 2 Dem, 292, 295), and in fact embodies most of the permissive enactments prior to the Code. Collectors or special administrators were much restricted in respect to the disbursements they could be allowed, or the disposition they could make of the moneys in their hands. Thus a collector was held to have no power to pay funeral expenses. *Cogswell's Estate*, 4 Redf. 241. Section 2672 now permits such a disbursement. A special collector had not power to pay out any moneys of the estate except for his own necessary expenses. *Parish's Estate*, 29 Barb. 627. He may now pay legacies, expenses of administration, stenographer's and referee's fees. § 2672, Code Civ. Proc. A collector could not be directed to pay debts of the estate up to 1870, when by ch. 359, § 10, provision was made for the payment of debts in certain cases. *Ex parte Haskett*, 3 Redf. 165. Under the Code by §§ 2673 and 2674 (see *post*, § 532), full power is given to the Surrogate in this regard. Prior to the Code no Surrogate could direct him to make payment of a legacy or a distributive share of the estate. *Riegelman* v. *Riegelman*, 4 Redf. 492; *Riegelman* v. *McCoy*, 1 Dem. 86, 88. The power to sell personal property and convert into money has frequently been exercised. Thus a temporary administrator will be authorized to sell the horses and carriages of an estate in order to reduce expense (*Matter of Cogswell*, 4 Redf. 241), provided they shall first have been appraised. So a temporary administrator, since he may sue and be sued, has the right to employ counsel, and to be allowed proper payments made to such counsel. *Matter of King*, 122 App. Div. 354. (See § 530 below.) His powers to sue are given by § 2672, and only by it. That section authorizes him to sue only for *either* of two purposes: *a.* to secure and preserve personal prop-

erty; *b.* to collect choses in action. *Hastings* v. *Tousey*, 123 App. Div. 480. Thus, in this case, the temporary administrator had actual custody of a stock certificate. But, held, he could not sue in equity for a decree that decedent was its lawful owner, or directing it be transferred to him as such administrator on the books of the company.

§ 524. **Must deposit all moneys.**—With regard to the use of the funds in his hands, the rule as to the deposit of such funds by such an administrator are covered by special provision of the Code. These provisions are as follows:

> A temporary administrator, appointed as prescribed in this article, must, within ten days after any money belonging to the estate comes into his hands, deposit it as prescribed in this section. Where he was appointed by the surrogate's court of any county except New York, it must be deposited with a person, or with a bank, or in a domestic incorporated trust company, designated by the surrogate; but a natural person, so designated as depositary, must file first in the surrogate's office a bond to the surrogate, in a penalty, fixed by him, executed by the depositary and two sureties, and conditioned to render a faithful account, and pay over all money received by him, upon the direction of any court of competent jurisdiction. Where the temporary administrator was appointed by the surrogate of the county of New York, the money must be deposited in a domestic incorporated trust company, having its principal office or place of business in the city of New York, and either specially approved by the surrogate, or designated, in the general rules of practice, as a depositary of funds paid into court. **§ 2678, Code Civil Proc.**

Such depositaries of "funds paid into court" have been held to be, *pro hac vice*, officers of the court, and subject to the court's jurisdiction, if they pay out moneys, deposited with them by one of limited authority to deal with them, without order of court. *Matter of Rothschild*, 109 App. Div. 546.

§ 525. **Proceedings where he neglects to deposit.**—The Code further provides:

> If a temporary administrator neglects to make a deposit, as prescribed in the last section, within the time therein limited, the surrogate must, upon the application of a creditor or person interested in the estate, accompanied with satisfactory proof of the neglect, make an order, directing him to do so forthwith, or to show cause why a warrant of attachment should not issue against him. In the county of New York, the order must be made returnable three days after issuing it; and it must be served upon the temporary administrator, at least two days before the return day thereof, either personally or by leaving a copy thereof within the state at his dwelling place, or his office for the regular transaction of business in person; or if it cannot be served in either of those methods, by serving it in such other manner, as the surrogate directs. In any other county, it must be made returnable within a reasonable time, not exceeding fifteen days after issuing it; and it must be served, in like manner, at least ten days before the return day thereof. **§ 2679, Code Civil Proc.**

§ 526. **Money deposited; how withdrawn.**

Money deposited by a temporary administrator, as prescribed in this article, cannot be withdrawn, except upon the order of the surrogate, a certified copy of which must be presented to the depositary. Such an order may be made upon two days' notice of the application therefor, given to all the parties to the special proceeding, in which the temporary administrator was appointed, who appeared therein; but not otherwise. **§ 2680, Code Civil Proc.**

See § 524, above, as to depositary's acting at its peril if it pay out, without an order of the Surrogate. *Matter of Rothschild,* 109 App. Div. 546.

§ 527. **Accountability of temporary administrator.**—The temporary administrator must account not only for principal sums received by him, but for any money belonging to the estate coming into his hands; this includes the interest or other income credited him by the trust company or received by him from any source. See Laws of 1864, ch. 71, § 12; *Livermore* v. *Wortman,* 25 Hun, 341. See under "Accountings," *post,* as to rents and profits of realty. The deposit in a trust company, required by § 2678, is required not only as a matter of safety, but also in contemplation of the interest it will thereby earn. Hence, if the temporary administrator fail to so deposit it, he is chargeable with the interest which the trust company would have paid (*Matter of Philp,* 29 Misc. 263); unless he be guilty of misconduct when a greater rate may be charged. *Ibid.,* and *Livermore* v. *Wortman, supra.* (See below.) The temporary administrator has no power to invest the assets which come into his hands (*Baskin* v. *Baskin,* 4 Lansing, 90), but he ought if possible to obtain interest on the funds (*Harrington* v. *Libby,* 6 Daly, 259), and will be required to deposit moneys with a trust company, or person or bank designated by the Surrogate. *Livermore* v. *Wortman, supra.* The court in its discretion may permit a temporary administrator to temporarily continue the business of the decedent. *Matter of Moriarity,* 27 Misc. 161. This was a case where the necessity of the appointment was due to a will contest. Much greater might the propriety be where the appointment is made because of a presumption of death. Where a collector deposits moneys to the credit of a firm in which he was a partner, thereby subjecting it to the business risks of that firm, or when he deposits it to his individual account in a bank, thereby subjecting it to the risks of his personal business, he will be chargeable with interest upon the funds during the time they were so deposited. The rate of interest charged has been variously fixed. Thus, Surrogate Calvin (*Matter of Mairs,* 4 Redf. 160) held that such wrongful deposit amounted to a misappropriation of the funds and charged the collector 7 per cent interest, then the legal rate, during the time the trust moneys were thus endangered, citing *King* v. *Talbot,* 40 N. Y. 76; *Hassler* v. *Hassler,* 1 Bradf. 248. See cases cited in *Hassler* v. *Hassler,* at page 252. In the case of *Livermore* v. *Wortman,* the General Term in the First Department on appeal from the decision of Surrogate Calvin (*sub nom. Matter of Mairs, supra*) modified his decree by reducing the interest to that interest or income which might have been derived from the deposit if it had been made with a trust company as directed by statute. Davis, P. J., dissented, on the

ground that there was a presumption in the absence of proof to the contrary that the collector had the benefit and use of the funds and was chargeable with the full rate of lawful interest. The theory of this decision was explained later in the case of *Butler* v. *Jarvis*, 51 Hun, 248, at page 265, where Judge Daniels intimated that there had been no misappropriation of the funds but a mere neglect of duty on the part of the collector. In 1887 Surrogate Rollins in the case of an administrator retaining moneys on deposit in bank charged him upon his accounting with interest at 1½ per cent per annum, the interest which a trust company would have paid under the circumstances. *Matter of Mapes*, 5 Dem. 446. See also *Matter of Scudder*, 21 Misc. 179, citing *Matter of Meyers*, 131 N. Y. 409, 415, 417. Where a temporary administrator made a special deposit of funds in his hands on an agreement for their repayment to him in six months with interest, it was held that in the event of nonpayment he should be held personally liable for the money. *Baskin* v. *Baskin*, 4 Lansing, 90.

§ 528. **Same subject.**—A temporary administrator may retain in his hands a reasonable sum to defray current expenses. *Harrington* v. *Libby*, 6 Daly, 259. But the Surrogate's authority to direct the application of such moneys is limited by the provisions of § 2672. *Kruse* v. *Fricke*, 2 Dem. 264. An application for an order directing a temporary administrator to pay such sums as might be deemed proper to enable proponents of the will to procure the attendance of expert witnesses was denied. The expense which the Surrogate is empowered to authorize arising on a contest are limited to stenographer's or referee's fees. They do not extend to the payment of any costs. *Matter of Aaron*, 5 Dem. 362, Surrogate Rollins, citing *Matter of Parish*, 29 Barb. 637; *Matter of Badger*, 3 Law Bulletin, 71.

§ 529. **Same subject.**—With regard to the instituting of suits, the prosecuting of claims and choses in action has always been recognized. In 1856 Surrogate Bradford declared that he had no hesitation in saying that permission should be granted to a collector to institute a suit to collect and obtain the securities and property belonging to the estate. *Delafield* v. *Parish*, 4 Bradf. 24. And the learned Surrogate says (at page 26) in respect to suits the special administrator stands on the same footing as other administrators. And the present statute distinctly provides that for *either* of the purposes of securing and preserving personal property or to collect choses in action, he may maintain any action or special proceeding. *Matter of McGowan*, 36 N. Y. St. Rep. 689. A chose in action in this connection has as broad a meaning as in any other. Thus a fire insurance policy after a loss has occurred is a chose in action, and a temporary administrator may collect the same, and, if necessary, commence an action for that purpose. It is quite immaterial in this connection whether the proceeds are to be treated as real or personal property or both. The power to collect is indisputable; that power necessarily implies the further power to do whatever is requisite in order to perfect the chose in action so that collection can be enforced. *Matthews* v. *American Central Ins. Co.*,

154 N. Y. 449, 460. The power to do any act includes the power to do all that is reasonably necessary to do it effectively. *Id.*, by Vann, J., at page 460, citing *Hall* v. *Lauderdale*, 46 N. Y. 70, 73; *Parker* v. *Supervisors*, 106 N. Y. 392. The Court of Appeals held in this case that it was the duty of the persons interested in the estate to apply for a temporary administrator and to endeavor through him to give the notice required by the policy, and essential to perfect the cause of action, and then to have suit brought within the period stipulated in the policy, and that a failure so to do and to comply with the terms of the policy was fatal to any recovery against the insurance company. As to maintaining or defending actions or special proceedings in relation to decedent's real property, see the explicit provisions of § 2675, quoted *post.*

§ 530. **Same subject—Counsel fees.**—As incidental to these powers to sue, the temporary administrator has of course power to employ counsel and to pay them a reasonable sum for necessary legal services. Surrogate Rollins (*Stokes* v. *Dale*, 1 Dem. 260) held that he had power to authorize a temporary administrator to withdraw from deposit a specific sum and to pay thereout a reasonable sum for the services and disbursements of his counsel under the clause in § 2672 authorizing the Surrogate to direct the payment of "any expenses of the administration of the trust." He stated that the situation of a temporary administrator does not essentially differ in this respect from that of any other administrator, or from that of an executor; when either of those officers has expended sums of money as counsel fees, he may properly assert a claim to be credited therefor in his account with the estate, and upon the settlement of such accounts the Surrogate will allow such credit if it appear that the expenditures have been necessarily incurred and are reasonable in amount, citing *Estate of St. John*, Daily Reg., May 21, 1883. See *Parish's Estate*, 29 Barb. 627. And see *Matter of King*, 122 App. Div. 354. But it has been held that the Surrogate could not order a temporary administrator to pay costs awarded by the decree granting letters of administration. *Estate of Badger*, 3 Law Bulletin, 71. Nor it seems can the Surrogate allow the temporary administrator for the expenses incurred in the application to have such temporary administrator appointed. *Matter of Bankard*, 19 N. Y. Week. Dig. 452. It has been held that a Surrogate may authorize the administrator, while the will is being contested, to continue the business of the decedent. *Estate of Dinsmore*, 2 Law Bulletin, 28.

§ 531. **Actions against temporary administrators.**—The power given by § 2672 to the Surrogate, to authorize the institution of an action against a temporary administrator upon a debt of the decedent or of the absentee whom he represents in like manner and with like effect as if he were an administrator in chief, will be exercised only in cases of urgency or necessity. The discretionary authority given by the section should never be exercised where its exercise might result in inflicting upon the estate an injury far greater than could possibly be suffered by the one applying for leave to sue if his application were denied. *Matter of Fleming*, 5 Dem.

336. But in a necessary case and where the claimant's rights would suffer by reason of any delay, a Surrogate has full power to allow the suit; and may even, in case of litigation pending at the time of the death or disappearance of the person whose estate is being administered, direct the substitution of the temporary administrator as defendant, provided, of course, the cause of action survives. *Getty* v. *Amelung*, 7 Albany Law Journal, 415.

§ 532. **Power of temporary administrator in regard to debts.**—The power of a temporary administrator to ascertain the claims against the estate and in certain cases to pay them, is now fully regulated by the Code, as follows:

> *General powers, etc., as to requiring creditors to present claims.*
>
> After six months have elapsed, since letters were issued to a temporary administrator, appointed upon the estate, of either a decedent or an absentee, he has the same power, as an administrator in chief, to publish a notice requiring creditors of the decedent or absentee, to exhibit their demands to him. The publication thereof has the same effect, with respect to the temporary administrator, and also an executor or administrator, subsequently appointed upon the same estate, as if the temporary administrator was the executor or an administrator in chief, and the person to whom the subsequent letters are issued was his successor. **§ 2673, Code Civil Proc.**
>
> *General powers as to paying debts.*
>
> After a year has elapsed, since letters were issued to a temporary administrator, appointed upon the estate, of either a decedent or an absentee, the surrogate may, upon the application of the temporary administrator, and upon proof, to his satisfaction, that the assets exceed the debts, make an order, permitting the applicant to pay the whole or any part of a debt, due to a creditor of the decedent or absentee; or, upon the petition of such a creditor he may issue a citation to the temporary administrator, requiring him to show cause why he should not pay the petitioner's debt. When such a petition is presented, the proceedings are, in all respects, the same as where a creditor presents a petition, praying for a decree directing an executor or administrator to pay his debt, as prescribed in article first of title fourth of the chapter. **§ 2674, Code Civil Proc.**

A temporary administrator is not, therefore, *bound* to pay debts. He can only do so when authorized. *Matter of Philp*, 29 Misc. 263.

It will be noticed that the power of the Surrogate to authorize such an administrator, after a year has elapsed, to pay the whole or part of a debt presented pursuant to the notice required by § 2673, either upon the application of the temporary administrator or upon the petition of a creditor, while stated by § 2674 to be, in respect to the proceedings thereon, similar to cases where such application is made for a decree directing an executor or administrator to pay a debt, is limited to cases where it is proved to the satisfaction of the Surrogate that the value of the total assets left by the decedent or the absentee *is greater than the amount of all the debts*. When this is demonstrated to the satisfaction of the Surrogate,

the temporary administrator will be permitted, just as if he were administrator in chief, to use his own discretion respecting payment of persons claiming to be creditors. *Mason* v. *Williams*, 3 Dem. 285, Rollins, Surr. And in such a case the Surrogate should grant permission to discharge debts which bear no indication of mistake, exorbitance or fraud. The objection of persons interested to the payment of a specific item should be reserved until the accounting, as the Code makes no provision for the trial of issues raised by such persons interested at the time of granting leave to pay the claims. *Mason* v. *Williams*, *supra*, reported *sub. nom.; Estate of Hamersley*, 15 Abb. N. C. 187. See also *In re Haskett*, 3 Redf. 165.

In *Matter of Philp*, 29 Misc. 263, the headnote suggests that a temporary administrator may, if the personalty is insufficient to pay all the debts in full, make *pro rata* payments. This seems to be more than the opinion warrants. Section 2674, as above noted, is explicit in making it a condition of granting leave to pay debts at all that the assets are greater than the amount of all the debts. But this case properly held that as the temporary administrator had, *without* permission of court, paid a number of unpreferred claims, he should be surcharged that excess which represented the difference between what he paid and what would have been the *pro rata* share of the creditors to whom he made payment. To this surcharge trust company interest was added, as he had acted without bad faith supposing the real estate of testator to be available for sale to pay the other debts.

§ 533. **The temporary administrator and the transfer tax.**—The transfer tax law (*q. v.*, *post*), provides for a suspension or remission of penalty for delay in paying the tax when the executor is prevented from acting by reason of legal proceedings on contested probate. Not only is a penalty imposed for delay, but a discount allowed for quick payment. As to the latter, there seems to be no valid reason why the temporary administrator should not pay the tax and move primarily in the matter, in order to save to the estate the amount of the discount which is allowed by the act. But of course he cannot do this if the contest makes it doubtful what persons are to take, and how much they are to take. In case of an appointment under subd. 2, i. e., a case of disappearance, it would seem that to enable the State to assess and collect the tax, the *fact* of death would have to be affirmatively established, and not merely the "reasonable grounds," etc., upon which the Surrogate may appoint. If the situation warrants his asking for the appraisal of the estate and the fixing of the tax, he must assert the right to have his commissions deducted, for they are an expense chargeable to the estate, and reducing the quantum that passes to the beneficiaries. Carter's Transfer Tax Law (ed. of 1903) citing *Matter of Gihon*, 169 N. Y. 443.

§ 534. **Temporary administrator and the real property of the estate.**—The Code confers upon the Surrogate power to give the temporary administrator authority to take possession of the real property of a decedent or absentee, to receive the rents and profits thereof, and upon application

to lease or do any other act with respect thereto *except to sell it.* The sections are as follows:

> When a temporary administrator is appointed and a proceeding is pending for the probate of a *will of real property,* or there is a delay in the granting of letters testamentary or administration on such a will, or in the qualification of a trustee named therein, the order appointing him may confer upon him authority to *take possession* of real property, in the same or another county, which is affected by the will, and to receive the rents and profits thereof. The surrogate may, by an order, confer upon him *authority to lease* any or all of the real property, for a term not exceeding *one year;* or to do any other act with respect thereto, *except to sell it,* which is, in the surrogate's opinion, necessary for the *execution of the will,* or the *preservation or benefit* of the real property. For either of these purposes, he may maintain or defend any action or special proceeding. **§ 2675, Code Civil Proc.**

The rents and profits collected pursuant to an order made under this section must be paid into court, and if so paid the temporary administrator need not account therefor to the permanent successor. *Matter of Goetz,* 120 App. Div. 10.

> A temporary administrator, appointed upon the estate of an absentee, has all the powers and authority enumerated in the last section, with respect to the real property of the absentee. His acts, done in pursuance of that authority, bind the absentee, if he is living, or his heirs or devisee, if he is dead, in the same manner as the acts of an executor or administrator bind his successor. **§ 2676, Code Civil Proc.**

The general tenor of the decision in the *Hamersley* case, 3 Dem. 285, *sub. nom. Mason* v. *Williams,* is that while the Surrogate may confer authority upon the temporary administrator in respect to his payment of debts or his dealing with the real estate, he will not usually direct a temporary administrator to do such acts as would be left to the discretion of an administrator in chief; he may be *authorized* to do them, in which case his failure to avail himself of the authority could be called in question at the time of his accounting, and could be then justified by proof of the existing conditions and facts. It has been held, for example, that a special administrator could not be required to pay or buy in a mortgage which the mortgagee was foreclosing upon part of decedent's real estate. *Matter of Dooley,* 3 Law Bulletin, 18. On the other hand, the power of a temporary administrator in regard to real estate depends wholly upon the statute, and upon the authority of the Surrogate evidenced in the order appointing him, or in a subsequent order made upon proper application which may authorize disbursements from the rents collected. *Matter of Goetz, supra,* citing *Powell* v. *Demming,* 22 Hun, 235. So a temporary administrator has no authority to mortgage the real estate of the decedent or absentee by virtue of his office. As temporary administrator he takes no title to the real estate of the decedent, or absentee, and can by no act of his, by virtue of his office, sell, charge or encumber it, or in any way

affect or prejudice the rights of heirs or devisees. The provisions of the Code as to the power of Surrogates in respect to the sale or mortgage of decedent's real estate for the payment of debts (see §§ 2749 *et seq.*), expressly provide that an application for leave to sell or mortgage real estate must be made by an executor or administrator *other than a temporary administrator.* § 2750, Code Civ. Proc.; *Duryea* v. *Mackey,* 151 N. Y. 204, 207, Andrews, Ch. J.

§ 535. **Providing for family of absentee.**—Section 2677 gives the Surrogate power to direct the maintenance of an absentee's family in a case expressly falling within its provisions. The section is as follows:

> Upon proof, satisfactory to the surrogate, that the wife or any infant child of an absentee, upon whose estate a temporary administrator has been appointed, is in such circumstances as to require provision to be made out of the estate for his or her maintenance, clothing, or education, the surrogate may make an order, directing the temporary administrator to make such provision therefor, as the surrogate deems proper, out of any personal property in his hands, not needed for the payment of debts. **§ 2677, Code Civil Proc.**

It would at first seem, under this section that, as the provision is statutory and, therefore, to be strictly construed, the Surrogate would be without power to direct the temporary administrator to make provision for the maintenance, clothing, or education of the wife or infant child of an absentee within the time provided by § 2673, Code Civ. Proc., within which it is possible for the temporary administrator to ascertain the amount of the debts, for § 2677 limits the funds out of which such provision may be made, "to the personal property in the hands of the temporary administrator *not needed for the payment of debts.*" However, the intent of the statute being clear, it would be proper for a Surrogate upon satisfactory proof that the wife or infant child is in the needy circumstances contemplated by the section to exercise his power to direct provision to be made, upon satisfactory proof by the administrator or otherwise as to the extent of the debts of the absentee.

§ 536. **How long temporary administrator may act.**—The functions of a temporary administrator of a decedent continue until the qualification of the executor or of the administrator in chief; that is to say, until the issuance of permanent letters. But, they then cease and determine. *Matter of Goetz,* 120 App. Div. 10, citing *Matter of Lewis,* 17 Week. Dig. 311; *Matter of Choate,* 105 App. Div. 356; *Matter of Storm,* 84 App. Div. 552. See also *Hastings* v. *Tousey,* 123 App. Div. 480. So, pending an appeal from a decree admitting a will to probate, a temporary administrator will not be ousted at the instance of the executors named in the will, except the "preservation of the estate" within the intent of § 2582 of the Code shall require it (see *ante,* pp. 209 and 468). And that condition cannot be said to exist where the temporary administrator has given ample security and there is nothing in the estate necessitating the exercise of executorial functions as opposed to what the temporary administrator can lawfully do.

Matter of Gihon, 27 Misc. 626, aff'd 48 App. Div. 598. It is not necessary that an application for the revocation of letters of temporary administrators of decedents should be made. The very term temporary administrator suggests that the authority of such an officer is to be deemed extinguished by the issuance of letters testamentary or letters of administration in chief. *Matter of Eisner*, 5 Dem. 383, 387; *Matter of Lewis*, 17 Weekly Dig. 311. In *Matter of Choate, supra*, the court says: "Upon the issuance of letters testamentary, the temporary administrator theretofore appointed became *functus officio*." Upon an appeal from the decree awarding letters the Surrogate may award to the executors limited authority under § 2582 or, *it seems*, might still continue the temporary administration by special order. *Ibid.* But in the case of a temporary administrator of an absentee, that is, one appointed under subd. 2 of § 2670, Code Civ. Proc., it seems clear that his functions do not determine until proceedings initiated by petition under § 2685 shall have been had. The portion of such section referring to this subject-matter is as follows:

> In either of the following cases a creditor or person interested in the estate of the decedent, may present to the surrogate's court, from which letters were issued to an executor or administrator, a written petition, duly verified, praying for a decree revoking those letters; and that the executor or administrator may be cited to show cause why a decree should not be made accordingly.
>
> Subd. 8. In the case of a temporary administrator appointed upon the estate of an absentee where it is shown that the absentee has returned; or that he is living, and capable of returning and re-assuming the management of his affairs; or that an executor, or administrator in chief, has been appointed upon his estate; or that a committee of his property has been appointed by a competent court of the state. **§ 2685, Code Civil Proc.**

§ 537. **Accounting.**—When permanent letters issue or the letters of the temporary administrator are revoked pursuant to proceedings had under § 2685, subd. 8, quoted above, it is then his duty to account. The Surrogate's Court may compel a judicial settlement of the account of a temporary administrator *at any time*. § 2726, subd. 4, Code Civ. Proc. But the temporary administrator has no absolute right to demand a judicial settlement at any time; and the practice seems to be that his account will not be judicially passed upon and finally settled until final letters testamentary or of administration in chief are issued and the executor or administrator in chief is capable of being joined as a party to the accounting proceedings. *American Bible Society* v. *Oakley*, 4 Dem. 450, Rollins, Surr.

Section 2743 of the Code is not applicable. *Matter of Philp*, 29 Misc. 263. Therefore he is not called upon to make any distribution, but when his account is judicially settled he will be directed to pay the balance in his hands to the holder of permanent letters. *Ibid.* Or, if his letters were revoked by reason of the reappearance of the supposed decedent, he may be required to surrender the property to him. Where, under § 2675, he has been directed to take possession of the real property, the decree should contain appropriate direction as to that.

But, it seems, under *Matter of Goetz*, 120 App. Div. 10, that if he paid the rents and profits into court, they are not to be specified in his account. It was held to be discretionary with the Surrogate, under the particular circumstances, to determine whether: (*a*) they should be paid to the permanent representative, or (*b*) to the persons entitled to them, or (*c*) remain in court to abide the event of litigation pending in which conflicting claims thereto were being litigated.

Where the temporary administrator becomes the permanent representative, and, after accounting, merely turns over the balance to himself as executor or administrator, it is clear that the decree discharging him as temporary administrator has no conclusive effect on the *cestuis que trustent* under the will as to the fund against which, or out of which any particular payment is made. The executors receive the balance, and must adjust the various funds or interests. Thus, where a temporary administrator paid taxes upon real property, subjected by will to a trust, it was held to be the executor's duty to adjust it and charge it against the general estate rather than the trust estate, and if it were not so done the beneficiaries could come in on accounting regardless of the decree discharging the temporary administrator and have the charge readjusted. *Matter of Doheny*, 70 App. Div. 370, 375.

His right to commissions is the same as that of other representatives. In fact he will get full commissions, which a permanent administrator appointed before the discovery and probate of a will cannot receive. *Matter of Hurst*, 111 App. Div. 460. Where he has been empowered to continue the business of the supposed or actual decedent, this falls within those extra-official duties for which proper additional compensation can, in the Surrogate's discretion, be allowed upon the accounting. *Matter of Moriarity*, 27 Misc. 161, citing *Lent* v. *Howard*, 89 N. Y. 169; *Matter of Braunsdorf*, 13 Misc. 666; *Matter of McCord*, 2 App. Div. 324. See *Russell* v. *Hilton*, 37 Misc. 642.

§ 538. **The procedure upon appointment.**—As is intimated in § 7 above, an application for temporary administration can be made in two different forms. Under subd. 1 of § 2670, the appointment must be made by order, the application for which is of course upon motion, which as intimated in the Code must be noticed at least ten days prior to the return day, "unless the Surrogate is satisfied by proof that the safety of the estate requires the notice to be shortened," in which case it may be shortened to not less than two days. The following precedent is suggested for the notice:

Notice of motion for appointment of temporary administrator.

Surrogate's Court,
County of

(Here give title of the proceeding in which the delay in the granting of letters has occurred necessitating the application.)

Please take notice that on the annexed affidavit of verified the day of copy of which is hereto an-

nexed, and on all the proceedings heretofore had herein, I shall move before the Surrogate of this county at a special term of his court to be held at (*note*) in on the day of at o'clock in the noon of that day for an order appointing as temporary administrator of the goods, chattels and credits of the above named decedent and for such other and further relief in the premises as to the said Surrogate may seem just.

Note. In New York County name a regular motion day.

(Date.) Attorney for
Office and post-office addresses.

This motion should be addressed under section 2670, to each party to the proceeding who has appeared. (*Note.*) See *Matter of Ashmore*, 48 Misc. 312.

The affidavit upon which such motion is to be made, should contain all the jurisdictional facts, and the following precedent is suggested:

Affidavit on motion for appointment of temporary administrator.

Surrogate's Court,
County of
Same title as foregoing.
State of New York, County of } ss.:

being duly sworn deposes and says:

I. I am (*here state status of applicant in the pending proceedings and relationship to decedent*).

II. That the above entitled proceeding commenced on the day of being a proceeding for the (*say* for the probate of the will of deceased, *or* for the granting of letters of administration upon the goods, chattels and credits of deceased), and that and and are the only parties who have appeared in such proceeding.

III. That delay has necessarily occurred in the granting of letters (testamentary *or* of administration *as the case may be*) in consequence of (*say*, a contest arising on such application for the probate of said will *or* the application for letters of administration *or* in consequence of the absence from the state of an executor named in the will, *or for whatever cause is proper under section* 2670, *subdivision* 1).

IV. That the property of the above named decedent consists of (*here specify nature of property, whether real or personal, or both; if real state whether it is rentable and has any rental income necessitating the appointment of the administrator for its collection*).

V. Your petitioner has (caused to be) ascertained and estimated the value of the said property and verily believes the same to be as follows: Of the rentable property not to exceed dollars, the rental income of which does not exceed dollars, and of the personal property not to exceed dollars.

VI. That it is necessary, in order to the preservation of the estate of such decedent, that a temporary administrator thereof be appointed by the Surrogate, and deponent says that is a person competent to serve as such temporary administrator.

(Jurat.) (Signature.)

Upon the return day the Surrogate, upon inquiry into the facts, and upon being satisfied that it is necessary for the safety of the estate that a temporary administrator be appointed, may make the following order:

Surrogate's Court
Caption.

Title.

Orders for letters of temporary administration under subdivision 1 of section 2670.

A motion having been made in the above entitled proceeding on behalf of a party thereto, for an order appointing a temporary administrator of the goods, chattels and credits of the decedent above named, and ten days' notice of said motion having been duly given to all the parties who have appeared herein, and proof of the service of such notice of motion being duly filed (*or if the Surrogate has permitted shorter notice to be given under section* 2670 *state the fact*).

Now on reading and filing the affidavit of verified the day of 19 and on all the papers and proceedings heretofore had herein, and after hearing (*here specify parties who have appeared upon the return day in support of or opposition to the motion*), and the Surrogate being satisfied that a delay has necessarily occurred in the granting of letters (testamentary *or* of administration) herein, and that a temporary administrator ought to be appointed of the goods, chattels and credits of the decedent above named, and also that (and) is (*or* are) a person competent and qualified to serve.

Now on motion of attorney for said it is hereby

Ordered, that temporary administration on the goods, chattels and credits of said the above named decedent, be and the same hereby is granted to said and that letters of temporary administration upon the goods, chattels and credits of said decedent issue to the said A. B. upon executing and filing (*here specify amount and character of the bond required, which must be such a bond as is prescribed with respect to an administrator in chief, and its amount is determined by the amount of the estate fixed by the affidavits or proof upon the hearing*).

And it is further Ordered, (*here incorporate such direction as may be necessary in regard to taking possession of the premises belonging to the decedent, collecting the rents, issues and profits*

thereof, and any other acts permitted under section 2672 *of the Code*) until the further order of this court in the premises.

And it is further Ordered, (*here incorporate such directions as the Surrogate may require, designating a depositary of the funds coming into the hands of the temporary administrator*).

Surrogate.

Where the application is under subd. 2 of § 2670 it must be made by petition, and is a special proceeding of itself, not to be entitled in any other proceeding. See discussion, *supra*. The following petition is suggested as a precedent:

Petition for the appointment of a temporary administrator under subdivision 2 of section 2670, C. C. P.

Surrogate's Court,
County of

In the Matter of the Application of for Letters of Temporary Administration upon the estate of (*describe absentee as a lunatic, or otherwise, in the language of subdivision* 2).

To the Surrogate's Court of the County of

The petition of respectfully shows to the court and alleges:

I. That formerly of in the county of possessed of real and personal estate within said county, over the administration of which the Surrogate thereof would have jurisdiction if said were shown to be dead, has disappeared, or is missing, and his abode cannot be ascertained although diligent search has been made (*or* caused to be made) by your petitioner (*here state the circumstances which under the section afford reasonable ground to believe that he is dead, or that he has become a lunatic, or that he has been secreted, confined or otherwise unlawfully made away with. These facts should be stated fully and clearly*).

II. That the property of such absentee or lunatic, etc., consists of (*here state condition and amount of property substantially as in above affidavit, so as to show necessity for temporary administrator and including estimate of value of same*).

III. That the names, residences and ages of all persons interested in the estate of such absentee, as next of kin (widow *or otherwise*), as nearly as they can be ascertained by your petitioner are as follows:

IV. That your petitioner is (here state either a creditor or a "person interested," stating kinship, residence, etc., of the applicant).

V. Wherefore, your petitioner prays that temporary administration on the goods, chattels and credits of the above named absentee, may be granted, and that a person competent and qualified to serve may be appointed

temporary administrator thereof, and letters of temporary administration may be issued to him according to law, and that and and may be cited to show cause why letters of administration should not be issued to him as herein prayed.

(Date.) (Signature.)

(Verification.)

Upon the return day fixed by the citation issued upon this petition, the Surrogate must take proof of the facts as to the disappearance or presumptive death of the absentee, and as to the qualification and competency of the persons to whom letters are prayed to be issued. If he is satisfied that letters should issue he may make an order substantially as above indicated, except that it should begin:

On reading and filing the petition of dated the day of to the Surrogate of the county of for the appointment of a temporary administrator of the goods, chattels and credits of the above named absentee, together with proof of due service of the citation issued upon such petition upon all the parties therein cited (here add appearances, or say, if such is the case, none of such parties having appeared upon the return day, and then proceed as in the foregoing order).

§ 539. **Serving notices.**—The Code contains special provision for giving the notices called for by art. V, title 3, on temporary administration, as follows:

Notices required by this article; how given.

A notice required to be given, as prescribed in this article, to a party other than the temporary administrator, must be served upon the attorney of the party to whom notice is to be given; or, if he has not appeared by an attorney, upon the party, in like manner as a notice may be served upon an attorney in a civil action, brought in the supreme court. But where the attorney or party to be served does not reside in the surrogate's county; or where the attorney for a party has died, and no other appearance for that party has been filed in the surrogate's office; the surrogate may, by order, dispense with notice to that party; or may require notice to be given to him, in any manner which he thinks proper. **§ 2681, Code Civil Proc.**

CHAPTER IV

LETTERS OF ADMINISTRATION

§ 540. **What is an intestate.**—An intestate is a person who dies without leaving any valid will disposing of his real or personal property. Section 2514, subd. 1 reads: "The word 'intestate' signifies a person who died without leaving a valid will; but where it is used with respect to particular property, it signifies a person who died without effectually disposing of that property by will, whether he left a will or not." See *Matter of Cameron*, 47 App. Div. 120, 123. So in *Matter of Maccaffil*, 57 Misc. 264, the distinction is clearly made being intestacy of the person, and intestacy as to particular property. A person may leave a valid will, but die intestate as to specific property. A person may die intestate,

(*a*) Who has never made any will.

(*b*) Who has made a will but revoked it validly prior to his death.

(*c*) Who has made a will defectively executed so as not to be entitled to probate under the statute.

So a man may leave a will valid to pass personal but not real property. He will then be intestate as to the one class of property. But where the Code refers generally to an intestate it means a case of total intestacy. Thus § 2733 provides for reckoning in advancements to the child of "intestate" as part of his estate. Held, inapplicable to case where decedent left a will, admitted to probate, but subsequently adjudged invalid in its disposition of the remainder. *Messman* v. *Egenberger*, 46 App. Div. 46, 50, citing *Thompson* v. *Carmichael*, 3 Sandf. Ch. 120; *Kent* v. *Hopkins*, 86 Hun, 611.

The administration of the estates of intestates is conducted according to the statute of distributions by means of an officer appointed by a Surrogate, selected by him by virtue of § 2660 of the Code to whom letters of administration are issued, which are the source of authority of administrators as distinguished from the will, which is the source of authority of executors. But, where executors find in their hands an unbequeathed residuum, it is not necessary to have an administrator appointed to distribute. The executor may distribute under the statute. See *post*, under Accounting and Distribution. Where a wife makes an antenuptial agreement that if her husband survive he shall have absolute title to all her personal estate "left by her," he takes the residuum left after due administration. He cannot reduce it to immediate possession directly as against the executor of her will. *Foehner* v. *Huber*, 42 App. Div. 439, and cases discussed.

§ 541. **Prerequisites to jurisdiction.**—The foundation of the Surro-

gate's authority apart from the questions of residence and of *locus* of property is first, the death of the intestate, second, the intestacy.

The Surrogate must be satisfied as to the death of the person upon whose estate administration is applied for. A mere allegation that the alleged decedent is dead to the best of petitioner's knowledge, information and belief is insufficient. *Roderigas* v. *E. R. Sav. Inst.*, 76 N. Y. 316. Actual physical death is contemplated and not civil death. So where a man was indicted, tried and convicted of the crime of murder in the second degree and sentenced to state prison for life, and his only brother applied for letters of administration, it was held that the provisions of the Code of Civil Procedure from which Surrogates derive their authority to grant letters of administration, have no application to a case of civil death, but apply only to cases of actual death. *Matter of Zeph*, 50 Hun, 523. See *Avery* v. *Everett*, 110 N. Y. 317, opinion of Andrews, J., discussing the meaning and effect of civil death.

§ 542. **Presumption of death.**—The common-law rule was that the continuance of life should be presumed until the contrary was shown. But the present rule which has been commonly acted upon by Surrogates, and is now generally accepted, is, that when a party has been absent seven years since any intelligence of him has been received, he is in contemplation of law presumed to be dead. *Eagle* v. *Emmet*, 4 Bradf. 117, followed in *Seligman* v. *Sonneborn*, 11 St. R. 305; *Matter of Sullivan*, 51 Hun, 379; *Matter of Davenport*, 37 Misc. 455; *Matter of Losee*, 119 App. Div. 107. And the same rule is applied where the one so disappearing was one of those entitled priorily to letters. *Matter of Barr*, 38 Misc. 355. This length of time may be abridged and the presumption be applied earlier by proof of special circumstances tending to show the death within a shorter period; for example, that at the last accounts, the person was dangerously ill, or in a weak state of health, or suffering from chronic incurable disease, or was exposed to great perils of disease or accident, or that he embarked on board of a vessel which had not since been heard from though the length of the usual voyage has long since elapsed. *Eagle* v. *Emmet*, *supra*. See English cases cited at page 120.

The Surrogate may refer the question as to whether the alleged decedent is dead. The reference is to take the proofs and report. *Matter of Sanford*, 100 App. Div. 479.

Section 841 of the Code prescribes that a person upon whose life an estate in real property depends, who remains without the United States, or absents himself in the State or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time. It has been held that the proof of absence for seven or more years must not necessarily be direct and positive, but that such absence may be fairly inferred from facts which clearly point to that conclusion. *Cromwell* v. *Phillips*, 6 Dem. 60, 69. So, where it appeared by affidavit that the alleged decedent had been an educated man,

industrious and sober, until he lost his wife, when he became dissipated, and finally underwent an attack of delirium tremens the night before he went away, and that while suffering greatly from his debauch and that attack, he left his home expressing his intention of committing suicide, going towards a certain dock, and was never again seen or heard from by any of his friends, held, that from such silent absence during ten years it was proper that a presumption of death should be raised. *Matter of Nolting*, 43 Hun, 456; *Sheldon* v. *Ferris*, 45 Barb. 124; *King* v. *Paddock*, 18 Johns. 141. See, also, *Matter of Losee*, 46 Misc. 363. Mere absence will not raise a presumption of death where there are no circumstances which would make it probable that the absentee would communicate with his home, or where it appears that he was illiterate. *Matter of Miller*, 30 N. Y. St. Rep. 212; *McCartee* v. *Camel*, 1 Barb. Ch. 455. So where a person immigrated from a foreign country without intending to return, no presumption of death arises until proper inquiry has been made at his last known place of residence in this country. *Matter of White*, 31 Misc. 484. So, where A emigrated in 1852 to New Zealand and was never heard from after 1855; never communicated with his family, and in 1886 became, if living, entitled to a share in the estate of a rich testator as the child of a deceased cousin, and, on an application to distribute his share on the ground of his death, it appeared no effort had been made to find or trace him in New Zealand, where he was last heard of, it was held proper to refuse to distribute, as there were not sufficient facts on which to base a presumption of his death or of his death without issue. *Dunn* v. *Travis*, 56 App. Div. 317; *Vought* v. *Williams*, 120 N. Y. 253; *Dworsky* v. *Arndtstein*, 29 App. Div. 274. See also *Morrow* v. *McMahon*, 35 Misc. 348, and discussion in *Czech* v. *Bean*, 35 Misc. 729. It has been held that hearsay evidence is admissible as to the *fact* of a person's death. *Matter of Stewart's Will*, 3 N. Y. Supp. 284, Ransom, Surr., citing *Fosgate* v. *Hydraulic Co.*, 12 Barb. 352; *Jackson* v. *Bonham*, 15 Johns. 226. See *People* v. *Etz*, 5 Cowen, 314; *Clark* v. *Owens*, 18 N. Y. 434. But this rule has been limited by holding that it is to be admitted to rebut the presumption of life only after a considerable lapse of time. *Stouvenel* v. *Stephens*, 2 Daly, 319. But hearsay evidence is inadmissible to prove the *place* of a person's death. *McCarty* v. *Terry*, 7 Lansing, 236. In *Matter of Stewart*, above cited, where the decedent had gone in his yacht upon a voyage to be of about twenty days, to a specified destination, and the vessel was spoken on a certain day at a given point, over which shortly thereafter a storm of great intensity raged, and the vessel never reached its destination, nor was any news ever heard afterwards by the friends of the decedent, although they exhausted apparently every source of information, Surrogate Ransom held there was sufficient evidence of the death to warrant proceedings in the Surrogate's Court with a view to the administration of his estate under his will, using the following language:

"It is well settled that it is not necessary that any specific period should elapse to create the presumption of death, but that it may arise whenever

the facts of the case will warrant it. *Stouvenel* v. *Stephens*, 2 Daly, 319. And if the party whose death is in question went to sea, and nothing has been heard of the vessel in which he sailed, or of those who accompanied him, the presumption, after a sufficient length of time has elapsed, will be that the vessel was lost, and that all on board perished. *Merritt* v. *Thompson*, 1 Hilt. 550, and cases cited. In the following cases such facts existed. *Matter of Ketcham's Estate*, 5 N. Y. Supp. 566; *Matter of Ackerman*, 2 Redf. 521; *Sheldon* v. *Ferris*, 45 Barb. 124; *Oppenheim* v. *Wolf*, 3 Sandf. Ch. 571; *Gerry* v. *Post*, 13 How. Pr. 118; *Merritt* v. *Thompson*, 1 Hilt. 550; *King* v. *Paddock*, 18 Johns. 141; *McCartee* v. *Camel*, 1 Barb. Ch. 455. Where, when last heard from, one was in contact with some specific peril, this circumstance may raise a presumption of death, without regard to the duration of the absence. *Lancaster* v. *Insurance Co.*, 62 Mo. 121; *White* v. *Mann*, 26 Me. 361. In *Merritt* v. *Thompson, supra*, it was held that the presumption of death does not rest upon the fact that the party had not been heard from for 17 months, but on the weightier circumstance that the vessel had not been heard from. In *Gerry* v. *Post*, 13 How. Pr. 118, it was held that, if a vessel had been absent double the longest time of a voyage, she may be presumed to be lost; and it follows, as a consequence, that all perished with her, if none of the passengers or crew are afterwards heard of.

"On March 11, 1841, one Leo Wolf departed from New York in the steamship President. Nothing was heard of the vessel or of her passengers. The usual time to cross the Atlantic was 14 or 15 days, and the longest passages did not exceed 23 or 24 days. It was held that the steamer was lost before May, 1841, and that Leo Wolf's death occurred before that time. *Oppenheim* v. *Wolf*, 3 Sandf. Ch. 623. I am convinced by the evidence that Mr. Stewart is dead, and that his death occurred between the 10th day of March, 1888, and the 17th day of September, 1888, the date of the petition herein." See also *Karstens* v. *Karstens*, 20 Misc. 247, at page 250, Russell, J. The presumption is strengthened in cases of a person who has attempted or threatened suicide. *Matter of Nolting*, 43 Hun, 456; *Sheldon* v. *Ferris*, 45 Barb. 124; *McComb* v. *Wright*, 5 Johns. Ch. 263; *Matter of Ketcham*, 5 N. Y. Supp. 566; *Matter of Allen*, 24 N. Y. St. Rep. 251. Cases have arisen where there has been a conflict of two presumptions, for example, a woman who had previously been married and whose husband disappeared in the year 1875, having previously been tried and convicted upon a criminal charge and confined in state's prison until September, 1878, at which time he came to the city of New York and was arrested for the crime of burglary, and, after giving bail, disappeared, and there was no legal or satisfactory evidence that at any time, or in any place, he had since been seen by any human being, and five years later the woman married again: Surrogate Rollins held, upon an application by the woman for letters of administration on the estate of her second husband which was opposed by his sons on the ground of her being still the lawful wife of the man to whom she was first married, that the presumption of continuance in life of her first husband must yield to the presumption of her innocence

of the crime of bigamy. *Nesbit* v. *Nesbit*, 3 Dem. 329, 332. The learned Surrogate held as follows:

"This presumption in favor of seven years' continuance of life has been repeatedly held, however, to be inferior in force to the presumption of innocence, where the two have come in conflict; and the doctrine is now firmly established, that one who enters into a second marriage, the validity of which is attacked upon the grounds urged by the respondents in the present intention, must be presumed legally competent to contract such marriage until positive proof has been furnished that his or her former wife or husband was living at the time of such second marriage. *Dixon* v. *People*, 18 Mich. 84; *Klein* v. *Laudman*, 29 Mo. 259; *Sharp* v. *Johnson*, 22 Ark. 79; *Greenboro* v. *Underhill*, 12 Vt. 604; *Hull* v. *Rawls*, 27 Miss. 471; *Cochrane* v. *Libby*, 18 Maine, 39; *Spears* v. *Burton*, 31 Misc. 547; *Gibson* v. *State*, 38 *id.* 313; *Yates* v. *Houston*, 3 Tex. 433; *Lockhart* v. *White*, 18 *id.* 102; *Canady* v. *George*, 6 Rich. Eq. S. C., 103; *Loring* v. *Steineman*, 1 Metc. 204; *Kelly* v. *Drew*, 12 Allen, 107; *Blanchard* v. *Lambert*, 43 Iowa, 228; *Matter of Edwards*, 58 *id.* 431; *Senser* v. *Bower*, 1 Penrose & Watts (Pa.), 450.

"The doctrine of the cases just cited seems to be approved in *Clayton* v. *Wardell*, 4 N. Y. 230; and in *O'Gara* v. *Eisenlohr*, 38 N. Y. 296, it is recognized by Mason, J., pronouncing the opinion of the Court of Appeals, though he proceeds to show why the presumption of innocence should not, upon the facts of the case, be allowed to prevail.

"Upon the foregoing authorities, I feel bound to hold (in the absence of evidence establishing that, at any time between the winter of 1878 and January, 1883, Oscar Decker was living) that, when John Nesbit died, this petitioner was his lawful wife. Even if I make a far less rigid application than the authorities above cited seem to require of the presumption of innocence, as conflicting with the presumption of life, I can come to no other conclusion than that which has just been declared." Where a court is led to indulge the presumption of death from a seven years' absence, the date of death cannot of course be fixed. But as, in such cases, death would not be presumed until the time fully elapsed, so the end of the period may be taken as the date of death merely to determine who are the survivors and entitled to the estate. *Matter of Davenport*, 37 Misc. 455. In this case a brother surviving after the seven-year period was held entitled to the exclusion of heirs of a sister dying before it elapsed. It is customary where it is impossible to fix a date to assume the time of death as of the date of the decree. *Matter of Losee*, 46 Misc. 363. But in order to adjust distributive interests the decree should, if the facts warrant it, fix the date at some preceding time or within some preceding period. *Allen* v. *Ketcham*, 5 N. Y. Supp. 566.

§ 543. **Proof of intestacy.**—Ordinarily, however, the fact of death is proved as any other fact, without resorting to presumption, and the second essential prerequisite to letters of administration, to wit, the fact of intestacy, remains to be proved. This is ordinarily shown by evidence that no will can be found although proper search has been made therefor among

the papers of the decedent. This fact must be proved *to the satisfaction of the Surrogate,* who may summon witnesses before him, such as persons having the custody of the decedent's papers, and cause them to be examined in regard to the nature and extent of the search made. *Bulkley* v. *Redmond,* 2 Bradf. 281, 285. If it appear that there has been a will, although it may be claimed that the said will was revoked, or for any reason invalid, the Surrogate will not grant letters of administration in chief pending the necessary proceedings to determine whether or not the instrument in question is in fact the decedent's last will and testament. *Matter of Taggart's Estate,* 16 N. Y. Supp. 514; *Bulkley* v. *Redmond, supra.* When letters have once been granted it will be presumed that the fact of death and intestacy was properly proved before the Surrogate, particularly where there are recitals of the jurisdictional facts in the letters of administration. *Johnson* v. *Smith,* 25 Hun, 171, citing *Westcott* v. *Cady,* 5 Johns. Ch. 334, 343; *Bolton* v. *Brewster,* 32 Barb. 389, 394; *Van Deusen* v. *Sweet,* 51 N. Y. 385; *Porter* v. *Purdy,* 29 N. Y. 106; *Dayton* v. *Johnson,* 69 N. Y. 419, 426. And the letters of administration issued by a Surrogate cannot be questioned collaterally when regular on their face. *Farley* v. *McConnell,* 7 Lansing, 428; *Monell* v. *Denison,* 17 How. Pr. 422; *Kelly* v. *West,* 80 N. Y. 139; *Leonard* v. *Columbia Steam Co.,* 84 N. Y. 48. But the letters may be attacked directly upon jurisdictional grounds in proceedings to revoke or set them aside. *Kelly* v. *West, supra; Matter of Patterson,* 146 N. Y. 327. (See *ante,* Decrees and Orders.)

§ 544. **Existence of property and jurisdiction of Surrogate.**—The application is of course to be made to a Surrogate having jurisdiction. As against other Surrogates of the State the jurisdiction may be conditioned by decedent's residence. *Matter of Hyland,* 24 Misc. 357. There is no occasion for the exercise of jurisdiction of the Surrogate to grant letters of administration if there is no property to be administered. But a right of action arising out of death of intestate is an asset on which an administrator may be appointed, and may sue under §§ 1902–1904 of the Code. (See § 546 below.) This fact of existence of personal property within the county over which the Surrogate has jurisdiction ought to be alleged in the petition. See § 2662 discussed below. If, however, it is not so stated, but the fact is made to appear to the satisfaction of the Surrogate before he passes upon the petition for letters, the statutory requirement as to this jurisdictional fact will be met. The recital in the letters of the existence of such assets is *prima facie* evidence of their existence. *O'Connor* v. *Huggins,* 113 N. Y. 511, 516. The decision in *Hart* v. *Coltrain,* 19 Wend. 378, turned upon the peculiarly limited statute in force at that time giving the judge of probates power to grant letters of administration upon the estate of a non-resident, which was distinctly held not to depend upon the question whether the decedent left assets within the State. The jurisdiction of a Surrogate to grant letters of administration is defined by the subdivisions of § 2476 which provide that the Surrogate's Court of any county has jurisdiction exclusive of every other Surrogate's Court to grant letters of administration in any one of the following cases:

1. Where the decedent was, at the time of his death, *a resident of that county*, whether his death happened there or elsewhere.

2. Where the decedent, not being a resident of the State died within that county, leaving personal property within the State, or leaving personal property which has since his death come into the State, *and remains unadministered.*

3. Where the decedent, not being a resident of the State died without the State, *leaving personal property within that county, and no other;* or leaving personal property which has, since his death, *come into that county, and no other*, and *remains unadministered.*

4. Where the decedent was not, at the time of his death, a resident of that State, and a petition for probate of his will, or for a grant of letters of administration, under subdivision second or third of this section, has not been filed in any Surrogate's Court; but *real property of the decedent*, to which the will relates, or which is subject to disposition under title fifth of this chapter, *is situated within the county, and no other.*

§ 545. **The property basis of jurisdiction.**—It may be well, however, to reiterate at this point what assets will justify the Surrogate in assuming jurisdiction to grant letters of administration. It will be noted, under the provision of § 2476 above quoted, that personal property is the usual basis of administration, except in the case covered by subd. 4 where the decedent was a nonresident of the State and no petition for administration or probate has been filed in any Surrogate's Court; but the real property of the decedent which is subject to disposition under title 5 of ch. 18 (that is to say, disposition for the payment of debts and funeral expenses), is situated within the Surrogate's county *and no other.* With this exception any personal property will suffice to give the Surrogate jurisdiction; even property exempt from execution. *Matter of Clark*, 40 N. Y. St. Rep. 12. So where the asset which is asserted to be the basis of jurisdiction is a claim against an insurance company upon its policy upon the life of the decedent payable in the county of the Surrogate to the decedent's "executors, administrators, or assigns," a Surrogate may assert jurisdiction regardless of whether the policy is itself in the State or not. *Matter of Miller*, 5 Dem. 382, Rollins, Surr. In this case the Surrogate held that such a policy of insurance was not a debt "evidenced by a bond, promissory note, or other instrument for the payment of money only, in terms negotiable or in terms payable to bearer or holder," which class of debt is by § 2478 regarded for the purpose of conferring jurisdiction as personal property at the place where the bond, note or other instrument *is*. Of course the situs of the property regulates jurisdiction as to the administration of the estate. *Isham* v. *Gibbons*, 1 Bradf. 69, 71. Under subd. 2, quoted above, the property brought into the State must be such as "remains unadministered." A foreign administrator cannot, by bringing property *in his control* into this State, give our court jurisdiction. *Matter of McCabe*, 84 App. Div. 145.

§ 546. **Chose in action a basis; negligent killing of decedent.**—Section § 2664, dealing with the bond to be given by an administrator, takes

into account as affecting its amount "the probable amount to be recovered by reason of any right of action, granted to an . . . . administrator, by *special provision of law.*"

Section 1902 is such special provision. It reads:

> "The executor or administrator of a decedent, who has left him surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death."

It frequently happens that this right of action is the only asset making it worth while to take out letters. The "probable amount to be recovered" is a warrant for jurisdiction. The letters applied for are called limited letters because of the restrictions on the powers of the administrator if he wins the suit. They are discussed below under Limited Letters. But, *it seems*, that if the death occurs outside the State the cause of action, *being statutory*, is dependent upon *lex loci mortis*. *Gurofsky* v. *Lehigh Valley R. R. Co.*, 121 App. Div. 126. If the law of that State gives no right of action to an administrator, then it is manifest that, barring other assets, there is nothing on which to base administration here. See opinions in *McDonald* v. *Mallory*, 77 N. Y. 556; *Wooden* v. *W. N. Y. & P. R. R.*, 126 N. Y. 10; *Meekin* v. *B. H. &c. R. R.*, 164 N. Y. 145.

§ 547. **Lost, destroyed or revoked will.**—Full discussion has been elsewhere had as to what constitutes proper proof of the loss, destruction, or revocation of a will. Where a party, however, petitions for letters of administration on the ground that the decedent left no last will or testament, and this fact is put in issue, the Surrogate must determine the fact of intestacy judicially. The burden of proof that there was a will rests upon those opposing the grant of letters. *Matter of Demmert*, 5 Redf. 299. So, where there was an application for letters of administration the petition in which alleged that the decedent died without leaving a last will and testament, and it appeared that he had in fact left a will which had previously, however, been denied probate by the Surrogate on the ground that its execution was obtained through undue influence, Surrogate Livingston held that if parties opposing the application for letters alleged that another will had been executed by the decedent which had been destroyed, they must prove that fact, *in the pending proceeding*, and while of course it was possible that the will might have been destroyed under circumstances not amounting to revocation, that fact must be affirmatively established and that in the absence of such proof the letters must issue. Surrogate Bradford held in *Isham* v. *Gibbons*, 1 Bradf. 69, 71, the only mode of showing that decedent left a will is either by the production or original proof of a will before the Surrogate, or by evidence that a will has been duly proved before some other court of competent jurisdiction. In the latter event proof of probate

may be directly opposed against the application for administration. But if an unproved will is produced or shown to exist it is proper to stay the application for letters of administration pending the proceedings to prove the will before issuing letters of administration in chief. No prejudice to the persons interested in the estate can be wrought thereby, because of provisions already discussed under which temporary administration can be had.

§ 548. **Settlement without administration.**—The object of administration being to distribute the estate among those entitled thereto after payment of debts, it follows that, where there are no creditors, the heirs or next of kin may by private agreement settle the estate without taking out letters of administration. *Herrington* v. *Lowman*, 22 App. Div. 266, citing *Hyde* v. *Stone*, 7 Wend. 354, 357; *Wormuth* v. *Hale*, 17 Weekly Dig. 180; *Matter of Losee*, 119 App. Div. 107, citing Schouler on Executors, 3d ed., § 120; going further yet by saying that, if no reason for administration is shown, letters should be withheld. These family arrangements by which estates have been settled and divided, and property transferred by the next of kin without obtaining letters of administration, where the rights of creditors were not concerned, have been sustained (*Herrington* v. *Lowman*, *supra*), for the reason that, in the absence of creditors, an administrator would be a mere trustee for the next of kin, whose sole duty would be to collect, convert and distribute the estate among the beneficiaries according to their respective interests. Where the whole trust estate is legally and justly distributed and the purpose of the law thus accomplished there is no need of an administrator. *Ledyard* v. *Bull*, 119 N. Y. 62, 72. So, also, adult heirs or next of kin may make a valid and enforceable settlement of the estate pursuant to terms of a paper of decedent's not provable as a will. *Williams* v. *Whittell*, 69 App. Div. 340. And the validity of the will cannot affect such voluntary agreement, or its enforcement. *Chauvet* v. *Ives*, 173 N. Y. 192, 198, aff'g 62 App. Div. 339. These settlements are subject to attack only by creditors or persons interested whose rights were ignored. *Ibid.* So a judgment creditor may sue to impress a lien upon a trust fund erected by such voluntary settlement. *City of N. Y.* v. *U. S. Trust Co.*, 78 App. Div. 366. So held even when he failed to present claim pursuant to published notice. *Ibid.* If there are infants, a settlement under which they receive what they would be entitled to receive had there been an administrator, will be sustained. Where, however, all the parties beneficially interested in the estate are of full age, any voluntary settlement and distribution among them which they may agree to, whether in accordance with the statute of distributions or not, in the absence of deceit or fraud, will be sustained. *Ledyard* v. *Bull*, *supra*.

§ 549. **Who entitled to letters of administration.**—The Code provides an explicit order of priority among those entitled to administer the estate of an intestate decedent as follows:

> Administration in case of intestacy must be granted to the relatives of the deceased entitled to succeed to his personal property, who will accept the same, in the following order:

1. To the surviving husband or wife.
2. To the children.
3. To the father.
4. To the mother.
5. To the brothers.
6. To the sisters.
7. To the grandchildren.
8. To any other next of kin entitled to share in the distribution of the estate. [See chap. 410, L. 1901, quoted under Distribution, *post.*]
9. To an executor or administrator of a sole legatee named in a will, whereby the whole estate is devised to such deceased sole legatee.

If a person entitled is a minor, administration must be granted to his guardian, if competent, in preference to creditors or other persons. If no relative, or guardian of a minor relative, will accept the same, the letters must be granted to the creditors of the deceased; the creditor first applying, if otherwise competent, to be entitled to preference. If no creditor applies, the letters must be granted to any other person or persons legally competent. (See *Matter of Haug*, 29 Misc. 36, making this applicable to § 2643, C. C. P.) Letters of administration shall also be granted to an executor or administrator of a deceased person named as sole legatee in a will. The public administrator in the city of New York has preference after the next of kin and after an executor or administrator of a sole legatee named in a will whereby the whole estate is devised to such deceased sole legatee over creditors and all other persons. In other counties, the county treasurer shall have preference next after creditors over all other persons. If several persons of the same degree of kindred to the intestate are entitled to administration, they must be preferred in the following order: First, men to women; second, relatives of the whole blood to those of the half blood; third, unmarried women to married. If there are several persons equally entitled to administration, the surrogate may grant letters to one or more such persons, and administration may be granted to one or more competent persons, although not entitled to the same, with the consent of the person entitled to be joined with such person or persons; which consent must be in writing and filed in the office of the surrogate. If, in an action, brought or about to be brought, the intestate, if living, would be a proper party thereto, any party to such action, interested in the subject thereof, may apply to the surrogate's court for the granting of letters of administration to himself, or some other qualified person, and upon the jurisdictional facts being satisfactorily shown, and no relative, or guardian of a minor relative, and no creditor, county treasurer or public administrator consenting to such administration, some legally competent person must be appointed administrator. **§ 2660, Code Civil Proc.**

The following provisions have been taken out and re-enacted as § 103 of Decedent Estate Law, and are quoted here to avoid confusion by their simple excision without comment. "If a surviving husband does not take out letters of administration on the estate of his deceased wife, he is presumed to have assets in his hands sufficient to satisfy her debts, and is liable therefor. A husband is liable as administrator for the debts of his wife only to the extent of the assets received by him. If he dies leaving any assets of his wife, unadministered, except as otherwise provided by law, they pass to

his executors or administrators as part of his personal property, but are liable for her debts in preference to the creditors of the husband."

The amendment by ch. 184, Laws of 1909, of § 2662 permitting one, having a claim for the funeral expenses of the decedent, to petition for administration, must here be noted. See § 559, *post.*

§ 550. **Statutory priority must control.** Since the statute fixes the order of priority, the Surrogate must grant letters to the applicant establishing his priority to the satisfaction of the Surrogate, unless any of the disabilities pointed out later on are shown to exist.

If several claimants clearly belong to different classes specified in the subdivisions of § 2660, the Surrogate's task is a simple one. He merely adjudicates that the petitioner being in such and such a class has priority over the others. But it is the duty of the Surrogate to actually find that the applicant does belong to the class alleged. For example:

WIFE

Where the petitioner claims to be the widow of decedent, the Surrogate may, if the issue be raised, take proof of her actual marriage to the decedent. *Matter of Gerlach,* 29 Misc. 90. But, it has been held that the fact that the marriage of the widow of intestate is voidable is no answer to her application for letters unless the marriage has been actually declared void by a court of competent jurisdiction. *White* v. *Lowe,* 1 Redf. 376, and cases cited. The rule is stated to be, where the contract of marriage is void absolutely, the surviving husband or wife is not entitled to administer, but where it is merely voidable and sentence of nullity has not been declared, the right to administer remains. 1 Williams on Executors, 358.

Where, however, it appears that the wife has been divorced, she is not entitled to administration, *Estate of Ensign,* 103 N. Y. 284, except where the divorce is one which is not valid under the laws of this State, in which case the wife so actually divorced is entitled to letters in preference to one who subsequently to such divorce married the decedent. *Matter of House,* 20 Civ. Proc. Rep. 131. But if the wife secures a divorce she may not subsequently assert its invalidity in order to get letters. *Matter of Swales,* 60 App. Div. 599.

See *Matter of Ward,* 50 Misc. 483, where petitioner married decedent, having a former husband living. Also *Matter of McGarren,* 112 App. Div. 503, where petitioner's marriage to decedent had been annulled by Supreme Court.

Also *Matter of Wells,* 123 App. Div. 79. In this case A, in good faith, marries B, who had a wife, C, living; C died, unknown to A and B, who continue to cohabit and hold themselves out as husband and wife. Common-law marriages are valid in State of their domicile. At B's death A is given letters *as his widow.*

And see for complete discussion of law, opinion by Beckett, Surr., in *Matter of Garner,* 59 Misc. 116.

HUSBAND

The right of a husband in administration stands on a peculiar basis. At common law the husband was entitled to administer upon the estate of his deceased wife and to retain and own all assets left after the payment of her debts. *Robins* v. *McClure*, 100 N. Y. 328, 333. See also *Ransom* v. *Nichols*, 22 N. Y. 110. The development of the legislation on this subject is summarized in *Matter of Thomas*, 33 Misc. 729, where Thomas, Surr., construing the effect of § 2660, citing *Matter of Bolton*, 159 N. Y. 129, 133; *Robins* v. *McClure, supra; Matter of Nones*, 27 Misc. 165; *Matter of McLeod*, 32 Misc. 229, states after discussing the provision of the statute, 1 R. S. m. p. 75, §§ 29–30, 2 R. S. m. p. 98, § 79, and Laws of 1867, ch. 782, § 11, "it will be observed that no change in the common-law rule in case where a wife leaves no descendants her surviving is attempted and the opinion of the court in *Robins* v. *McClure*, is largely devoted to showing that the common-law rule in such cases remained, notwithstanding the amendment, in full vigor." And he points out that where married women leave descendants, their estates must be administered by administrators appointed as such. The present statutes covering the subject were §§ 2734 and 2660 of the Code. Section 2734 is now § 100, Decedent Estate Law, and is quoted, *post*, under "Distribution." Section 2660, so much as relates to this, is now § 103 of Decedent Estate Law and is quoted at the end of § 549 above.

This section provides that, if a surviving husband does not take out letters of administration on the estate of his deceased wife, he is presumed to have assets in his hands sufficient to satisfy her debts and is liable therefor. If he takes out letters he is liable as such administrator for her debts only to the extent of the assets received by him.

The section further provides that if he dies leaving any assets of his wife's unadministered, excepting as otherwise provided by law, they pass to his executors or administrators as part of *his* personal property, but are liable for her debts in preference to the creditors of the husband. This provision dealing with the unadministered estate of the wife, contemplates both the cases where he does and does not take out letters, for it provides that her estate passes to his representatives as part of *his* personal property to be administered by them, subject to the payment of *her* debts. Therefore, it has been held that where a wife leaving no issue, dies intestate, survived by a husband and a brother, and the husband subsequently dies without administering the estate, letters issued to the brother without notice to the husband's personal representatives were void and would be vacated upon their application. *Matter of Thomas, supra.* It will be noted that the personal representatives of the husband in such a case are not required to take out letters of administration on the wife's estate, but they have the right to reduce her estate to their possession as part of *his* personal property.

CHILDREN

Where one petitions as the child of the decedent, it is a material inquiry whether the petitioner properly falls within that class. *Ferrie* v. *Public Administrator*, 3 Bradf. 151, 169. Thus an illegitimate child of a woman subsequently married to a man not its father is not legitimatized by such marriage, and is not one of that man's "children" nor entitled to administer under § 2660. *Matter of Pfarr*, 38 Misc. 223. Legitimacy will be presumed in the absence of proof to the contrary, but if illegitimacy be proved it affects the right to administer. See *Matter of Losee*, 119 App. Div. 107. The statute entitling the illegitimate to share in the estate of the mother has been held not to affect the right of administration, which in default of lawful kin belongs to the successive classes indicated in § 2660. *Ferrie* v. *Public Administrator*, *supra*. Surrogate Bradford held (*Public Administrator* v. *Hughes*, 1 Bradf. 125), that where the intestate was an illegitimate child, domiciled in England where she died unmarried, leaving assets in New York City, she could have no legal kindred except lineal descendants, for having no legal ancestors she could have no collateral relatives, and that consequently a son of her mother was not entitled to administration; and he accordingly granted letters to the public administrator.

On appeal in the *Pfarr* case, 79 App. Div. 634, the Appellate Court ordered a reference to take further proof on the question of legitimacy.

FATHER

It is hardly necessary to discuss all the headings of subdivisions of § 2660, but it must be borne in mind in connection with them all that the relationship to the intestate giving priority must be the relationship at the time of his death. For example, in *Matter of Seymour*, 33 Misc. 271, the intestate at his death left a widow and infant child and also a father, mother, brother and sister. The widow and child died subsequently, the child first. Now it is clear at the death of the intestate the widow had the priority of right to administration and on the death of the child was entitled to the personal property of the decedent. The father, upon her death, petitioned for letters on the estate of the intestate son, and his application was denied.

MOTHER

One distinctive feature must be noted here, although the provision appears in § 2732, under "Order of Distribution" and now known as § 98 of Decedent Estate Law. It is in subd. 9, and ought to be part of § 2660.

"If the deceased was illegitimate and leaves a mother [and no child, or descendants, or widow], such mother . . . . shall be entitled to letters of administration in exclusion of all other persons."

OF NEXT OF KIN ENTITLED TO SHARE IN THE DISTRIBUTION OF THE ESTATE

This subdivision eight has given rise to considerable controversy. Originally the Revised Statutes provided that administration should be granted

to any other next of kin who *would be* entitled to share in the distribution of the estate, and in *Lathrop* v. *Smith*, 24 N. Y. 417, the father of an intestate renounced and letters were issued to a creditor without citing the brother and the issuance of letters was refused for the reason that on the renunciation of the father, the brother was next entitled to letters because he would have been entitled to share in the estate upon the death of the father. The court says: "The true construction of the statute would therefore seem to be that all persons who *might be* entitled to participate in the distribution of the estate being the relatives or those representing the relatives of the decedent have the first right to administration in the order named in the statute." Section 2660 now reads, however, administration in case of intestacy "must be given to the relatives of the decedent *entitled to succeed* to his personal property" and, in subd. 8, "to any other next of kin *entitled to share* in the distribution of the estate." It is claimed that this amendment changes the rule adopted in the *Lathrop* case. The General Term in the Fourth Department in *Matter of Wilson*, 92 Hun, 318, 321, held that this was not so for the reason that after the decision in the *Lathrop* case, § 27 of the Revised Statutes was amended by § 3 of ch. 362, Laws, 1863, by adding the following clause: "This clause shall not be construed to authorize the granting of letters to any relatives not entitled to succeed to the personal estate of the decedent as his next of kin *at the time of his decease.*" In the *Wilson* case it was held that this amendment indicated the legislative intent to override the decision in the *Lathrop* case; but it was again amended by § 6 of ch. 728 of Laws of 1867, leaving out the words added by the amendment of 1863, so the *Wilson* case holds that the repeal of that amendment indicated the intent to leave the law as the *Lathrop* case put it.

In *Matter of Seymour*, 33 Misc. 271, Silkman, Surr., declares this decision to have been *obiter* and holds that the result of the successive amendments being to change the original words "would be entitled to share" to the words, "entitled to share" is sufficient indication of the intention of the legislature to finally change the rule adopted in the *Lathrop* case and accordingly he denied letters to the father of the intestate, who when he died left a widow and child, both of them dying after the decedent, on the ground that the personal property would pass entirely to the widow and must go to her legal representatives. In *Matter of Lowenstein*, 29 Misc. 722, Varnum, Surr., held under a different set of facts, where the public administrator petitioned for the appointment that, in spite of the amendment of the Code, the rule laid down in *Lathrop* v. *Smith* and in *Matter of Wilson* is still effective as an authority upon this question and that, therefore, the uncles and aunts and other relatives of the intestate, although not entitled to share in the intestate's estate were persons who under subd. 8 had a right to letters superior to that of the public administrator, citing § 2663 of the Code, *Butler* v. *Perrott*, 1 Dem. 9. In this last case, Rollins, Surr., held that a personal right to participate in the distribution of the personal property of an intestate is not an essential qualifi-

cation of one applying as a relative for letters of administration on his estate and held explicitly that the right to such letters of *any person of the blood* of the intestate, not disqualified, is superior to that of the public administrator. This case, however, was decided in 1882, and went on the theory that where the legislature re-enacts a provision which has been construed by the courts, the statute so re-enacted is to be deemed an adoption by the legislature of such construction; therefore, it would seem that, if the legislature deemed it necessary after the decision of the *Lathrop* case, to re-enact in 1867 the law interpreted by the Court of Appeals eliminating the amendment of 1863, then this subsequent amendment of the statute in the form now obtaining in § 2660 is equally significant, and that the decision of the Surrogate of Westchester County in the *Seymour* case states the correct rule. In *Matter of Gilchrist*, 37 Misc. 543, in Kings County, the Surrogate held that the public administrator in that county had under the express provision of § 2669 priority over next of kin who were not "entitled to a distributive share of the estate of such intestate." The fact that this explicit provision as to the public administrator in Kings County, which was enacted in 1893, gives that officer priority over next of kin "not entitled to a distributive share of the estate," is significant of the intention of the legislature, in framing a harmonious and consistent scheme, that the next of kin in other counties should have a right based solely upon their being entitled to share in the estate, and that the sections covering other counties should be read in the light of such expressions.

It must be observed in this connection that the *Wilson* case is authority for the proposition that where the next of kin would have been entitled to letters, the fact of a release of interest by renunciation or otherwise does not take away their right to letters as against the public administrator. In *Matter of Haug*, 29 Misc. 36, the case involved letters of administration c. t. a. Section 2643 of the Code provides in subd. 3, "That lacking those priorily entitled, letters should issue to one or more of the next of kin, if competent." Fitzgerald, Surr., construing this subdivision, held that where the brother of a testator died then the son of the brother is not of the next of kin of the decedent because he is not entitled to share, "in his own right in the unbequeathed residue of the estate," and, therefore, the executor of a sole legatee had a prior right under § 2660 to letters. He based his decision on subd. 12 of § 2514, which reads, "The term next of kin includes all those entitled, under the provision of law relating to the distribution of personal property, to share in the unbequeathed residue of the estate of a decedent after payment of debts and expenses, other than the surviving husband or wife." He held, accordingly, that § 2660 was applicable to administration with the will annexed, citing *Matter of Moehring*, 24 Misc. 418, and that he was not one of the next of kin within the meaning of § 2643.

Heaton, Surr., in *Matter of Goggin*, 43 Misc. 233, granted letters to executor of a sole legatee over the claim of next of kin not entitled to share. He reads together §§ 2660 and 2643.

Taking these various sections together and in connection with the definition contained in § 2514, the reasonable rule appears to be, that while the general intent of the statute is to give persons interested in the estate by relationship prior right of administration in the order of their interests as defined by the statute, yet that its special intent is that where a person, although related to decedent, is not interested in the property, he is to be treated as against the persons specified in the Code as much a stranger as are strangers to the blood.

OF MINORS

Section 2660 provides that if the person entitled is a minor, administration must be granted to his guardian, if competent, in preference to creditors or other persons. This provision is general and relates to all the classes in the section. In *Matter of Hudson*, 37 Misc. 539, the public administrator claimed the right to administer as against a minor on the ground that § 2669 gave him prior right where there were no next of kin entitled to a distributive share . . . . *competent* to take out letters. Section 2660, however, cures such incompetency by providing that where such special disability of minority exists, letters must be granted to the guardian.

§ 551. **Priority among persons in same class.**—As between various persons belonging to the same class or degree of priority under § 2660, the Surrogate may select, except as noted below, in his discretion such a one of that class as may seem best qualified to administer the estate. But under § 2660 if several persons of the same degree of kindred to the intestate are entitled to administration they must be preferred in the following order:

First, man to woman;

Second, relatives of the whole blood to those of the half blood;

Third, unmarried women to married.

So a Surrogate in pursuance of the statute will prefer a son though a nonresident to a daughter who is a resident. *Lussen* v. *Timmerman*, 4 Dem. 250, Rollins, Surr.; *Matter of Drowne*, 1 Connoly, 163. This means citizens of United States, not alien nonresidents. *Matter of Page*, 107 N. Y. 266. But, the nonresident must assert his right; for the Surrogate has discretion, under § 2663, quoted below, not to cite nonresidents. See *Matter of Tyers*, 41 Misc. 378. Prior to the Code it was held that male relatives of the intestate under the age of twenty-one years had no prior right to administer through their guardians over female relatives of the same degree of kinship who were of age. *Wickwire* v. *Chapman*, 15 Barb. 302. But, in that case, the minor male relatives were nonresidents and the adult female relatives were residents. In another case it was held that the adult married daughter should be entitled to administer in preference to her brother who was a minor, through his guardian. *Cottle* v. *Van Hayden*, 56 Barb. 622. It has been held that the provisions in that part of § 2660 following

subd. 9 are not intended to modify the priority established by the first nine subdivisions and are intended to apply to cases not covered by those subdivisions. Thus, where an intestate left him surviving a sister and a brother, and the sister was of the whole blood, while the brother was of the half blood, Surrogate Fitzgerald held that, the priority of brother over sister fixed by subds. 5 and 6, was superior to the priority of relatives of the whole blood to those of the half blood defined in subsequent provisions of § 2660, and granted letters to the half-brother of the intestate. *Estate of Moran*, 5 Misc. 176. This decision is based upon the theory that the provisions of § 2660 preferring among persons of the same degree of kindred of the intestate, man to woman, relatives of the whole blood to those of the half blood, and unmarried women to married women are so stated in the order of their importance. That is to say that while relatives of the half blood, by which is meant those having but one parent in common (Bouvier's Law Dictionary), are deemed to be of the same degree of kindred to the intestate as relatives of the whole blood, and are ordinarily to be postponed to the relatives of the whole blood, yet if, of such relatives, some are males and some are females, the former will be preferred. Consequently, in view of this decision, the only case in which relatives of the whole blood will be preferred to those of the half blood is a case where the intestate dies leaving him surviving none of the individuals mentioned in the first four subdivisions of § 2660; or none competent to act; but leaves several sisters only, or several brothers only, one or more of whom may be of the half blood, but where he leaves both brothers and sisters the first rule of priority, i. e., of male to female, takes precedence of the second rule of priority as to relatives of the whole to those of the half blood. Similarly it would also follow that, where all the persons belonging to a given class are women, as is possible under subds. 2, 6, 7 and 8, unmarried women must be preferred to married women. *Matter of Curser*, 89 N. Y. 401. And the fact that, of two women equally related to the intestate, the unmarried one is under twenty-one and the other is over twenty-one, will not affect the priority of the unmarried woman, as there is a provision to the effect that if a person is a minor, administration must be granted to the guardian, if competent. The provision as to priority of men to women and unmarried to married women does not relate to creditors, as in regard to them § 2660 contains an express provision that as between creditors, the *creditor first applying*, if otherwise competent, is entitled to preference. Where members of the same class are of different degrees of kindred, the nearest will be preferred, regardless of sex. Thus a niece will be preferred to a grandnephew. *Matter of Hawley*, 37 Misc. 667.

§ 552. **Renunciation.**—A person entitled to administration may renounce this right either generally or in favor of a specific applicant. When renounced in favor of a particular applicant who subsequently dies, the Surrogate has full power to permit a retraction of the renunciation and grant letters to the applicant as against some other claimant not priorily entitled. *Matter of Haug*, 29 Misc. 36. The formalities of a renunciation

are similar to those in the case of renouncing the right to letters testamentary. (See § 2639, *supra, q. v.*, and cases discussed.)

The language of the statute in directing letters to issue to persons "competent who will accept" contemplates that their refusal or any unwillingness to accept shall be evidenced by a formal declaration to that effect; for § 2663 provides: "Any person who has a right to administration prior or equal to that of the petitioner, may renounce his right by a written instrument acknowledged or proved and certified in like manner as a deed to be recorded in the county or *otherwise proved to the satisfaction of the Surrogate*, which must be filed in the Surrogate's office." A mere agreement by a wife with her husband to accept a sum of money in satisfaction of her right of dower and of her distributive share in his estate, but silent upon the right to administer upon his estate is not a renunciation under § 2663. *Matter of Wilson*, 92 Hun, 318. The renunciation of the right to administer must relate to administration in the State of New York. *Sulz* v. *Mutual Reserve*, 7 Misc. 593, affirmed upon opinion of Gaynor, J., 83 Hun, 139. If the renunciation above referred to is a general one, nevertheless, it can be retracted only by leave of the Surrogate, under the same reasoning applicable under § 2639 already discussed. It provides in that section that such renunciation may be retracted "at any time before the letters testamentary or of administration with the will annexed have been issued to any other person in his place." See *Matter of Suarez*, 3 Dem. 164, 167; *Codding* v. *Newman*, 63 N. Y. 639; *Casey* v. *Gardner*, 4 Bradf. 13.

§ 553. **Exercise of discretion by Surrogates.**—A Surrogate has no discretion to exclude a person "entitled" to letters except for a statutory cause. *Coope* v. *Lowerre*, 1 Barb. Ch. 45; *Harrison* v. *McMahan*, 1 Bradf. 283; *Matter of Cutting*, 5 Dem. 456; *Coggshall* v. *Green*, 9 Hun, 471; *McMahan* v. *Harrison*, 6 N. Y. 443; *Emerson* v. *Bowers*, 14 N. Y. 449; *O'Brien* v. *Neubert*, 3 Dem. 156; *Blanck* v. *Morrison*, 4 Dem. 297; *McGregor* v. *McGregor*, 1 Keyes, 133; *Hayward* v. *Place*, 4 Dem. 487.

§ 554. **What is incompetency.**—Section 2661 defines what shall be deemed incompetency to take letters. It is as follows:

> Letters of administration shall not be granted to a person convicted of an infamous crime, nor to any one incapable by law of making a contract, nor to a person not a citizen of the United States, unless he is a resident of the State, nor to a person under twenty-one years of age, or who is adjudged incompetent by the Surrogate to execute the duties of such trust by reason of drunkenness, improvidence or want of understanding. **§ 2661, Code Civil Proc.**

While the Surrogate has no discretion to exclude a person entitled to a preference for any but a statutory cause (*Coope* v. *Lowerre*, 1 Barb. Ch. 45; *Harrison* v. *McMahan*, 1 Bradf. 283; *Matter of Cutting*, 5 Dem. 456, Rollins, Surr., citing *Coggshall* v. *Green*, 9 Hun, 471; *McMahan* v. *Harrison*, 6 N. Y. 448), yet it is further provided by § 2612 that a Surrogate in his discretion may refuse to grant letters testamentary or of administration to a

person unable to read or write the English language. So in *Matter of Haley*, 21 Misc. 777, Marcus, Surr., excluded from administration a widow unable to read or write our language or to count money, and granted letters to a son of the testator by a former marriage. The Surrogate observes, at page 779: "While it is true no new disqualification can be added to those specified in the statute, yet any person applying for letters, deficient in capacity to manage or ability to perform duties necessarily incumbent upon them, lacking the requisite understanding to be directed intelligently. . . . when a person is so evidently unsuitable, unable to read or write, it seems a reasonable exercise of discretion to refuse the granting of letters."

What constitutes drunkenness, improvidence or want of understanding is a matter for the court to determine upon the facts presented. The denial of letters to one convicted of an infamous crime requires proof of actual conviction after trial. So Chancellor Walworth held that no degree of legal or moral guilt or delinquency is sufficient to exclude a person from administration as the next of kin in the cases of preference given by the statute, unless such person has been actually convicted of an infamous crime. And he added (*Coope* v. *Lowerre*, 1 Barb. Ch. 45, 47), the improvidence which the framers of the Revised Statutes had in contemplation as a ground of exclusion, is that want of care or foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe and liable to be lost or diminished in value by improvidence in case administration thereof should be committed to such improvident person. Surrogate Ransom (*Matter of Selling*, 2 N. Y. Supp. 634) refused letters of administration to a son of an intestate who was a resident of the State and gave them to a nonresident married daughter of the intestate on the ground that the son was a professional gambler known as "Poker Joe," and had no employment or vocation except gambling, and lived on the money he won; it appeared, however, in addition that he had been arrested in another State for embezzlement, that he had been guilty of forgery, and had kept an assignation house, so that exclusive of his character as a professional gambler there were grounds for excluding him from administration. It has been also held in strict interpretation of the statute that vicious conduct, improper and dishonest acquisition of property, and even loose habits of business did not constitute improvidence within the meaning of the statute. *Coggshall* v. *Green*, 9 Hun, 471, citing *Emerson* v. *Bowers*, 14 N. Y. 449; *McMahan* v. *Harrison*, 10 Barb. 659. And the General Term adopted the language of the chancellor in *Coope* v. *Lowerre*, *supra*, that the fact that a man seeks to obtain the property of others by theft or fraud is not evidence of "improvidence." *Matter of Raynor*, 48 Misc. 325, has already been cited to the proposition that pardon recapacitates the one formerly incompetent because of conviction of infamous crime.

§ 555. **Same subject.**—In *Harrison* v. *McMahan*, 1 Bradf. 283, Surrogate Bradford granted letters to one accused of being a professional gam-

bler, holding that gambling *per se* was not evidence of improvidence. He remarks, "The man who habitually loses sums disproportionate to his means is manifestly improvident; but when he upon the whole gains he can hardly be termed improvident though leading an idle and vicious life." But the Court of Appeals (*McMahan* v. *Harrison*, 6 N. Y. 443) laid down the true doctrine as to the effect of proof of an applicant for letters of administration being a professional gambler; in affirming the decision of the Supreme Court (10 Barb. 659), reversing the decision of Surrogate Bradford above quoted. 1 Bradf. 283. It passed directly upon the question, whether the fact that a man is a professional gambler is presumptive evidence of such improvidence as unfits him for the office of administrator or executor, and laid down the following very sound rule: "We coincide entirely in the views expressed by the chancellor, in *Coope* v. *Lowerre*, 1 Barb. Ch. 45, that this statute does not at all look at moral delinquency, but regards the likelihood of the estate and effects of the intestate being lost or squandered by an improvident person. But, so regarding the statute, we should obstinately close our eyes against the light of experience, if we fail to recognize the truth, that the pursuit of gambling is, in a pecuniary sense, the most hazardous of all pursuits. That it naturally engenders habits of recklessness and extravagance; that, whether, for the time, successful or unsuccessful, it has but one common issue, and that, utter ruin. We think, therefore, that the fact of a man being a gambler, is *prima facie* evidence of such improvidence as rendered him incompetent to be an administrator; and that the facts shown in this case, relating to the appellant's success in that pursuit, are not sufficient to rebut the presumption of incompetence." The rule now warrants any Surrogate in excluding from administration one who it is conclusively shown may properly be termed a professional gambler. Habitual drunkenness, of course, in the legal sense of the term, should disqualify (*Matter of Reichert*, 34 Misc. 288, citing *Matter of Cutting*, 5 Dem. 456; *McMahan* v. *Harrison*, 6 N. Y. 448; *Emerson* v. *Bowers*, 14 N. Y. 445; *Matter of Manley*, 12 Misc. 472), although it seems that habits of intemperance short of habitual drunkenness will not. See *Elmer* v. *Kechele*, 1 Redf. 472; *Matter of Kechele*, 1 Tucker, 52. See generally as to improvidence, *Matter of Cutting*, 5 Dem. 456; *Shilton's Estate*, 1 Tucker, 93; *Freeman* v. *Kellogg*, 4 Redf. 218; *Martin* v. *Duke*, 5 Redf. 597; *Hovey* v. *McClain*, 1 Dem. 396; *Ballard* v. *Charlesworth*, 1 Dem. 501. Eccentricities of character, violent temper, lack of self-control, will not disqualify (*McGregor* v. *McGregor*, 1 Keyes, 133), nor old age or feeble health (*Matter of Berrien*, 3 Dem. 263), unless they are of a character to amount to total disability, or to constitute "want of understanding"; nor is the fact that a person is indebted to the estate any ground of exclusion. *Matter of Morgan*, 2 How. Pr. N. S. 194; *Churchill* v. *Prescott*, 2 Bradf. 304. Although it is probable that the fact that a person had failed in his business because of shiftless and improper business methods, had been declared a bankrupt, and was hopelessly involved in debt, might be deemed strong evidence of the improvidence contemplated by statute.

§ 556. **Infamous crime.**—The words "infamous crime" are defined by statute (4 R. S., ch. 1, title 7, § 31) as follows: "Whenever the term infamous crime is used in any statute, it shall be construed as including every offence punishable with death or by imprisonment in a state prison and no other." Conviction of an offense of which the Court of Special Sessions has exclusive jurisdiction followed by a $50 fine, is not an infamous crime." *Matter of O'Hare*, 60 Misc. 269. Surrogate Rollins (*O'Brien* v. *Neubert*, 3 Dem. 156) held, where the grandson of intestate objected to the issuance of letters to the son of the decedent on the ground that he had been convicted in New Jersey of the crime of larceny, that the statute did not cover such a case and limited "incapable because of conviction of crime," to conviction under and by virtue of the laws of the State of New York and relied upon the decision of the Court of Appeals in *Sims* v. *Sims*, 75 N. Y. 466. *National Trust Co.* v. *Gleason*, 77 N. Y. 400. As noted above, a pardon removes this incompetency. It blots out the record of conviction, and recapacitates the offender in his civil rights. *Matter of Raynor*, 48 Misc. 325. It seems a misdemeanor is not within the contemplation of the section. *Matter of Greene*, 48 Misc. 31.

§ 557. **Nonresidents.**—It has been intimated that nonresidence merely will not render an applicant for letters of administration incompetent under the statute. *Matter of Williams*, 111 N. Y. 680, aff'g 5 Dem. 292; *Estate of Selling*, 17 N. Y. St. Rep. 833. Section 2663 making the citation of nonresidents discretionary does not diminish nor destroy their statutory right to letters under § 2660. *Libbey* v. *Mason*, 112 N. Y. 525; *Matter of Campbell*, 192 N. Y. 312. Section 2661 provides that letters of administration should not be granted to a person not a citizen of the United States, unless he is a resident of the State. See *Matter of Page*, 107 N. Y. 266; and *Matter of Tyers*, 41 Misc. 378. This provision of the statute cannot be gotten around by the device of a power of attorney of such nonresident alien to a resident of the State. The nonresident alien being prohibited expressly by the statute to obtain letters of administration in person cannot authorize anyone to do for him what he is so precluded from doing in person. *Sutton* v. *Public Administrator*, 4 Dem. 33; *Matter of Ferrigan*, 92 App. Div. 376. So in *Matter of Flynn*, 92 App. Div. 379, it was held a nonresident alien could not even petition for letters to another. But the words as to an alien: "unless he is a resident," by direct implication give a resident alien a right to letters. *Tanas* v. *Municipal Gas Co.*, 88 App. Div. 251.

§ 558. **Foreign consul's right to administer.**—There are conflicting decisions as to the right of a consul of another nation to administer upon the estate of his fellow subjects deceased within his consulate. In *Matter of Fattosini*, 33 Misc. 18, the consul general of Italy claimed a priority of right to administer upon the estate of a decedent. The next of kin were all in Italy. It had been previously held by the same Surrogate, Silkman, *Matter of Tartaglio*, 12 Misc. 245, that such consul general had, where the next of kin were all abroad, the right to receive their distributive shares and that his receipt would discharge the county treasurer with whom they had

been deposited under a decree of the court, and in that case the court cited *The Bello Corrunes*, 6 Wheat. 168, where the Supreme Court declared it to have been the long and universal usage of the courts of the United States, to permit consuls, including vice-consuls duly recognized, to assert or defend the rights of property of individuals of their nation in any court having jurisdiction of the case, and it also laid down the proposition "Foreign consuls have authority and power to administer on the estates of their fellow subjects deceased within their territorial consulate," citing, Wheat. Int. L., 2d Eng. ed., 151; Woolsey Int. L. § 96. Accordingly in the *Fattosini* case and construing the treaty between the United States and Italy, the Surrogate held that such treaty gave the consul general specifically the power claimed, holding that treaty provisions were to be construed with greater liberality than legislative enactments in that, by reason of the difference in language, nice distinctions must be avoided. The treaty with Italy contains a "most favored nation" clause under which the Surrogate gave to the consul general of Italy the same powers and rights conferred upon the consul general of the Argentine Republic by art. 9 of the treaty of July 27, 1853, with said Republic, which provision was as follows:

"Article 9. If any citizen of the two contracting parties shall die without will or testament in any of the territories of the other, the consul general or consul of the nation to which the deceased belongs, or the representative of such consul general or consul in his absence, shall have the *right to intervene* in the possession, *administration* and judicial liquidation of the estate of the deceased, conformably with the laws of the country, *for the benefit* of the creditors and legal heirs."

It appearing in this case that there were no creditors resident in the State of New York, letters of administration issued without requiring any security.

In a later case, *Matter of Logiorato*, 34 Misc. 31, Thomas, Surr., considering the *Fattosini* case, refused to follow the principle laid down therein. In this case the decedent died intestate being a citizen and subject of the Kingdom of Italy and all of his next of kin being there resident; there appeared to be no creditors, the public administrator, although cited, made no appearance and the consul general asserted a right to administer without security and in preference to the public administrator on the strength of the treaty provisions reviewed in the *Fattosini* case. Surrogate Thomas, considering the same provision of the treaty with the Argentine Republic, construed somewhat strictly the clause, "shall have the right to *intervene* in the possession, administration and judicial liquidation of the estate of the deceased, *conformably with the laws of* the country" and he held that intervention conformably with the laws of New York gave no right of priority to the consul general, as against the express language of our statute, to administer the estate, but merely to come in and protect the rights of citizens in his territorial jurisdiction. There being, however, in this case, no relatives or guardian of any relative and no creditor or public adminis-

trator consenting to serve, he granted letters to the consul general merely on the ground that he was a legally competent person, but required him to give the usual bond.

As between these two decisions, both of which resulted in the granting of letters to the consul and neither of which was appealed, it is sufficient to say that it may prove significant hereafter, on any subsequent inquiry of the same character, to bear in mind that the United States itself gives by its Revised Statutes almost plenary powers to its own consuls abroad in respect to reducing to possession and safeguarding the assets of intestate Americans dying within their territorial jurisdiction. The rights it gives to its own consuls and the duties it lays upon them cannot reasonably be denied to foreign consuls here to whom may be given by treaty, directly or by implication, as from a "most favored nation" clause, a right to "intervene in the *possession, administration* and judicial *liquidation* of the estate." The words passed upon by both Surrogates above, "for the benefit of the creditors and legal heirs," could hardly be given any meaning if the intervention is to be limited as suggested in the *Logiorato* case. An administrator in possession of the assets *protects* creditors as well as legal heirs. It seems clear that the words "legal heirs" as used in the treaty is intended to include the next of kin and it seems equally clear that the words "conformably with the laws of the country," merely require that the consul given this right as to "the possession, administration and judicial liquidation of the estate" must submit to the supervision and control of an appropriate court having jurisdiction in the premises. This view makes it not unreasonable that the Surrogate in a proper case may require security to be given by the consul as against resident creditors. As against the persons interested in the estate, resident in the country by which the consul is accredited, they are deemed amply protected as against him. And it may be conceded that nothing contained in the most explicit treaty provisions would divest the Surrogate's Court of this right to protect resident creditors having claims upon the estate of a foreigner leaving assets here which ought to be made to respond for his debts; but where there are no next of kin it hardly seems that either justice or good faith would permit the public administrator to receive letters as against the consul general asserting the right under treaty.

It may be further observed that the word "intervention" as used in the treaty quoted would have in both the French and Spanish languages a far wider interpretation than that granted it in the *Logiorato* case.

Still later, the Danish consul having petitioned *for probate of the will* of a Danish subject in Queens County, Noble, Surr., passed on the "most favored nation clause" in the United States treaty with Denmark. The consul asserted the right to waive issuance and service of citation for the heirs-at-law and next of kin, all residing in and subjects of Denmark. Held that as to adults this right was conceded; but not as to infants, jurisdiction of whose persons could only be acquired pursuant to statute. He refers to *Matter of Tartaglio*, 12 Misc. 245; to the *Fattosini* case; to *Matter of Lo-*

brasciano, 38 Misc. 415; to *Matter of Davenport*, 43 Misc. 573, and a Massachusetts cause reported in N. Y. Law J., April 16, 1906.

§ 559. **Practice in applying for letters.**—The practice upon the application for letters is covered by §§ 2662 and 2663 of the Code of Civil Proc. Section 2662, provides that (amendment by ch. 184, Laws 1909, in italics),

> A person entitled absolutely or contingently, to administration of the estate of an intestate, *or any person having a claim for the funeral expenses of the decedent* may present to the surrogate's court having jurisdiction a written petition, duly verified, praying for a decree awarding letters of administration, either to him, or to such other person or persons, having a prior right, as is entitled thereto, or in the alternative, as the petitioner elects; and if necessary, that the persons required to be cited, as prescribed in the next section, be cited to show cause why such a decree should not be made. The petition must set forth the petitioner's title; the facts on which the jurisdiction of the court to grant letters of administration upon the estate depends; and the names of the husband or wife, if any, and of the next of kin of the decedent, so far as they are known to the petitioner, or can be ascertained by him with due diligence. A citation shall not be issued, and a decree shall not be made, where a citation is not necessary, until the petitioner presumptively proves, by affidavit or otherwise, to the satisfaction of the surrogate, the existence of all the jurisdictional facts, and particularly that the decedent left no will. For the purpose of the inquiry touching any of these matters, the surrogate may issue a subpœna, requiring any person to attend and be examined as a witness. § **2662, Code Civil Proc.**

§ 560. **Who may make the application.**—The Code as just quoted provides that the petition for letters of administration may be presented by "any person entitled absolutely or contingently to the administration of the estate of the intestate." This entitles anyone to whom in a proper case, letters would issue in the absence of persons priorily entitled under § 2660, to petition for the issuance of letters. (See *ante*, under "Parties," as to rights of an assignee of party entitled.) But the amendment of 1909 adds also one who has a claim for the funeral expenses of the decedent. The petition may pray that letters issue to the petitioner; or it may pray they may be issued to such person or persons as may be shown to have a prior right; or it may contain a prayer in the alternative; but a petition is not defective in not containing a prayer in the alternative, or a prayer for the issuance of letters to those having a prior right to the petitioner; for the provisions of § 2660 are mandatory, and before letters are issued the Surrogate is bound to ascertain all the facts, which necessarily includes ascertaining who are the surviving kindred entitled to administration, and, whoever may be the petitioner, letters must issue in the statutory order of priority to such person or persons entitled thereto, "who will accept the same." See § 2660.

Unless a written renunciation is filed, every person *who is a resident of the State*, and has a prior right to administration, must be cited. See *Matter of Lowenstein*, 29 Misc. 722. And if a Surrogate should issue letters to a

petitioner, where resident persons entitled to prior right had not renounced or been cited, the issuance of letters to the petitioner is invalid, and will be revoked upon application of such parties priorily entitled. *Barber* v. *Converse*, 1 Redf. 330, 333.

§ 561. **Contents of the petition.**—The petition for letters of administration must state the following facts: The name of the petitioner, his relation, whether of kindred, or as a creditor, or in some official capacity to the decedent, or his estate, that the decedent is dead, giving the place and time of such death, that the decedent died intestate, that petitioner has made diligent search and inquiry for a will without finding any, or without obtaining any information that he ever left or made one. The petition should then state that the decedent died possessed of certain personal property within the State giving the value of such property, or if there is no such property within the State, but a right of action which the administrator of the decedent would have by special provision of law, there should be stated the probable amount recoverable upon such right of action. The petition should also contain the name of the surviving husband or wife, if any, and the names of the next of kin surviving the intestate, stating their relationship to the decedent, and it is the better practice to state these names in the order of priority under § 2660. There should also be an additional allegation, which may be made on information and belief, that the Surrogate to whom the petition is presented has exclusive jurisdiction to grant letters of administration. Unless it is made to appear that the decedent left no property in other counties of the State it is well to add an allegation that no petition for grant of letters has been filed in any other Surrogate's Court of the State. The prayer of the petition is for a decree awarding letters of administration upon the goods, chattels and credits of the intestate to the petitioner or some specified person or persons, and prays for the issuance of a citation to all parties, having a prior or equal right with the petitioner, to show cause why the decree should not be made as prayed for. (See, as to sufficiency of petition, *Matter of Cameron*, 47 App. Div. 120.) The following precedent for a petition is illustrative. Every court has its own forms:

Petition for Letters of Administration.

Surrogate's Court,
Erie County, New York.

In the Matter of Awarding Letters of Administration upon the Estate of Deceased.

To the Surrogate's Court of the said County of Erie:

The petition of residing in the in the said County of Erie, respectfully shows:

Your petitioner allege that late of the of in the said County of Erie, died in said of on or about the day of 19 and the said decedent was at the time of his decease a resident of said County of Erie.

Your petitioner further allege that ha made dili-

gent search and inquiry for a will and testament of said decedent, and ha not found any or obtained any information that said decedent left any, and that to the best of your petitioner's knowledge, information or belief, the said decedent died without leaving a will.

Note. State names if possible in order of priority of right to administer under § 2660.

Your petitioner further allege that the following named person (*note*) as far as they are known to or can be ascertained by your petitioner with due diligence, are the only heirs and next of kin, and of the said decedent, h surviving, and their relationship, ages and places of residence, are as follows:

NAME	RELATIONSHIP	AGE	RESIDENCE

That no right of action exists, granted to the administrator of the estate of said decedent by special provisions of law (*or* if such right of action exists specify it and state the probable amount recoverable thereon. This *must* be done if it constitutes the only asset to be administered).

That the value of all the personal property, wherever situated, of which the decedent died possessed, does not exceed dollars.

The said decedent died seized of real estate situated within the State of New York, and that the estimated value thereof does not exceed dollars.

That your petitioner is of full age, and that he is informed and believes that the Surrogate of said County has the sole and exclusive power to grant Letters of Administration of the goods, chattels and credits of said intestate; he therefore prays that such letters on the estate of said decedent may be granted to h (jointly with residing in the town of in said County), (*or to some specified person or persons having a prior right to that of the petitioner, whose relationship to the decedent must be alleged*) and that such persons, having a right to such letters prior or equal to that of your petitioner as this Court may direct, be cited to show cause why such a decree should not be made, and that all such process and proceedings may be had and taken in this proceeding to the end that Letters of Administration be granted upon the estate of said decedent as the law may require.

Dated at this day of 19

.....

Petitioner to sign here.

.....

(Verification.)

Where joint administration is prayed add consent as follows:

I. named in the within petition, hereby consent that administration upon the goods, chattels and credits of deceased, be granted to me jointly with as asked for in said petition.

Dated 19 .

The oath, duly verified, may be filed with the petition.

The decree awarding letters of administration may recite the bond as filed. *Or the reference to the bond may be omitted and a provision put in at the close* "and upon executing to the People of the State of New York a joint and several bond of *himself* and (2) good and sufficient sureties in the penalty hereby fixed at $ conditioned as prescribed by law, to be duly approved by the Surrogate, and filed with the clerk of this court."

§ 562. **Who must and who may be cited.**—Section 2663 defines who are *necessary*, and who are *proper* persons to be joined as parties upon an application for letters of administration. The section or so much of it as relates to this point is as follows:

> Every person, being a resident of the state, who has a right to administration, prior or equal to that of the petitioner, and who has not renounced, must be cited upon a petition for letters of administration. The surrogate may, in his discretion, issue a citation to non-residents, or those who have renounced, or to any or all other persons interested in the estate, whom he thinks proper to cite. Where it is not necessary to cite any person, a decree, granting to the petitioner letters, may be made on presentation of the petition. Where the surrogate is unable to ascertain, to his satisfaction, whether the decedent left, surviving him, any person entitled to succeed to his estate, a citation must be issued, directed generally to all creditors of, and persons interested in the estate, and also to the attorney-general, and the public administrator of the proper county, requiring them to show cause why administration should not be granted to the petitioner. . . . Where a citation is issued, any creditor of the decedent, or any person interested in the personal estate, although not cited, may appear and make himself a party to the special proceedings, in like manner and with like effect, as a devisee or legatee, who is not cited on an application for probate. On the return of a citation, issued as prescribed in this article, the surrogate must make such a decree in the premises as justice requires. The decree may award administration to any party to the special proceeding who appears to be entitled thereto. The surrogate, in his discretion, may award administration without a personal examination of the person to whom it is awarded. **§ 2663, Code Civil Proc.**, in part.

This section explicitly gives the Surrogate power to refrain from citing nonresidents. Hence, a local creditor may secure letters without notice to nonresident heirs. But the heirs' right is not destroyed. "It remains unchanged. The remedy for its enforcement has been modified." *Libbey* v. *Mason*, 112 N. Y. 525. The letters taken out by the creditor are regular. But the heir, unless he renounced, may come in and ask for their revocation, and assert his right to letters. But there is a limit on the discretion, the rule as to which is well analyzed in *Matter of Campbell*, 123 App. Div. 212, aff'd 192 N. Y. 312.

(*a*) If a person is a citizen of the United States, his nonresidence does not affect his statutory priority under § 2660.

(*b*) The discretion of the Surrogate to ignore him is limited by the grounds of rejection specified in § 2661.

(*c*) But, if he dispenses with citation, under § 2663, to nonresidents, priorily entitled, their prior right is not destroyed.

(*d*) So, at any time, they may come in and ask for revocation of letters, assigning subd. 1 of § 2685 as the ground for such revocation. See also *Matter of Tyers*, 41 Misc. 378.

§ 563. **Necessary and proper parties.**—The provisions of § 2662 which require the names of the husband or wife, if any, and of the next of kin of the decedent, so far as they are known to the petitioner, or can be ascertained by him with due diligence, to be set forth in the petition are mandatory in the sense that if the names of necessary parties, as, for example, the widow, are omitted from the petition *and* no citation issues or is served pursuant to § 2663, a decree granting letters to any person subsequently entitled would be invalid and could be revoked or vacated in a direct proceeding for the purpose. So, where a wife died, without issue, leaving a husband and brother, and later the husband died, his personal representatives under § 2660 have prior claim to administer over brother, and if letters issue to brother without citing them, the letters will be vacated. *Matter of Thomas*, 33 Misc. 729. They would not, however, be void and could not therefore be collaterally attacked. *Kelly* v. *West*, 80 N. Y. 139, opinion of Earle, J., at page 145, cited in *Power* v. *Speckman*, 126 N. Y. 354, 357. See also *Power* v. *Burmester*, 12 N. Y. Supp. 25. So, where one of the facts stated in the petition for administration is untrue, as, for example, a false allegation by the petitioner that he is the surviving husband of the intestate, the order granting the letters does not fall, is not revoked, or is not even shaken in the authority given by it to the appointee to administer, by proof in other proceedings that the allegation is false. But the next of kin who were not cited in the proceeding can always attack the order directly, for the order is not conclusive upon the reasons and facts not jurisdictional which led to it, as against parties not cited, not appearing, and who have in no manner been heard in respect to them. *Matter of Patterson*, 146 N. Y. 327, opinion of Finch, J., at page 331, and cases cited. This decision, however, does not affect the fact that the surviving husband or wife, if any, is always a necessary party, and, if not in fact the petitioner in the proceedings, must be cited unless a renunciation as above specified has been executed, acknowledged and filed. In addition it is equally clear from the Code that every person having a prior right to administer, or having a right equal to that of the petitioner, must be cited. So that, for example, where a creditor of the intestate is the petitioner, the surviving husband or wife and all the next of kin are *necessary parties*. The foregoing statement must be qualified by the provision of § 2663 just discussed, which limits necessary parties to those *who are residents of the State.*

§ 564. **When no citation is necessary.**—The Court of Appeals has in-

timated (*Libbey* v. *Mason*, 112 N. Y. 525) that where the applicant has the first and paramount right to letters, that is, where, in the language of § 2663, there is no person a resident of the State who has a right to administer, prior or equal to that of the petitioner, the Surrogate may act at once upon the petition. Judge Finch says, "because citation to anyone would be useless." Where there are others having equal rights the same rule holds if renunciation of those who had equal rights and were residents of the State, are filed with the petition. So, if the widow of intestate decedent petitions for letters of administration it is not necessary that any citation should issue. *Matter of Moulton*, 10 N. Y. Supp. 717. Thus Surrogate Bradford, where several persons were equally entitled to administration, held that letters could be granted *ex parte* to any one of them without citing the others, and that the citation was necessary only where there was an existing person or persons who had a preference to the applicant. *Peters* v. *Public Administrator*, 1 Bradf. 200. This was a case where the Surrogate had refused letters to the son of the mother of the intestate, who was an illegitimate child, on the ground of her being incapable of having any kin through her natural parents. *Public Administrator* v. *Hughes*, 1 Bradf. 125. Subsequently and pending appeal from his decision the legislature passed a special act expressly giving the right of administration over the assets of the foreign intestate illegitimate to the children of the deceased mother of such illegitimate son or one of them. The Surrogate, upon the provisions of this act being presented to him in an application by one of said children for letters, revoked his prior order and issued letters to the applicant in pursuance of the act and without citing the others who were equally entitled. This decision of course is superseded in this one regard by the provision of § 2663 which adds to the statute as it then existed (2 R. S., page 139, 3d ed., § 36, which required a citation only where there were persons having a prior right) the words "*or equal to that of.*" The rule as it now stands is well indicated in the case of *Matter of the Administration of the goods and chattels of Benjamin Curser, deceased*, 89 N. Y. 405, where the Surrogate issued letters of administration to one of two sisters who was unmarried, without notice to the other who was a married woman, the Court of Appeals, by Finch, J., said, "If the two had in all respects an exactly equal right, notice to one was an essential requisite to a valid appointment of the other." But it was held that the priority given by the statute (2 R. S., title 2, part 2, ch. 6, § 28), now incorporated in § 2660 of the Code, to unmarried over married women operated, so that the unmarried and married woman did not have an *exactly equal* right but that the right of the unmarried woman was prior and that the action of the Surrogate was proper, and should be affirmed, reversing 25 Hun, 579.

§ 565. **Same subject—Satisfying the Surrogate.**—The provision of § 2663 that, "where it is not necessary to cite any person, a decree granting to the petitioner letters, may be made on presentation of the petition," is not to be taken as indicating that such letters will issue in any given case merely upon statements in the petition showing that it is not necessary to

cite any person; for § 2662 contains an express provision that a decree shall not be made where a citation is not necessary *until the petitioner presumptively proves by affidavit or otherwise to the satisfaction of the Surrogate all the jurisdictional facts.* And, in connection with this, provision is made that the Surrogate may issue a subpœna requiring any person to attend and be examined as a witness, for the purpose of inquiry touching any of these matters. § 2662, Code Civ. Proc. These provisions taken together may fairly be construed as meaning that the Surrogate is not bound to issue citation upon the mere presentation of a written petition, even though the same be duly verified and sufficiently executed; but that before directing the citation to issue he may in his discretion require additional proof of the facts and circumstances upon which the proceeding is based. *Moorhouse* v. *Hutchinson*, 2 Dem. 429, 433. And, still in addition to this, the provision in § 2663, that the Surrogate may in his discretion issue a citation to a nonresident, or to those who have renounced, or to any or all persons interested in the estate whom he thinks proper to cite, implies some inquiry on his part as to the truth of the allegations in the petition, stating the names of the surviving husband or wife or next of kin prior to his act in deciding whether or not to issue the citation or to make the decree. Commonly, however, if the facts are stated in the petition with sufficient exactness and there are no suspicious circumstances, and, particularly, if the applicant belongs to the first order of priority, letters will issue as of course. If the Surrogate is in doubt in regard to the person or persons entitled to succeed to the estate of the intestate, the general citation required by § 2663 must issue directly to all creditors of and persons interested in the estate, as well as the attorney general, and the public administrator of the proper county, requiring them to show cause why the petitioner should not be granted letters of administration. § 2663, Code Civ. Proc.

But the discretion not to cite a nonresident may be deemed to have been abused if such nonresident has prior right. That is the intimation or trend of the opinion in *Matter of Campbell*, 192 N. Y. 312, 318, discussing *Libbey* v. *Mason*, 112 N. Y. 525, and *Matter of Tyers*, 41 Misc. 378.

§ 566. **Proof of the jurisdictional facts.**—The Surrogate is not confined to any form of precedure or to any mode of proof in acting upon an application for letters. *O'Connor* v. *Huggins*, 113 N. Y. 511, 516. And, once his decree has been made, if the jurisdictional facts appear to have been alleged and the necessary parties have been duly cited to appear before him, it will not thereafter be open to collateral attack, in the absence of fraud or collusion. In the case just cited the Court of Appeals, by Gray, J., says, "It is not material how the decision is reached, provided the facts which confer power to act were alleged." The proof, therefore, which the Surrogate will resort to, is first the verified petition, second, the proof "by affidavit or otherwise" specified in § 2662, Code Civ. Proc. The words "duly verified," used as qualifying the petition, which must be presented, contemplates the verification required by the Code; but it has been held that, even where there was no separate verification appended to the

petition, but merely an ordinary jurat, "sworn to before me this day of ," the court would entertain the presumption that the petitioner in being sworn, swore that the petition by him subscribed was true, etc., and that the petition would be deemed verified as required by the statute. *Crozier* v. *Cornell Steamboat Co.*, 27 Hun, 215. So, although, as has been already stated, an allegation in a petition in regard to one of the jurisdictional facts, such as the death of the intestate, when made upon mere information and belief, would, in the absence of other and sufficient proof of the facts so alleged, be insufficient to give jurisdiction to the Surrogate (*Roderigas* v. *East Riv. Sav. Inst.*, 76 N. Y. 316), yet the verification of a petition which is by the petitioner sworn to be true "to the best of petitioner's knowledge and belief," has been held to be sufficient to authorize the issuing of letters. *Sheldon* v. *Wright*, 5 N. Y. 497.

§ 567. **Same subject.**—The language of the present section therefore gives the Surrogate power to take the proof required to satisfy his judgment in any manner he may direct. The words, "by affidavit or otherwise," are very broad. In cases where there is no contest as to the facts, affidavits will usually be deemed sufficient. So also, where the witnesses are merely orally examined before the Surrogate upon the point or points as to which he requires a corroboration or a supplementing of the verified petition, once the decree is entered there will be a presumption (in favor of the performance of official duty and of the regularity of his official act) that sufficient and proper evidence of jurisdictional facts was given before the Surrogate. This is especially so where there are recitals of the jurisdictional facts in the letters of administration. *Johnston* v. *Smith*, 25 Hun, 171, 176, citing *Westcott* v. *Cady*, 5 Johns. Ch. 334, 343; *Bolton* v. *Brewster*, 32 Barb. 389, 394; *Van Deusen* v. *Sweet*, 51 N. Y. 385; *Porter* v. *Purdy*, 29 N. Y. 106. The status of the applicant being a material inquiry, the Surrogate may inquire into such status. E. g., where petitioner alleged she was intestate's widow it was held proper to take proof of her actual marriage, the issue being properly raised. *Matter of Gerlach*, 29 Misc. 90.

§ 568. **What will prevent the issuance of letters.**—The issuance of any letters of administration upon the estate of an alleged intestate decedent will be denied:

(*a*) In case the alleged decedent is shown to be living.

(*b*) In case there is not sufficient proof of death. *Roderigas* v. *East Riv. Sav. Inst.*, 76 N. Y. 316.

(*c*) In case there are no assets of the decedent at the time of his death, or afterwards in the Surrogate's County. *Matter of Brewster*, 5 Dem. 259, 265, and cases cited.

(*d*) In case the decedent left a will.

(*e*) In case it appears that the assets claimed to be the basis of jurisdiction are being or have been already administered upon. See *Matter of McCabe*, 84 App. Div. 145, 150.

In case the objection to the issuance of letters of administration is that the decedent, alleged to be intestate, in fact left a last will and testament,

it is proper for the Surrogate to stay the proceedings for administration (*Isham* v. *Gibbons*, 1 Bradf. 69; see § 543, above), and to entertain separate proceedings to determine the validity of the alleged will. *Estate of Taggart*, 40 N. Y. St. Rep. 368. It is not proper to investigate the validity of the will in the proceedings for administration (*id.*), and where the proceedings for the probate of the alleged will result in a decree by the Surrogate refusing it probate, the proceedings for administration may then be resumed and letters issue, unless the action of the Surrogate is stayed by an appeal duly perfected, in which case the appointment of an administrator during the operation of such a stay is improper and void. See *Hicks* v. *Hicks*, 12 Barb. 322. This is not affected by the provisions of § 2583, Code Civ. Proc., above discussed. That section merely provides that an appeal from a decree revoking probate of a will or revoking letters testamentary, etc., does not stay the execution of the decree or order appealed from. Consequently, if a Surrogate makes a decree revoking probate of a will and revoking the letters testamentary issued thereunder, the execution of the order is not stayed and the rights of the executors under such letters terminate; but the Surrogate has no power pending the appeal to take the further action involved in the issuance of letters of administration. But the issue whether decedent left a valid will is a fundamental one and the Surrogate passes on it in the proceeding for letters of administration, and may hear evidence on the factum of a will. If he disbelieve the genuineness of the alleged will or the validity of its execution he determines the issue adversely and issues letters. *Matter of Cameron*, 47 App. Div. 120 (where alleged will was not produced, but shown to have been probated in Illinois).

§ 569. **The bond of an administrator.**—The subject of the bonds of administrators and executors will be more fully discussed under that head, *q. v.* It is sufficient at this point to note the section of the Code which requires the administrator, as a condition precedent to the issuance of letters, to execute and file the proper bond. The section is as follows:

Administrator's bond.

A person appointed administrator, before letters are issued to him, must file his official oath, execute to the people of the state, and file with the surrogate, the joint and several bond of himself and two or more sureties, in a penalty fixed by the surrogate, not less than twice the value of the personal property of which the decedent died possessed and of the probable amount to be recovered by reason of any right of action, granted to an executor or administrator, by special provision of law.

The sum to be fixed as the amount of the penalty must be ascertained by the surrogate, by the examination on oath of the applicant or any other person, or otherwise, as the surrogate thinks proper.

The bond must be conditioned that the administrator will faithfully discharge the trust reposed in him as such and obey all lawful decrees and orders of the surrogate's court touching the administration of the estate committed to him.

But where a right of action is granted to an executor or administrator by

special provision of law, if it appears to be impracticable to give a bond sufficient to cover the probable amount to be recovered, the surrogate may, in his discretion, accept modified security, and issue letters limited to the prosecution of such action, but restraining the executor or administrator from a compromise of the action, and the enforcement of any judgment recovered therein, until the further order of the surrogate on additional further satisfactory security.

In cases where all the next of kin to the intestate consent, the penalty of the bond need not exceed double the amount of the claims of creditors, against the estate, presented to the surrogate, pursuant to a notice to be published twice a week for four weeks in the official state paper, and in two newspapers published in the city of New York, and once a week for four weeks in two newspapers published in the county where the intestate usually resided, and in the county where he died, reciting an intention to apply for letters under this provision, and notifying creditors to present their claims to the surrogate on or before a day to be fixed in such notice, which shall be at least thirty days after the first publication thereof; but no bond so given shall be for less than five thousand dollars; and such bond may be increased by order of the surrogate for cause shown. Pending such application, no temporary administrator shall be appointed, except on petition of such next of kin. **§ 2664, Code Civil Proc.**

Former § 2667 unchanged.

§ 570. **The letters.**—The Surrogate's decree granting letters will issue,

(*a*) In case, where no citation was necessary, he is satisfied of the necessary jurisdictional facts either from the verified petition or by proof "by affidavit or otherwise," (§ 2662, Code Civ. Proc).

(*b*) Where when citation is necessary he is similarly satisfied on the return of the citation and upon the proof then submitted or taken.

The words of § 2663 requiring him to make such a decree in the premises "as justice requires" are very broad; but, by the following clause in the same section, he is limited in his award of administration, "to any party to the special proceeding, who appears to be entitled thereto." But this right must be asserted *in the proceedings* by the party claiming. So, if the Surrogate, in the exercise of the discretion given him by § 2663, deems it unnecessary to direct the citation of a nonresident, although he may have a right prior to the petitioner's, the Surrogate is warranted in awarding administration to the petitioner as against such nonresident person having the prior right, for the reason that he is not *a party to the special proceeding.* See § 563 above. No prejudice can result in ordinary cases from the operation of the rule fixed by this section as it gives the freest right of intervention to all such parties and makes their citation necessary in all cases where they are residents of the State. And Surrogates will usually require their citation unless unreasonable delay would be caused thereby, particularly if petitioner is a creditor or public administrator.

§ 571. **The form of the letters.**—The form of the letters issued to an administrator in chief is usually general in terms, and grants administration of all and singular the goods, chattels and credits belonging to the in-

testate and constituting the appointee administrator thereof. Each Surrogate's office has its own printed form.

§ 572. **Limited letters.**—But letters are perfectly valid which specify in detail the powers granted to the administrator, for the law does not direct what language should be employed in letters issued by the Surrogate, or what precise powers or duties should be laid down in the same. *Martin* v. *Dry Dock, East Broadway and Battery Railroad Co.*, 92 N. Y. 70, 75. Consequently the Court of Appeals have held that, as the Surrogate is empowered to direct and control administrators, there is no reason why in the exercise of this authority he may not limit the application of the letters originally issued by him and upon which, as has been elsewhere noted, the authority of the administrator depends. So where a Surrogate issued letters of administration containing a limitation limiting the power of the administratrix to prosecute only and not giving her power to collect or compromise (*Martin* v. *Dry Dock, East Broadway and Battery Railroad Co.*, 92 N. Y. 70, 75), the Court of Appeals observed, "We think it rests with him (the Surrogate) to say, in the exercise of his discretion, what powers should be conferred upon an administrator, and so long as he does not exceed the authority vested in him by law, there is no valid ground for assuming that the letters issued by him are not authorized." And the court held that so long as the Surrogate did not extend the powers of the administrator beyond the statutory limits, within those limits he could confine the power of the administrator in the original letters as in his discretion he thought best. The court intimated, however, that if the Surrogate should improperly limit the power of an administrator, the party in interest could review his determination upon appeal; but that the objection was not one which could be raised collaterally in a suit by the administratrix; nor could the letters be held void. *Id.* at page 76. Limited power to prosecute only, gives no power to issue execution. *Lambert* v. *Metrop. St. R. Co.*, 33 Misc. 579.

§ 573. **Same subject—Action for causing intestate's death.**—This power (recognized by the Court of Appeals in the case above discussed, to issue letters limiting by their terms the powers of the administrator in dealing with the estate) the Surrogate is expressly directed to exercise in the case covered by § 2664, Code Civ. Proc. above quoted, where a right of action is granted to the administrator *by special provision of law*, and it appears to be impracticable to give a bond in a penalty sufficient to cover the probable amount to be recovered, in which case the Surrogate is given power in his discretion to accept modified security, and to issue letters limited to the prosecution of the action and restraining the administrator from compromising the action or enforcing the judgment recovered therein until the further order of the Surrogate on additional, further, satisfactory security. It has been held that the provisions of this section are limited only to cases where there is a right of action granted by special provision of law, and not to one in which there is an ordinary claim of debt due the intestate. *Estate of Mallon*, 13 Civil Proc. 205. This, however, must be

taken only as limiting the right of the Surrogate to accept modified security, as under the decision of the Court of Appeals the right to limit the letters is general. Therefore, while the Surrogate must, in the cases specified in § 2664, require security in an amount at least double the value of the personal property of which the decedent died possessed and of the probable amount to be recovered by reason of any right of action granted by special provision of law (where it seems practicable to give such a bond) and while, moreover, in case a bond in such amount is given, the Surrogate will ordinarily issue letters general and unlimited in their terms, yet where modified security is accepted the proper practice is to issue letters in the usual form adding a clause restraining the executor or administrator from compromising the claim or action or enforcing any judgment recovered therein until the further order of the Surrogate on additional, further, satisfactory security. *Matter of Malloy*, 1 Dem. 421, 424, Livingston, Surr. This restriction does not in any way interfere with the authority of the executor or administrator over the other assets of the decedent; he can go on and exercise his authority over them as if no limitation had been inserted in the letters. But if it is desired to compromise the action, or if, after he has prosecuted it to judgment, it is desired to enforce such judgment, a verified petition should be presented to the Surrogate setting forth the restriction contained in the letters, stating the additional amount which will come into the hands of the executor or administrator by reason of the proposed compromise, or in the event of the enforcement of the judgment, and asking that an order may be made, upon giving further security satisfactory to the Surrogate, revoking the restriction imposed on the executor or administrator in the letters whereupon he will be free to compromise the claim or to enforce the judgment in all respects as if the original letters had not been restricted. *Ibid.* and § 2664. See *Lowman* v. *E. C. & N. Co.*, 154 N. Y. 765, aff'g 85 Hun, 188.

The provisions of §§ 2590 to 2594, both inclusive, already quoted in the discussion of letters testamentary, *q. v.*, are equally applicable to letters of administration. Briefly summarized in this connection they relate first, to the formal requisites of letters of administration; second, they relate to the effect of such letters as conclusive evidence of the authority of the persons to whom they are granted until revoked, or until the decree granting them is reversed upon appeal; third, they relate to the priority of letters of administration first issued from a Surrogate's Court having jurisdiction to issue them, so as to give the parties having prior letters the right to demand and recover from persons holding subsequent letters any of the decedent's property which he may have in his hands; fourth, a technical requirement with regard to the computing of time after the issuance of letters of administration, and the requisites of the official oath of an administrator in respect to which the discussion already had (*supra*) may be referred to.

§ 574. **Kinds of limited letters.**—Letters of administration may be limited as to the functions to be exercised, as where they are issued solely

to bring an action for causing intestate's death. This limitation is rigid. Appointed to sue for damages for death, he may not bring any other kind of suit. *Kirwin* v. *Malone*, 45 App. Div. 93. Appointed to sue, he may not compromise without further order of court (see last section). Appointed only to reduce the cause of action to judgment, he can go no further, e. g., even to issue execution, *Lambert* v. *Met. S. R. Co.*, 56 App. Div. 624, aff'g 33 Misc. 579, much less to collect, for his bond is measured by probable recovery and may have to be readjusted.

Section 1902 of the Code is amended this year (1909) by adding this provision:

> When the husband, wife, or next of kin do not participate in the estate of a decedent, under a will appointing an executor [other than such husband, wife, or next of kin] *who refuses to bring such action*, then such husband, wife, or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

Thus letters testamentary, and *special* letters of administration, may be issued by the same Surrogate. The condition of the special letters, which are *ad litem*, is the refusal, of the holder of permanent letters, to bring the action.

Or they may be limited as to the degree of control to be enjoyed by the recipient. This is by virtue of § 2595 of the Code, which is as follows:

> *Deposit of securities to reduce penalty of bond.*
>
> In a case where a bond, or new sureties to a bond, may be required by a surrogate from an executor, *administrator*, guardian, or other trustee, if the value of the estate or fund *is so great*, that the surrogate deems it inexpedient to require security in the full amount prescribed by law, he may direct that any securities for the payment of money, belonging to the estate or fund, be deposited
>
> With him, to be delivered to the county treasurer, or
>
> Be deposited, subject to the order of the trustee, *countersigned by the surrogate*, with a trust company duly authorized by law to receive the same.
>
> After such a deposit has been made, the surrogate may fix the amount of the bond, with respect to the value of the remainder only of the estate or fund.
>
> A security thus deposited shall not be withdrawn from the custody of the county treasurer or trust company, and no person, other than the county treasurer or the proper officer of the trust company, shall receive or collect any of the principal or interest secured thereby, without the special order of the surrogate, entered in the appropriate book.
>
> Such an order can be made in favor of the trustee appointed, only where an additional bond has been given by him, or upon proof that the estate or fund has been so reduced, by payments or otherwise, that the penalty of the bond originally given, will be sufficient in amount, to satisfy the provisions of law relating to the penalty thereof, if the security so withdrawn is also reckoned in the estate or fund. § **2595, Code Civil Proc.**

This direction, limiting the degree of control, may be inserted in the letters, or embodied in an independent order.

The limitations on powers of an executor or administrator by force of statute upon the happening of certain contingencies of litigation, e. g., as by appeal under § 2582, do not fall under this head; nor would they be embodied necessarily in the letters.

§ 575. **Joining persons, not entitled, in letters.**—Section 2660 further provides that, at the request, in writing, duly filed, of one entitled, the Surrogate may grant letters to the one ("or more" if several are equally entitled) entitled jointly with "one or more competent persons, although not entitled to the same."

A peculiar situation under this section is shown in *Matter of Ireland*, 47 Misc. 545. A, decedent's widow, prayed for letters to herself and to B, a stranger to the blood. Decreed accordingly. Whereupon, B alone qualified and proceeded to act. C, a grandson, thereupon petitioned for revocation on the ground that the section contemplated "joint administration" and not a scheme of ousting persons subsequently entitled by a technical assertion of a right immediately to be devolved on another having no statutory right.

Held, that (thanks to the migration of a comma) the intent of the act is met by the *grant of letters*, irrespective of whether the one entitled shall qualify. In other words, the right of priority in administration includes the right of substitution. In deference, we submit this was not the legislative intent, though the opinion of Lester, Surr., is well reasoned.

Joint administration was the end in view, and the main purpose should control in construing, even a comma.

§ 576. **Revocation of letters.**—The subject of revocation of letters of executors and administrators is discussed separately under ch. 9 of this part, to which reference is hereby made.

CHAPTER V

ADMINISTRATION DE BONIS NON

§ 577. **Definition.**—An administrator *de bonis non administratis*, is one appointed to complete the administration of an estate interrupted by the death of the former administrator, or by his retirement, voluntary or involuntary, from the office.

The Code of Civil Procedure combines its directions in regard to administrators with the will annexed and administrators *de bonis non*. The section is as follows:

> Where all the executors, or all the administrators, to whom letters have been issued, die, or become incapable, as prescribed in section 2692, or the letters are revoked as to all of them; the surrogate must grant letters of administration to one or more persons as their successors, in like manner as if the former letters had not been issued; and the proceedings to procure the grant of such letters, are the same, and the same security shall be required, as in a case of intestacy, except that the surrogate may, in his discretion, in case where the estate has been partially administered upon by the former representative or representatives, fix as the penalty of the bond to be given by such successor or successors, a sum not less than twice the value of the assets of the estate remaining unadministered. **§ 2693, Code Civil Proc.**

An administrator with the will annexed, as has already been indicated, derives his powers in regard to the distribution of the estate from the will, as if he had been named executor, subject, however, to the limitations noted in that connection. An administrator *de bonis non*, however, should only be appointed as such, where all the administrators to whom letters have been issued, die or become incapable (as prescribed in § 2692, that is to say, either by reason of lunacy, or by conviction of an infamous offense or otherwise) of discharging the trust reposed in them, or where the letters of all the administrators are revoked. See § 2693. But where these same conditions, or any of them, exist with respect to an executor or executors, or an administrator with the will annexed, it presents a case for the appointment of a further administrator with the will annexed. The first point to be noted, therefore, under § 2693 is, that where there are several administrators, an administrator *de bonis non* is never to be appointed unless all of them die, become incapable, or have their letters revoked, for it is expressly provided by the previous § 2692 that, where one of two or more administrators dies or becomes lunatic, or is convicted of an infamous offense or becomes otherwise incapable of discharging the trust reposed in him, or where his letters are revoked, a successor to such administrator whose letters are revoked *shall not be appointed*, but the other

or others may proceed to complete the administration of the estate pursuant to the letters issued and may continue any action or special proceeding brought by or against them. The exception noted in § 2692 which is not incorporated in the foregoing extract applies only to the cases where there is a will under which an executor or executors or one or more administrators with the will annexed are administering the estate. In such a case a successor to one whose letters are revoked for any of the above stated causes will be appointed, "if such an appointment is necessary in order to comply with the express terms of the will."

§ 578. **The estate must be unadministered.**—The words *de bonis non* signify that the administration, now under discussion, is limited to such part of the estate of the decedent as has not been administered by the former administrator. As Blackstone remarks (part 2, page 506) in this connection "when it becomes necessary for the ordinary to appoint a successor to an administrator," who he points out is merely the officer of the ordinary and not the appointee of the testator, "it is necessary for the ordinary to commit administration afresh of the goods of the deceased *not* administered by the former administrator." The distinction above made between an administrator with the will annexed and an administrator *de bonis non* is in many respects one that does not need to be emphasized, for in most particulars the courts have used the words *de bonis non* in speaking of what it is manifest is an administration c. t. a. Thus the Court of Appeals in *Casoni* v. *Jerome*, 58 N. Y. 315, at page 320, says: "The bond upon which this action is brought was given on the appointment of Mrs. Levy, as administratrix *de bonis non* of the estate of her husband upon issuing to her letters of administration with the will annexed." In this particular case executors had previously qualified, acted and been removed, and of course in such a case the administrator c. t. a. is an administrator of an estate not administered, but such administration is governed by the rules relating to the administration with the will annexed, and is limited in regard to the powers which such administrator has, in distributing the estate by the valid provisions of the will. An administrator *de bonis non*, pure and simple, is an administrator of an estate left unadministered by a previous administrator in chief. But it is said that where letters of administration with the will annexed are granted in a case where letters testamentary have never been issued and cannot issue, the administrator may properly be designated an administrator *cum testamento annexo de bonis non*. *In re Ward*, 1 Redf. 254. The wording of the original statute which is now substantially embodied in the Code was in this case paraphrased by Surrogate McVean in the following language: "The true construction of this statute (2 R. S. 78, § 45), which is rendered ambiguous by a desire to economize in the use of words, is this: If an executor or original administrator with the will annexed shall die or become incapable as aforesaid, or the power and authority of all of them shall be revoked according to law, letters with the will annexed *de bonis non* shall be granted to persons in the same order of preference as is prescribed in

the law of original administration with the will annexed; and if an original administrator in case of intestacy shall die, etc., letters *de bonis non* shall be granted to persons in the same order of preference as is prescribed in the case of granting letters originally on the estates of intestates." The provisions of § 2693 are not inconsistent with this construction of the former statute; the section provides that the letters must be granted in like manner as if the former letters had not been issued, which makes the rule already noted applicable. The same security is required as in a case of intestacy except that the minimum penalty of the bond to be given, instead of being determined by the amount of the estate at the death of decedent is determined by the amount of the assets of the estate remaining unadministered.

Where, therefore, the decedent left a will, whether an executor has partly administered or it has already been necessary to appoint an administrator with the will annexed, and the administration is interrupted for any of the reasons specified in § 2693, the proper course is to apply for an administrator with the will annexed and to follow the procedure indicated in the discussion in that connection. On the other hand, wherever the decedent left no will and the administration of the estate has been interrupted for any of those reasons as specified, the application should be for the appointment of an administrator *de bonis non.* In whatever way the authority of an administrator terminates whether by death, removal or otherwise, if the estate in his hands has been fully administered, that is to say, is in condition to distribute, it is never necessary to appoint an administrator *be bonis non;* nor would it be proper to do so; the procedure in such case is to compel the final settlement of such administrator's account and to make a decree of distribution. *Prentiss* v. *Weatherly,* 68 Hun, 114, 117, aff'd 144 N. Y. 707.

§ 579. **Right to administer de bonis non.**—Section 2693 is capable of no other construction than that the right to administration *de bonis non* given thereby follows the same order of preference of the same classes of persons as in the case of original administration. *Matter of Ward,* 1 Redf. 254, 256; *Bradley* v. *Bradley,* 3 Redf. 512, Calvin, Surr. So where there is no person having a prior right to the applicant it is not necessary that citation should issue. *Cobb* v. *Beardley,* 37 Barb. 192.

The words "the Surrogate" means the Surrogate having jurisdiction over the prior administrator or executor. Section 2605 referring to the case of revocation of letters (one of the contingencies mentioned in § 2693) provides that if so revoked by a Surrogate's Court, "*that court*" has the same powers, etc., as if no letters had yet been issued. It is clear the jurisdictional question cannot be different in the other contingencies. The death or incapacitation of a representative cannot divest the jurisdiction of the court over the *estate.*

§ 580. **Powers and duties.**—The powers and duties of an administrator *de bonis non* correspond to those of the representative of the estate whom he has been appointed to succeed. The administration is merely the con-

tinuance of the prior administration. So, wherever acts are required to be done by the representative of the estate within a given time, limited by the issuance of letters, the time so specified must be reckoned from the issuing of the first letters, except there be an express provision to the contrary. § 2693, Code Civ. Proc.; *Slocum* v. *English*, 2 Hun, 78, 81; *S. C.*, 62 N. Y. 494, 496. An administrator *de bonis non* takes the estate *where his predecessor left it*, and in respect of the time to sell real estate, as well as in most other respects, his administration is a mere continuance of that preceding. *Matter of Kingsland*, 60 Hun, 116, 121, citing *Slocum* v. *English*, *supra*. Any other rule would render uncertain and vague the right of heirs, devisees, purchasers and creditors; so, where the predecessor of the administrator *de bonis non* has been guilty of laches, or has not exercised due diligence in the prosecution of claims, or has done some act, or been guilty of some omission to act, prejudicial to his rights as representative, the administrator *de bonis non* is bound thereby. *Matter of Kingsland*, 60 Hun, 116; *Whitlock* v. *Bowery Savings Bank*, 36 Hun, 460. And if a proceeding which he desires to institute is open to the defense that he has not exercised due diligence, his own diligence alone will not avail if his predecessor omitted to exercise proper diligence. But, he may not be concluded in matters of judgment and discretion by the course of the one he supplants or succeeds. His predecessor's rejection of a creditor's claim may be reconsidered by him. If he does so and pays the claim, the propriety of his conduct can be passed upon at the time of accounting. *Matter of Hallenbeck*, 119 App. Div. 757.

§ 581. **Same subject.**—The administrator *de bonis non* has full power to compel his predecessor or his representative to account and to take all proceedings necessary to that end. *Dale* v. *Roosevelt*, 8 Cowen, 333; *Walton* v. *Walton*, 1 Keyes, 1. This power is expressly given him, or, rather, the Surrogate's Court is given power to compel such accounting by virtue of § 2605 of the Code, which is as follows:

> Where letters have been revoked by a decree of the surrogate's court, that court has, except in a case where it is otherwise specially prescribed by law, the same power to appoint a successor to the person whose powers have ceased, as if the letters had not been issued. The successor may complete the execution of the trust committed to his predecessor; he may continue, in his own name, a civil action or special proceeding, pending in favor of his predecessor; and he may enforce a judgment, order, or decree, in favor of the latter.
>
> The surrogate's court has the same jurisdiction, upon the petition of the successor, or of a remaining executor, administrator, guardian or trustee, to compel the person whose letters have been revoked, to account for, or deliver over money or other property, and to settle his account, which it would have upon the petition of a creditor or person interested in the estate, if the term of office, conferred by the letters, had expired by its own limitation.

Under this section it has been held that the administrator *de bonis non* is the proper person to compel the accounting (*Breslin* v. *Smyth*, 3 Dem. 251, Rollins, Surr.; *Matter of O'Brien*, 45 Hun, 284, 291), for the provision

of the section is explicit that the jurisdiction to compel the accounting, or the delivery of money or other property must be upon the petition *of the successor*. See *Matter of Richmond*, 63 App. Div. 488, 492. This case involved an administrator c. t. a. but is pertinent to this discussion.

The administrator *de bonis non* has no further power or authority over the estate than the preceding administrator possessed at the time of his removal or decease (*Whitlock* v. *Bowery Savings Bank*, 36 Hun, 460), and succeeds to these powers only so far as the estate is unsettled. The authority of an administrator *de bonis non* includes only such powers and functions as are necessary to completely settle and adjust the remaining affairs of the estate. The procedure upon the accounting is of course discussed separately under the general head of "accounting." Since all statutory limits, as has been already noted, dated back to the issuance of the first letters, if an administrator *de bonis non* moves for an accounting under § 2605 or 2606 he must initiate his proceedings within the ten years limited by the statute. *Pitkin* v. *Wilcox*, 12 N. Y. Supp. 622. So where an administratrix *de bonis non* began proceedings to compel an accounting by the representative of her deceased predecessor, the Court of Appeals (*Matter of Rogers*, 153 N. Y. 316), discussing the question directly of the effect of the statute of limitations as a bar to the proceedings, held first, that the rules of limitation were applicable to special proceedings the same as to civil actions (page 321, citing Code Civ. Proc. §§ 414, 3333, 3334, and *Church* v. *Olendorf*, 19 N. Y. St. Rep. 700); and second, that the authority for an administrator *de bonis non* to call the executor of his predecessor to an accounting in the Surrogate's Court was first conferred by § 2606, going into effect September 1, 1880; and third, that since the proceeding in question was instituted under that section and by the plaintiff as successor in administration, it could have been made immediately after such appointment (citing Code Civ. Proc. § 2643; *Matter of Wiley*, 119 N. Y. 642); and consequently while the remedy provided by § 2606 could not have been applied for in the case at bar until after the death of the administrator or executor first appointed, which in that case took place on the 2d of July, 1885, "Or more than six but less than ten years before this application was made on the 27th of July, 1891, the plaintiff had the right to the benefit of the statute in her capacity as administratrix giving her ten years in which to apply for the remedy." And the court held further that the fact that she was the sole next of kin and would, had she applied in that capacity, have been governed by the usual period of six years, was merely a coincidence and her rights as administratrix, after having been duly appointed, were not affected thereby. *Wiggins* v. *Sweet*, 39 Amer. Dec. 716. The court adopted the language of the Supreme Court in *Matter of Latz*, 33 Hun, 618, where an administrator *de bonis non* sought to compel the executor of his predecessor to account (which language is quoted from the opinion of Judge Bradley at pages 324 and 325).

§ 582. **Petition for letters of administration de bonis non.**—The necessary allegations of the petition appear in the following precedent:

Surrogate's Court,
City and County of New York.
In the Matter of the Application for Letters of Administration on the Goods, Chattels and Credits (left Unadministered *or* De Bonis Non) of Deceased.

To the Surrogate's Court of the City and County of New York:

The petition of respectfully shows:

That your Petitioner is a resident of No. in the and is the of the said deceased, and is of full age; that said deceased departed this life at on the day of 19 that Letters of Administration upon the goods, chattels and credits of deceased, were duly granted by the Surrogate of the City and County of New York on the day of 19 unto the of said deceased, that said administrat of the Estate of said deceased, has since departed this life (*or* was removed upon proceedings duly had in this court by final order made and entered on the day of 19), on the day of 19 leaving certain property and assets of the said still unadministered; that your Petitioner has to the best of h ability ascertained and estimated the personal estate of which the said died possessed, and the value of the same does not exceed the sum of dollars.

And your petitioner has been informed, and believes, that the said deceased left h surviving only next of kin; that said deceased was and was at or immediately previous to death a resident of the County of New York.

Your petitioner therefore prays that a decree of the said Surrogate's Court of the City and County of New York issue appointing your petitioner Administrator De Bonis Non of the goods, chattels and credits of said deceased.

The decree granting letters is substantially identical in form with that granting letters of administration except as to recitals.

There may properly be one as to prior administration and the date and character of its ending. There may also be the jurisdictional recital, which asserts the Surrogate's right to appoint the successor. Thus, the letters granted in Westchester County contain this form, in this respect: "And Whereas the said at or immediately previous to death was an inhabitant of the County of Westchester, having whilst living and at the time of death, goods, chattels and credits, within this State, *by means whereof* the ordering and granting administration of all and singular the goods, chattels and credits and also the auditing, allowing and final discharging the accounts thereof, *doth appertain unto us.*"

CHAPTER VI

ANCILLARY ADMINISTRATION

§ 583. **Enforcing foreign wills and letters.**—Article 7, of title 3, of ch. 18, of the Code is entitled Foreign Wills and Ancillary Letters. By it provision is made for giving proper effect in this State to foreign testamentary dispositions and probate. The jurisdiction of the Surrogates in regard to such wills and to the issuing of ancillary letters is derived wholly from the statute.

§ 584. **Definitions.**—The words, "Ancillary Administration," have been thus defined, "A local and subordinate administration of such part of the assets of a decedent as are found within a State other than that of his domicile, and which the law of the State where they were found requires to be collected under its authority in order that they may be applied: *first*, to satisfy the claims of its own citizens, instead of requiring the latter to resort to the jurisdiction of principal administration to obtain payment; *the surplus*, after satisfying such claims, to be remitted to the place of principal administration."—Century Dictionary. This definition is an excellent one and emphasizes the fact that ancillary administration is a secondary or subordinate one. The statutory provisions consequently providing for the granting of ancillary letters testamentary or of administration with the will annexed or of administration upon a foreign grant of administration are conditioned first, by a regard for the rights of creditors resident in the State and their protection, and second, by principles of comity under which the New York law recognizes the status of a foreign executor or administrator in his own State or country, whose right to distribute the estate after the payment of debts and administration expenses in this State is safeguarded.

§ 585. **Laws governing the estate affected.**—The article formerly commenced by declaring, in § 2694, the statutory rule by which in this State the validity and effect of testamentary dispositions of real and personal property disposed of by will are to be regulated, where the property of whatever character is situated within this State; as well as the manner in which such property is to descend or to be distributed where it is not disposed of by will. The section is now incorporated into the Decedent Estate Law, is unambiguous and reads as follows:

Validity and effect of testamentary dispositions.

The validity and effect of a testamentary disposition of real property, situated within the state, or of an interest in real property so situated, which would descend to the heir of an intestate, and the manner in which such prop-

erty or such an interest descends, where it is not disposed of by will, are regulated by the laws of the state, without regard to the residence of the decedent.

Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident, at the time of his death. **§ 47, Dec. Est. Lsw.**

§ 586. **Same subject.**—This provision was new in the Code. It is capable of subdivision into four propositions.

(*a*) The validity and effect of a testamentary disposition of real property or of an interest in real property situated within this State is regulated by the laws of this State irrespective of the residence or nonresidence of the deceased.

(*b*) The manner in which real property or an interest in real property situated within the State shall descend from an intestate decedent, is to be regulated by the laws of this State irrespective of his residence or nonresidence.

(*c*) The validity and effect of a testamentary disposition of property other than real situated within the State must be regulated by the laws of the State or country of which the decedent died a resident.

(*d*) The ownership and distribution of property other than real belonging to an intestate and situated within the State must be regulated by the laws of the State or country of which the decedent died a resident.

Propositions (*c*) and (*d*) are subject to the exception, "where special provision is otherwise made by law." In a case originating prior to the enactment of these provisions the Court of Appeals had decided that the New York law must govern the construction of the will of one, who though a citizen of this country died a resident of France. *Caulfield* v. *Sullivan*, 85 N. Y. 183. This case was a peculiar one; the decedent had resided in France several years prior to his death, his will was made in French and in France, and his will with a codicil thereto were admitted to probate in New York County, where original letters of administration with the will annexed were granted. By the will the testator appointed a universal legatee in France, which corresponds to an executor in this country, to whom he gave all his property in France on condition of her releasing all claims to his property in America. By his codicil he left all his property in America to his two brothers, citizens of this country, and appointed one of them, a resident of New York County, executor as to all his property in America. The Court of Appeals held that, as the testator was a citizen of this country, claiming his domicile here, but temporarily residing in France, his will must in our courts be construed according to our laws. Opinion of Earl, J., at page 159. Section 2694 was not passed upon in this connection and it may be doubted whether the decision of the court would have been inconsistent with this section even had the case arisen after the enactment of the section, for there was a manifest intent in the will and codicil taken together, that the distribution of his American property should be by an American exec-

utor and should not in any manner be combined or mixed up with the administration of his property in France, which was under a separate executor and bequeathed to a separate legatee. So far, however, as the case cited purports to lay down the general rule in this State, it is superseded by the rule declared by § 2694. It is accordingly unnecessary to cite other cases declaring the rule as it formerly existed. This section must not be extended beyond its express intent. It must not be taken as extending so as to limit the power of a New York Surrogate to control an ancillary administrator under a foreign will or administration in his custody and disposition of New York assets, prior to their transmission to the principal executor or administrator. The laws of this State and the rules established by our courts affecting the control and management of ancillary funds must govern as regards property within the control of the ancillary administrator and hence of the Surrogate. In other words, the State law controls the procedure. *Matter of Kucielski*, 49 Misc. 404. If ancillary funds are removed, properly or improperly, to the place of principal administration the Surrogate loses his jurisdiction thereof; but may in case of improper removal hold the ancillary administrator to strict accountability. See *Johnson* v. *Johnson*, 4 Dem. 93. See also *Lawrence* v. *Elmendorf*, 5 Barb. 73. And see very clear discussion by Thomas, Surr., in *Matter of Barandon*, 41 Misc. 380, where decedent was domiciled in Switzerland, and his property in New York County was both real and personal.

§ 587. **Difference between ancillary and principal administration.**— The difference between ancillary and principal administration is material and important when there are several administrations. Where a decedent dies in another State or country the custody, management, and distribution of his property in that State are of course exclusively committed to the persons who may be appointed there by the proper court as administrators of his credits and effects. *Carroll* v. *Hughes*, 5 Redf. 337, 342, citing Dayton on Surrogates, 208; *Schultz* v. *Pulver*, 11 Wend. 361, 363; *Lawrence* v. *Elmendorf*, 5 Barb. 73, 76; Williams on Executors, 291, *n.*; 3 Redf. on Wills, 26, 28. The administration granted in the country of the deceased is the principal one and that granted in any other country is merely ancillary or auxiliary to it. *Id.* Those charged with the ancillary administration are liable to account in the country where it was granted for all the assets collected thereunder, after paying from said assets all the debts due to resident creditors and the proper commissions and expenses of administration; the balance may then be ordered, in the discretion of the court before which the accounting is had, either to be distributed to the persons entitled thereto, or to be remitted to the place of domicile of the deceased, to be there distributed by the principal administrator. *Carroll* v. *Hughes*, *supra*, citing *Parsons* v. *Lyman*, 20 N. Y. 103; *Despard* v. *Churchill*, 53 N. Y. 192. See also *Hendrickson* v. *Ladd*, 2 Dem. 402. So where the administration in this State is subsidiary to that at the place of the decedent's domicile, it must, under the rules laid down in this chapter, relate exclusively to the assets in this State and the jurisdiction of the New York Sur-

rogate is limited to them. *Black* v. *Woodman*, 5 Redf. 363, citing *Lynes* v. *Coley*, 1 Redf. 405.

§ 588. **Administration in this state under a foreign probate.**—The necessity for the granting of ancillary or subordinate letters lies in the fact that foreign executors, which includes foreign administrators with the will annexed or foreign administrators, have no standing *ex virtute officii* in the courts of this State. This rule, that a foreign executor cannot sue or be sued, purely in his representative capacity, in the courts of this State, is well settled. *Farrington* v. *American L. & T. Co.*, 18 Civ. Pro. 135; *Flandrow* v. *Hammond*, 13 App. Div. 325, citing *Matter of Webb*, 11 Hun, 124; *Vermilyea* v. *Beatty*, 6 Barb, 429; *Field* v. *Gibson*, 20 Hun, 274; *Hopper* v. *Hopper*, 125 N. Y. 400; *Johnson* v. *Wallis*, 112 *id.* 230; *Doolittle* v. *Lewis*, 7 Johns. Ch. 45; *Petersen* v. *The Bank*, 82 N. Y. 21; *Lawrence* v. *Lawrence*, 3 Barb. Ch. 74. By the phrase, "Foreign executor," the court never means the mere nonresidence of the individual holding the office but the foreign origin of the representative character. *Hopper* v. *Hopper*, 125 N. Y. 400. It is not the residence of an executor outside of the State which makes him a foreign executor but the creation of his official character under and by force of a law foreign to our own. The representative character, therefore, is the sole product of the foreign will and, depending upon it for existence, cannot pass beyond or have any force and effect outside of the jurisdiction of its origin. So, in the case just cited, Judge Finch observes that an individual may come here and acquire rights or incur liabilities which a New York tribunal will defend or enforce. But the fact that he has a representative character in a foreign jurisdiction gives him in our tribunal no representative rights or liabilities. *Id.* at page 403. The cases are carefully reviewed in *McGrath* v. *Weiller*, 98 App. Div. 291, *q. v.* See *Taylor* v. *Syme*, 162 N. Y. 513; *Schluter* v. *Bow. Sav. Bk.*, 117 N. Y. 125, 129; *Matter of Fitch*, 160 N. Y. 87, 95. So a foreign executor may sue or be sued in our courts upon his own contract (*Lawrence* v. *Lawrence*, 3 Barb. Ch. 74; *Johnson* v. *Wallis*, 112 N. Y. 230; *Hopper* v. *Hopper*, 125 N. Y. 400, 403; *Flandrow* v. *Hammond*, 13 App. Div. 325, 327), but not upon the contract of his testator. See *Johnson* v. *Wallis*, 112 N. Y. 230. To enable him to do the latter is the object of the sections of the Code about to be discussed. These provisions indicate when and in what manner a foreign executor may become an executor here and clothe himself with a representative character under our law, and by force of an authority conferred within our jurisdiction. This is by virtue of the following section:

> Where a will of personal property, made by a person who resided without this state at the time of the execution thereof, or at the time of his death, has been admitted to probate within the foreign country, or within the state, or the territory of the United States, where it was executed, or where the testator resided at the time of his death; the surrogate's court, having jurisdiction of the estate, must, upon an application made as prescribed in this article, accompanied by a copy of the will, and of the foreign letters, if any have been issued, authenticated as prescribed in section forty-five of the decedent estate

law, record the will and the foreign letters, and issue thereupon ancillary letters testamentary, or ancillary letters of administration with the will annexed, as the case requires. § **2695, Code Civil Proc.**

By compliance with the terms of this section in a proper case, a foreign executor acquires an official and representative character under our law and becomes an executor here, and may be described as, "An official of our State acting under our laws." *Cummings* v. *Banks*, 2 Barb. 602. But the compliance must be shown. See *Taylor* v. *Syme*, 162 N. Y. 513, where letters were issued ancillary to a Louisiana probate but decedent in fact resided and executed the will in Alabama. The Surrogate, not noting this discrepancy, granted letters, and the ancillary administrator having brought suit as such it was held open to collateral attack for want of jurisdiction. See *Baldwin* v. *Rice*, 183 N. Y. 55, aff'g 100 App. Div. 241; 44 Misc. 64.

§ 589. **Ancillary executors, powers; title.**—It follows from what has been stated that if the ancillary executor has been properly appointed he becomes, so far as our courts are concerned, in protecting his rights and those of creditors within this State, a local executor. In *Smith* v. *Second Nat. Bk.*, 169 N. Y. 467, 474, the court holds that an ancillary administrator has, except in the particulars specified in this section, the same general powers as a domestic administrator. These exceptions do not curtail or limit his title to the assets in his hands. *Ibid.* So he may pledge these assets for the purposes of the estate to the same extent as could a domestic administrator. *Ibid.* He is amenable to suits by creditors regardless of whether they be residents or nonresidents of the State. This is not only a rule based upon reason, but distinctly based upon statute. Section 2702 provides as follows:

Ancillary executor's and administrator's general powers and duties.

The provisions of this chapter, relating to the rights, powers, duties, and liabilities of an executor or administrator, apply to a person to whom ancillary letters are granted, as prescribed in this article; except those contained in title fifth thereof;* or where special provision is otherwise made in this article; or where a contrary intent is expressed in, or plainly to be inferred from, the context. § **2702, Code Civil Proc.**

A domestic executor can be sued by a nonresident for his testator's debt. *Hopper* v. *Hopper*, 125 N. Y. 400, 404. Hence, so can the ancillary representative. Of course in such a case the rule limiting the rights of a nonresident to sue, obtain regardless of the character of the defendant. See discussion in *Hopper* v. *Hopper*, by Finch, J., at page 405.

§ 590. **Prerequisites to ancillary letters upon foreign probate.**—The following facts must be made to appear to the satisfaction of the Surrogate before he can issue ancillary letters testamentary or of administration with the will annexed:

*I. e., paying debts with decedent's realty.

(*a*) That there has been probate within a foreign country, or another State or a territory of the United States.

(*b*) Of a will of personal property.

(*c*) That such will so made was proved in the proper court of the country, State or territory where it was executed or where the testator resided at the time of his death.

In other words, a person relying on the decree of a foreign probate court admitting a will to probate must prove that the steps necessary to enable the foreign court to acquire jurisdiction of the subject-matter and of the parties were duly had and taken according to the course of the law of the foreign jurisdiction. *Matter of Law*, 56 App. Div. 454 (headnote).

The allegations of the petition must be definite and direct. The jurisdictional facts must not be left to inference, and the petition should be verified. *Estate of Winnington*, 1 Civ. Proc. Rep. 267. The jurisdiction of a Surrogate in this State to entertain an application for ancillary letters upon foreign probate depends first upon the existence within his jurisdiction of property belonging to the estate. See § 2476, Code Civ. Proc.; *Evans* v. *Schoonmaker*, 2 Dem. 249, Rollins, Surr. So, where the widow of a decedent applied to the Surrogate of New York County for ancillary letters of administration on his estate, and it was made to appear merely that she had been appointed administratrix of his estate by the Orphans' Court of the District of Columbia, which was the place of the decedent's domicile at the time of his death, and it appeared that all the assets of the estate were in her possession in the city of Washington in the District of Columbia, it was held that there was no occasion for the granting of ancillary letters.

Another basis for assuming jurisdiction is that the decedent whose estate is sought to be administered in this State under the ancillary letters was indebted to creditors within the State. This rule is based upon the principle above stated that the chief object of the provision in our statute as to ancillary administration of the assets here is, as it has always been, to preserve and protect the claims of creditors residing in this State. *Moyer* v. *Weil*, 1 Dem. 71. So Surrogate Rollins held in a case before him (*Hendrickson* v. *Ladd*, 2 Dem. 402, 406), that the failure in the petition for ancillary letters to allege indebtedness to creditors in this State was fatal to its effectiveness considered as an application for letters ancillary, citing *Estate of Winnington*, 1 Civ. Proc. Rep. 267. But the Appellate Division in the First Department sustained a petition as containing sufficient jurisdictional allegations in the following case (*Taylor* v. *Syme*, 17 App. Div. 517): "The deceased, Eliza Kenner, left a last will and testament which was duly admitted to probate in the courts of Louisiana, the letters testamentary thereon were issued to the plaintiff in this action, and in August, 1896, an application was made to the Surrogate of the county of New York for ancillary letters upon a petition of the attorney of the plaintiff setting up the fact of the will; that the decedent was at the time of her death a resident of Mobile in the State of Alabama; that the will had been duly

admitted to probate in Louisiana where the decedent left real estate and the said will was executed; also the issuance of letters testamentary thereon and the existence of personal property within this State. Attached to said petition were the will and proofs of execution, by which it appeared that the will in question was not executed in Louisiana, but in Alabama."

Van Brunt, P. J., in passing upon the question of jurisdiction said, "It is claimed that because of this fact the Surrogate had no jurisdiction to issue the letters, because by the provisions of the Code of Civil Procedure (§ 2695) ancillary letters can be granted upon a foreign will only where such will has been admitted to probate within a foreign country or within the State or Territory of the United States where it was executed, or where the testator resided at the time of his death. We are of opinion that the petition presented to the Surrogate contained adequate allegations to confer jurisdiction upon him. Having acquired such jurisdiction, his judicial action cannot be inquired into collaterally as is attempted to be done in the case at bar. Where such papers are presented as call upon the Surrogate to determine the question of jurisdiction, his decision that he has jurisdiction and his action in accordance with such decision cannot be questioned in a collateral proceeding." This decision was reversed, 162 N. Y. 513, on the ground that the petition contained a false allegation, evident from the transcript of foreign probate. And in *Matter of Gennert*, 96 App. Div. 8, the jurisdiction to grant letters where there are no creditors is doubted. And in *Spratt* v. *Syms*, 104 App. Div. 232, the failure to allege indebtedness to creditors in this State is held fatal to granting ancillary letters. As Van Brunt concurred in this opinion it would seem that, though the appointment may be sought in order to maintain actions to recover property belonging to the estate, and to give the foreign representative that right and no other, yet in that event there must be local probate first. See opinion in *Spratt* v. *Syms*, *supra*.

§ 591. **What is sufficient proof of the foreign probate.**—Section 2695 requires that the petition for letters shall be accompanied by "a copy of the will and of the foreign letters if any have been issued, authenticated as prescribed in § 45 of Decedent Estate Law." This refers to former § 2704, which may properly be interjected at this point as it is fundamental to ancillary administration both under foreign probate and under foreign administration. This section (45 Dec. Est. Law) is as follows:

> *Authentication of papers from another State or foreign country for use in this state.* [Italics are used merely for emphasis and contrast.]
>
> To entitle a copy *of a will* admitted to probate or *of letters testamentary* or of *letters of administration*, granted in any other state or in any territory of the United States, and of *the proofs*, or of any *statement of the substance of the proofs*, of any such will, or of *the record* of any such will, letters, proofs or statement, to be recorded or used in this state as provided in article seventh of title third of Chapter eighteenth of the Code of Civil Procedure, or in section forty-four of this chapter, *such copy must be authenticated by the seal* of the court or officer by which or by whom such will was admitted to probate or such letters

were granted, or having the custody of the same or of the record thereof, *and the signature* of a judge of such court, or the signature of such officer and of the clerk of such court or officer *if any;* and *must be further authenticated* by *a certificate under the great* or principal *seal* of such state or territory, *and the signature* of the officer who has the custody of such seal, *to the effect* that the *court or officer* by which or whom such will was admitted to probate or such letters were granted, was *duly authorized* by the laws of such state or territory to admit *wills to probate* or to *grant letters* testamentary or of administration and to keep the same and records thereof; that the *seal* of such court or officer affixed to such copy *is genuine, and* that the officer making such certificate under such seal of such state or territory *verily believes that each of the signatures* attesting such copy is genuine.

And to entitle any *certificate concerning proofs* accompanying the copy of the will or of the record so authenticated, to be recorded or used in this state, as provided in said article or section, such certificate must be under the seal of the court or officer by which or whom such will was admitted to probate, or having the custody of such will or record, and the signature of a judge or the clerk of such court, or the signature of such officer, authenticated by a certificate under such great or principal seal of such state or territory, and the signature of the officer having the custody thereof, to the effect that the seal of the court or officer affixed to such certificate concerning proofs is genuine, and that such officer making such certificate under such seal of such state or territory, verily believes that the signature to such certificate concerning proofs is genuine.

To entitle a copy of a will admitted to probate or of letters testamentary or of letters of administration granted in a foreign country, and of the proofs, or of any statement of the substance of the proofs, of any such will or of the record of any such will, letters, proofs or statement to be recorded or used in this state as provided in said article or section, such copy must be authenticated by the seal of the court or officer by which or by whom such will so admitted to probate or such letters were granted or having the custody of the same or of the record thereof and the signature of a judge of such court or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by a certificate of a judge of a court of record of such foreign country; to the effect that the court or officer by which or by whom such will was admitted to probate, or such letters were granted, was duly authorized by the laws of such foreign country to admit wills to probate or to grant letters, testamentary or of administration and to keep the same and records thereof; and that the judge making such certificate verily believes that the seal and each of the signatures attesting such copy is genuine, and the signature and official character of such of a court of record shall be attested by a United States consul or vice-consul.

And to entitle any certificate concerning proofs accompanying the copy of a will or of the record so authenticated to be recorded or used in this state, as provided in said article or section, such certificate concerning proofs must be similarly authenticated and attested.

§ 592. **Minuteness of exemplification.**—The intent of this section is to afford to the Surrogate who is asked to issue the ancillary letters an authenticated certificate of exemplification from which on principles of comity

he may be enabled judicially to find that the will has been admitted to probate by a competent court. Care therefore should be taken that the exemplifications of both will and of letters should be in compliance with the requirements of the statute. Surrogate Livingston (*Matter of Hudson*, 5 Redf. 333) in a case where there was no exemplified copy of a judgment, decree, or order admitting the will to probate accompanying the petition, and where it appeared that under the laws of the State of New Jersey, where the will had been proved, no such written judgment, decree or order is required, but that wills were admitted to probate on the mere oral direction of the court, held that it was essential that that fact should appear in the certificates of exemplification of the will and in case the designated officials should refuse to certify to the fact it should be proved to the satisfaction of the Surrogate by the affidavit of some person having knowledge of the laws of New Jersey.

The learned Surrogate, also, held that it was essential that the will should be shown to have been admitted to probate by a duly constituted and competent court.

The statute contemplates not a proceeding for probate here but merely the supplementing of the foreign probate upon satisfactory proof before the Surrogate of the authenticity of the foreign record. And so it has long been the rule that the genuineness and validity of the will itself are subjects which can only be inquired into at the place of probate. *Will of Esther Levy*, 1 Tucker, 20. But the statute now requires complete exemplification (*a*) where it is intended to record the will under § 44, Dec. Est. Law (former § 2703, Code Civ. Proc.), (*b*) or when the "copy" is to be used in order to ancillary letters.

On the other hand, the will or letters may owe their force (*a*) to the acts of the courts of another State or territory, or (*b*) to the acts of the courts in a foreign country.

In order to emphasize the contrast the provisions of the act, quoted in the preceding section, are paragraphed, which is not the case in the act itself.

§ 593. **Where administration in this State need not be ancillary.**—Where there is no other application for domiciliary letters in this State and the foreign will is one which under § 2611 is entitled to probate in this State, the application may be directly for probate of the will, if there was one, and for letters of administration with the will annexed, or even for letters testamentary in a proper case, and in such a case there is no necessity for making the administration an ancillary one. Surrogate Rollins passed upon this question (*Hendrickson* v. *Ladd*, 2 Dem. 402), upon an application by an administratrix with the will annexed for leave to mortgage, lease, or sell real property of her decedent. Her authority to act representatively was called in question and in passing upon it the learned Surrogate held as follows:

"Next comes the question whether the letters held by the petitioner warranted her in instituting this proceeding. Under the laws in force

prior to the adoption of the Code, there can be no doubt, I think, that she would, in the absence of an application by a domiciliary executor or administrator, have been entitled to letters of administration with the will annexed, and that such letters would have been justly regarded as strictly local letters, more especially if there had been no domiciliary letters outstanding at the time of her application. That, in the absence of a claim by the foreign executor and administrator, letters could be issued under § 60, 3 Rev. Stat., 6th ed., p. 67, to the person entitled to letters of administration, with the will annexed, under the statute making provision with regard to domestic administration, and in the order of priority specified thereunder, and that such letters so issued would be principal and not ancillary letters seems to be recognized by § 34 of the Revised Statutes. 6th ed., p. 76, and by the following authorities: *Isham* v. *Gibbons*, 1 Bradf. 69, 76, 79; *Russell* v. *Hartt*, 87 N. Y. 18, 24; *St. Jurjo* v. *Dunscomb*, 2 Bradf. 105; *Sullivan* v. *Fosdick*, 10 Hun, 173, 180. Those provisions of the Revised Statutes, relating to this subject, as well as ch. 403 of the Laws of 1863, which have some bearing upon it, were repealed by the General Repealing Act which ushered in the Code of Civil Procedure. The substance of the earlier provisions is adopted into and now forms part of § 2695 of the Code. This appears by comparison of the old and new statutes, and Mr. Throop, in his annotation to the section, declares that no substantial change was intended.

"I find nothing in the language of § 2695 which declares an intention on the part of the legislature to prevent the issuance, under such circumstances as here appear, of letters of administration with the will annexed, conforming to the requirements of our statute with regard to the local administration. The practice existed before the enactment of the Code, and I do not think that the Code abolished it.

"I hold, therefore, that the letters held by this petitioner warranted her in instituting this proceeding." See also *Spratt* v. *Syms*, 104 App. Div. 232.

In case there appear, then, to be two original, or more properly, independent administrations, one here, and one elsewhere, then the court will marshal the assets and dispose of them in such a way as to equitably discharge the claims against the decedent.

§ 594. **Section 2695 further discussed.**—Section 2695 not only limits ancillary letters upon foreign probates to wills of personal property (*Matter of Langbein*, 1 Dem. 443), but it also requires that the testator shall be shown to have resided without this State at the time of the execution of the will, or at the time of his death. As this, therefore, is a jurisdictional fact it cannot be determined on affidavits in case it is put in issue. Accordingly it is proper for the Surrogate in such a case to order a reference to determine the fact as to the residence of the deceased either at the time of his death or of the execution of the will. *Matter of Cavin*, 1 Connoly, 117, 119, Ransom, Surr.

§ 595. **Ancillary letters upon foreign grant of administration.**—An-

cillary letters may also be granted in this State upon a foreign grant of administration.

> Upon application by the party entitled, as hereinafter provided, or by his duly authorized attorney in fact, made as prescribed in this article, to a surrogate's court having jurisdiction of the estate; and upon the presentation of a copy, authenticated as prescribed in this article, of letters of administration upon the estate of a decedent who resided, at the time of his death, without this state, but within the United States, granted within the state or territory where the decedent so resided; or in cases where the decedent, at the time of his death, resided without the United States, upon the presentation to such surrogate's court of satisfactory proof that the party so applying, either personally or by such attorney in fact, is entitled to the possession in the foreign country of the personal estate of such decedent, the surrogate's court, to which such copy of such foreign letters so authenticated or such proof is so presented, must issue ancillary letters of administration, in accordance with such application; except in the following cases:
>
> 1. Where ancillary letters have been previously issued, as prescribed in the last section.
>
> 2. Where an application, for letters of administration upon the estate, has been made by a relative of the decedent, who is legally competent to act, to a surrogate's court of the state, having jurisdiction to grant the same; and letters have been granted accordingly, or the application has not been finally disposed of. **§ 2696, Code Civil Proc.**

The application for ancillary letters upon foreign grant of administration differs, first of all, in that the application may be made by the duly authorized attorney in fact of the party entitled to receive such letters. This is shown in § 2697, below. Thus, in *Baldwin* v. *Rice*, 183 N. Y. 55, the plaintiffs sued as ancillary administrators. The defendant put in issue the validity of their appointment, and was sustained in that

(*a*) Their petition for appointment was not accompanied by the requisite copy of "foreign letters."

(*b*) Nor was it accompanied by the instrument of designation from the foreign representative required by § 2697 (*post*). It will be recalled that in regard to ordinary administration in chief the right to administer cannot be delegated in this way, but the person entitled in order of priority must either assert his right in person or yield to the next in order of preference. It has also been noted elsewhere that in regard to probate and the issuance of letters testamentary under a will, or of administration with the will annexed, a different rule was established by the Court of Appeals. *Russell* v. *Hartt*, 87 N. Y. 18. In this case the jurisdiction of a Surrogate was upheld to take the proof of a will of real and personal estate executed in Scotland by a citizen of this State temporarily residing in that country, in accordance both with the foreign law and with our own, and to issue letters to one appointed by a power of attorney, duly and properly executed, to present the will for probate and to ask for and receive letters and to take possession of and to administer upon the estate. Opinion of Finch, J., at pages 21 and 22.

§ 596. **Same subject.**—The second peculiarity to be noted in regard to the granting of ancillary letters upon foreign grant of administration is in the exceptions noted in § 2696. They are, first, that such letters may not be granted where they have already issued upon an independent application under the previous section, to wit, upon foreign probate. The second exception is, and it is one on which the courts have been called upon to pass, where applications for domiciliary administration have already been made within the State. In regard to this it is immaterial, so far as the Surrogate's discretion is concerned, as to whether letters shall have actually been issued or whether the application is still pending undetermined. From the cases that have arisen in this connection, it appears that the Surrogate is not limited in the exercise of his discretion, by the fact that either the application for ancillary or that for local letters was made first. It is clear in the first place that exception two in § 2696 is not mandatory upon the Surrogate in either direction. In a case (*Lussen* v. *Timmerman*, 4 Dem. 250) where a daughter of an intestate, dying in New Jersey and leaving certain personal property in the county of New York, filed a petition for administration upon the estate here, subsequent to which a son of the decedent procured letters of administration in chief in the State of New Jersey and thereafter filed a petition for ancillary letters with the New York Surrogate, the latter (Rollins) held that on the one hand, since the exception provided for in § 2696 existed in the case at bar, the Surrogate had power to grant the daughter's application despite the application for letters ancillary (citing *Weed* v. *Waterbury*, 5 Redf. 114, Calvin, Surr.), and that he had on the other hand in the exercise of his discretion the right to grant the petition for letters ancillary despite the pendency of the other. *Id.*, page 252. It is clear, therefore, that § 2696 is mandatory only in its direction to the Surrogate to issue (except in one of the two cases therein specified) ancillary letters of administration when an application is made to him as provided in that and the following section. Surrogate Rollins held in a later case (*Matter of Williams*, 5 Dem. 292), where an application for original letters was already pending before him when the petition of a foreign representative (who was a domiciliary administrator of the estate of a decedent who died a resident of Tennessee leaving personal property in New York) for ancillary letters was presented to him, that § 2696 merely authorized the Surrogate to decline to grant letters ancillary in case of the pendency of an application by a relative of the decedent for local original letters of administration.

§ 597. **Granting letters to one holding a power of attorney.**—In addition to what has been already said in this connection, it must be added that the words "duly authorized attorney in fact" in § 2696, contemplate not only the proper execution and the technical legal regularity of the power, as well as the proper authentication of the authority of the officer before whom it is executed to take the acknowledgment thereof, but also and chiefly contemplates that the power, or designation, shall expressly indicate the desire of the foreign representative that the attorney in fact

therein named is to apply for and receive ancillary letters and administer the ancillary estate. Consequently, a power of attorney, however regular as to form and execution, merely authorizing the applicant to wind up the business of the decedent or generally to settle his affairs, is not sufficient. *Estate of Thompson*, 1 Civ. Proc. Rep. 264. See also *Ross* v. *Willett*, 76 Hun, 211. The case last cited was one where the applicant for ancillary letters showed himself to have acquired under regular judicial proceedings, known as "verification of heirship" in the province of Quebec in the Dominion of Canada the legal right to the possession of all the personal estate of the decedent, and had also certain powers of attorney under which the acts in question had been done, and his authority under which had not been revoked or annulled in the province of Quebec, and it was held that his appointment as ancillary administrator by the Surrogate of the county of New York was regular and proper. See opinion of Follett, J., at pages 214, 215, and *Baldwin* v. *Rice*, 183 N. Y. 55, already cited, shows the materiality of filing this designation with the petition.

§ 598. **To whom ancillary letters may be granted.**—This is covered by § 2697, which is as follows (the wording is broken into paragraphs merely for clearness):

> Where the will specially appoints one or more persons as the executors thereof, with respect to personal property situated within the state, the ancillary letters testamentary must be directed
>
> (*a*) to the persons so appointed, or to those who are competent to act and qualify.
>
> If all are incompetent, or fail to qualify, or in a case where such an appointment is not made, ancillary letters testamentary, or ancillary letters of administration, issued as prescribed in this article, must be directed
>
> (*b*) To the person named in the foreign letters, or
>
> (*c*) The person otherwise entitled to the property of the decedent, unless
>
> (*d*) another person applies therefor, and files, with his petition, an instrument, executed by the foreign executor or administrator, or person otherwise entitled as aforesaid, or, if there are two or more, by all who have qualified and are acting; and also acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, authorizing the petitioner to receive such ancillary letters; in which case, the surrogate must, if the petitioner is a fit and competent person, issue such letters directed to him.
>
> Where two or more persons are named in the foreign letters, or in an instrument executed as prescribed in this section, the ancillary letters may be directed to either or any of them, without naming the others, if the others fail to qualify, or if, for good cause shown, to the surrogate's satisfaction, the decree so directs. **§ 2697, Code Civil Proc.**

This section defines the priority of right to ancillary letters. The persons entitled may be classified as follows, bearing in mind that the designation of all the persons so classified is limited by their being competent to qualify and act.

(*a*) One or more persons designated by the foreign testator's will to administer the property in this State.

(*b*) The foreign representative,

(*c*) Or the person otherwise entitled to the property of the decedent,

(*d*) Or the persons designated by an instrument executed by either *b* or *c* to receive ancillary letters.

Our statute recognizes, therefore, the testator's desire, where there is a foreign will, and will appoint under the ancillary letters the person designated by the testator. But, failing such designation, which is exceptional, it is the intent and spirit of our statute that the foreign representative or representatives, or his or their duly designated attorney in fact, shall receive the ancillary letters. *Estate of Wise*, 2 Civ. Proc. Rep. 230, *n.*, where due and timely application is made by them. See *Matter of Hanover*, 3 Redf. 91, 96.

§ 599. **Same subject.**—But it is manifest that if no foreign letters have yet been issued, and there is no person entitled to the property of the decedent, or no attorney in fact duly authorized by such person entitled, then the application for administration in this State for ancillary letters must be on behalf of the person who would be entitled to letters under our statute in a case of domestic administration. *Estate of Wise*, 2 Civ. Proc. Rep. 230, *n.; Estate of Williams*, 5 Dem. 292. This applies equally to ancillary letters testamentary, ancillary letters of administration c. t. a., or ancillary letters of administration. *Id.*

§ 600. **Procedure.**—The procedure upon application for ancillary letters is defined by §§ 2698 and 2699. Section 2698 refers to the petition and citation thereupon and is as follows:

> An application for ancillary letters testamentary, or ancillary letters of administration, as prescribed in this article, must be made by petition. Upon the presentation thereof, the surrogate must ascertain, to his satisfaction, whether any creditors, or persons claiming to be creditors, of the decedent reside within the state; and, if so, the name and residence of each creditor, or person claiming to be a creditor, so far as the same can be ascertained. *Unless such creditors shall file duly acknowledged waivers of the issuance and service of citation*, he must thereupon issue a citation, directed to each person whose name and residence have been so ascertained, and also directed generally to all creditors, or persons claiming to be creditors, of the decedent. Any such person, although not cited by his name, may appear and contest the application, and thus make himself a party to the special proceeding. **§ 2698, Code Civil Proc.**

The contents of the petition have already been discussed; it has been in that connection suggested that a failure to allege local indebtedness, i. e., indebtedness to creditors within the State may render the petition defective (see § 590 and cases cited) as the purpose of the ancillary administration is the protection of New York creditors. *Matter of Gennert*, 96 App. Div. 8. But under § 2698, the applicant must set forth so far as they are ascertainable by him the names and residences of every creditor residing within the State; the full names of all should be given. *Estate of Thompson*, 1 Civ. Proc. Rep. 264. Of course, if the applicant does not know the

names of all the creditors, an allegation as to one would be sufficient, as would also be an allegation in the petition made upon information and belief that there were creditors of the decedent in the State or persons claiming to be such, and that their names and residences were unknown to the petitioner. This statement while applicable to the petition does not relieve the Surrogate of the necessity of ascertaining to his satisfaction the facts regarding such allegations with a view to the issuance of the citation. That this is so, is apparent from the wording of the section which provides that the citation must not only be directed to each person whose name and residence shall have been so ascertained, "but also directed generally to all creditors or persons claiming to be creditors of the decedent." Any such person becomes a party to the special proceeding, though not cited by name, merely by his appearance therein. It has been held, however, that where a foreign administrator makes an application under this section and alleges in his petition and proves to the satisfaction of the Surrogate that there are no creditors or persons claiming to be such within this State, letters may nevertheless properly issue to him and that without notice to the widow or other relatives of the decedent. *Matter of McEvoy*, 3 Law Bulletin, 31.

§ 601. **Petition for ancillary letters testamentary (or of administration).**—Where no printed blank is furnished the petition may be substantially as follows:

Surrogate's Court,
County of New York.

In the Matter of the Application for Ancillary letters testamentary (or of administration) on the last will and testament of late of State of Deceased.

To the Surrogate's Court of the County of New York:

The petition of residing at State of respectfully showeth: that your Petitioner is of said deceased.

That said deceased was at the time of h death a resident of State of and departed this life in State of on the day of 19 leaving personal property within this county.

That heretofore (i. e., on the day of 19) a will of personal property, made by said deceased, was duly admitted to probate by (or letters of administration of the goods, chattels and credits of said decedent were granted to your petitioner pursuant to decree duly made and entered by) (here specify the Court definitely) the same being a competent court having jurisdiction in the premises within the State of where the decedent so resided as aforesaid, and the said will was executed.

That said will is filed and recorded (or said letters were duly recorded) in the the same being the proper office therefor, as prescribed by the laws of said State of and the said will, with the proofs and the records thereof, remains in said court.

That on the day of 19 letters testamentary upon the estate of said deceased were duly issued by said court to as execut named in said will.

That an exemplified copy of the will, and of the judgment, decree or order so admitting the same to probate as aforesaid, and also of the said letters (*or* of said letters of administration and of said decree granting the same), is hereto annexed.

That petitioner has made diligent search as follows, to wit, by to discover whether any creditors or persons claiming to be creditors of the decedent reside within this State, and he is informed and believes that (*here state the facts so ascertained*).

That the amount of debts due or claimed to be due from the decedent to residents of this State is dollars or thereabouts, and does not exceed dollars. And that the amount of personal property in this State left by the decedent does not exceed in value dollars.

That no previous application for ancillary letters has been made in this or any other Surrogate's Court of this State.

Your Petitioner therefore prays that said Surrogate issue a citation according to law, record said exemplified copies, and issue thereupon ancillary letters to upon h qualifying as prescribed by law.

Dated New York City, 19

.....
Petitioner.

(Verification.)

§ 602. **The decree.**—In drawing the decree awarding ancillary letters testamentary, care must be taken to insert the following allegations, when the facts so require, e. g., *together with an instrument duly executed by said executor, authorizing of No. Street, in to receive ancillary letters of administration with the will annexed, upon the estate of said A.* Use this when original executor does not apply in person, but designates one to apply in his stead.

An allegation as to how the creditors were brought in is also advisable.

And it may be well in the provisions of the decree to add in a proper case: "And it is further Adjudged and Decreed, that the said to whom ancillary letters (testamentary or of administration *as the case may be*) are hereby decreed to be issued, shall not transmit the money and other personal property of the decedent received by him after the letters are issued

(*or* now in his hands in any other capacity) to in (*the State, territory or country where the principal letters were granted*) the principal executor (*or* administrator, etc.), under the said last will and testament of deceased, to be disposed of pursuant to the laws of said State, territory (*or* country) until the further order of this court (*or* until he shall first have paid out of the moneys or avails of the property to be received by him under the ancillary letters the debts of the decedent due creditors residing within the State)."

Here note the closing provision of § 2701 as to *pro rata* payment where the decedent's debts exceed the amount of all his personal property applicable thereto, as well as provisions as to distribution among legatees or next of kin.

The wiser practice is merely to subject the ancillary executor to the further order of the court so as to afford reasonable time in which to ascertain the facts and give the creditors opportunity to apply for an order directing the payment of their claims. If no precautionary provision is inserted in the order, it will be noted under § 2700 that under the ancillary letters he is warranted in transmitting the property to the State, territory or country of principal administration and must be allowed in his accounting for any amount of property so transmitted by him at any time before he is directed to retain it.

§ 603. **Same.**—After the petition is filed and the citation issued and served, and the proofs of service thereof duly presented on or before the return day, the subsequent procedure must follow the course prescribed as follows:

> Upon the return of the citation, the surrogate must ascertain, as nearly as he can do so, the amount of debts due, or claimed to be due, from the decedent to residents of the state. Before ancillary letters are issued, the person, to whom they are awarded, must qualify, as prescribed in article fourth of this title, for the qualification of an administrator upon the estate of an intestate; except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of the state, as will, in the surrogate's opinion, effectually secure the payment of those debts; or the sums which the resident creditors will be entitled to receive, from the persons to whom the letters are issued, upon an accounting and distribution, either within the state, or within the jurisdiction where the principal letters were issued. **§ 2699, Code Civil Proc.**

This section states clearly the purpose of requiring that the creditors and the amount of their respective claims be definitely proved before the Surrogate; and it is moreover to the advantage of the ancillary administrator that this be done; for in the absence of satisfactory proof of this character he will be compelled to qualify in a bond for double the value of the property within this State which he is to administer. If, however, he can prove the amount of the debts due from the decedent to resident creditors the Surrogate may in his discretion require only a bond in a sum not exceeding

twice the amount of such debts; but if the debts of resident creditors equal an amount greater than the value of the assets of the decedent which the ancillary representative is to administer, then the bond should not in any case exceed double the amount of the assets within the jurisdiction. *Evans* v. *Schoonmaker*, 2 Dem. 249; *Goran's Estate*, 23 N. Y. Supp. 766. It must be borne in mind that the security required in this State is exclusive of and supplemental to the security required of the administrator in chief in the foreign State or country. The Court of Appeals has stated the rule in regard to the bonds of ancillary administrators with the reason for such rule in a recent case. *Matter of Prout*, 128 N. Y. 70. In that case, where the widow of a decedent who had received the letters from a probate court in New Jersey applied to the Surrogate of Kings County for ancillary letters in this State, the Surrogate made an order that ancillary letters should be granted to her on condition that she should give a bond with sureties to be approved by the Surrogate in a penalty of double the value of that part of the personal estate of which the deceased died possessed within the county of Kings. The Court of Appeals, by Andrews, J., in affirming this action of the Surrogate uses the following language:

"If the Surrogate had power to impose, as a condition to the granting of letters ancillary, that the administratrix should give a bond to secure the whole fund which might come to her hands by virtue of such letters, the imposition of the condition was a discreet exercise of such power. The general rule in this and other States requires that the administrator should give security in double the value of the personal estate of an intestate before assuming the administration. The actual location of the personal estate or of the securities by which it is represented, is not under our statute material in determining the amount of the bond in a case of purely domestic administration, for the rule that personal property is deemed to follow the person of the owner, fixes the legal possession in the intestate at his place of residence, wherever in fact the property may be. Where the administrator has properly qualified and assumed the administration in the State of the domicile, he is invested with the power to receive the debts owing to the intestate and take possession of the securities and give proper acquittances wherever the debtors or securities may be, whether within or without the State. But where the debtor or the securities are in a foreign jurisdiction, and are not voluntarily paid or surrendered to the administrator of the place of the domicile of the intestate, the courts of the foreign jurisdiction will not enforce the recovery of the debts or securities upon his application until he has procured ancillary letters or a new administrator has been authorized under the laws of the place where assets may be. It is unnecessary to enter into the reasons of this rule. They are familiar, and the rule has been frequently recognized. See *Parsons* v. *Lyman*, 20 N. Y. 103; *Despard* v. *Churchill*, 53 *id.* 192; *In re Hughes*, 95 *id.* 55.

§ 604. **Same subject.**—The opinion continues: "The unquestioned rule of the common law that the succession to and the distribution of the estate of an intestate is governed by the law of the domicile, makes security,

there taken on the granting of letters of administration covering the whole personal estate of the intestate, an adequate protection to all parties interested; and where ancillary letters are applied for in another State or jurisdiction, there would not seem to be any necessity that additional security should be required were it not for another principle almost universally recognized, that the claims of creditors living in a jurisdiction where ancillary letters are sought, are entitled to have their just right in the assets of the intestate secured by a proper bond as a condition of granting the application. To this end security is usually required to be given by the applicant for ancillary administration, enforceable in the tribunals of the place, for the protection of creditors therein residing. The course of legislation in this State upon the subject of ancillary administration and the security required may be briefly stated. The Revised Statutes enacted that "every person appointed administrator" should give a bond in a penalty not less than twice the value of the personal estate of which the deceased died possessed. Provision was made for granting letters on the application of foreign executors or administrators where persons, not inhabitants of this State, shall die leaving assets here. Section 31. There was no provision exempting persons applying for ancillary letters from the operation of the general rule declared in § 42, and it would seem that they, as well as domestic administrators, were required to give a bond in a penalty twice the value of the property upon which administration was sought. Section 2699 of the Code of Civil Procedure undertook to define the practice on the application for ancillary administration, which was left much at large under the Revised Statutes. In construing the section the various conditions to be provided for may justly be considered. There may be domestic creditors entitled to protection. The assets in this State may be less or more than sufficient to provide for the rights of citizens here. Or again there may be no creditors. Ancillary letters may become necessary to enable the administrator or executor to recover assets by hostile proceedings out of the jurisdiction where the principal letters were issued. It is contended on the part of the appellant that upon an application for ancillary letters under § 2699, no security can be required in any case, exceeding twice the amount of the claims of domestic creditors and that the discretion of the Surrogate is only to be exercised within this limit. It is evident that this construction would in the present case defeat the general policy which requires an administrator to give adequate security for the whole estate which may come into his hands. The security given in New Jersey was limited to the sum of $5,000, double the value of the personal estate of the intestate in his actual possession there, taking no account of the much larger amount in this State, and this course seems to have the sanction of the New Jersey courts. *Lewis* v. *Grognard*, 17 N. J. Eq. 425.

"The contention of the appellant, if sustained, would enable the administratrix to take into her possession $40,000 in securities belonging to the estate, without any security except a bond not exceeding double the

amount of the debt of $7,305, alleged to be due to Moses P. Prout. It may be that the primary purpose of § 2699 was the protection of domestic creditors. The citation is required to be issued to creditors only. Section 2698. The legislature may have assumed that proper and adequate general security would be exacted by the law of the place of the principal administration. But although the language of § 2699 is vague, we think it is capable of a construction which will subserve the general policy of the law. The legislature in this section first declares a general rule, that before ancillary letters are issued, the person to whom they are awarded must qualify as provided in the fourth article of the title for the qualification of an administrator upon the estate of an intestate. Referring to the fourth title it is found that § 2667 prescribes as one of the acts to be done by an administrator, to qualify him for the office, that he shall execute a bond in a penalty not less than twice the value of the personal property of which the intestate died possessed, subject to certain exceptions, one of which is that with the consent of all the next of kin of the intestate, the bond may, upon notice being given to creditors, be limited to twice the amount of their debts. The exception in § 2699, was, we think, intended to give the Surrogate a discretion to modify the general rule declared in the preceding clause and to accept a bond less in amount than that prescribed in ordinary cases of administration, if by reason of adequate security having already been given, additional security for the protection of the general interests was not in his judgment required, or where the next of kin had consented to waive security, and in a case of domestic creditors where their protection was the only interest involved, to prescribe a limit beyond which security should not be exacted."

§ 605. **Same subject.**—So, in a case where an ancillary administrator had been appointed in Westchester County of an estate which, upon their appointment, was shown not to exceed $100 in value, and the ancillary administrator qualified by giving a bond of $120, or double the amount of the only known debt, and subsequently a person claiming to be a creditor to the extent of $240, came in and applied for an order requiring such ancillary administrators to give an increased bond in a penalty of $600, it was held by Surrogate Coffin, her claim being disputed, first, that the validity of her claim could not be tried by him, but that for jurisdictional purposes her petition must be deemed sufficient to entitle her to make the application; but second, that notwithstanding this, her application must be denied as the Surrogate was without power to exact a bond in a penalty in any event greater than twice the value of the assets in the State. *Goran's Estate*, 23 N. Y. Supp. 766. The Surrogate observed, "It would be absurd to hold that the legislature intended that where the amount of the assets was only $100, and the amount of the debts $5,000, the executor should give a bond in the penal sum of $10,000, ... the only object of the bond here is to secure the creditors to the extent of the value of the assets." The foreign court is expected to exact security based upon the value of the estate at large; with that the New York courts have nothing to do. In

fixing the bond of the ancillary administrator, they are only called upon to protect local creditors. *Matter of McEvoy*, 3 Law Bulletin, 31. While, as has been indicated, the Surrogate will not try the validity of a claim upon which a creditor bases his application or right to be heard upon the amount of the bond of the ancillary administrator, on the other hand the creditor must at least *prima facie* establish his claim. The Surrogate is required by § 2698 to ascertain to his satisfaction who are the creditors residing in the State and the amount of the debt claimed to be due. If a creditor in his application does not satisfy the Surrogate as to the amount of his claim, or as to the fact that he is a creditor, he may properly ignore such a claim if it be controverted by the ancillary administrator. Thus Surrogate Rollins (*Matter of Musgrave*, 5 Dem. 427) disregarded the claim of a petitioning creditor on the ground that on the papers presented to him it was not shown that the claim was probably enforceable, but on the contrary that it would surely be defeated ultimately unless further evidence in its support should be presented; and that while if there were such further evidence he would examine it upon the application made, in its absence the application would have to be denied. *Id.*, at page 428.

§ 606. **Relation of ancillary administrator to administrator in chief.**— Section 2700 further emphasizes the subordinate character of an ancillary administrator and is as follows:

> *Persons acting under ancillary letters must transmit assets.*
>
> The person to whom ancillary letters are issued, as prescribed in this article, must, unless otherwise directed in the decree awarding the letters; or in a decree made upon an accounting; or by an order of the surrogate, made during the administration of the estate; or by the judgment or order of a court of record, in an action to which that person is a party; transmit the money and other personal property of the decedent, received by him after the letters are issued, or then in his hands in another capacity, to the state, territory, or country, where the principal letters were granted, to be disposed of pursuant to the laws thereof. Money or other property, so transmitted by him, at any time before he is so directed to retain it, must be allowed to him upon an accounting. **§ 2700, Code Civil Proc.**

By § 2701 the Surrogate is given power, however, to limit the ancillary administration in this regard. The sections must be discussed together. Section 2701 is as follows:

> The surrogate's court, or any court of the state, which has jurisdiction of an action to procure an accounting, or a judgment construing the will, may, in a proper case, by its judgment or decree, direct a person, to whom ancillary letters are issued as prescribed in this article, to pay, out of the money or the avails of the property, received by him under the ancillary letters, and with which he is chargeable upon his accounting, the debts of the decedent, due to creditors residing within the state; or, if the amount of all the decedent's debts, here and elsewhere, exceeds the amount of all the decedent's personal property applicable thereto, to pay such a sum to each creditor, residing within the state, as equals that creditor's share of all the distributable assets, or to dis-

tribute the same among legatees or next of kin, or otherwise dispose of the same, as justice requires. **§ 2701, Code Civil Proc.**

The General Term of the First Department in discussing these sections (*Smith* v. *Second National Bank*, 70 Hun, 357, 359, Van Brunt, P. J.), observes:

"It appears, therefore, by § 2700 that there is only one duty which an ancillary administrator is to perform, viz., that he must, unless otherwise directed, in the manner provided for in the section, transmit the money and other personal property of the decedent received by him after the letters are issued, if then in his hands in another capacity to the State, territory or country where the principal letters were granted, to be disposed of according to the laws thereof. This is his first and primary duty, and the provision is mandatory. He *must* transmit the same unless otherwise directed in decree awarding the letters, or in a decree made upon an accounting, or by an order of the Surrogate made during the administration of the estate, or by the judgment or order of a court of record in an action in which the ancillary administrator is a party.

"Then by § 2701 power is given to the Surrogate's Court, or any court of the State which has jurisdiction of an action to procure an accounting, or a judgment construing a will, by its judgment or decree, to direct the person to whom the ancillary letters are issued to pay out of the money or avails of the property received by him under the ancillary letters, and with which he is chargeable upon his accounting, the debts of the decedent due to creditors residing within this State. And that is all. Having done that, § 2700 becomes operative again, and he is bound to transmit the balance, if any, to the State, territory or country where the principal letters were granted, to be disposed of pursuant to the laws thereof." The duty to transmit arises only after the preliminary work of local administration is performed. *Smith* v. *Second Nat. Bank*, 169 N. Y. 467, 471. Hence, § 2701 amplifies and does not limit the ordinary powers of the Surrogate's Court in this connection. *Ibid.*

§ 607. **Same subject.**—The provisions of § 2702 already quoted do not affect the two prior sections. It is perfectly manifest that it was not the intention of § 2702 to repeal any of the restrictions or requirements contained in §§ 2700 and 2701, and reading these sections together it seems to be apparent that the only duty of the ancillary administrator is to transmit the assets, unless he is directed by express decree to retain some portion of the same for the payment of debts due to resident creditors. *Smith* v. *Second National Bank*, 70 Hun, 357, 360.

It is clear from the adjudicated cases that the Surrogate has discretion whether or not to make the direction referred to. See *Parsons* v. *Lyman*, 20 N. Y. 103 (repeatedly cited); *Matter of Hughes*, 95 N. Y. 55; *Matter of Fitch*, 160 N. Y. 87, 96. On the one hand there is the willingness of our courts that the foreign jurisdiction of original administration should direct distribution even though the policy of the foreign State or country may

permit bequests invalid under our laws. *Despard* v. *Churchill*, 53 N. Y. 192. On the other hand, there is the intent of the statute and the power vested in the Surrogate to retain local assets to pay local debts. *Matter of Hughes*, 95 N. Y. 55. The ancillary administrator does not by reason of the fact that his administration is based upon a foreign probate or administration acquire any immunity from the control which the Surrogate has over all administrators to whom he has issued letters, and a Surrogate accordingly, if limitations upon the powers of the ancillary administrator have not been incorporated in the decree granting letters, may at any time make an order with respect to the retention within the State of the assets in the hands of the ancillary administrator. So the Surrogate has power at any time to compel an accounting by an ancillary administrator. *Duffy* v. *Smith*, 1 Dem. 202. But it follows from the nature of his administration that he is only liable to account for assets in this State, that is, for the property he holds as ancillary administrator. See *Lynes* v. *Coley*, 1 Redf. 405, Charles P. Daly, Acting Surrogate. "The accounting of the executor here is to be carried no further than may be necessary to enable our own citizens to secure their claims out of assets situated within our own jurisdiction. *Id.*, page 407. Nor can an ancillary administrator be compelled to account for property transmitted by him to the place of principal administration prior to the issuance of letters to himself. *Lynes* v. *Coley*, 1 Redf. 409. If after the issuance of letters to himself he shall have transmitted money or other property at any time before he may have been directed by the Surrogate or by the judgment or order of a court of record in an action to which he was a party to retain it, he must be credited such transmitted assets upon his accounting. Section 2700. As to whether the courts of this State will proceed further than to direct the payment of debts, or, acting under the power conferred by § 2700, decree distribution among legatees or next of kin, is a question not of jurisdiction but of judicial discretion depending upon the circumstances of each particular case. *Despard* v. *Churchill*, 53 N. Y. 192, 200, Folger, J. In *Lynes* v. *Coley, supra*, Charles P. Daly, Acting Surrogate, held that if creditors were not likely to be prejudiced he would decree the payment of a legacy out of assets situated within the jurisdiction of his court where the legatee resided. In the case of *Despard* v. *Churchill, supra*, the Court of Appeals held (at page 200) that while the courts of this State would not directly aid in carrying out a bequest which would be in violation of our statute law and contrary to a policy of which it is tenacious, yet they could not hold the bequest void when it was valid by the law of the State by which the disposition of the property is to be governed. In the case of *Parsons* v. *Lyman*, 20 N. Y. 103, where the Court of Appeals reversed 4 Bradf. 268, the court held where Connecticut executors applied for ancillary letters in this State, and under such letters took into their possession the assets of the estate, and petitioned the Surrogate for a settlement of their account, the jurisdiction of the New York Surrogate was limited to taking the account of the ancillary administrators as to the assets collected by virtue of the authority granted

by him. See full discussion in opinion of Denio, J., pages 112 to 122. See also *Hopper* v. *Hopper*, 125 N. Y. 400, 405.

§ 608. **Ancillary representative has no trustee powers.**—It may be stated as a general rule that an ancillary administrator has no power *ex virtute officii* to perform any trust under the decedent's will. *Bonilla* v. *Mestre*, 34 Hun, 551. So where a testator, a resident of Cuba, left a last will and testament creating certain trusts, under which letters testamentary were issued to the executors in Cuba, and they, by a proper power of attorney, designated one to apply to the Surrogate in New York County for letters of administration ancillary with the will annexed to administer the goods, chattels and credits of the testator in said city, which letters were granted, the General Term of the First Department, Davis, P. J., held that the claim of such ancillary administrator that he had a right to retain certain securities, reduced to possession by him as ancillary administrator, on the ground that the trust created by the will of the testator in respect of them had devolved upon him and must be executed by him as trustee was wholly without foundation. *Ibid.*, at page 554. The court held that the question did not appear to have been previously raised, but observed, "We apprehend courts will hesitate to construe the statutes in such a manner that the ancillary administrator with the will annexed can capture for himself any distinct trust created by a will which the nominated and duly qualified executors are still engaged in executing." The learned court might well have based its decision, the correctness of which cannot be doubted, in that particular case upon the ground, that the ancillary administrator being appointed under a power of attorney, could not by any stretch of legal imagination be deemed, by virtue thereof, to be vested with any delegated right to administer a trust personally reposed by the testator in the persons by whom the specific power to ask for ancillary letters was given him.

§ 609. **Surrogate's duty to transmit.**—If there are no creditors to pay, or if all have been paid and if no legatee or next of kin appears and applies for the retention of the funds in this State, it would seem that the Surrogate would not be justified in making any order other than to transmit to the place of principal distribution. For example, he would not be justified in refusing to direct such transmission on the ground that the principal administrator or executor was incompetent or inexperienced; that is a matter for the court of original administration alone to pass upon. See *Matter of Conkling*, 15 St. Rep. 748.

§ 610. **When ancillary letters determine.**—The ancillary letters depend for their continued validity upon the life of the original letters. It has even been held by the General Term of the Second Department (*Matter of Gilleran*, 50 Hun, 399), that where the original letters testamentary upon which ancillary letters in this State were based were revoked in the State of California, that the ancillary letters, deprived of the support of the original letters, fell without an order for their annihilation, and that the only effect of an order by the Richmond County Surrogate to revoke

the ancillary letters would be to disincumber the records of his office. The court held that when the letters testamentary were called back by the California court, the ancillary letters were thereby canceled and destroyed by operation of law.

§ 611. **How far ancillary administrator bound by judgment of domiciliary courts.**—In all cases of ancillary administration the court in this State will endeavor so far as is possible, after protecting local creditors, to co-operate with the foreign court having jurisdiction over the original administration so as to produce, by a proper marshalling of the assets, equality among all creditors of the estate. *Lawrence* v. *Elmendorf*, 5 Barb. 73; *Accounting of Hughes*, 95 N. Y. 55. Section 2701, by the general words giving the Surrogate's Court power to direct the ancillary administrator to pay debts in whole or ratably or to distribute among legatees or next of kin "*or otherwise dispose of the assets as justice requires*" gives the Surrogate the broadest discretion in following the rules which not only equity but comity recognize and require. And so the statute is not mandatory but leaves the question of distribution and transmission to the judicial discretion of the Surrogate or court having jurisdiction. This is the rule declared by Story, J., in the leading case of *Harvey* v. *Richards*, 1 Mason, 380, the doctrine of which case has been expressly affirmed by our Court of Appeals in *Parsons* v. *Lyman*, 20 N. Y. 103, and *Despard* v. *Churchill*, 53 N. Y. 192. This doctrine does not interfere with the general principle of law that personal property is distributable and that succession thereto is regulated by the law of the decedent's domicile. The courts of this State, when ancillary administration is granted, when decreeing distribution apply the law of the domicile unless such application will interfere with the rights of domestic creditors, or unless there is special provision otherwise made by law as specified in § 2694. See *Matter of Accounting of Hughes*, 95 N. Y. 55, at p. 60. In the *Hughes* case the decedent was a resident of Pennsylvania where he died intestate. Soon after his death his brother was appointed administrator of his estate, in this State, by the Surrogate of Kings County. A week later an administrator of the property of the deceased was appointed in Pittsburg, Pa. There were no creditors in this State, but all the next of kin of the intestate, five brothers and sisters all resided in this State. On the application of the Kings County administrator for a final accounting, the foreign administrator presented a petition claiming the right to intervene as principal administrator and asking for the transmission of the property to him for distribution under the Pennsylvania law. The Court of Appeals in reversing the decree of the Surrogate which granted his application, held that " as it did not sufficiently appear that there were creditors to be paid in Pennsylvania, and as the next of kin were all residents of the State presumably consenting to distribution here, and as the transmission of the funds under such circumstances to the Pennsylvania administrator would merely subject the assets to double commissions, it would be an idle show of courtesy to remit the funds to a foreign jurisdiction. . . . When the only effect would be to deplete it by unnecessary charges and expenses

to the prejudice of all the parties interested." Opinion of Andrews, J., at page 63.

§ 612. **Effect of § 2702.**—Section 2702 must not be deemed to enlarge the powers of an ancillary executor or administrator with regard to his dealing with the funds in his hands beyond the plain intent of §§ 2700 and 2701. Thus, where an ancillary administrator applied to a bank for a loan of $600, stating that he desired the loan for the purposes of the estate in anticipation of income and gave as collateral for the loan a $5,000 7% accumulated debt bond of the city of New York, with his promissory note for the amount of the loan, and the bank upon the nonpayment of the note, attempted to collect the bond in order to satisfy the debt and to sell the bond at public auction,—one who had been appointed ancillary administrator in the place and stead of the one who negotiated the loan stopped the transfer of the bond and enjoined the sale by temporary injunction. In an action brought by the ancillary administrator to compel the delivery of the bond to him, the General Term of the First Department, in reversing the action of the trial court in dismissing the complaint, declared that the sole question involved in the appeal was as to the right of an ancillary administrator to pledge any portion of the assets which might come into his hands; and in holding that he could not, the court observed, by Van Brunt, P. J., "It is difficult to see how, either for the purpose of transmission or even for the payment of debts, the administrator could possibly have any occasion to anticipate income. The only duty of the ancillary administrator is to transmit the estate, unless he is directed by express decree to retain some portion of the same for some purpose permitted under § 2701." *Smith* v. *Second National Bank*, 70 Hun. 357.

§ 613. **Foreign executors and administrators.**—It has already been stated (see § 588, *ante*), that foreign executors or administrators have no representative status in our courts. The language of the decisions has been uniform (sees cases there cited), in effect, though variously expressed. It has been held that an administrator appointed in one State has no authority as such beyond that State. *Ulster County Savings Inst.* v. *Fourth National Bank*, 8 N. Y. Supp. 162. And again that the remedy against a foreign administrator, in his representative character, to charge the assets of his intestate for a debt or liability of the decedent, is governed by the law of the jurisdiction where he was appointed, and must be pursued in the legal tribunal, in the State or country where the decedent resided at the time of his death, and where administration was granted. *Lyon* v. *Park*, 111 N. Y. 350, 355, citing Story's Conf. of Laws, § 513; Schouler on Executors, § 173; *Petersen* v. *Chemical Bank*, 32 N. Y. 21; *Hadenberg* v. *Hadenberg*, 46 Conn. 30. See *Ferguson* v. *Harrison*, 27 Misc. 380, holding that the rule that a foreign executor cannot be sued here is not altered by the fact that there are assets of the decedent in his possession here. So, the foreign executor cannot be made to account here. *Matter of McCauley*, 49 Misc. 209. In this case the foreign testator was administrator here of his brother's estate. The foreign executor refused either to apply

here for ancillary letters or to designate anyone so to apply. It was held the Surrogate's Court was powerless to appoint a representative of the said brother's estate or call the recalcitrant foreign representative to account. But this general rule that foreign representatives cannot sue or be sued in this State and acquire all their rights from, and owe their responsibilities to, another jurisdiction is not without its limitations. The Court of Appeals has distinctly confined it to claims and liabilities resting wholly upon the representative character. *Johnson* v. *Wallis*, 112 N. Y. 230, 232. In *Lawrence* v. *Lawrence*, 3 Barb. Ch. 74, the rule was declared to be applicable only to suits brought upon debts due to the testator in his lifetime or based upon some transaction with him, and not to operate so as to prevent a foreign executor from suing in our courts upon a contract made with him as such executor. Consequently if he can sue upon such a contract, he may be sued upon it. So in one of the cases cited above (*Petersen* v. *Chemical Bank*), a foreign executor sold an obligation of the estate and his assignee sued upon it, and the action was sustained on the ground that the title of the foreign executor was good and he could transfer it, and while he could not have sued upon it his assignee was not prevented. So if foreign executors are owners of a judgment which they can sell they can also contract for its sale; if they do so contract they are liable upon such contract and it can be enforced against them because they made it. But the contract does not derive its existence from any act or dealing of the testator. See *Johnson* v. *Wallis*, *supra*.

§ 614. **Same.**—In view of the general application of the rule above stated the natural expedient has been resorted to, of suing the foreign executor in this State, not as an executor but individually. Thus in a recent case (*Collins* v. *Stewart*, 2 App. Div. 1st Dept. 271), an action was brought by the widow of a New Jersey decedent testator against the New Jersey executor in this State, but not expressly in his representative capacity, to recover certain securities claimed to belong to the plaintiff individually under a certain instrument purporting to create a trust in her favor to secure her against loss by reason of the testator having pledged certain of her bonds as security for his personal note. The defendant set up his appointment as executor in New Jersey and claimed his right to recover the securities (which had been brought to the city of New York subsequent to the decedent's death, by the plaintiff's legal advisor) and remove them to the State of New Jersey and to administer them in the regular way through the Orphans' Court having jurisdiction over him. The Appellate Division, Judge Barrett writing the opinion, reversed the judgment entered upon a referee's report which directed the defendant individually to deliver the securities in question to a receiver. The court observed, first, that the mere fact that the defendant was not sued in his representative capacity was not conclusive, the rule being that if the averments in a complaint show that the cause of action devolves upon or exists against a party in his representative capacity the action will have a representative character despite the fact that the party sues or is sued individually,

citing *Beers* v. *Shannon*, 73 N. Y. 292; *Patterson* v. *Copeland*, 52 How. Pr. 460. Second, that the action could not be maintained against the defendant individually, as he was a mere depositary of the securities as if he were a safe deposit company. In such a capacity, no judgment could be rendered against him except to deliver the property to whomever was legally entitled to it, and he could not be required to apply it equitably. Third, that considering the action as one against the estate the New York court was without jurisdiction. See discussion of *McNamara* v. *Dwyer*, 7 Paige, 239; *Brown* v. *Brown*, 1 Barb. Ch. 189, at pages 281 and 282, opinion of Barrett, J. Fourth, that the limitation on this rule indicated by the cases discussed, namely, that a New York court will interfere to call a foreign executor to account only to prevent a failure of justice, while broad enough to cover any case where a failure of justice will result from a refusal to exercise jurisdiction, nevertheless "this failure of justice must mean failure of justice of the appropriate forum." And the court declares "It is the latter principle which underlies the rule, and which is the foundation of the jurisdiction asserted by the cases. The policy of the law is, that estates of decedents shall be settled as far as possible in one forum, not in a number." It is only where facts appear showing that the original forum will be unable to perform the duty incumbent upon it, that the courts of this State will intervene. They do so to assist, not to embarrass, the original forum; and facts must be adduced bringing the exception into play.

§ 615. **Same subject.**—The intimation in the opinion above quoted, that the assignees of a foreign executor or administrator could sue where his assignor could not, states a well-settled rule. Foreign executors and administrators may assign claims in their own jurisdictions to residents in this State qualified to sue. *Guy* v. *Craighead*, 6 App. Div. 1st Dept. 463, citing *Petersen* v. *Chemical Bank*, 32 N. Y. 21. Even guardians of infants may do the same if their assignment is sufficient to pass legal title at the place where it was made. Similarly our courts will recognize the foreign executor as the personal representative of a decedent mortgagee and will sustain a satisfaction piece executed by him in that capacity as sufficient to discharge from the record a mortage given to his testator. The facts showing a probable failure of justice if the New York courts should refuse to assume jurisdiction against a foreign executor are pretty clearly defined and limited; they relate chiefly to cases where the foreign executor is shown to be wrongfully using or misapplying the estate funds, or to have wrongfully removed them from the place of original jurisdiction, or to have himself removed therefrom; or where the foreign representative is shown to have squandered the estate in a foreign jurisdiction and the local creditors might be without remedy or without adequate remedy in case he was allowed to remove assets in this State to the place of original jurisdiction. See cases above cited. A failure of justice may result from misconduct on the part of the representative other than misappropriation of assets; notably from a wrongful refusal to submit himself to the jurisdiction of the courts of the State which granted him letters. *Collins* v. *Stewart*,

supra, at page 283. So Chancellor Walworth (*Brown* v. *Brown*, 1 Barb. Ch. 189) while deciding that a suitor was not necessarily under all circumstances confined to the original forum, held that nevertheless in exceptional cases the applicant for relief must show that by some act of the foreign representatives in removing their persons or property from that jurisdiction any remedy which he might undertake to pursue there would be fruitless. See also *Bischoff* v. *Engel*, 10 App. Div. 240. But it is manifest that suits of this character are never maintained where there are no assets in this State, and suits in relation to assets situate in a foreign jurisdiction must be against the administrator there. *Holyoke* v. *Union Mutual Life Ins. Co.*, 84 N. Y. 648; *Lyon* v. *Park*, 111 N. Y. 350. The acts of a foreign representative, however, apart from his status as a suitor, may be perfectly valid if done within his representative rights. In addition to the cases above referred to it has been held, that a foreign administrator of the beneficiary of a fund deposited with a New York bank had power to demand payment of the bank, and if payment were made his discharge in his representative capacity would be effectual. *Schluter* v. *Bowery Savings Bank*, 117 N. Y. 125, 129, citing *Parsons* v. *Lyman*, 20 N. Y. 103; *Petersen* v. *Chemical Bank*, 32 N. Y. 21; *In the Matter of the Estate of Butler*, 38 N. Y. 397; *Wilkins* v. *Ellett*, 9 Wall. 740. Similarly the right of a foreign administrator to assign a mortgage upon property in this State and the validity of such assignment has been upheld. *Smith* v. *Tiffany*, 16 Hun, 552. This, however, has been held to be limited in case there is a domestic administrator; in such a case it has been held that the foreign administrator cannot discharge a mortgage upon a nonresident's property within this State as against the domestic administrator. *Stone* v. *Scripture*, 4 Lansing, 186. In the absence of New York creditors, a foreign representative collecting the debts due to his decedent in the State of New York can protect those who pay such debts to him by his receipt, for it is the duty of the administrator of the domicile to exercise due diligence to recover personal property when beyond the jurisdiction of the State and collect debts owing to the decedent by nonresidents; and for his failure in this regard, he may be charged in the settlement of his accounts. *Maas* v. *German Savings Bank*, 73 App. Div. 524, 528, [aff'd 177 N. Y. 377,] citing *Parsons* v. *Lyman*, 20 N. Y. 70; *Schultz* v. *Pulver*, 11 Wend. 361; *Matter of Butler*, 38 N. Y. 397. This case reversed the Appellate Term (38 Misc. 134), which held the savings bank liable to the New York administrator, although without notice of his appointment the bank had previously paid to the New Jersey administrator the balance due his intestate.

The court below had held that if New York letters had not been actually issued in this State when the defendant paid over the deposit, the defendant's liability would have been discharged, in spite of the fact that a foreign representative cannot enforce such a claim in this State. The Appellate Division, however, held that as the foreign administrator had title to the personal property of the intestate wherever situated, the succession to which was governed by the law of domicile (*Matter of Prout*, 128

N. Y. 70), the voluntary payment made to him, within or without the State by a nonresident debtor, discharged the indebtedness.

The court pointed out that it is only on grounds of public policy and to protect home creditors that a foreign administrator or executor is not permitted to maintain an action to recover property located here or to enforce the payment of an indebtedness owing to the intestate by a resident of our State. He may, however, assign the claim and his assignee may recover the property or collect the indebtedness by an action in this State. *Maas* v. *German Savings Bank, supra,* page 527, citing *Toronto General Trust Co.* v. *C., B. & Q. R. R. Co.,* 123 N. Y. 37, 47; *Petersen* v. *Chemical Bank,* 29 How. Pr. 240; 32 N. Y. 21; *Middlebrook* v. *Merchants' Bank,* 3 Keyes, 135; *McNulta* v. *Huntington,* 62 App. Div. 257, 258. See also *Mabon* v. *Ongley Elec. Co.,* 156 N. Y. 196, 201.

In affirming the *Maas* case, 177 N. Y. 377, the Court of Appeals lays stress upon the duty of the ancillary administrator to act with reasonable dispatch; and also held that the mere record of his appointment in the court here was not constructive notice to the bank of his rights.

In *Taylor* v. *Syme,* 162 N. Y. 513, 518, it is said that where there are no local creditors the rule forbidding the foreign executor or administrator to sue in this State has little force, but nevertheless still obtains. In the *Maas* case the court distinguished the case of *Stone* v. *Scripture, supra,* on the ground that in that case it was manifest that the parties were aware of the appointment of the domestic administrator; and where there is a local administrator and a foreign administrator both claiming the right to collect a debt owing to the decedent by a debtor residing here, the debt must be paid to the domestic and not to the foreign administrator. *Lawrence* v. *Townsend,* 88 N. Y. 24. But if without knowledge of the appointment of a domestic administrator or of facts and circumstances which would lead a prudent man to inquire whether one had been appointed, the local debtor pays the foreign domiciliary administrator who is vested with the title, the debt is discharged. It seems hardly necessary to repeat that a nonresident who has been appointed executor or administrator of an estate in this State is not a foreign executor within the meaning of the law. His nonresidence will not affect his accountability to the Surrogate who appointed him. His application for letters by which he assumes to administer an estate subjects him to the jurisdiction and direction of the court. Surrogate Calvin extended this rule so as to hold that personal service of a citation without the limits of this State upon a nonresident executor holding letters from this court was valid. *Stevens* v. *Stevens,* 3 Redf. 507.

§ 616. **The ancillary administration and the transfer tax.**—By § 229 of the Tax Law, ch. 908, Laws, 1896, it is provided that "every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of article 7, title 3, chapter 18, Code of Civil Procedure, shall set forth the name of the county treasurer or comptroller, as a person to be cited as therein prescribed; and a true and correct

statement of all the decedent's property in this State and the value thereof; upon the presentation thereof the Surrogate shall issue a citation directed to such county treasurer or comptroller; and upon the return of the citation the Surrogate shall determine the amount of the tax which may be or become due under the provisions of this article; and his decree awarding the letters may contain any provision for the payment of such tax or giving of security therefor which might be made by the Surrogate if the county treasurer or comptroller were a creditor of the decedent."

§ 617. **Letters on estates of American citizens dying in foreign countries.**—The provisions of § 2611 of the Code have already been discussed as to wills executed as prescribed by the laws of the State, or wills of personal property executed without the State and within the United States, the Dominion of Canada, the Kingdom of Great Britain and Ireland as prescribed by the laws of the State or country where the wills were executed. There is another class of cases, namely this, of American citizens residing in foreign countries within the territorial jurisdiction of a United States consulate. We find the following provisions in the United States Revised Statutes, § 1709:

"Section 1709. It shall be the duty of consuls and vice-consuls, where the laws of the country permit:

"*First.* To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representatives, partner in trade, or trustee by him appointed to take care of his effects,

"*Second.* To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

"*Third.* To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

"*Fourth.* To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

"*Fifth.* To transmit the balance of the estate to the treasury of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings."

The United States has entered into treaties with most of the civilized powers, covering the rights of United States citizens dying in these various lands, and reference must be had to the terms of such treaties in determining whether under § 2611 the will, if any be left, is executed according to the laws of the country in which the testator dies a resident. For, under the terms of most of such treaties, the consul is given the right to issue letters testamentary or of administration on the estates of United States citizens.

I have been unable to find any case fully illustrating this situation, but I have from the attorneys interested, a case, unreported, in Broome County. In that case the decedent was an American missionary living in Turkey, but died leaving a will attested by but one witness, such witness being a beneficiary thereunder, and being named the executor of the will. This designated executor applied to the consul for letters under the provision of the treaty with Turkey and having received the same reduced the estate in that country to possession, and upon his petition in Broome County, the Surrogate there held that it appeared from the United States statutes, taken in connection with the treaty with Turkey, that the United States Consular Court had jurisdiction. The adjudication by the Consular Court that the will was a valid disposition of personal property was held conclusive upon the Surrogate, disregarding the patent defective execution of the will. He further held that the jurisdiction being that of the United States, the record of proceedings of the Consular Court, duly attested by that court according to § 2704 of the Code and duly certified by the Secretary of State of the United States was sufficient to authorize him to record the will and the proceedings had in the Consular Court, and he accordingly issued ancillary letters to one authorized to apply therefor by power of attorney from the executor named in the alleged will.

There was no contest in this case and no conflicting rights under the will, the decedent having left a child and a husband.

Apart from the inquiry whether the will in question in that case did not upon its face show that it was not a valid will, the practice followed appears to be perfectly regular under the Code and under the United States Revised Statutes.

But, in cases affecting substantial property, it would seem preferable in such a case to apply here for independent letters. The practice is growing up, among American citizens residing abroad, of executing duplicate wills, naming local executors in each jurisdiction, and thereupon independent letters may be sued out here and abroad.

CHAPTER VII

EXECUTORS AND ADMINISTRATORS OF DECEASED EXECUTORS AND ADMINISTRATORS

§ 618. **Executor or administrator of a deceased executor or administrator.**—The executor or administrator of a decedent who in his own lifetime was an executor or administrator has a double status, one in his distinctive representative capacity of his immediate decedent, and the other in respect to the estate of which his decedent was the representative. There is now no explicit statute which denies the right of an executor's executor as such to administer on the first testator's estate. Prior to the General Repealing Act (ch. 245 of the Laws of 1880), the Revised Statutes provided (part 2, ch. 6, title 2, § 17), "No executor of an executor shall as such be authorized to administer on the estate of the first testator." See *Matter of Moehring*, 154 N. Y. 423. But it has been held (*Matter of Allen*, 2 Dem. 203, Rollins, Surr.) that the repeal of this provision was not designed to effect any change in the law of the State in this regard. This ruling was based upon the fact that § 11, title 3, ch. 8, part 3, was in force before the repeal and was not repealed thereby. That section provides, "An executor of an executor shall have no authority to commence or maintain any action or proceeding relating to the estate, effects, or rights of the testator of the first executor or to take any charge or control thereof as such executor." In regard, therefore, to the assets of an unadministered estate which come into the hands of the executor or administrator of a deceased executor or administrator, he may be said to be a mere temporary custodian thereof pending the appointment of a successor-administrator or administrator with the will annexed. The Code of Civil Procedure protects the beneficiaries of the first decedent's estate by means of the provisions of § 2606 under which the executor or administrator of a deceased executor, administrator, guardian or testamentary trustee, may be compelled to account or may voluntarily account for any of the trust property which is in his possession. The section is as follows:

> Where an executor, administrator, guardian or testamentary trustee dies, the surrogate's court has the same jurisdiction, upon the petition of his successor, or of a surviving executor, administrator or guardian, or of a creditor, or person interested in the estate, or of a guardian's ward or the legal representative of a deceased ward, or a surety upon the official bond of the decedent, or the legal representative of a deceased surety, to compel the executor or administrator of the decedent to account, which it would have against the decedent if his letters have been revoked by a surrogate's decree. And an executor or administrator of a deceased executor, administrator, guardian or

testamentary trustee may voluntarily account for the acts and doings of the decedent, and for the trust property which had come into his possession or into the possession of the decedent. And on the death, heretofore or hereafter, of any executor, administrator, guardian or testamentary trustee while an accounting by or against him, as such, was or is pending before a surrogate's court such court may revive said proceedings against his executor, administrator or successor and proceed with such accounting and determine all questions and grant any relief that the surrogate would have power to determine or grant in case such decedent had not died or in a case where the executor or administrator of said last mentioned decedent, acting at the time of such revival had voluntarily petitioned for an accounting as provided in this Section. On a petition filed either by or against an executor or administrator of a deceased executor, administrator, guardian or testamentary trustee, or on a revival and continuation of an accounting pending by or against such decedent at the time of his death, the successor of such decedent and all persons who would be necessary parties to a proceeding commenced by such decedent for a judicial settlement of his accounts shall be cited and required to attend such settlement. The surrogate's court may at any time on its own motion or on the motion of any party to any one of two or more of such proceedings, consolidate said proceedings but without prejudice to the power of the court to make any subsequent order in either of them.

With respect to the liability of the sureties in, and for the purpose of maintaining an action upon the decedent's official bond, a decree against his executor or administrator, rendered upon such an accounting, has the same effect as if an execution issued upon a surrogate's decree against the property of decedent had been returned unsatisfied during decedent's lifetime. So far as concerns the executor or administrator of decedent, such a decree is not within the provisions of section twenty-five hundred and fifty-two of this act. (Quoted *post.*) See *Matter of Seaman*, 63 App. Div. 49, 52.

The surrogate's court has also jurisdiction to compel the executor or administrator at any time to deliver over any of the trust property which has come to his possession or is under his control, and if the same is delivered over after a decree, the court must allow such credit upon the decree as justice requires. § **2606, Code Civil Proc.**

This section of the Code was the first statutory authority conferred upon the Surrogate's Court or upon an administrator *de bonis non* to call an executor or administrator of a decedent representative to an accounting. It has already been noted, in another connection, that the remedy provided by the section must be timely availed of, that is to say, the statute of limitations runs against the successor of the representative as if his administration was identical with, as it is a continuation of, the original administration. See *Matter of Rogers*, 153 N. Y. 316, rev'g 92 Hun, 609. See *Pitkin* v. *Wilcox*, 20 Civ. Proc. Rep. 27. It is proper, provided the limitation by the statute has not expired, that the application for the accounting should be made immediately upon the appointment of the successor. *Matter of Rogers*, 153 N. Y. 316, 323, citing *Matter of Wiley*, 119 N. Y. 642. In *Matter of Wiley* and in *Matter of Clark*, 119 N. Y. 427, the Court of Appeals held that this section of the Code gave the Surrogate jurisdiction upon

the death of an executor to require his executor or administrator to account for and deliver over the trust estate precisely as if the letters of the deceased executor had been revoked in his lifetime, and he had been called upon to deliver up the assets; and that his representative stood in his place for the purpose of such accounting and delivery, and that the application could be made immediately upon the appointment of the executor.

But, the successor cannot be called to account unless the right existed to require the deceased representative so to do. So where A was widow, executrix and sole legatee of B, and, after paying all debts of B and of his estate, died, it was held her representative character and title had merged in that of legatee, and that neither she nor her own representative could be compelled to account. *Matter of Kinsella*, 50 Misc. 235; *Blood* v. *Kane*, 130 N. Y. 514.

§ 619. **Presumption of continuity of possession.**—The Court of Appeals in *Matter of Clark* (above cited), reversed the General Term which had affirmed the decision of Surrogate Ransom, *sub nomine*, *Fithian's Estate*, 3 N. Y. Supp. 193, and appeared to hold that proof upon the accounting of the executor or administrator that money or assets belonging to the original decedent had come into the hands of the deceased executor or administrator raised a presumption of fact that they were still in the hands of the executor or administrator of the deceased representative, whose individual liability therefor fairly followed as a conclusion of law. This liability of course can be avoided by proof of a lawful disposition of such money or property prior to the death of the deceased representative. See *Perkins* v. *Stimmel*, 114 N. Y. 359; *Matter of Seaman*, 63 App. Div. 49, 53. So it has been held executors of a deceased trustee are chargeable with a trust fund where it is admitted that he had it nine years before his death, where it is not shown that he ever parted with it, and where he, and they, after his death, paid the interest or income of it to the beneficiary; and the fact that it cannot now be distinguished as such, having probably been commingled by the trustee with his own property, cannot defeat an application by the present trustees of the trust for delivery to them of the fund by the executors. *Matter of Steinway* (headnote), 37 Misc. 704, citing *Matter of Holmes*, 37 App. Div. 15, aff'd 159 N. Y. 532. But in *Matter of Hicks*, 170 N. Y. 195, it was held (see headnote) that there is no presumption that a trust fund, which had been in the hands of a general guardian for many years and was unpaid and unaccounted for at the time of his death, is a part of his estate in the hands of his executor, and the ward is not entitled to an order, under § 2606 of the Code of Civil Procedure, compelling such executor to pay over the amount due her from such trust fund in preference to other creditors of decedent, without proof that the assets of decedent in the hands of his executor are a part of, or derived from, the trust fund. (See dissenting opinion.) Prior to the amendment of § 2606 in 1884, it was held that an executor of a deceased executor could be called to an account only for, and directed to pay over, such assets as were shown to have come into his possession or control. See *In re Butler's Estate*, 9 N. Y. Supp. 641, 651,

citing *In re Fithian*, 44 Hun, 457, reversed on another ground *sub nomine*, *Matter of Clark*, 119 N. Y. 427. The amendment of 1884, giving the Surrogate's Court power to compel the executor or administrator at any time to deliver over any of the trust property which has come to his possession or is under his control, has been held to include a debt due the original testator from the deceased representative. *Matter of Butler, supra; Baucus* v. *Stover*, 89 N. Y. 1. This is based on the provision of the Revised Statutes (2 R. S., p. 84, § 13, 8th ed., p. 2558), to wit: "The naming of any person as executor in the will shall not operate as a discharge or bequest of any just claim which the testator had against such executor, but such claim shall be included among the credits and effects of the deceased in the inventory; such executor shall be liable for the same as for so much money in his hands at the time such debt or demand became due; and shall apply and distribute the same in the payment of debts and legacies, and among the next of kin, as part of the personal estate of the deceased." The justice of such a claim may be tried by the Surrogate (*In re Butler's Estate, supra*, citing *Everts* v. *Everts*, 62 Barb. 577), in spite of the death of the deceased executor, for § 2606 gives the Surrogate's Court the same jurisdiction in regard to a compulsory accounting which it would have against the deceased executor, administrator, guardian, or testamentary trustee, if his letters had been revoked by the Surrogate's decree. In other words, § 2606 is to be read in connection with §§ 2603, 2604 and 2605. This remedy against the executor, or administrator of a deceased executor, administrator, guardian or testamentary trustee, should be provided for in the Surrogate's Court and not through an action for an accounting. The rule is that when complete relief can be obtained in the Surrogate's Court, a court of equity will decline to undertake an action for accounting against executors. *Wager* v. *Wager*, 89 N. Y. 161; *Strong* v. *Harris*, 84 Hun, 314; *Shorter* v. *Mackey*, 13 App. Div. 20, 24. See also *Levett* v. *Polhemus*, 86 App. Div. 495. In *Volhard* v. *Volhard*, 119 App. Div. 266, it was held that the remainder-man was not entitled to personal judgment against the executor of the deceased executor: (*a*) because a representative of the prior estate was not in court in order to decreeing payment by him as such. (*b*) Because there was no proof that defendant had any property in his possession or control that was in decedent's possession as executor. In other words, the spirit of § 2606 will govern the remedy in the Supreme Court.

§ 620. **Same subject.**—It must be borne in mind that prior to the amendment of 1884, § 2606 did not empower the Surrogate to exact an accounting as to all the property which came into the possession or under the control of the deceased executor or administrator, guardian or testamentary trustee. But the accounting which the Surrogate could order theretofore extended only to such property as had come into the accountant's own possession or was under his own control. *Le Count* v. *Le Count*, 1 Dem. 29, 31, Rollins, Surr., citing *Montross* v. *Wheeler*, 4 Lansing, 99; *Dakin* v. *Demming*, 6 Paige, 95. See also *Matter of Fithian*, 44 Hun, 457, reversed on another ground *sub nomine*, *Matter of Clark*, 119 N. Y. 427; *Popham* v.

Spencer, 4 Redf. 401; *Spencer* v. *Popham*, 5 Redf. 428; *Maze* v. *Brown*, 2 Dem. 217; *Scofield* v. *Adriance*, 1 Dem. 196; *Bunnell* v. *Ranney*, 2 Dem. 327. In the cases last cited Surrogate Rollins held, that a petition for such compulsory accounting which failed to allege that assets of the original testator have come into the possession of the executor or administrator of the deceased executor or administrator was fatally defective. Subsequent to the amendment of 1884, it was, however, held that upon a compulsory accounting the executor or administrator of a deceased executor or administrator was to be held accountable for the assets of the original estate which came into the hands of his immediate decedent. See also *Matter of Fithian*, 44 Hun, 457. So the Court of Appeals distinctly held that the purpose of the amendment of 1884, was to enable the Surrogate to develop by the compulsory accounting all that the executor of the deceased executor, administrator, guardian or trustee knew or could learn about the trust estate and in reference to it. *Perkins* v. *Stimmel*, 114 N. Y. 359, 370. But in the case just cited Judge Brown who wrote the opinion of the court observed, "Undoubtedly no decree could be made against the administrator if the petition to the Surrogate failed to allege or the proof failed to show *property of the estate in the administrator's possession.*" This of course continues in effect the decision of Judge Rollins above referred to, prior to the amendment of 1884, as to the necessity of alleging in the petition that the executor or administrator who was called to account had such property in his possession. The Court of Appeals in a still more recent case (*Matter of Moehring*, 154 N. Y. 423, at pp. 428 *et seq.*), examined this section at great length construing it in connection with § 2603, which section defines the power of the Surrogate to compel an executor, administrator, guardian or testamentary trustee to account upon the revocation of his letters by the Surrogate's decree. The general purpose of § 2606 is said by the Court of Appeals in that case to be to call an executor of an executor to account for the money or property belonging to the first estate *which came into his hands;* and second to require him to pay and deliver it over to a legal representative of the estate; the section is intended to apply to all cases where an executor or administrator dies leaving an estate wholly or partially unadministered at whatever stage his administration may be when his death occurred.

But the amendments of 1901 and 1902 enlarge the field of this accounting, first, by providing that he may voluntarily account for the trust property which had come into his possession *or into the possession of the decedent;* second, by providing that he may account for the *acts and doings of the decedent*, and third, by providing that an accounting, voluntary or compulsory, pending when decedent died, may be revived and proceeded with as if he had not died. This makes the Surrogate's power to fully ascertain the condition of the trust left unaccounted for by the deceased representative more complete and satisfactory. It does not seem to change the rule that the representative of the deceased representative is not liable for what he never had, or could with reasonable diligence have had in his possession.

In *Matter of Walton*, 112 App. Div. 176, upon a compelled accounting by the executrix of a deceased executor, it was held she was not to be charged with debts and judgments uncollected by her decedent as executor. This for the express reason that they never came into her control, and, moreover, it appeared affirmatively that as an administrator c. t. a. had been appointed they had vested in him.

§ 621. **Limitations on the Surrogate's power.**—There is nothing in § 2606 which authorizes the Surrogate to permit any administration or distribution of the unadministered assets by an executor or administrator of a deceased executor, administrator, guardian or testamentary trustee. While, under the wording of the section, a surviving executor, administrator, guardian or a creditor, or a person interested in the estate, or the ward of a deceased guardian, may institute the proceedings for a compulsory accounting under this section (or a legatee; *Matter of Irvin*, 68 App. Div. 158), it is manifest that the petitioner cannot secure the payment over of the moneys found to be in the executor's or administrator's hands to any but the persons expressly designated in § 2603. The section contemplates the protection and preservation of the estate by means of the accounting, and its being then turned over to the hands of a legal representative for distribution and settlement. Section 2603 which is, by reference, to be deemed a part of § 2606, authorizes the Surrogate to require the removed representative to pay and deliver over all money and other property in his hands:

(*a*) Into the Surrogate's Court;

(*b*) Or to his successors in office

(*c*) Or to such other person as is authorized by law to receive the same.

Consequently a legatee, or a devisee, or a creditor, cannot be said to be such a person authorized by law to receive the estate; such a person must wait until the distribution of the estate subsequent to its being fully administered by a proper representative. *Matter of Moehring*, 154 N. Y. 423, 430. (See accountings.) To concede that such an executor or administrator could be directed to pay a legatee, would be to give to such executor or administrator rights of administration and distribution, which it is not contemplated by the section that he should have. *Matter of Wiley*, 119 N. Y. 642; *Matter of Clark*, 119 N. Y. 427. So also he cannot be directed to pay over a trust fund to one appointed substituted trustee, except through and as the result of an accounting under § 2606. *Mount* v. *Mount*, 68 App. Div. 184.

But, in the accounting, properly instituted, the Surrogate has ample power to pass on all the questions necessary to his decree.

In *Matter of Hull*, 97 App. Div. 258, it was held he could surcharge the decedent administratrix's estate in the accountant's possession with illegal debts of honor of her decedent which as administratrix she had paid.

In *Matter of Collyer*, 113 App. Div. 468, it appeared the deceased administrator had accounted but had not complied with the decree by paying over the fund. The petition was that his executrix pay this money

into court in order to its distribution. The Surrogate held the only two remedies were (*a*) contempt (which of course was impossible as administrator was dead) (*b*) execution under the original decree. On appeal he was reversed, the court holding the proceeding proper under § 2606 as the respondent was to be required to "deliver over any of the trust property in possession or under control." Thereupon the Surrogate directed the executor to deliver up a check made by the deceased administrator. At first this was affirmed but, on reargument (124 App. Div. 16), it was held that the check was not legal tender and that the money itself should be paid over.

See *Bushe* v. *Wright*, 118 App. Div. 320, 332, and cases cited.

§ 622. **Same subject.**—The amendment of 1884 above referred to, however, referred only to compulsory accountings under § 2606 (*Crawford* v. *Crawford*, 5 Dem. 37), and it was, accordingly, held that the executor of a deceased executor could not upon a voluntary accounting, account generally for the whole estate. By the amendment of 1891 to this section of the Code provision is made for such a voluntary accounting in these words: "And an executor or administrator of a deceased executor, administrator, guardian or testamentary trustee, may voluntarily account for any of the trust property which has come to his possession and upon his petition such successor or surviving executor, administrator or guardian, or other necessary parties shall be cited and required to attend such settlement." Subsequently to the enactment of this amendment the Surrogate of Onondaga County sanctioned the practice of consolidating a petition of an administrator with the will annexed to compel the executor of the deceased executor to account with the proceedings for a voluntary accounting by the executor of said deceased executor, and made a decree judicially settling the account of the deceased executor. Upon appeal the General Term in the Fourth Department (*Matter of Shipman*, 82 Hun, 108), held, that as the same section authorized both proceedings no prejudice was wrought by the consolidation, although there appeared to be no special power given in the Code to consolidate these two particular proceedings, citing *Matter of Hodgman*, 31 N. Y. St. Rep. 479.

§ 623. **The right to the accounting.**—Prior to the amendment of 1891 it had been held that the mere fact that the representative of the deceased executor, administrator, guardian, or testamentary trustee, had accounted once in proceedings instituted by one of the persons described in § 2606, was no answer to a proceeding by another of such persons subsequently and independently for a similar accounting; and, accordingly, several creditors or legatees could compel separate and successive accountings and in the absence of any right under the section for the judicial settlement of his account in voluntary proceedings, such representative of a deceased representative was capable of being subjected to great annoyance. In *Spencer* v. *Popham*, 5 Redf. 425, Surrogate Coffin suggested the advisability of an amendment to § 2606 authorizing the executor of a deceased executor to apply for a citation to all persons interested in the estate of the first testa-

tor to attend his accounting as to that estate. See also *Bonnell* v. *Ranney*, 2 Dem. 327; *Crawford* v. *Crawford*, 5 Dem. 37. Accordingly the amendment of 1891 may be said to have removed this anomaly.

If a beneficiary of the trust, administered by the decedent, die, his representative may require the accounting. Such representative indeed is the proper one to move, as against his widow or legatees, who have no status. *Bushe* v. *Wright*, 118 App. Div. 320.

§ 624. **When right to compulsory accounting may be lost.**—If the executor or administrator of one who had been an executor, administrator, guardian, or testamentary trustee finds no unadministered assets which can be identified as assets of the estate of which this decedent was executor, administrator, guardian or testamentary trustee, he may proceed in the administration of his decedent's estate and advertise for claims. Thus, where a sole administratrix died prior to rendering her account, and her executor qualified and filed an inventory showing assets to a considerable amount, but found no funds deposited to her credit as administratrix, nor any specific property which could be distinctly traced and identified as having been received in her official capacity, and, consequently, in his administration of her estate advertised for, and paid all claims against the estate, accounted and had his account passed by the Surrogate, it was held that a subsequent application by an administrator *de bonis non* to compel him to account for the sums which the original sole administratrix had received was properly denied. *Matter of O'Brien*, 45 Hun, 284. The General Term based its decision on the fact that by this mingling of the estate money with the individual funds one right of the beneficiaries of the estate of which she had been sole administratrix to compel her to account was lost by her death, and they were remitted to the standing of mere creditors of her estate. Judge Pratt remarked in his decision at p. 289, "They thus lost their vested rights in the fund as owners of it, and were remitted to the rights of beneficiaries of O'Brien's official trust as executor of Jane Boyle's will . . . . as against them O'Brien was the owner of the entire funds as executor, and that consequently as they had not presented their claims as creditors and the executor had innocently distributed the funds their rights as against him were gone."

§ 625. **General liability.**—But, the liability of the decedent for waste or conversion is enforceable against his estate. The law is not new. It was in the Revised Statutes, and is now embodied in § 114, Dec. Est. Law.

> The executors and administrators of every person who, as executor, either of right, or in his own wrong, or as administrator, shall have wasted or converted to his own use, any goods, chattels, or estate, of any deceased person, shall be chargeable in the same manner as their testator or intestate would have been, if living.

Section 116 of the same law provides that

> Actions of account, and all other actions upon contract may be maintained by and against executors, in all cases in which the same might have been maintained, by or against their respective testators.

It is proper to assume, however, that if the action was one which would have been by or against such testator in a representative capacity, then the one appointed to succeed him as such, and not his own executor is the proper plaintiff or defendant. See also § 117, Dec. Est. Law, providing that administrators shall have "same rights and liabilities as executors," and § 118 that executors and administrators shall have actions for waste, conversion or trespass affecting the real or personal property of the decedent in his lifetime.

CHAPTER VIII

PUBLIC ADMINISTRATION

§ 626. **Definitions.**—The public administrator is an officer, existing in every county, for the purpose of administering the estate of any decedent where there is no person previously entitled, and willing to administer under § 2660, Code Civ. Proc.; or of acting as conservator of the estate in certain cases, while the court is ascertaining to whom administration ought to be confided.

The office of the public administrator was created for the purpose of providing a public official who should take charge of the estates where there was no next of kin entitled to act, on the theory that it would be better for such estates to have some competent public official act in preference to a creditor who would manifestly be interested to the extent of his claim only. *Matter of Hudson*, 37 Misc. 539; *Matter of Goddard*, 94 N. Y. 544.

In the counties of Kings and New York the public administrator is an officer appointed under that name, and it has been held in the city of New York that the public administrator is a city officer or officer of the corporation and that the city or corporation is answerable for his acts or omission in any case in which an executor would be liable (*Glover* v. *New York*, 7 Hun, 232; *Matthews* v. *New York*, 1 Sandf. Ch. 132; *Nash* v. *New York*, 4 Sandf. Ch. 1), unless of course the acts of the public administrator are individual acts out of the line of his duty. *Levine* v. *Russel*, 42 N. Y. 251.

Outside of these two counties the powers and duties of a public administrator are vested by law in the county treasurer of the respective counties, except Richmond, Laws, 1899, ch. 486, and any county where the office of county treasurer is abolished, Laws, 1900, ch. 501. The section of the Code empowering the county treasurer *ex officio* to act as public administrator is § 2665, the first part of which is as follows:

> The county treasurer of each county, except New York and Kings, by virtue of his office, has authority to collect and take charge of the assets of every person dying intestate, amounting to one hundred dollars or more, on which letters of administration are not granted, in the following cases:
>
> 1. When such persons leave assets in the county of the treasurer and there is no widow or relative in the county entitled or competent to take letters of administration on the estate.
>
> 2. When assets of any such person, after his death, come into the county of the treasurer and there is no person in the county entitled and competent to take administration of the estate.

In Kings County, however, the Surrogate, together with the county treasurer, are given power by § 2669 to appoint a public administrator for the county who holds office for five years. In New York County the public administrator was formerly the head of the second department of the corporation counsel's office and was appointed to his office, but is now appointed by the Surrogate. (See below.)

§ 627. **The county treasurer as public administrator.**—The functions of public administrators in the counties of New York and Kings being governed by special rules and enactments they will be discussed separately below. The functions, rights and duties of county treasurers acting as public administrators in other counties of the State are uniform under the Code. In the first place it must be noted that under § 2660 the county treasurer is deferred as to his right to administer to the nine classes covered by the subdivisions of that section as well as to creditors of the deceased. In either of the cases covered by subds. 1 and 2 of § 2665, Code Civ. Proc., the county treasurer possesses the rights of a collector of the estate; which rights continue until the issuance of letters in chief either to himself or to such person or persons as may prove entitled thereto when the proceedings hereinbelow described shall have been taken. At the outset, however, he has authority merely to collect and take charge of the assets of the intestate. His powers in this initial stage of his administration are defined by the latter part of § 2665, which provides that in either of the cases referred to, the intestacy of the person dying in his county will be presumed until a will is proved and letters testamentary issued thereon, and provides further as follows:

> For the purpose of collecting and preserving such estates, the county treasurer may maintain suits in his name of office, and without any other authority, in the same manner as an executor may by law. If there is a widow or relative of such intestate entitled to administration on his estate in the county and if due proof is made to the surrogate in the county that there are creditors or relatives of the deceased, residing more than one hundred miles distant from the residence of the surrogate, who are interested in the distribution of the estate, and that the effects of the deceased are in danger of waste or embezzlement, he may grant an order to the treasurer of the county, authorizing him to seize and secure the said effects, or any part thereof, which order shall vest in him all the powers given in this section.
>
> When any county treasurer is authorized, pursuant to the provisions of this section, to take charge of any property of an intestate, he shall have the same powers and be entitled to take the same proceedings which an administrator of the estate of a deceased person may have or be entitled to take, for the discovery of any property of the intestate, which may be concealed or withheld, and for the sale of any that may be perishable; and to cause an inventory of the property of the intestate to be made by appraisers appointed by the surrogate, executed by the county treasurer and filed with the surrogate. Such inventory shall be returned to the surrogate within ten days after the county treasurer takes charge of such property; and the time for making the return may, for good cause shown, be extended by the surrogate ten days longer. If the county

treasurer neglects to make the return within the time prescribed, he shall forfeit the sum of five hundred dollars, to be sued for and recovered by the county superintendent of the poor, for the use of the poor of the county, and also forfeit his office.

The treasurer of the county of Richmond shall not act in any case where the public administrator of the city of New York has jurisdiction.

§ 628. **Same subject—The public administrator a conservator of the estate.**—The rights of the county treasurer at this stage of his functions are very limited. The intent of the section is that he shall collect and preserve the estate pending a permanent appointment. He is given full power to maintain any action necessary in his official capacity for the purpose of collecting and preserving the estate without special authority of the Surrogate, except in the particular case specified in the section, when he must act by virtue of an order of the Surrogate where it is necessary in order to prevent waste or embezzlement of the effects of the deceased, that he shall seize and secure the same or any part thereof. It is further to be noted that he may take any proceedings which an administrator may take by way of discovery of any concealed or withheld property or may cause perishable property to be sold.

§ 629. **The Inventory; Practice.**—He is required, as appears from the section just quoted, under a heavy penalty, to cause an inventory to be made within ten days after he shall take charge of the property, unless this particular period be extended by the Surrogate for good cause. The practice upon the return of the inventory is as follows:

When the inventory is returned, the county treasurer must give the bond required by law to be given by a temporary administrator appointed by a surrogate, with such sureties and in such penalty as the surrogate approves, and the surrogate must then issue letters to such county treasurer, authorizing him to collect and preserve the estate of the deceased. The surrogate must immediately thereafter cause notice thereof to be published once in each week for three months, in a newspaper printed in his county, and in the official state paper, requiring all persons claiming a right to administer on such estate to appear and interpose such claim before the surrogate within a certain time to be therein specified, not less than six months after the first publication of such notice in the official state paper. If before such time any person entitled to administer appears and claims the same, the surrogate must cause ten days' notice of such claim to be served on the county treasurer and may, at the expiration of such time, grant letters to such person unless it appear that he is not entitled thereto; and thereon the publication of the notice must be discontinued. At the time appointed, if letters have not been previously granted, any person entitled to administration on such estate and duly qualified and competent, who appears and claims the same, shall be entitled to letters testamentary or of administration, as the case may be. On the granting of such letters, all control and authority of the county treasurer over the estate of the deceased cease, and he must deliver all the assets in his hands to the person so appointed after deducting therefrom the expenses incurred in securing and preserving the assets, in obtaining letters, and publishing the notice herein re-

quired, and a reasonable compensation for his services not exceeding three dollars for each day necessarily employed, to be allowed and taxed by the surrogate on the oath of the county treasurer. **§ 2666, Code Civil Proc.**, in part.

If persons having a prior right appear within the three months limited by these provisions, they will be given letters in preference to the public administrator. *Matter of Blake*, 60 Misc. 627, citing *Matter of Lowenstein*, 29 Misc. 722; *Butler* v. *Perrott*, 1 Dem. 9.

§ 630. **Same subject—He is a temporary administrator.**—These provisions emphasize the description of the county treasurer at this stage of his administration as a temporary administrator. This further appears by the last paragraph of § 2666, which limits his powers until letters of administration are granted in the administration of the estate; first, to pay the funeral charges of the deceased; second, to collect debts due the estate; third, to take possession of and secure the effects of the intestate; fourth, to sell such as are perishable; fifth, to defray the expenses of the proceedings required by law.

§ 631. **Same subject—When his administration becomes permanent.**—But when the notice required by § 2666 has been duly given without resulting in the appearance of anyone qualified and competent to administer, or the production of a will, or the granting of administration by some other Surrogate, the temporary administration of the county treasurer may become an administration in chief upon his receipt of letters from the Surrogate. The Code provides (§ 2666, in part) as follows:

> If letters testamentary, or of administration, be not granted by the surrogate to any person at or before the expiration of the time specified in the notice, then, unless it appear that such letters have already been granted by some other surrogate, the surrogate must grant letters of administration thereon to the county treasurer as in other cases, on receiving the like bond, with the like sureties, and in the like penalty, as administrators are required to give. The county treasurer must accept of such letters and give the bond above required. Such letters and the record thereof and a transcript of such record, duly certified, are conclusive evidence of the authority of the county treasurer in all cases in which the surrogate has jurisdiction under this article. The surrogate must immediately transmit to the comptroller a certified copy of all such letters granted by him to the county treasurer, the expense of which must be paid to him out of the state treasury, on the warrant of the comptroller.

§ 632. **Superseding public administrator.**—This administration in chief by the county treasurer is liable, however, in certain cases, to be determined and superseded in three distinct cases which are specified as follows:

> The powers and authority of the county treasurer in relation to the estate of a deceased person shall be superseded:
>
> 1. By the production of letters testamentary granted before or subsequently to his becoming vested with the authority of an administrator on the same estate.

2. By the production of letters of administration granted to any other person on the same estate before the county treasurer became vested with the powers of an administrator thereon.

3. By the production of letters of administration issued by the surrogate of a county in this state of which the deceased was a resident at the time of his death, granted after the county treasurer became vested with the powers of an administrator on the estate of such deceased.

When his authority is so superseded, he must deliver to the executor or administrator producing such letters, all the assets of the deceased in his hands, after deducting therefrom the allowance for his services and the expenses incurred, to be taxed and allowed by the surrogate. All acts done by him in good faith previous to the time when his authority shall be superseded shall be valid. All suits commenced by him may be continued by and in the name of the executor or administrator who succeeds him in the administration of the estate in relation to which the suit may be brought. **§ 2667, Code Civil Proc.**

§ 633. **The right of the public administrator to appointment.**—The right of the public administrator to administer an intestate's estate in the cases provided for by the statute cannot be avoided or superseded except in the particular instances also provided for by the statute. So where a person is incompetent to qualify as administrator under the subdivision of the Code already quoted (§ 2661, Code Civ. Proc.), the right of the public administrator cannot be defeated by the device of a power of attorney to some other person than the one incompetent. *Matter of Blank*, 2 Redf. 443; *Sutton* v. *Public Administrator*, 4 Dem. 33. See also *Matter of Ferigan*, 92 App. Div. 376; *Matter of Flynn*, 92 App. Div. 379; for no one can confer upon another in this regard any right which he does not himself possess, nor can any person, or class of persons, having a priority of right in the order of preference, appoint or nominate a person administrator who is not otherwise entitled to administration to the exclusion of others below them in the order of preference; that is to say, a person entitled to administer, say, the widow of the intestate, can renounce or can refuse to assert her right to administer, but the law appoints the successor. The right is personal without the power of substitution. Consequently the right of the public administrator to take after the persons entitled under the statute cannot be defeated by any arrangement that has been made or can be made between the persons interested. The next of kin can deprive him of the administration by taking letters themselves and in no other way. His right after that is perfect. *In re Root*, 1 Redf. 257. See discussion of § 2660, *ante*, *et seq.*

It is manifest from the sections already quoted and discussed that the county treasurer assumes his temporary administration as soon as it is made to appear that the conditions contemplated by § 2665, subds. 1 and 2, exist. He takes this action by virtue of his office, and needs no authority of the Surrogate except in the precise instances already discussed when for one of the reasons specified in the Code it is necessary for him to do some act more than would be required of a mere collector.

His right to act permanently as a public administrator, in the second place, depends upon the publishing of the notice already described and the nonappearance of any person competent and qualified to act who claims the right within the statutory time. It appears, therefore, that it is not proper in any given case that any person desiring that the estate of an intestate be administered should petition for the appointment of the public administrator, for as has been elsewhere noted the petitioner in proceedings for administration must under § 2644 pray that all persons who have a prior right, who have not renounced, be cited to show cause why administration should not be granted *to the petitioner*. *Batchelor* v. *Batchelor*, 1 Dem. 209, 211. And as the public administrator is not required to petition but merely to proceed by means of the publication of the notice required by § 2666, Code Civ. Proc., the practice sought to be followed in the case just cited is wholly irregular.

§ 634. **Proceedings by public administrator pending the issuance of letters.**—The acts which a public administrator may perform prior to the appointment of himself or someone entitled to permanently administer the estate have been noted under § 2665. The subjoined precedents will indicate sufficiently the practice necessary in applying for authority to do the specific acts permitted by the section, to wit:

(*a*) Application for leave to seize and secure any effects of the decedent which are in danger of waste or embezzlement.

(*b*) An application for leave to sell perishable property.

(*c*) The form of notice constituting the application for letters on the part of the public administrator required by § 2666.

The proceedings for the discovery of concealed property will of course be the same as those required by any administrator.

§ 635. **Statute must be strictly followed, particularly as to notice.**—It follows, of course, from the fact that the public administrator's rights are of statutory origin, that his appointment must be regular, and follow the steps indicated in the statute, so, if the Surrogate grants him letters in the absence of the publication of the notice which is required by law, such letters must be revoked on proper application which may be made by the widow or next of kin or even by a creditor in the case where creditors have a prior right to the public administrator, which, as has been noted, is in all counties but New York. *Proctor* v. *Wanamaker*, 1 Barb. Ch. 302. Chancellor Walworth in construing the statutes, which, in the respects now under discussion, were substantially similar to those of the Code, held that the statutory provision as to the publication of the notice and the service of such notice upon the parties specified must be rigidly followed, and that the application of any person who had been deprived of administration by the irregular or improper proceedings whereby the public administrator had obtained letters could apply for the revocation of his letters although such application was not made within the time in which under the statute they are required to appear and claim the right of administration. In the case before him the widow, within six weeks after she discovered that ad-

ministration had been granted to the public administrator, applied to the Surrogate to have the grant of administration to the public administrator vacated and set aside, for noncompliance with the statutory regulations in his appointment; and the chancellor held that, independently of the statute, the Surrogate was authorized to call in and revoke letters of administration to whomsoever made, which may have been irregular and improperly obtained, upon a false suggestion of a matter of fact and without due notice to the party rightly entitled to administration. So the Court of Appeals made a similar determination. *Matter of Page*, 107 N. Y. 266. The facts in the case before them were that the necessary notice and citation having been given and served upon the return day, while the parties cited on the application of the public administrator were in court, that officer did not appear. The counsel for the parties cited remained in court until after the second call of the calendar and left the court upon being informed by the Surrogate that there was no such application upon his calendar for that day. No further notice was given to the parties cited or to their counsel, but subsequently the public administrator applied to the Surrogate for the issuance of letters and received them. It appeared that the Surrogate made no order adjourning the proceeding to any given day, and the Court of Appeals, Judge Peckham writing the opinion, held: "It is thought that where no one appeared upon the return day of the citation on behalf of the public administrator, and when the counsel for the widow did appear and was then ready to oppose the granting of such application, and no order was made in the proceedings at that time, the Surrogate lost jurisdiction to proceed further without either the due service of another citation or the voluntary appearance of the widow and next of kin. Their counsel had done all that he could be expected to do when he appeared for them, as cited, and was ready to oppose the application. If no one appeared upon the other side, and no order was made in the case, the proceedings went down, and nothing further could be done without due notice.

"We cannot agree that in such event the matter stood over ready to be heard whenever, in the ordinary course of the business of the court, it should be brought to the attention of the Surrogate. The Surrogate might have made an order adjourning the case to some specified time, and thus retain jurisdiction, but he did nothing of the kind, and the proceeding was simply out of court.

"This necessitates the reversal of the order of the General Term, and the entry of an order in the Surrogate's Court annulling and setting aside and revoking the letters of administration heretofore granted to the public administrator of New York."

§ 636. **Same subject.**—So on the other hand, in the absence of irregularities in the proceedings for the appointment of the public administrator, his appointment must stand and may not be superseded unless the parties entitled act within the time limited by the statute. *Tuohay* v. *Public Administrator*, 2 Dem. 412. This case turns upon a statutory limitation applicable to the public administrator in the county of New York which is

noted here merely by way of distinction, for in that county as will be more fully noted later, within three months after the letters have issued to the public administrator, any relative of the decedent entitled to administration may come in, and, on proof either that he did not reside in the city of New York at the time of the testator's death, or that, although residing there, he was not served with notice of the public administrator's application for letters, apply for letters, which must issue to him if he is qualified and competent, whereupon the letters of the public administrator are superseded and revoked. This right does not exist outside of the county of New York, consequently relatives of the decedent entitled to administration must appear within other counties within the time limited in § 2662, Code Civ. Proc., or the rights of the public administrator will continue. See *Matter of Ciotto*, 105 App. Div. 143, where regularity of appointment is reviewed in a proceeding to revoke letters.

§ 637. **Status of the public administrator after letters have issued.** —After letters have issued to the county treasurer granting him as public administrator administration upon the goods, chattels and credits of the deceased intestate, his status is substantially that of an ordinary administrator in chief except as limited by the provisions of the statute which are contained in § 2668 of the Code, which is as follows:

> On receiving letters of administration, the county treasurer shall be vested with all the powers and rights of other administrators, and subject to the same duties and obligations, except as herein otherwise provided. He must account and may be compelled to account in the same manner as other administrators, and proceedings for such accounting may be had at the instance of any person interested, or of the attorney-general or the comptroller. He must be allowed on the settlement of his accounts for his expenses as other administrators and for his services double the commissions allowed them by law. The residue of any moneys in his hands must be paid into the treasury of the state for the benefit of the persons entitled to receive the same. He must exhibit to the comptroller annually, at the time of rendering his account of taxes, a verified statement of all moneys received by him for commissions, services and expenses, and the total amount of his receipts and expenditures in each case in which he has taken charge of and collected any effects, or in which he has administered on any estate during the preceding year, with the name of the deceased, his place of residence at the time of his death, if known, and the place from which he came, if he was not a resident of the state at the time of his death. A copy of such statement must be published once a week for three weeks in a paper printed in the county and in the official state paper, the expense of which may be retained by him out of any balance in his hands payable into the state treasury. For a neglect to comply with this provision, he forfeits one hundred dollars to the people of the state, to be recovered by the attorney-general; and the comptroller shall give notice to the attorney-general of every such omission. **§ 2668, Code Civil Proc.**

§ 638. **Same subject.**—The first distinction between him and the ordinary administrator is that he is allowed for his services double the commission allowed ordinary administrators by law. The second distinction is

that, after making such disbursements as he is authorized by the statute to make, and has paid the debts of the intestate when they shall have been ascertained, in the regular way, he must deposit the residue of the funds in his hands with the state treasurer. This deposit is for the benefit of the persons entitled to receive the same. The deposit of such moneys with the state treasurer having been made, the proceedings by the person entitled thereto must follow the course indicated in § 2747 of the Code as to the practice required where an executor or administrator pays into the state treasury the legacy or distributive share of a person unknown. By this section the Surrogate or the Supreme Court upon the petition of a person claiming to be so entitled may ascertain the rights of the persons interested; but notice of the application must be given to the attorney general. At least 14 days' notice is required and a copy of the petition must be served, with the notice, upon him. The rights of the persons interested may be ascertained either by a reference or by directing the trial of an issue by a jury or the Surrogate may try the question himself, the provisions of the Code being very broad in that respect. When these rights have been ascertained the Surrogate or the Supreme Court, as the case may be, may grant an order directing the payment of the money which is shown to be due the claimant. The certified copy of this order must then be served upon the comptroller whereupon he draws his warrant upon the treasurer for the amount directed in the order to be paid. This amount is the face amount of the claimant's share without interest, and subject to deduction for expenses incurred by the State, with respect to the decedent's estate. Upon presenting the warrant of the comptroller to the state treasurer the latter will pay to the person entitled thereto the amount to which he is entitled as fixed by the order. Funds so deposited with the state treasurer are in no respect moneys of the State, and therefore no legislative appropriation is required to authorize their payment; the machinery indicated by § 2747 is all that is requisite, and the certified copy of the order of the Surrogate or of the Supreme Court is a sufficient warrant for the comptroller. *People* v. *Chapin*, 101 N. Y. 682. The duties of the county treasurer acting as public administrator are sufficiently indicated in § 2668, Code Civ. Proc., and are not necessary to be included in a discussion on practice.

§ 639. **Same subject.**—These provisions must not be confused with those of § 2748 which direct payment to the county treasurer of any legacy or distributive share which is not paid to the person entitled thereto at the expiration of two years from the time when a decree of distribution shall have been made or when such legacy or share is payable by the terms of such decree. Moneys so paid in to a county treasurer can only be paid out by him upon the special direction of the Surrogate or pursuant to the judgment of a court of competent jurisdiction. See § 2748.

§ 640. **Disposition of funds where appointment of public administrator was irregular.**—If any person entitled to administer discovers that there has been some irregularity in the granting of letters to the public administrator, he may, as we have already noted, move promptly after

making the discovery to have his letters revoked and superseded, or he may acquiesce for the time being in the administration and await the accounting which by § 2668 the public administrator is required to render. Or, in the third place, he may institute proceedings for a compulsory accounting, alleging the failure to comply with the statute on the part of the public administrator in securing his letters. The Surrogate upon such accounting may make an ordinary decree of distribution provided that all the creditors shall have been paid, with which decree the public administrator must comply. A peculiar case occurred in Westchester County where the county treasurer, supposed by all parties to be acting as public administrator under the statute, accounted, and the account being settled he was found chargeable with a certain surplus; thereupon certain next of kin applied to the Surrogate for a direct distribution of the surplus in his hands and it was shown that upon the application for letters by the county treasurer, while he had described himself as county treasurer, he had prayed for the issuance of letters to himself personally, and they had been so issued. It also appeared that a sister of full age was residing in the county at the time of his application, had renounced her right to administer requesting the court to appoint, "David Cromwell, county treasurer of the said county, the administrator," but the petition was merely signed "David Cromwell," and the letters were issued to David Cromwell, administrator. The Surrogate held that the administration was a mere general administration and that it was the duty of the Surrogate to decree distribution. *Tymon* v. *Cromwell*, 2 Dem. 650. See *Matter of Hoes*, 119 App. Div. 288, as to Surrogate's power to modify his accounting decree.

§ 641. **The public administrator in litigation.**—It has already appeared that the public administrator may take all the necessary proceedings which an administrator of the estate of a deceased person may take for the discovery of any concealed or withheld property, for the sale of perishable property, or for the recovery of any assets of the estate. Generally his right to sue or his liability to be sued is the same as that of an ordinary administrator. It appears that, if he has been a party to an action and is removed as county treasurer or in his capacity as public administrator, his successor in office may be substituted as defendant upon proper application. *Burras* v. *Looker*, 2 Edwards' Ch. 499. Upon proceedings by the public administrator to compel the payment of a debt due the intestate, where it appears that there never have been any assets of the decedent in the State or that the assets which had been in the State have been reduced to possession by administrators appointed under another jurisdiction prior to the proceedings in this State, the Surrogate is without power to compel payment to the public administrator. *Matter of Paramore*, 15 N. Y. St. Rep. 449. So where the public administrator sues upon a policy of life insurance on the life of his intestate and it appears that the policy has not been within the State either at the time of the intestate's death or subsequently, but has, as a matter of fact, been in the possession of a foreign administrator, the public administrator has no title to the policy

upon which to base a suit; nor any right to its possession, and his complaint will be dismissed. *Morrison* v. *Mutual Life Ins. Co.*, 57 Hun, 97, citing and examining *Holyoke* v. *Mutual Ins. Co.*, 22 Hun, 75, aff'd 84 N. Y. 648; *Holmes* v. *Remson*, 4 Johns. Ch. 460; *Embree* v. *Hannah*, 5 Johns. 101. A public administrator has power to avoid contracts of his intestate upon the ground of the intestate's infancy (*Hangen* v. *Hachemeister*, 17 J. & S. 34), in which case he stands exactly as the intestate would if seeking to avoid the contract for the same reason; or on the ground of fraud in the contract or transfer, in which case he may be said to represent the creditors of the intestate. *Hangen* v. *Hachemeister*, 21 J. & S. 532, aff'd 114 N. Y. 566. See also *Dayton* v. *Johnson*, 69 N. Y. 419; *Ketchum* v. *Morrell*, 2 N. Y. Legal Observer, 58. It has been held that, where the statutory right of action for death is given by *lex loci mortis* the public administrator here may under his letters sue for damages for causing his decedent's death. *Hoes* v. *N. Y., N. H. & H. R. R.*, 73 App. Div. 363.

§ 642. **Public administrator of Kings County.**—The public administrator of Kings County derives his powers and functions in respect of intestates' estates in that county, from § 2669 of the Code. So far as they are applicable the provisions of law conferring jurisdiction, authority or power on or otherwise relating to the office of public administrator in the other counties of the State or in the county of New York are distinctly applied to and conferred upon the office created by that section which needs no separate discussion, therefore, apart from the others. The section is as follows as amended in 1904 (italics showing amendment):

> The surrogate of the county of Kings and the county *judges* of such county *shall, on or before the twenty-seventh day of April, nineteen hundred and four, and every five years thereafter—except as hereinafter provided*—appoint a public administrator of *said* county to hold office for the term of five years *beginning on said date*, unless sooner removed for cause. *In case of a vacancy in said office by reason of death, resignation or otherwise said surrogate and county judges shall fill the same by appointing a public administrator for the full term of five years from the date of such appointment.* Before entering *upon the performance of* the duties of his office *the person so appointed* must take and subscribe before the county clerk or *one of the* county *judges* of the county, or a justice of the supreme court, the constitutional oath of office, and execute a bond with sureties to be approved by a justice of the supreme court, or such county judge, to the county of Kings, in a penal sum of fifty thousand dollars, conditioned for the faithful discharge of all the duties of his office, and that he will fully and correctly account for and pay over all moneys and property that may come into his hands as such public administrator, according to law, which bond must be filed with the clerk of the county. He shall be entitled to retain from all moneys or property of any intestate that come into his hands after deducting all actual and necessary expenses the same commissions as are now allowed by law to executors or administrators, but he shall receive no salary for his services. He shall have the prior right and authority to collect, take charge of and administer upon the goods, chattels, personal property and debts of per-

sons dying intestate, and for that purpose to maintain suits as such public administrator, as any executor or administrator might by law in the following cases:

1. Whenever such person dies leaving any assets or effects in the county of Kings, and there is no widow, husband or next of kin entitled to a distributive share in the estate of such intestate, resident in the state, entitled, competent or willing to take out letters of administration on such estate.

2. Whenever assets or effects of any person dying intestate, after his death, come into the county of Kings and there is no such person entitled, competent or willing to take administration of the estate. In such cases intestacy is presumed until a will is proved and letters testamentary issued thereon. All provisions of law conferring jurisdiction, authority or power on, or otherwise relating to, the office of public administrator of the city of New York and to the office of public administrator in the several counties of the state, so far as applicable, apply to and are conferred on the office hereby created. The surrogate of the county of Kings, in cases where now authorized by law to issue letters of temporary administration, may in his discretion issue letters of temporary administration to such administrator without further security than required by this section. **§ 2669, Code Civil Proc.**

See *Speckles* v. *Public Administrator*, 1 Dem. 475. The jurisdiction of the Surrogate of Kings County to grant letters to the public administrator was defined by Surrogate Lott. *Taylor* v. *Public Administrator*, 6 Dem. 158. He held that the provision that the person dying must leave assets or effects in the county of Kings in order to confer jurisdiction upon his court to grant such letters related exclusively to a case in which such deceased person was a nonresident of the State, and declared that if the decedent were a resident of the State the location of his personal assets of all kinds within the State would be the county of his residence at the time of his death. Consequently, if the decedent died in Kings County the Surrogate of that county had jurisdiction to grant letters to the public administrator although the assets of the estate might be located in another county, and he based his decision upon the provisions of the Code, giving exclusive jurisdiction to grant letters of administration to the Surrogate of the county in which an intestate resided, provided such intestate was at the time of his decease a resident of the State. This construction of the act has not been disturbed. See *ante*, under § 2660, as to priority of next of kin "entitled to share" over public administrator in Kings County.

§ 643. **The public administrator as temporary administrator.**—The sections of the Code applicable to temporary administration which have already been discussed, together with the closing provision of § 2669 above recited, indicate that the public administrator in Kings County and the county treasurer, in counties other than New York, may in certain cases be appointed to temporary administration of an intestate's estate. In Kings County the peculiarity is that, wherever the Surrogate of that county is authorized to issue letters of temporary administration, he may issue them to the public administrator without further special security

beyond the bond which he files upon assuming his office. In the counties of the State other than New York and Kings the county treasurer is in certain cases, entitled to apply for the appointment of a temporary administrator by virtue of the provisions of § 2670, which defines when and how a temporary administrator may be appointed. Under this section a county treasurer of a county where the person whose estate is in question last resided, or, if he was not a resident of the State, of the county where any of his property, real or personal, is situated, may apply for the appointment of a temporary administrator with like effect and in like manner as if he were a creditor. Under this section the Surrogate has power to appoint the county treasurer, temporary administrator *ad ipso nomine*. *The Public Administrator* v. *Burdell*, 4 Bradf. 252. In such case the county treasurer takes and administers as temporary administrator with the powers and limitations of such an administrator, and where he is appointed in this capacity his commissions should be limited to those which any other temporary administrator may receive, and he must give the bond required of such administrators. From the wording of § 2670 it is very clear that the right of the county treasurer to apply for temporary administration is intended to be confined to a case arising under subd. 2 of that section, that is to say, of administration upon the estate of an absentee. This is manifest from the phraseology of the 4th paragraph of the section. It first provides for the appointment of a temporary administrator in a case specified in subdivision first of the section and provides that the appointment must be an order and prescribes the practice in applying for such order. It then proceeds to define the way in which application must be made for the appointment of a temporary administrator in a case specified in subdivision second, where it is provided, that it "must be made by petition in like manner as where an application is made for administration in case of intestacy and the proceedings are the same as prescribed in article 4th of this title relating to such last mentioned application." Directly following this provision are the words, "*Such an application* . . . . may also be made by the county treasurer," etc. This can refer only to an appointment under the second subdivision and the right of the county treasurer to apply cannot be deemed to be extended by this section. The case of *The Public Administrator* v. *Burdell*, above cited, was prior to the Code and was a case where the public administrator of New York County was appointed collector of a decedent's estate pending a contest on the grant of letters, and is merely cited above as indicating a case in which the public administrator had been deemed a proper party to appoint collector or temporary administrator, but in view of the express language of § 2670 the case cannot be deemed authority against the rule above stated.

§ 644. **The public administrator of New York County.**—Chapter 230 of the Laws of 1898, completely remodeled the provisions of the consolidation act, formerly obtaining in the county of New York. Many of the provisions are still retained, but so completely reconstructed in many respects

as to supersede many of the former adjudications. The act went into effect upon the 12th of April, 1898, and it has seemed proper merely to give the sections with such annotations following each as are applicable or instructive.

" § 1. The city of New York when mentioned in this act shall mean the city of New York as constituted by chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven." The new charter of 1901 continues the office by § 1585 without changing his powers, duties and obligations.

" § 2. Any person hereafter appointed to the office of the public administrator of the county of New York, shall, before entering upon the duties of his office, execute a bond to the city of New York, with such sureties as shall be approved by the mayor thereof, in the penal sum of fifty thousand dollars, conditioned for the faithful discharge of all duties enjoined on him by law, and particularly that he will account for and pay over all moneys and property that may come to his hands as such public administrator, according to law. The assistant public administrator shall, in addition to his other powers, possess every power and perform all and every duty belonging to the office of the public administrator, when in the case of sickness or other disability of the public administrator, the public administrator, or either of the surrogates of the county of New York, shall designate and authorize him so to act, such designation and authority to be duly filed in the surrogate's office of the county of New York; before acting, however, under such designation and authorization, such assistant public administrator shall give a bond in the penal sum of twenty-five thousand dollars, in the same form as herein prescribed for the public administrator and with like approval; such authority to the assistant public administrator shall cease and determine upon the resumption of duty by the public administrator, or upon the written direction of either of said surrogates to that effect. That power to appoint and remove the public administrator is hereby vested in the surrogates of the county of New York, and the appointment and the removal of his subordinates is hereby vested in the public administrator."

It will be noted that the manner of designating the public administrator is changed by this section from what it was prior to ch. 827 of Laws, 1895, and he is subject now very properly to the control of the Surrogate's office, with which his whole administration is so closely connected. The public administrator is however made the head of his department, with independent control of his subordinates. The power of removal given to the Surrogate over the public administrator himself is of course inferentially subjected to reasonable restrictions, and should only be exercised upon good cause shown, and in the general public interest.

" § 3. The public administrator shall retain a commission, over and above all expenses, upon all moneys that shall come into his hands, at the rate of five dollars upon the hundred dollars, upon all sums received from any one estate not exceeding two thousand five hundred dollars, and upon all sums so received exceeding that sum, at the rate of two dollars and fifty cents upon every hundred dollars; which sums may be so retained in preference to any debts or claims excepting funeral charges. The public administrator shall

not receive to his own use any fees or emoluments in addition to his salary, and he shall pay into the treasury of the city of New York all commissions and costs received by him from any source whatever; such payments shall be made monthly, and shall be accompanied by a sworn statement in such form as the comptroller of the city of New York shall prescribe, and such statement, with the detailed list of costs and commissions, shall be published in the City Record monthly."

§ 4. In the right of his office, the public administrator shall have authority to collect and take charge of the goods, chattels, personal estate, and debts of a person dying intestate, and for that purpose to maintain such suits as public administrator, as any executor might by law, in the following cases:

1. Whenever any person shall die intestate, either within this State, or out of it, leaving any goods, chattels, or effects within the county of New York.

2. Whenever any goods, chattels, or effects, of any person who shall have died intestate, shall arrive within the county of New York, after his death.

3. Whenever any person coming from any place out of this State, in a vessel bound to the port of New York, and arriving at the quarantine, near the city of New York, shall there die intestate, and shall leave any effects either at the said quarantine or in the county of New York, or elsewhere.

4. Whenever any effects of any such person so arriving and dying intestate at the said quarantine shall, after his death, arrive either at the said quarantine or within the county of New York.

5. Whenever any person, coming from any place out of this State in a vessel bound to the port of New York, shall die intestate on his passage, and any of his effects shall arrive at the said quarantine.

In all the preceding cases, intestacy shall be presumed until a will shall be proved, and letters testamentary be granted thereon. When an executor named in a will refuses or neglects to act or is dead, the public administrator in the right of his office shall have authority to collect and take charge of the goods, chattels, personal property and debts of the testator, in the above cases as though said testator had died intestate, and for that purpose to maintain such suits as public administrator as any executor might by law.

The public administrator of the county of New York derives his authority to administer upon certain intestates' estates from the statute and not from the Code. The rule in this respect is the same as under the Laws of 1882, ch. 410. See *Matter of Brewster*, 5 Dem. 259. If a case provided by this act is shown to exist, the public administrator has a right to take the property, in the right of his office as indicated in this section.

§ 5. But the last section shall not confer on the public administrator any authority in respect to the estate of any person not a citizen of this State dying within or outside of this State, or on board of any foreign vessel within the harbor of New York, unless:

1. Such person shall have landed within the county of New York, or at the quarantine near the said county; or

2. Unless the effects of such person, or some part of them, shall have been so landed; and when any effects of such person shall have been so landed, the authority of the public administrator shall extend to such effects only; or

3. Unless the decedent died leaving personal property within the county

of New York, or leaving personal property which has since his death come into the county, and remains unadministered.

And the public administrator shall have no authority to collect and take charge of the wages and effects of seamen dying on board the vessels of a foreign country, whose laws entrust the custody and disposition of such wages and effects to their respective consuls or consular officers.

§ 6. Whenever there shall be any widow, or next of kin of any such intestate, entitled to a distributive share in his estate, residing in the county of New York, at the time of his death, the public administrator, upon receiving notice of such fact, shall not have any authority to interfere with the effects of the deceased until he shall have obtained an order from the surrogate to take charge thereof. Such order may be granted by the surrogate, upon the application of the public administrator, and upon due proof being made to him, by affidavit, that the effects of the deceased are in danger of waste or embezzlement, or that for any other reason it would be for the benefit of the estate to have the same, or any part thereof, seized and secured.

The object of these preliminary sections is practically to provide for a temporary administration of the estate, or rather for the custody and securing of the property of the alleged intestate, prior to the application for letters required by § 12, *post*, where the estate amounts to over $100. The section (6) requires the public administrator having knowledge of the existence of a widow or next of kin who may be entitled to a distributive share in the alleged intestate's estate to apply to the Surrogate for leave to take the estate into his temporary custody prior to the application for letters. Unless the Surrogate is, upon application to him, satisfied that there is danger of waste or embezzlement, he may withhold the order applied for and remit the public administrator to his regular application, notice of which must be served upon all such parties; upon which application they can all be heard and the right of the public administrator to administer can be determined in view of all the facts.

Petition for order to seize personal property to prevent waste.

Surrogate's Court,
County of New York.

Title. }

To the Surrogate's Court of the County of New York:

The petition of public administrator respectfully shows, on information and belief, that late of died in on the day of 19 intestate, leaving certain effects in the county of New York, and that the said effects are in danger of waste or embezzlement. And he further shows on information and belief, that the said left him surviving his widow, of full age, and and (*specify the "next of kin" entitled to a distributive share in his estate*), all, at the time of the death of the said intestate, and still, residing in the county of New York, and for proof of the allegations herein contained the public administrator refers to the affidavit of a of the said intestate, hereunto annexed.

Your petitioner, as public administrator, pursuant to § 6 of chap. 230 of the Laws of 1898, asks the Surrogate for an order authorizing him to take charge of, seize, and secure the effects of the said deceased, intestate.

(Signature.)

(Verification.)

Affidavit.

Surrogate's Court,
County of

Title. }

(Venue.)

of the city of being duly sworn, says: that he is a (give status of affiant, as creditor or relation) of late of the person referred to in the annexed petition. That the said died in the city of on the day of 19 . That he left him surviving of full age, his widow, and and his only (children and) next of kin, and that the said widow and next of kin of the said intestate resided at the time of his death, and still reside, in the county of New York. That the said died possessed of effects (describe same) worth, as deponent is informed and verily believes, upwards of thousand dollars, at No. street, in the city of . That the said effects have been, since the death of the said in possession of . But that no responsible person has been in charge thereof, and that portions of the said effects to the amount of upwards of thousand dollars, have been disposed of and carried away by (*or state facts showing actual or threatened waste*).

And this deponent further says, that the said goods are in danger of waste or embezzlement, and that, as this deponent believes, it will be for the benefit of the estate of the said deceased to have the said goods seized and secured.

(Jurat.) (Signature.)

Surrogate's Court
Caption.

Present:
Hon.
Surrogate.

Order.

Title. }

On reading and filing the petition of the public administrator of the county of verified the day of 19 and the affidavit of a of the said deceased, verified the day of

19 by which it appears that the said intestate left him surviving his widow and and his only next of kin entitled to a distributive share in his estate, and residing in the County of New York at the time of the death of the said intestate, and still residing in the said county, and that the effects of the said deceased in the county at are in danger of waste and embezzlement; and that it would be for the benefit of the estate of the said intestate to have the said stock of goods seized and secured; Now, on motion of Esq., attorney for as public administrator, it is

Ordered, That the said public administrator of the County of New York, be, and he hereby is authorized to take charge of, seize and secure all the effects of the said deceased, wherever the same may be found within the said County of New York.

(Signature.)
Surrogate.

§ 7. Whenever, in any of the cases in which the public administrator is authorized to take charge of the effects of any deceased person, any goods, chattels, credits, or effects of the deceased, or of which he had possession at the time of his death, or within twenty days previous thereto, shall not have been delivered to the public administrator, nor accounted for, satisfactorily, by the persons who were about the deceased in his last sickness, or in whose hands the effects of the deceased, or any of them may be supposed at any time to have fallen, the public administrator may institute an inquiry concerning the same; and upon satisfying the surrogate, by affidavit, that there are reasonable grounds for suspecting that any such effects are concealed or withheld, he shall be entitled to a subpœna to be issued by the surrogate under his seal of office, to such persons as the said public administrator shall designate, requiring them to appear before such surrogate, at the time and place therein to be specified, for the purpose of being examined touching the estate and effects of the deceased. If the surrogate be absent from the city, such application for a subpœna may be made to any justice of the supreme court, or to the recorder of said city, either of whom is hereby authorized to issue such subpœna, under his hand and private seal, in the same manner as the surrogate.

This section is new. The public administrator acting as an officer of the Surrogate's Court is entitled to the machinery of the court for the purpose of discovering assets which it is his duty to take into his custody. A failure to obey the subpœna issued under this section and to appear for examination at the time and place designated therein, is a contempt, punishable as any other contempt of the court. See § 8. While doubtless this relief could have been secured by the former public administrator in a proper case, it was not expressly covered by the consolidation act; but this power of inquisition, which is manifestly intended to be safeguarded by a wise judicial discretion in the exercise thereof, should not be extended beyond its evident purpose, which is to secure and preserve the character of estates likely to fall into the public administrator's hand; it should not be made an

occasion of burdening such estates with additional costs and expenses. The word "satisfactorily" in the above section appears to relate to the public administrator, but he must satisfy the Surrogate by affidavit that the property claimed to be withheld has not been accounted for satisfactorily and that there are reasonable grounds for suspecting that they are concealed or withheld. This construction of the section makes the Surrogate the judge of whether an occasion for the exercise of the power hereby given exists.

§ 8. Such subpœna shall be reserved in the same manner as in civil causes, and if any person shall refuse or neglect to obey the same, or shall refuse to answer touching the matters hereinafter specified, he shall be attached and committed to prison by the said surrogate or other officer so issuing such subpœna, in the same manner as for disobedience of any citation or subpœna issued by a surrogate in any case within his jurisdiction. Upon the appearance of any person so subpœnaed before such surrogate or other officer, he shall be sworn truly to answer all questions concerning the estate and effects of the deceased, and shall be examined fully and at large, by the public administrator in relation to the said effects.

The inquiry conducted under these two sections is in the nature of a special proceeding and the party interrogated would undoubtedly be entitled to be represented by counsel thereon, and the examination will undoubtedly be limited by the ordinary rules of evidence and the provisions as to a refusal to answer touching the matters hereinafter specified will undoubtedly be restricted to mean a refusal to answer any proper and competent question touching such matters. The inquiry is intended to be addressed to the discovery of property, and undoubtedly the person cited would be directed to answer any question not tending to incriminate him and relating to his knowledge of, or dealings with such property, and it would be competent for his counsel, if present, to interrogate him after the examination fully and at large by the public administrator.

Application for inquiry under § 8.

Surrogate's Court,
County of New York.

In the Matter of the Estate of
Deceased.

To the Surrogate of the County of New York:

The Petition of WILLIAM M. HOES respectfully shows: That your petitioner, the Public Administrator of the County of New York, was on the day of 19 duly appointed the Administrator of the effects of the above-named deceased, and upon that same day letters of administration were issued to him.

And your petitioner further shows, upon information and belief, That one in the County of New York, who was about the person of the deceased prior to his death, has in his possession and under his control certain property belonging to the decedent, viz.:

and other property of the deceased.

That he withholds, conceals and refuses to exhibit the property above described, which ought to be delivered to the petitioner, so that they cannot be inventoried or appraised by him.

Your petitioner further says, that the sources of the above information are

Wherefore, he prays that an inquiry may be made respecting such money and effects, and that a citation be issued, directed to said directing him to attend such inquiry, and to be examined accordingly.

Dated, New York. 19

.....

Public Administrator, etc., Administrator, etc., of Deceased.

(Verification.)

Surrogate's Court

Caption.

Present:

Hon.

Surrogate.

Order for inquiry.

In the Matter of the Estate of Deceased.

On reading and filing the annexed petition, and on motion of Attorney for the Petitioner,

It is Ordered, That a citation issue, directed to said requiring him to appear before me for the purpose of being examined touching the property described in said petition, alleged to be in his possession and control and withheld and concealed from the Petitioner,

---

Citation to appear after the inquiry.

THE PEOPLE OF THE STATE OF NEW YORK

BY THE GRACE OF GOD, FREE AND INDEPENDENT.

To

SEND GREETING:

You are hereby cited and required personally to be and appear before our Surrogate of the County of New York, at the Surrogate's Office of said County, in the County Court House in the City of New York, on the day of 19 at half-past ten o'clock in the forenoon of that day, then and there to attend the inquiry concerning certain personal property belonging to the estate of deceased, alleged to be in your possession or control, and to be examined personally in respect to the same;

IN TESTIMONY WHEREOF, ETC.,

.....

Clerk of the Surrogate's Court.

Surrogate's Court
Caption.

Present:
Hon.
Surrogate.

Order.

Note. In the Matter of the Estate of Deceased

Note. This is to be entered upon the citation.

To

It is Ordered, That the party to whom the foregoing citation is addressed, be, and he hereby is directed to attend personally at the time and place and for the purpose therein specified.

§ 9. If, upon any inquiry, it shall appear to the officer conducting the same, that any effects of the deceased are concealed or withheld, and the person having possession of such property shall not give the security herein specified, for the delivery of the same, such officer shall issue his warrant, directed to the sheriff, marshals, and constables of the city or county, where such effects may be, commanding them to search for and seize the said effects and for that purpose, if necessary, to break open any house in the daytime, and to deliver the said property so seized to the public administrator, which warrant shall be obeyed by the officers to whom the same shall be directed and delivered, in the same manner as the process of a court of record. But such warrant shall not be issued to seize any property, if the person in whose possession such property may be, or any one in his behalf, shall execute a bond, with such sureties, and in such penalty as shall be approved by the surrogate, or other officer acting in his place, to the public administrator, conditioned that such obligors will account for and pay to the said public administrator the full value of the property so claimed, and withheld (and which shall be enumerated in the said condition), whenever it shall be determined in any suit to be brought by the public administrator, that the said property belongs to the estate of any deceased person, which the administrator has, by law, authority to collect and preserve.

It is unnecessary to indicate precedents for the search warrant or for the bond to be used under this section as they may readily be adapted. It is contemplated that the warrant shall be issued by the officer conducting the inquiry; this refers either to the Surrogate of the county who shall have issued the subpœna which naturally would be returnable before him; or in the case of his absence from the city, the justice of the Supreme Court, or the recorder of the city, either of whom is indicated in § 7 as authorized to issue the subpœna "in the same manner as the Surrogate," and presumably therefore a subpœna issued by such justice or recorder must be made returnable before him.

§ 10. Whenever any effects of a deceased person, of which the public administrator is authorized to take charge, shall be at the quarantine at the time of the death of such person, or shall arrive there afterwards, it shall be the duty of the health officer, his assistants or deputies, whichever shall be present, to secure the said effects from waste and embezzlement, and to make a true inventory thereof, and when the rightful claimants of such effects do not appear

within three months, to deliver the same, with such inventory, to the public administrator, and immediately to give information of such effects to the public administrator, to cause an inventory or account thereof to be taken, and to deliver the same to the said public administrator, unless the said property be of such a description as ought not to be removed, or may be ordered to be destroyed under the laws concerning the public health.

This section slightly modifies § 14 of the previous act and is confused by an interpolation of the amendment without a reconstruction of the section. The obvious intent of the section as amended is that the health officer or his assistant or deputy shall have a preliminary custody of such effects as against the public administrator for three months. Second, that the rightful claimants may oust the public administrator by appearing and claiming the property within such three months. Third, the power of the health officer to destroy the property under the laws concerning the public health is retained and the duty of taking an inventory at the outset is also continued. The section as it reads is repetitious.

§ 11. If any property taken into the charge of the public administrator, by right of his office, shall be in a perishable condition, he may immediately sell the same at public auction, or private sale, on obtaining an order for that purpose from the surrogate, which shall be granted on due proof of the fact; he may also, before letters of administration have been granted to him, upon the order of the surrogate, sell at public auction or private sale, such property as he deems it necessary to sell for the preservation and benefit of the estate.

This section amplifies § 15 of the previous law and grants the public administrator the much needed power of selling not only property which is in a perishable condition (*the former act read perishing condition*) but also any property which he deems it necessary to sell for the preservation and benefit of the estate. The provision as to obtaining an order from the Surrogate remits to the discretion and judgment of that officer the question of whether the necessity exists. The application for the order may be made *ex parte* and on affidavits in the form of a petition or application for the order, which affidavit should state the description and character of the property and such circumstances as show it to be in a perishable condition or as indicating the necessity of its sale for the preservation and benefit of the estate. The object of the section is indicated by the use of the word *and* between preservation and benefit instead of *or;* it emphasizes the duty of the administrator prior to his application for letters merely to preserve the estate; nothing in the nature of administration thereon is indicated by these preliminary sections.

Affidavit to obtain order to sell perishable property.

Surrogate's Court,
County of
Title. }
(Venue.)

being duly sworn, says: that he is public administrator of the county of New York; that on the

day of 19 of died intestate at said city, leaving certain personal property therein; that no notice has been received by the said public administrator that anyone entitled to a distributive share in the estate of said is a resident of the said county; and that the said by right of his office as public administrator, did, on the day of 19 take possession of, and now holds, the said property which was in said county of at the time of his decease, or which has since come therein; and that the same consists of the goods and chattels shown in the annexed Schedules A and B.

And deponent says that the property shown on Schedule B, hereto annexed, is in a perishable condition, and should be immediately sold at public auction. (*Add if necessary:* And deponent further says that he deems it necessary for the preservation and benefit of the estate that the following additional property be sold, and desires an order of the Surrogate permitting such sale, at public auction or private sale. *Where this is desired add allegation* that letters of administration have not yet been granted to deponent.)

(Jurat.) (Signature.)

At a Surrogate's Court (etc.).

Present:

Hon.

Surrogate.

Order.

Title.

On reading and filing the affidavit of hereto annexed, by which it appears that Esq., the public administrator of the county of New York, has in his charge, by right of his office, certain property (which is described in schedules attached to and made part of said affidavit), and that part of such property described in Schedule B thereto annexed is in a perishable condition;

Now, on motion of attorney for the said public administrator, it is

Ordered, that the said Esq., public administrator of the county of New York, sell at public auction the property described in the said affidavit and Schedule B, and that such sale take place on the day of 19 or on such adjourned days as the said public administrator shall designate. (*And add if necessary:* and it is

Further Ordered, that the said Esq., public administrator as aforesaid, have leave to sell, at public auction or at private sale, such other property, described in his said affidavit as he deems it necessary to sell for the preservation and benefit of the estate.)

(Signature.)

§ 12. If the property of an intestate of which the public administrator is authorized to take charge, shall exceed in value the sum of one hundred dollars, he shall immediately give notice of his intention to apply to the surrogate for letters of administration upon the estate of such intestate, specifying the time and place when such application will be made. Such notice shall be served personally on the widow and the relatives of the intestate entitled to any share in his estate, if there be any to be found in the county, and in case of an application for letters of administration with the will annexed upon the legatees named in said will and upon the husband or widow and relatives who would have been entitled to the estate had the deceased died intestate, if there be any to be found in the county, at least thirty days before the time therein specified. If there be none to be found in the said county, and in all cases where the notice shall not have been personally served, it shall be published at least twice in each week, for four weeks, in some newspaper printed in the county.

The provisions of this section indicating the statutory procedure upon the application must be strictly followed, particularly as to the service or publication of the notice. This section follows the prior law except in regard to the provision included for service, where the decedent is shown to have left a will and the application is for letters of administration with the will annexed.

It will be noted that the persons entitled to notice of the application by the public administrator are as they were under § 17, of the former act, the persons entitled to a distributive share of the personal estate. So the decision in *Matter of Brewster*, 5 Dem. 259, is still applicable, in which Surrogate Rollins held: "that the public administrator was not bound to give notice of his intention to apply for letters, to a relative of the decedent who though having a prior right to letters is not actually entitled to a share in the estate," citing *Lathrop* v. *Smith*, 24 N. Y. 417; *Butler* v. *Perrott*, 1 Dem. 9. It was further held in that case, "that a failure on the part of the public administrator to give proper notice to persons entitled thereto, was an irregularity which did not vitiate the proceeding and which could only be taken advantage of by the party entitled to and failing to receive notice." *Ibid.* at p. 264, citing *James* v. *Adams*, 22 How. Pr. 409; *People* v. *Waldron*, 52 How. Pr. 221; *Johnston* v. *Smith*, 25 Hun, 171; *Kelly* v. *West*, 80 N. Y. 139, 145. It is, however, undoubtedly true that if this irregularity be set up by one of the persons entitled to notice, the letters granted to the public administrator may be revoked. *Proctor* v. *Wanmaker*, 1 Barb. Ch. 302.

BUREAU OF THE PUBLIC ADMINISTRATOR,
119 Nassau Street.

Notice under § 12. Notice is hereby given to and to the relatives and next of kin of deceased, who is alleged to have died intestate, that I shall apply to a Surrogate of the County of New York, at his office in the County Court House in the City of New York, for letters of administration upon the

estate of the said intestate, on the day of next, at 10.30 o'clock in the forenoon.

Dated, New York, 19

WILLIAM M. HOES,
PUBLIC ADMINISTRATOR.

BUREAU OF THE PUBLIC ADMINISTRATOR,
119 Nassau Street.
Borough of Manhattan, New York City.

To the Surrogate's Court of the County of New York:

Please to take notice that on the day of 19 at 10.30 o'clock in the forenoon, I will apply to you for Letters of Administration upon the estates of the following named intestates:

Very respectfully,

WILLIAM M. HOES,
PUBLIC ADMINISTRATOR.

Petition by public administrator for letters.

Surrogate's Court,
County of New York.

In the Matter of the Application for Administration on the Goods, Chattels and Credits of Deceased.

To the Surrogate of the County of New York:

The Petition of WILLIAM M. HOES, the Public Administrator of the County of New York, respectfully showeth, that he is informed by of the City of New York, and verily believes that departed this life at on or about the day of without leaving any last will and testament; and that the said deceased died seized of no real property, but possessed of certain personal property in the State of New York, the value of which does not exceed the sum of about dollars.

That the said deceased left surviving as next of kin but no relative or next of kin entitled to share in the estate, residing or to be found in the County of New York. That the said deceased was at or immediately previous to death a resident of the County of New York, and left personal property therein by means whereof the ordering and granting administration of all and singular the goods, chattels and credits whereof said deceased died possessed in said State, and also the auditing, allowing and final discharging the accounts thereof, belong unto the Surrogate of the said County. That your petitioner has caused due notice to be served and published as is required by law, and as appears by affidavits accompanying this petition.

That no previous application has been made for letters

of administration upon the goods, chattels and credits of the above-named deceased.

Your petitioner therefore prays that you will appoint him administrator of all and singular the goods, chattels and credits which were of said deceased.

. . . . . .

Public Administrator of the County of New York.

State of New York,
County of New York, } ss.:

WILLIAM M. HOES, being duly sworn, deposes and says that he is the Public Administrator of the County of New York; that he has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief; and as to those matters he believes it to be true.

Sworn to before me, this
day of 19

. . . . . .

Notary Public, New York County.

§ 13. At the time specified in such notice, any person interested in the estate of the deceased may appear and contest the granting of letters of administration to the public administrator, and shall be entitled to subpœnas to compel the attendance of witnesses on such hearing. If it shall appear that the deceased has left any will of his personal property, by which any executor is appointed who is competent and qualified according to law to take upon him the execution of such will; or if it shall appear that there is a widow or any relative of the deceased entitled to a share in his estate, willing, competent and qualified according to law to take letters of administration, with the will annexed, if there be one, or to take letters of administration, if there be no will, then letters testamentary shall be granted to such executor or letters of administration shall be granted to such widow or relative, as in other cases. Upon such letters testamentary or letters of administration being granted, all control and authority of the public administrator over the estate of the deceased shall cease, and every order that may have been previously granted to him in relation to the estate shall be revoked.

Section 13 consolidates §§ 18, 19 and 20 of the former law and marks the point at which the temporary administration or rather custody of the decedent's effects by the public administrator determines. The whole object of the law of public administration is to conserve estates for unknown and indigent heirs or next of kin with the least possible expense and under the greatest possible safeguards as to security. Consequently as soon as it develops that there are persons entitled to administer or entitled to execute the will, if there be one, the object of the law is satisfied and the property must be turned over to such person or persons subject to the reasonable expenses incurred by the public officer in his preservation and custody of the estate.

§ 14. The expenses incurred by the public administrator, in all necessary measures for securing and guarding the effects of the deceased from waste and embezzlement, of serving and publishing the notice aforesaid, and of obtaining any necessary order from the surrogate, and of executing such order, shall be taxed and allowed by the surrogate, and may be retained by the public administrator out of any moneys or effects of the deceased in his hands, and the residue thereof shall be delivered by him to the executor or administrator so allowed or appointed without any abatement or deduction for commissions or for any other charges than such as shall have been so allowed and taxed. If there shall be no moneys or effects of the deceased in the hands of the public administrator to pay such expenses, the same, after being allowed and taxed, shall be paid by the executor or administrator so appointed, in preference to all other debts or claims, except funeral charges, and the public administrator may maintain an action therefor in his own name.

It will be noted that for this temporary administration the public administrator is only entitled to be recouped his expenses without any abatement or reduction for commissions or for any other charges, excepting such as shall have passed the scrutiny of the taxing officer, who is declared to be the Surrogate himself.

§ 15. If no executor be allowed, and no letters testamentary or of administration be granted by the surrogate to any other person, at the time specified for hearing the application, or at such other times as shall have been appointed, then, unless it appear that letters testamentary or of administration have already been granted on such estate, the surrogate shall grant letters of administration thereon, with the will annexed or otherwise, as the case may require, to the public administrator, without requiring him to file a further or other official oath or bond, briefly stating that the administration of the goods, chattels, credits, and effects of the deceased has been granted to him according to law; which letters, the record thereof, and a transcript of such record duly certified, shall be conclusive evidence of the authority of said public administrator in all cases in which he is authorized by law to act.

From these sections it appears that the public administrator is entitled to letters only in case nobody entitled thereto under § 2660, has satisfied the Surrogate of his right to administer or to take letters testamentary in case a will has turned up. His right may be defeated, however, by proof of administration elsewhere under letters testamentary or of administration already granted. In case letters are granted to the public administrator the form of such letters is essentially similar to that of ordinary letters of administration or with the will annexed, and no precedent for the same need be here given.

It is to be noted, that the procedure to be pursued, where the public administrator of New York County seeks letters, is not regulated by the Code but by the statute, the sections of which are here given. *Matter of Brewster* 5 Dem. 259.

§ 16. If the property of any intestate, of which the public administrator is authorized to take charge, be worth a sum not exceeding one hundred dollars,

he shall immediately give notice, briefly stating that the effects of the deceased, naming him, with his addition, in the hands of the public administrator, will be administered and disposed of by him according to law, unless the same be claimed by some lawful executor or administrator of the deceased, by a certain day to be specified in such notice, not less than thirty days from the service or first publication thereof, as herein directed. Such notice shall be personally served on the widow and every relative of the deceased who shall be residing in the county of New York, and in case of an application for letters of administration with the will annexed, upon the legatees named in said will and upon the husband or widow or relatives who would have been entitled to the estate had the deceased died intestate, who shall be residing in the county of New York, if any can be found, and if none be found, and in all cases where such personal service shall not have been made, the notice shall be published once in each week, for four weeks, in a newspaper printed in the county.

It will be noted, first, that the thirty days' notice required to be given under this section must be served on the widow and every relative of the deceased resident in the county of New York. The section differs from the former statute, §§ 24–25, in that it provides, that where the application is for letters of administration with the will annexed the thirty days' notice must be served upon the legatees named in the will, and upon the husband or widow, or relatives who would be entitled to a distributive share of the estate, with the additional qualification, "who shall be residing in the county of New York.

§ 17. If, at the time appointed in such notice, no claim to the effects of the deceased shall have been made by any lawful executor or administrator, the public administrator shall make and file in the office of the surrogate an affidavit, stating the value of the property and the effects of the deceased, and service and publication of the notice by him, as above directed, and that no claim has been made according to law, and that he has taken upon himself the administration of the estate of the deceased. Upon filing such affidavit, the public administrator shall be vested with all the rights and powers, and be subject to all the duties of an administrator of the estate of the deceased, in the same manner as if the letters of administration had been granted, without filing a further or other official oath or bond. Such affidavit and a duly certified copy thereof, shall be presumptive evidence of the facts therein contained, and that administration of the estate of the deceased has been committed to the public administrator according to law.

This section embodies §§ 26 and 27 of the former act.

§ 18. Until letters of administration shall be granted to the public administrator, or until an affidavit shall be filed by him as above directed, he shall not proceed in the administration of any estate, further than to pay funeral charges of the deceased, to take possession of, and secure, his effects as hereinbefore authorized, to sell such of them as shall be perishable, or such as he deems it necessary to sell for the preservation and benefit of the estate, and to defray the expenses of such proceedings, and of serving and publishing notices, and of taking out letters of administration; but he shall have authority, by virtue of his office, to receive and dispose at public auction of all property except cash,

which may be delivered to him of persons dying and reported to him by the board of public charities and commissioner of correction, and by coroners, or by any other person, not exceeding in value in any one case twenty dollars, when the same is unclaimed for a period of three months after the delivery in each particular case, and he shall pay the proceeds of such sales, and of such estates so unclaimed, into the treasury of the city of New York, to the credit of account of intestate estates, without deduction other than for lawful debts or claims for funeral expenses, payable out of the same, and commissions.

The latter half of this section, following the embodiment of § 28 of the former act, is new.

§ 19. Whenever the deceased, of whose estate the public administrator is authorized to take charge, shall be a foreigner and shall not have become naturalized, or taken any steps for that purpose, it shall be the duty of the public administrator to serve upon the consul of the nation to which the deceased belonged, if any there be in the city of New York, or upon his deputy, the notice of his intention to apply for letters of administration, and of his intention to administer, hereinbefore specified, said notice to be served eight days before the return thereof. During the administration of any estate by the public administrator, upon his application for letters of administration, upon his accounting, and in any proceeding taken or suit brought by or against him, the consul or consul-general or consular representative, resident in the city of New York or his deputy may appear in person or by attorney for any person interested in the estate as creditor, husband, widow, next of kin, legatee guardian of a minor, or otherwise, including a minor, who is then a resident of the country which the said consul, consul-general or consular representative, represents, without filing a power of attorney or other authority with the surrogate; and in the case of accountings may waive the issue and service of a citation and consent to the entry of a decree therein; and all citations now required by law to be served upon such persons may in the discretion of the public administrator be served upon said consuls, consuls-general or consular representatives or their deputies in lieu of service upon them eight days before the return day thereof; but minors' interests shall be represented as heretofore in all proceedings or actions in court, by special guardians appointed by the surrogate, or by their general guardians.

The first sentence in this section embodies § 29 of the former act, with the exception that the notice is prescribed to be an eight (8) day notice. The latter part of this section is new.

§ 20. If any lawful executor or administrator shall appear to claim the effects of the deceased, at any time before the public administrator becomes vested with the power of administering such effects, he shall, on producing the letters testamentary or of administration, be entitled to receive the goods and effects of the deceased in the hands of the public administrator, after deducting the charges specified in section fourteen hereof, to be allowed and taxed by the surrogate as therein directed.

This section corresponds to § 30 of the former act.

§ 21. The powers and authority of the public administrator, in relation

to the estate of any deceased person, shall be superseded in the three following cases:

1. Where letters testamentary shall be granted to any executor of a will of any deceased person, either before or after the public administrator shall have taken letters, or become vested with the powers of an administrator upon such estate.

2. Where letters of administration of such estate shall have been granted to any other person, before the public administrator became vested with the powers of an administrator upon the same estate.

3. Where letters of administration shall be granted upon such estate, by any surrogate having jurisdiction, at any time within six months after the public administrator became vested with the powers of an administrator upon such estate. See *Matter of Blake*, 60 Misc. 627.

This section corresponds to § 31 of the former act.

§ 22. If any husband, widow, or next of kin of the deceased, entitled to a distributive share in the estate of deceased, being competent and qualified according to law, shall, within three months after the public administrator has become vested with the powers of an administrator on such estate, apply to either of the surrogates of the county of New York for letters of administration, the same shall be granted to him, upon proof to the surrogate that the applicant did not reside in the county at the time of the death of the intestate; or that, residing in the said county, no notice was served on him as herein required. Upon notice being given to the public administrator of the granting such letters testamentary, or letters of administration, in either of the cases aforesaid, by producing to him duly attested copies thereof, his powers and authority in relation to such estate shall cease; and he shall deliver over to the executor or administrator so appointed the property, moneys and effects in his hands belonging to the said estate, after deducting his commissions on the moneys received by him, at the rate hereinbefore allowed, and the expenses incurred by him in section fourteen hereof, to be allowed and taxed as therein directed.

This section substantially embodies §§ 32 and 33 of the former act.

§ 23. No suit or proceeding that shall have been commenced by the public administrator shall abate on account of his authority having ceased for any cause; but the same may be continued by his successor, who shall succeed him in the administration of the estate, in relation to which such suit or proceeding shall have been brought.

This section amends § 34 of the former act by adding the words "or proceeding" and by omitting the words "by his successor," "or the executor or administrator of the deceased" which were purely surplusage.

§ 24. Whenever the public administrator shall become vested with the right of administering upon any estate whether by right of his office or by grant of original letters of administration, or letters of administration *de bonis non*, or letters of administration with the will annexed, he shall possess the following rights and powers and be subject to the following obligations:

1. He shall have all the rights, powers and authority given by law to any administrator, except so far as the same may be qualified by the provisions of this act.

2. He may, like any administrator, sue and be sued.

3. He shall make and return an inventory in all cases, in the same manner and within the same time as is required by law of other administrators, and the same proceedings may be had to compel such return.

4. He may sell the personal property of the deceased at public auction, after publishing notice thereof three days daily in a newspaper in the county of New York, or he may sell at private sale, or in such other manner and upon such other notice as the surrogate may direct.

5. He shall sell public stock or stock or bonds of any incorporated company, or other securities, within two months after letters of administration have been granted to him, unless upon his application or upon the application of some person interested in the estate, he is directed by the surrogate to hold said securities for a longer period; or, unless the same have no market value, in which case he may hold said securities until his accounting, or until a sale is directed by the surrogate.

6. In all cases where the estate of any deceased person in his hands, after the payment of funeral expenses, is less than the value of fifty dollars, he may make distribution of the estate without notice to the creditors of the deceased to exhibit their claims and without notice to the legatees, husband or widow or relatives, to claim their legacies or distributive shares; but in all other cases he shall give such notice by publication once in each week for twelve weeks in two newspapers printed in said county, requiring said creditors to present their claims and said legatees, husband or widow, and next of kin to claim their legacies or distributive shares, within twelve weeks from the date of such notice; if a suit be brought or proceedings begun by a creditor, legatee, husband, wife, or next of kin, or assignee or representative of such, on a claim which is not presented to him within six months from the date of his letters of administration, he shall not be chargeable for any assets or money that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the husband or wife or next of kin, before such suit was brought or proceeding was commenced, provided he shall have given said notice.

7. He may proceed as other administrators are allowed by law, to discover assets or obtain any knowledge or information which will in any way aid him in making discovery of assets which ought to be delivered to him and appraised, and to obtain the delivery and possession of the same; the surrogate may, even though an answer be filed as provided in section twenty-seven hundred and nine of the code of civil procedure, direct the person cited to be examined as to any knowledge or information he may have which may in any way aid the administrator in making discovery of the assets.

8. He shall adjust and pay all demands against the estate of the deceased, in the same manner as other administrators; and like them, may refer all disputes respecting such demands.

9. Six months after he shall become vested with the right of administering upon any estate, and except in the cases mentioned in paragraph sixteen of this section, he shall account on oath to the surrogate for all the assets of such estate received by him, and for the application thereof, and the same proceed-

ings may be had to compel such accounting as are provided by law in the case of administrators.

10. He may, in his discretion, proceed as other administrators are allowed by law, after the expiration of six months from the time he became vested with the powers of an administrator on any estate, to have a final settlement of his accounts in relation to such estate, and with the like effect.

11. In the settlement of his accounts, he shall not be allowed for any payment made by him, unless in addition to the other vouchers therefor, it shall appear that the same was made on a check, signed by himself upon the bank or banks in which his deposits are required to be made, excepting that he may be allowed for current expenses authorized by law, expenses of administration and claims of creditors and distributive shares and legacies, not to exceed twenty dollars paid at any one time.

12. In the settlement of his accounts he shall not be allowed for any demand which he may have against the estate of the deceased, unless such demand was specified in writing to the surrogate at the time of applying for letters of administration; or at the time of filing the affidavit herein required to vest him with the rights of an administrator, nor unless it shall appear that he had such demand, or that his responsibility, on which it may be founded, existed, previous to the death of the person against whose estate it may be exhibited.

13. He shall pay all legacies and shares of the estate of the deceased according to the decrees of the surrogate; but he may in his discretion pay a legacy or a distributive share payable to an infant having no general guardian appointed by a court of this state to his father, and if his father be dead, then to his mother, and if both be dead, then to the person with whom said infant resides, for the use and benefit of such infant; but the payment or an aggregate of payments so made shall not exceed the sum of two hundred and fifty dollars.

14. The balance of any money in his hands on the adjustment of his accounts, whether payable to persons unknown or if known whose places of residence are unknown, shall be paid immediately into the treasury of the city; and he shall transfer and deliver to the corporation of the said city all public stocks, stocks and bonds of any incorporated company, and other securities belonging to the estate of the deceased, if any there be in his hands remaining unsold.

15. Whenever in the performance of his duty he shall take an appeal from any decision affecting an estate in his hands, an undertaking shall not be required to perfect such appeal or to stay execution.

16. When the estate in his hands, or any part thereof, is not claimed by the widow, husband, next of kin, legatees and creditors of the deceased for a period of one year after the estate passes into his possession, and, after paying the just debts of the deceased and the expenses of administration, the balance of said estate is less than two hundred and fifty dollars, he shall pay the residue unclaimed into the city treasury, to the credit of account of intestate estates; the rights and remedies of all persons interested in any estate, or part of any estate, so paid into the city treasury, whether as widow, husband, next of kin, legatee, creditor or otherwise, to compel an accounting by him before the surrogate of the county of New York are not hereby affected or impaired, but the decree of distribution which shall be made in such proceedings shall provide that the payments therein directed shall be made by the

comptroller of the city of New York out of the intestate estates account of the city treasury.

17. Where the estate in his hands is claimed by the widow, husband, next of kin, legatees or creditors of the deceased, any or all of whom reside out of this state, and, after paying the just debts of the deceased and the expenses of administration, the balance of said estate is less than two hundred and fifty dollars, service of the citation upon the judicial settlement of his account shall be made upon those persons only whose places of residence are known; the order of the surrogate directing the service of the citation upon those persons who reside out of the state shall direct that the public administrator, at least forty days before the return day of said citation deposit in the post-office in the city of New York copies of the citation and said order, contained in a securely closed post-paid wrapper, directed to the person or persons to be served, at a place or places specified in the order, and service made in accordance with said order shall be sufficient service; he shall pay the share or shares of any unknown persons, or of any persons whose places of residence are unknown, including creditors, in and to such estate, into the treasury of the city of New York to the credit of the account of intestate estates, but the rights and remedies of all such persons to compel an accounting by him are not hereby affected or impaired, but the decree of distribution which shall be made in such proceedings shall provide that the payments therein directed shall be made by the comptroller of the city of New York out of the intestate estates account of the city treasury.

It will be noticed in the first paragraph of this section, that the right of the public administrator to administer *de bonis non* which was not formerly incorporated in the statute, but which was judicially recognized (see *Ketchum* v. *Morrell*, 2 N. Y. Leg. Obs. 58) is expressly incorporated.

The subdivisions under this section need little discussion.

Subdivision 1 in § 35 of the former act corresponds to subd. 1.

Subdivision 2 omits the words contained in the corresponding provision of the former act "he may plead the general issue in any action against him and give the special matter of his defense in evidence under that plea."

Subdivision 3 is unchanged.

Subdivision 4 is substantially different, as the provision as to private sale in such manner and upon such notice as the Surrogate may direct is substituted for the prohibition in the former section forbidding him to sell any property exceeding $500 in value without giving printed notice daily for 14 days.

Subdivision 5 is a substitution for the former subdivision of the prior statute from which it is a complete departure "he shall not sell any public stock or stock in any incorporated company unless for the payment of debts and on the order of the Surrogate to be duly entered in his records."

Subdivision 6 is substantially new and completely changes the requirement by which he was governed under the former act, which required notice, to exhibit claims, to be published in all cases where the estate in his hands should exceed $250.

Subdivision 7 considerably amplifies subd. 7 of the former section.

Subdivision 8 is identical.

Subdivision 9 shortens the time within which he must account, which was formerly one year.

Subdivision 10 is the same as the former subd. 10 except that the time is shortened to 6 months.

Subdivision 11 eliminates the provision existing in former subd. 11 for a joint check signed by the public administrator and the comptroller of the City of New York and adds to the $20.00, disbursement for which he is not required to submit vouchers which were formerly limited to current expenses, authority by law "expenses of administration, claims of creditors and distributive shares and legacies," substituting for the words, "not to exceed $20.00 in any one case," the words, "not to exceed $20.00 paid at any one time."

Subdivision 12 corresponds to former subd. 12.

The first two lines of subd. 13 correspond to the former subdivision; all the rest is new and seems to have been called for by the experience of the public administrator's office.

Subdivision 14 is an amplification of the former subdivision and does not materially change its purport except that it specifies bonds as well as stocks of incorporated companies.

Subdivision 15 is new.

Subdivision 16 is new.

Subdivision 17 is new.

> § 25. The public administrator shall deposit all moneys by him collected and received, within two days after the receipt thereof, in the banks or trust companies designated by him, said depositaries to be among the banks and trust companies designated pursuant to law for the deposit of the moneys of the city of New York, to the credit of himself, excepting so much as may be necessary to pay the current expenses of any proceedings authorized by law, which shall be allowed by the surrogate, and expenses of administration, and shall not exceed twenty dollars in any one case. The money so deposited shall be drawn out on the check of the public administrator, in the cases where by law the public administrator is required to pay out moneys.

This section consolidates §§ 36 and 37, eliminating, however, a provision as to the signing of checks by the comptroller and permitting the public administrator to designate his bank or trust company of deposit provided it be one of the banks or trust company designated as depositaries of the city of New York.

> § 26. The public administrator may at any time advance to any relative of the deceased such portion of the share of any estate to which he may be entitled, not exceeding fifty dollars, as in the opinion of the surrogate may be necessary for the support of such relative."

This section is the same as § 38 of the former act.

> § 27. The public administrator shall exhibit to the municipal assembly of the city of New York, on the first day of January, in each year, or within fourteen days after that day, a statement on oath of the total amount of his

receipts and expenditures in each case in which he shall have taken charge of and collected any effects, or in which he shall have administered during the preceding year, with the name of the deceased, his addition, and the country and place from which he came, if the same be known. The said statement shall be published in the City Record three times each week for three weeks, and brief notices referring to such publication shall be published for the like period and times in three daily newspapers to be designated by the board of city record, the payment of the expense of which shall be made through the proper disbursing officer of the finance department from an appropriation to be provided by the board of estimate and apportionment and municipal assembly in the annual estimate or budget, on vouchers to be filed in said department, certified by the public administrator, by warrants drawn on the city treasurer in the manner now prescribed by law. The public administrator shall once in three months and at such other times as the mayor of the city of New York may direct make to him in such form and under such rules as he may prescribe, reports of the operations and action of his bureau, which report shall be published in the City Record.

This section is new.

§ 28. If any public administrator shall neglect to render or to publish such statement, or such reports as hereinbefore required, he shall forfeit five hundred dollars, to be recovered by the attorney-general, for the use of the state; and on such recovery being had, he shall forfeit his office, and be thereafter incapable of being appointed to the same.

This section is new.

§ 29. The city of New York shall, in all cases, be responsible for the application of all moneys received by the public administrator, according to law, and for the due and faithful execution of all the duties of his office. The said corporation shall also be answerable for all stock transferred by the public administrator, and the dividends received thereon, and for all moneys paid into the city treasury by him, or which ought to be so transferred or paid in according to law, after deducting therefrom the commissions allowed by law; but not for any interest on such moneys or dividends on stock. All persons who shall be entitled to receive such moneys and stock, as creditors, legatees, or relatives of the deceased, and all persons aggrieved by any unauthorized acts or omissions of the public administrator, shall have the same remedies against the said corporation for the same as they would have against the executor.

This section corresponds to §§ 42 and 43 of the former act. See *Matthews* v. *The Mayor*, 1 Sandf. 132; *Suarez* v. *The Mayor*, 2 Sandf. Ch. 173; *Glover* v. *The Mayor*, 7 Hun, 232. This, however, does not make the city liable for the wrongful act of the public administrator in taking or retaining personal property belonging to a third person, such as the mortgagee, for example; the public administrator is in such a case liable personally although he acted in his official capacity and in good faith. See *Levin* v. *Russel*, 42 N. Y. 251, 254. Claim and demand for moneys paid to the comptroller under this section must precede any action or proceeding for re-

covery. This is by virtue of § 261 of the new charter. The demand must be made thirty days before commencing suit. *Matter of Rooney*, 26 Misc. 106.

§ 30. The public administrator shall report monthly to the municipal assembly a transcript of such of his accounts as have been closed or finally settled, and of those on which any money has been received by him as part of the proceeds of any estates on which he has administered.

This section is new.

§ 31. The annual salaries to be paid to the public administrator and assistant public administrator, after the passage of this act, shall be as follows: To the public administrator the sum of ten thousand dollars; to the assistant public administrator the sum of five thousand dollars, the same to be raised and paid each year in the same manner as are other county charges; and the board of estimate and apportionment of the city of New York are hereby authorized, empowered and directed to provide for the payment of such salaries for the remainder of the year eighteen hundred and ninety-eight, by the issue of special revenue bonds, and the comptroller of said city is hereby authorized and directed to issue the same, and so apply the proceeds therof, and the amount necessary for the redemption of such bonds shall be included in the estimate or budget for the year eighteen hundred and ninety-nine.

This section is new.

§ 32. Whenever the public administrator shall resign, or be removed from his office, he shall immediately deliver over all papers, money, and effects in his hands to his successor; and in case of the death of such officer, the persons into whose custody or possession any such papers, money, or effects may come, shall, on demand, deliver the same to the successor duly appointed.

Such successor, upon duly qualifying, shall at once succeed to all the rights, duties and powers of his predecessors in office, without the reissuance of letters of administration to him. Such delivery may, in either case, be enforced in the manner provided by law in relation to public officers. The present public administrator of the county of New York is hereby declared to have succeeded to all the rights, duties and powers of his predecessors in office, by virtue of their right of office, or by the grant of letters of administration to them, and without reissuance of letters of administration to him.

The first paragraph of this section is similar to the provisions of § 44 of the former act. The provision that the successor of the public administrator upon qualifying succeeded to all his rights, duties and powers without the reissuance of letters is new.

§ 33. Every person keeping a hotel, or boarding or lodging house in the county of New York, shall report in writing to the public administrator the name of every person not a member of his family, who shall die in his or her house, within twelve hours after such death; and every coroner, within twelve hours after an inquest, shall report to the public administrator the name, if known, of the deceased person. Every undertaker shall also report to the public administrator, within twelve hours after burial by him, any deceased

person having no next of kin known to him to be entitled to administer, the name and residence of such deceased person. Whoever shall neglect to comply with this provision shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by imprisonment in the penitentiary for a period not exceeding six months nor less than one month, or by a fine of one hundred dollars, one moiety of which shall be given to the informer and the other moiety paid into the city treasury.

This section corresponds to § 45 of the former act.

§ 34. The public administrator shall cause a copy of the last section to be left at every boarding and lodging house in the county, at least once in each year; and shall not be entitled to recover of any person the penalty given by the last section, without due proof of the service of a copy of that section, personally on the defendant, previous to the neglect for which such suit may be brought, and within one year before the commencement of such suit.

This section corresponds to § 46 of the former act.

§ 35. Sections two hundred and seventeen to two hundred and forty-seven, both inclusive, of the act of the legislature of the state of New York passed July first, eighteen hundred and eighty-two, known as the New York consolidation act of eighteen hundred and eighty-two, in relation to the public administrator of the city of New York, now known as the public administrator of the county of New York, the acts amendatory thereof, and supplemental thereto, and other acts of the legislature of the state of New York, now in force relating to said public administrator of the county of New York are hereby repealed so far as any provisions thereof are inconsistent with the provisions of this act, or so far as the subject-matter thereof is revised or included in this act, and no further. So far as the provisions of this act are the same in terms or in substance and effect as the provisions of the said sections of the said consolidation act, or of other acts of the legislature now in force relating to or affecting said public administrator, this act is intended to be not a new enactment, but a continuation of the said consolidation act of eighteen hundred and eighty-two, and said other acts, and is intended to apply the provisions thereof as herein modified to the public administrator of the county of New York, and this act shall accordingly be so construed and applied; and the mere omission from this act of any previous acts or any of the provisions thereof, including said consolidation act of eighteen hundred and eighty-two, relating to or affecting the public administrator in the city of New York, now the public administrator of the county of New York, shall not be held to be a repeal thereof.

§ 36. This act shall take effect immediately.

CHAPTER IX

REVOCATION OF LETTERS AND REMOVAL OF EXECUTORS AND ADMINISTRATORS

§ 645. **Source of power to revoke letters.**—Among the general powers given the Surrogate's Court by § 2472 is the power, "To grant *and revoke* letters testamentary and letters of administration and appoint a successor in place of a person whose letters have been revoked. . . . To direct and control the conduct and settle the accounts of executors, administrators and testamentary trustees, and to appoint a successor in place of a testamentary trustee *so removed.*" And under the incidental powers of Surrogates conferred by § 2481 the Surrogate has power, "to open, vacate, modify, or set aside, or to enter as of a former time a decree or order of his court."

In the exercise of these powers, in the cases provided by statute, the Surrogate's authority over executors and administrators extends to their removal from office and the revocation of letters under which they have been acting. And where he has issued letters under a misnomer of the estate or testator, he can, in a proceeding instituted therefor, amend the letters. *Matter of Zerwinski or Siriski*, 51 Misc. 661.

§ 646. **Revoking letters when their continuance is unnecessary.**—The procedure upon revocation of letters testamentary or of administration is covered by art. 6, of title 3, of ch. 18, of the Code. Before indicating the procedure, the Code provides the cases in which the Surrogate may or must revoke letters. Section 2684 defines the cases in which the Surrogate is required to revoke letters granted by him, because the necessity for their continuance has been obviated by the discovery and probate of a will where intestacy had been supposed to exist, or the revocation of probate for whatever cause under which letters testamentary had been issued. The section is as follows:

> Where, after letters of administration, on the ground of intestacy, have been granted, a will is admitted to probate, and letters are issued thereupon; or where, after letters have been issued upon a will, the probate thereof is revoked, or a subsequent will is admitted to probate, and letters are issued thereupon; the decree, granting or revoking probate, must revoke the former letters. **§ 2684, Code Civil Proc.**

There are thus two cases which arise under this section.

(*a*) Probate of a will of a supposed intestate upon whose estate letters of administration have heretofore been granted.

(*b*) The admission to probate of a later will, or the revocation of pro-

bate of a will formerly admitted to probate under which letters testamentary had been granted.

Under this section the Surrogate's action in revoking the letters of administration or testamentary, as the case may be, is not discretionary but is necessarily incidental to his making the decree granting or revoking probate. The directions of the section are mandatory, and the courts will assume that a decree granting or revoking probate in a case covered by the section obeys the law and revokes all former letters. *Power* v. *Speckman*, 126 N. Y. 354, 358.

It is manifest from the wording of the section that there can be no revocation of letters by reason of the discovery of a will or of a later will or the pendency of proceedings to revoke probate of a will admitted, until the making of the decree granting or revoking probate. The Code expressly embodies the rule stated by Surrogate Bradford, upon an application to revoke letters of administration upon allegations that a will existed or did exist at the time of the death of the decedent but had been lost or fraudulently destroyed; he held that, until proceedings should have been instituted to establish the instrument and should have terminated in some judicial act, the administration already granted should continue for the protection of the estate. *Holland* v. *Ferris*, 2 Bradf. 334.

But the revocation by due probate decree is complete. In fact, it is radical. So, in *Belden* v. *Belden*, 118 App. Div. 296, the administrator thus superseded had an action pending to recover estate property. Held, it abated; also that his sureties were released. Thereupon, when in an action, under § 2653*a*, the probate was set aside, it was held that neither was he reinstated, *ipso facto*, nor the action revived; but a new administrator must be appointed, with a new bond. This might well, under some limitation statute, defeat the estate rights. Section 115 of Decedent Estate Law might well be amended, therefore, by adding a provision transferring forthwith to the successor or substituted or superseding representative the right to prosecute or defend any action or proceeding involving the rights of the estate.

§ 647. **Exclusive jurisdiction of the Surrogate.**—The Supreme Court succeeded to the Court of Chancery, inheriting no jurisdiction to remove executors or to revoke letters testamentary. See *Wood* v. *Brown*, 34 N. Y. 337; *Quackenboss* v. *Southwick*, 41 N. Y. 117; *Hood* v. *Hood*, 85 N. Y. 561. The Surrogate alone has such power. *Matter of Hood*, 98 N. Y. 363, aff'g 2 Dem. 583. The Surrogate issues the letters and is alone clothed with power to revoke them by the statute which points out the mode of its exercise. Therefore, it is no answer to an application for the removal of an executor, that an action is pending in the Supreme Court praying for a judgment to the same effect. *Matter of Hood*, *supra*, at p. 371.

§ 648. **Direct proceedings for revocation of letters.**—It has been noted that the provisions of § 2684 are mandatory, and that, in the cases where the letters already granted have become nugatory by reason of subsequent judicial acts by the Surrogate, he must revoke outstanding letters.

Section 2685 prescribes other cases in which the Surrogate is empowered to entertain application brought directly for the revocation of letters testamentary or of administration. This section will be discussed under its separate subdivisions, which are eight in number, but certain general rules must first be premised. Not only has the Surrogate jurisdiction in these proceedings, as already observed, but he has a discretion under this section, which, except in cases of improper exercise, will not be disturbed by the Appellate Courts. *Matter of Keinz*, 88 Hun, 298, 301, citing *McGeorge* v. *Buel*, 24 N. Y. 169; *Matter of Chase*, 32 Hun, 320; *Matter of West*, 40 Hun, 291, aff'd 111 N. Y. 687; *Freeman* v. *Kellogg*, 4 Redf. 218; *Martin* v. *Duke*, 5 Redf. 597. See also *Matter of Moulton*, 10 N. Y. Supp. 717. And an appeal will always lie from the decree of the Surrogate in this regard, to the Appellate Division, which may reverse in case the discretion has been improperly used. Thus where it appeared that an executor and trustee had disregarded the provisions of the will in regard to the use of the trust moneys and had acted without the concurrence of his coexecutor and trustee, that he checked out moneys to his own order and lent them to individuals upon railroad bonds, and also purchased with moneys of the estate second mortgage bonds of a railroad company, the Appellate Division in the First Department held, that the Surrogate's exercise of discretion in refusing to remove the trustee was improper, and accordingly reversed his decree. *Matter of Havemeyer*, 3 App. Div. 519, 524. See also *Matter of Jacob*, 5 App. Div. 508, 514; *Haight* v. *Brisbin*, 100 N. Y. 219. As to an appeal to the Court of Appeals in such cases the rule has been stated by that court (*Matter of McGillivray*, 138 N. Y. 308) the court using the following language (see opinion of Earl, J., at p. 311): "The facts as disclosed in this record, do not make a very flagrant case of misconduct against the trustee, but we think there was sufficient evidence to give the Surrogate jurisdiction and to justify the exercise of the discretion conferred upon him by the section referred to. Where the evidence tends to establish any of the causes for removal mentioned in the section, then whether the trustee should be removed is a matter resting, in the first instance, in the discretion of the Surrogate. If he concludes that the evidence is sufficient he may remove him, and his discretion is subject to review upon appeal by the General Term. But if his discretion be there affirmed, and there be some evidence in the record to sustain the decision, then there is no question of law for consideration here, and we have no jurisdiction to interfere with the discretion properly vested in the courts below."

§ 649. **Section 2685—Who may apply.**—The first paragraph of § 2685 is as follows:

> *Revocation of letters for disqualification, misconduct, etc.*
>
> In either of the following cases, a creditor, or person interested in the estate of a decedent, may present, to the surrogate's court, from which letters were issued to an executor or administrator, a written petition, duly verified,

praying for a decree revoking those letters; and that the executor or administrator may be cited to show cause why a decree should not be made accordingly.

The authority of the Surrogate being derived from the statute and resting solely upon it, it is important to know who are the persons who may present the petition for revocation of letters under this section. Section 2685 provides that the prayer for a decree revoking letters, which have been issued by a Surrogate to an executor or administrator, may be presented by a creditor or a person interested in the estate. The word "creditor" is defined by the Code, § 2514, subd. 3, as including every person having a claim or demand against the estate upon which a judgment for the sum of money could be recovered in an action. And by the same section, subd. 11, the expression, "person interested," is defined as including, "Every person entitled either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee, or otherwise, except as a creditor." And it is also provided by the same section, that wherever a provision of ch. 18 prescribes, that a person interested may object to an appointment, or may apply for an inventory, an account, or an increased security, any allegation of his interest, duly verified, suffices, although his interest is disputed; unless he has been excluded by a judgment, decree, or other final determination and no appeal therefrom is pending. So it has been held that when a person alleging himself to be entitled as a legatee under a testator's will, or even as the assignee of a legatee, files a petition wherein he avers the existence of causes which would justify the removal of the executor and prays that such removal be decreed, the executor can no more deprive the Surrogate of jurisdiction by disputing the petitioner's interest than he can accomplish that result by disputing the existence of the causes, which the petitioner may have assigned as the foundation of his application. *Susz* v. *Forst*, 4 Dem. 346, 349, Rollins, Surr., distinguishing *Hurlburt* v. *Durant*, 88 N. Y. 121, and *Fiester* v. *Shepard*, 92 N. Y. 251, as to the effect of a verified answer denying the validity of a claim under § 2718. This does not mean, however, that the Surrogate has no jurisdiction where the status of the applicant is put in issue to determine whether he is or is not a person interested. The Surrogate always possesses this jurisdiction. See *Matter of Wheeler*, 46 Hun, 64; *In re Stern's Estate*, 9 N. Y. Supp. 445.

In *Matter of McGarren*, 112 App. Div. 507, an alleged widow petitioned that letters be revoked and reissue to her as widow. The administrator, by way of answer, set up a decree annulling her marriage to decedent in his lifetime and not appealed from. She replied that the judgment was a nullity in that process was not served upon her. The Surrogate doubted his power to try that question but denied her petition upon the ground that the decree was conclusive upon him until set aside in a direct proceeding. The Appellate Division held he had power to examine the question in order to determine the status and proceeded to do so for itself, held the

service good, the annulment binding, and affirmed the dismissal of her petition.

The exercise of this jurisdiction is most important, for the court ought not to remove one having charge of the estate except upon convincing proof of the disqualification or misconduct contemplated by the statute, and therefore it is always a valid issue to be determined by the Surrogate, that the petitioner for the removal has no status under the Code. Thus, in one of the cases cited above, Surrogate Ransom held, that where the petitioner had a claim against the business of the testator subsequent to his death, and while the business was being conducted by the executors and the surviving partner under an authority conferred by the will, the debt was not one against the testator's estate in general, but only against such assets as were properly embarked in the business, subsequent to the testator's death. Surrogate Ransom said, "He is simply a creditor as to the fund against which he might recover judgment, which is simply an asset or investment of the estate. This view is emphasized by the consideration that, apart from the authority to continue the business, the debt having accrued subsequent to the death of the decedent, the petitioner would not have been a creditor of the estate or of the decedent; he would have had a claim only against the executor personally." *In re Stern's Estate*, 2 Connoly, 204. Under the general phrase, "persons interested," of course any person expressly described in § 2514 would be entitled to petition; as a remainderman. *Fernbacher* v. *Fernbacher*, 4 Dem. 227. So a person named as legatee and executor in a will which the Surrogate has refused to admit to probate by a decree from which an appeal is pending, has been held to be a person interested, on the ground that the appeal suspended all proceedings under the decree of the Surrogate and that as he certainly would have an interest if the appeal were successful, that interest would be deemed sufficient to base such an application upon, until the decision of the Surrogate was affirmed or reversed. *Newhouse* v. *Gale*, 1 Redf. 217, 219, Smith, Surr.; *Cunningham* v. *Souza*, 1 Redf. 462. So an assignment of interest by one who properly comes within the expression "person interested," will not defeat his status if he alleges that such assignment was procured by fraud. *Schmidt* v. *Heusner*, 4 Dem. 275, 276. But on the other hand, the words "or otherwise" in subd. 11 of § 2514 relate only to persons entitled either absolutely or contingently to share in the estate or proceeds thereof and do not extend the definition beyond such persons. So that it has been held that a debtor of the estate, as such, cannot be included in the category of persons interested. The distinction between persons interested and creditors, which continually appears throughout ch. 18, commencing with their separate definition in § 2514, is so marked and so consistently maintained as to indicate that it was not within the contemplation of the Code that debtors should be included in either category. See argument of Rollins, Surr., in *Drexel* v. *Berney*, 1 Dem. 163, pp. 166-168. The extract from § 2514 above quoted, to the effect that a person interested may object to an appointment or may apply for an inventory, an account, or increased

security on a mere verified allegation of his interest and that such allegation suffices although the interest is disputed, does not extend beyond the express letter of the section.

Prior to the Code, Surrogate Bradford held, in the case of a creditor making an application for the removal of an executrix, that an apparent interest, duly sworn to, would be sufficient to justify the order to show cause, and that the validity of the claim would not be tried on such an application. *Cotterell* v. *Brock*, 1 Bradf. 148. And Surrogate Tucker held similarly in a later case, as to the claim of an alleged legatee, that her interest if sworn to, would be assumed as proven *prima facie*, and would not be tried upon the application for the giving of security. *Matter of Merchant*, 1 Tucker, 17. The second decision comes clearly within the intent of subd. 11, the first decision is excluded thereby; but it is doubtful whether under the words, "object to an appointment," an application for the removal of an executor could properly be included. And the rule above stated, as to the right of the Surrogate to determine the status of the applicant in such a proceeding, is believed to be correct. The decision by Surrogate Rollins (*Susz* v. *Forst*, *supra*), that the Surrogate could not be divested of jurisdiction in proceedings for the removal of an executor, by disputing the petitioner's interest, is in no respect inconsistent with this rule, for the learned Surrogate held in that case (4 Dem. at p. 349), that it is for the Surrogate to determine upon the evidence as well the status of the petitioner as the justice and propriety of affording him the relief which he asks. And Surrogate Coleman (*Woodruff* v. *Woodruff*, 3 Dem. 505, 509) distinctly points out that the proceedings specified in subd. 11, of § 2514, are each perfectly defined and well understood and entirely distinct from proceedings to remove an executor or administrator. And in that case where the petitioner was the wife of the decedent and had assigned her interest to the administrator which assignment she claimed to have been procured by fraudulent and dishonest acts of said administrator, which she claimed to be grounds for his removal, it was held that as the court had no power to try and determine the question whether the assignment was valid or was void for the fraud alleged (citing *Harris* v. *Meyer*, 3 Redf. 450; *Riggs* v. *Cragg*, 89 N. Y. 480) and until that question was determined she had parted with the interest which would entitle her to petition for the removal of the administrator, the proceedings were accordingly dismissed.

§ 650. **Revocation of letters distinct from revocation of probate.**—The right given to a creditor to secure the revocation of the letters of an executor or administrator must not be taken as extending to give to such a creditor the right to institute proceedings to revoke probate of the will. The creditor has no status in such proceedings. Section 2617, Code Civil Proc.; *Stapler* v. *Hoffman*, 1 Dem. 63, Rollins, Surr.; *Heilman* v. *Jones*, 5 Redf. 398, 400, Coffin, Surr.

§ 651. **Subdivision 1 of § 2685.**—Subdivision 1 of § 2685 is as follows:

> Where the executor or administrator was, when letters were issued to him, or has since become, incompetent, or disqualified by law to act as such,

> and the grounds of the objection did not exist, or the objection was not taken by the petitioner, or a person whom he represents, upon the hearing of the application for letters.

The incompetency or disqualification contemplated by this subdivision, is that defined in §§ 2612 (quoted *ante*) and 2661 (quoted *ante*), which define respectively who are incompetent to receive letters testamentary or of administration. *Coggshall* v. *Green*, 9 Hun, 471; *Freeman* v. *Kellogg*, 4 Redf. 218, 224. It was held in *Matter of Campbell*, 56 Misc. 229, that it does not refer to an application to revoke by one having a prior right. But this was reversed, 123 App. Div. 212, citing *Matter of Tyers*, 41 Misc. 378. The proposition thus fixed is that issuing letters to one not priorily entitled fixes upon him a "disqualification" under subd. 1, which the one priorily entitled may subsequently assert if he was not cited or represented on the original application. There were two dissents in the Appellate Division in the *Campbell* case, and the reasoning of their opinion is sound. But, at present, there is this additional meaning judicially read into the words of subd. 1.

While some of the grounds for refusing to issue letters in the first instance are specified as grounds for removal in subd. 2, which is discussed below, subd. 1 is nevertheless distinct in this respect, that it authorizes the Surrogate not only to remove an executor for causes developing after his appointment, which power he possessed before the Code, if not expressly, certainly incidentally, but also empowers him to revoke his letters upon its being made to appear that the person to whom he has granted letters was not competent to receive them at the time they were granted. This power was not expressly conferred prior to the Code, although doubtless it could have been exercised under the power of the Surrogate to vacate or set aside his acts or decrees, if it were shown that any fact which would have, if known, justified him in withholding letters, was improperly suppressed. Thus letters will be revoked where the court is satisfied that the administrator's whole interest is adverse to that of the estate. *Matter of Wallace*, 68 App. Div. 649; *Matter of West*, 40 Hun, 291, aff'd 111 N. Y. 687. But the mere fact that the administrator before appointment executed a formal renunciation is no reason for revoking letters. *Matter of Treadwell*, 37 Misc. 584.

§ 652. **Subdivision 2.**—Subdivision 2 is as follows:

> Where, by reason of his having wasted or improperly applied the money or other assets in his hands, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge, or by reason of other misconduct in the execution of his office, or dishonesty, drunkenness, improvidence, or want of understanding, he is unfit for the due execution of his office.

It may be said broadly under this subdivision that it contemplates either downright dishonesty and bad faith, or such negligent or improper administration as imperils the estate and amounts to unfitness for the due

execution of the office. So, *Matter of Burr*, 118 App. Div. 482, puts it clearly in the headnote: "An executor is removed to protect the estate, not to punish him," citing *Matter of Monroe*, 142 N. Y. 491. This provision has been variously stated by the courts, for example: "For gross neglect and especially for bad faith on the part of an executor in refusing to perform the duties of his trust, the Surrogate may remove him." *Haight* v. *Brisbin*, 100 N. Y. 219, 222. So where an executor made false accounts, and pocketed checks for the excess amount and falsified the vouchers, he was removed. *Matter of Patterson*, 41 Misc. 66. So an executor was removed for failure to do his part in the management of the estate and was in constant dissension with his coexecutor, so that it was clear his continuance in office would prejudice the trust. *Matter of Wheaton*, 37 Misc. 184, citing *Quackenboss* v. *Southwick*, 41 N. Y. 117; *Oliver* v. *Frisbie*, 3 Dem. 122; *Deraismes* v. *Dunham*, 22 Hun, 86. See *Matter of Waterman*, 112 App. Div. 313, as to what friction between coexecutors is not sufficient cause for removal. In *Matter of Thieriot*, 117 App. Div. 686 (the *Delmonico* case), one of the executors was a surviving partner of decedent and the business was left in her control. She took possession, and while engaged in paying the debts of the business the other representative petitioned for her removal for her refusal to permit him to take part in or control the business.

Held, until the partnership debts were paid the estate of the deceased partner had no rights save to expedite liquidation. The opinion closes: "A trustee will not be removed for every violation of duty or, *even breach of the trust*, if the fund is in no danger of being lost. . . . There must be a clear necessity for interference to save trust property. . . . There must be such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy." Citing *Elias* v. *Schweyer*, 13 App. Div. 336, 340; *Matter of Waterman*, *supra*. But it must be borne in mind that proceedings to remove executors and administrators often originate in hostility on the part of the beneficiary of the estate to the incumbent of the office. The grounds for the hostility may not constitute legal reasons for his removal although the hostility results in much, and even needless, litigation involving considerable expense to the estate. This evil can be met by an exercise of the power of the Surrogate to impose costs personally upon those occasioning needless litigation. The Appellate Division of the First Department in a recent case defined the nature of the judicial inquiry in such cases (*Matter of Havemeyer*, 3 App. Div. 519, 520), by observing, "But when this condition of hostility between those interested in an estate and its trustee exists, it becomes material to determine whether the feeling of hostility has been caused by an honest endeavor on the part of the trustee to carry out his trust and perform his duties, in opposing the wishes of the beneficiaries for an illegal and improper disposition of the trust funds, or whether it has been caused by an attempt of the trustee to manage the estate in a manner not authorized by law or by the will of the testator from whom he received his authority to act. If the latter

appears, we think that the interests of those concerned in the estate require that the trustee should make way for one who will manage the estate according to the rules prescribed for the management of such estates and who will act in sympathy with the beneficiaries rather than in hostility to them."

§ 653. **Same subject.**—The wording of subd. 2 of § 2685 may be more clearly understood by transposing the qualifying words to their proper place at the beginning of the subdivision; it may properly be read as follows: "Where the executor or administrator is unfit for the due execution of his office by reason of," etc. So transposed the meaning of the subdivision is clear, to wit, that not every act therein described is necessarily sufficient ground for removal unless the Surrogate is satisfied that by reason thereof the executor or administrator is so unfit. For example, among the grounds of incompetency specified in § 2612, inability to read and write the English language is made a ground for refusal by a Surrogate in his discretion to grant letters of administration or letters testamentary. But where one, to whom letters testamentary had been issued, was sought to be removed on the ground that she had but slight knowledge of the English language Surrogate Rollins very properly held that as the estate did not appear to have suffered or to be likely to suffer any evil results from that cause, it was not established to his satisfaction that she was within the meaning of the Code, "unfit for the due execution of her office by reason of want of understanding." *Hassey* v. *Keller*, 1 Dem. 577, 579. But where the person can neither read nor write English nor count money there is clear unfitness. *Matter of Haley*, 21 Misc. 777.

§ 654. **Same subject.**—The grounds upon which the executor or administrator may be alleged to be unfit for the due execution of his office fall under five heads.

(1) *Wasting or improperly applying the money or other assets in his hands.* So it has been held that where an executor having full power to dispose of real estate under the will conveyed the real property of his testator to the sureties upon his bond to indemnify them, it was a clear misapplication of the property of the estate and was alone sufficient grounds for his removal under § 2685. *Fleet* v. *Simmons*, 3 Dem. 542. So if an executor withdraws moneys of the estate and lends them upon improper security, the act is indefensible, and is ground for his removal under this section. See *Matter of Havemeyer*, 3 App. Div. 519. And it has been held that an executor who in bad faith or with gross negligence withholds land or personal property from sale until it has depreciated in value he just as completely wasted the assets as if he had willfully destroyed them or negligently permitted their injury. *Haight* v. *Brisbin*, 100 N. Y. 219, 223.

(2) *Investing money in securities unauthorized by law.* This phraseology may be said to include a case where an executor who is also a testamentary trustee improperly continues the testator's business and neglects or refuses to withdraw the funds from the risks to which they are thus exposed. *Matter of Hutchinson*, 10 N. Y. St. Rep. 10. But the mere fact that an

administrator, executor or trustee borrows the funds intrusted to his charge, does not *ipso facto* call for his removal; but when his conduct has been such as to endanger the trust property or to show a want of honesty or capacity or of reasonable fidelity, in so doing, it constitutes him unfit for the due execution of his office. See *Matter of Avery*, 45 Misc. 529, where letters to a foreign trust company were revoked, both for this reason and because of its initial incompetency as such to receive letters.

Surrogate Rollins held, in a case where the executors and trustees of a will were clothed with large discretionary powers as to the investment and reinvestment of the funds of the estate, that the testator certainly could not be deemed to have authorized them to lend to each other the assets of the estate or to invest them upon the hazardous security of a second mortgage. *Matter of Petrie*, 5 Dem. 352, 355, citing *King* v. *Talbot*, 40 N. Y. 76; *Adair* v. *Brimmer*, 74 N. Y. 539; *Savage* v. *Gould*, 60 How. Pr. 234; *Matter of Cant*, 5 Dem. 269, and eight English cases. The remedy contemplated under this section, namely, of securing the removal of the executor or administrator, is prospective in its character and has for its chief, if not, indeed, its exclusive, object, the future security and good management of the estate, so that if the alleged improper investment was done in good faith, or does not appear likely to put in jeopardy the rights of the persons interested in the estate, the Surrogate would be warranted in refusing the application. See *Morgan* v. *Morgan*, 3 Dem. 612, 618, Rollins, Surr. It is unnecessary here to refer to the cases which declare what are and what are not improper investments for executors. This will appear in the discussion of accountings. It is sufficient, however, to observe that where executors profess to act under language alleged to confer broad discretionary powers in the will, the courts will not favor any construction or interpretation of the will, unless called for by its manifest intent and wording, which would authorize the executors to invest the moneys in a manner which in the absence of any direction in the will would be deemed unlawful. Thus, where a testator gave his executors his whole estate, "entrusting to their discretion its investment for the benefit of my heirs," the Court of Appeals held that the ordinary powers of executor in securing investments for estate funds was not in the least enlarged by the language quoted. *King* v. *Talbot*, 40 N. Y. 76. So where a will directed the executor to invest such funds as might come into his hands "in such suitable manner as may be for the best interest of my estate, to be determined by my said executor," Surrogate Rollins in construing this language held, that it gave no broader discretionary authority than was given by the Court of Appeals in the case last cited. *Matter of Cant*, 5 Dem. 269, 271, and cases cited. In *Adair* v. *Brimmer*, 74 N. Y. 539, executors were directed by the will to invest the proceeds of the estate in "lands, buildings, bonds, and mortgages, or in such other securities as they shall deem safe and for the greatest benefit of my daughters." It was held this was not broad enough to authorize them to make investments in mortgage bonds of a coal mining company. The rule may be summarily stated to be that,

in the absence of specific express directions allowing an executor or trustee to invest trust funds, upon personal security, such investment is improper, and if made at all, is made at the peril of the trustee.

(3) *Where the executor or administrator has "otherwise improvidently managed or injured the property committed to his charge."* Where an executrix had practically sole and exclusive control of the estate and took the funds and securities thereof in large amounts and used them in her own personal speculations, and neither secured nor pretended to secure the estate therefor until threatened with legal proceedings by the beneficiaries, Surrogate Ransom held, that though it did not appear whether the estate had lost anything by these unlawful acts, and while he did not impute to the executrix personal dishonesty, yet her management was improvident and wasteful and within the purview of this section, and justified a conclusion of law that she was unfit for the due execution of her office, and accordingly removed her. *Matter of Stanton*, 1 Connoly, 108, 115. In *Matter of Heyen*, 40 Misc. 511, revocation of letters was decreed for such dealings with an asset of the estate (the fixtures, lease and good will of a business) as to sacrifice the same so far as the estate was concerned, and, on the other hand, collusively throw it into the representative's personal control.

So where executors turn over the whole estate to one having a mere life estate therein without exacting security for the safe transmission of the principal estate to the remaindermen, Surrogate Rollins held it to be evidence of misconduct and improvident management by the executors and of unfitness for the due administration of their trusts. *Fernbacher* v. *Fernbacher*, 4 Dem. 227, 246. It must be borne in mind that creditors, as well as beneficiaries of the estate, have a right to complain of improvident management of or injury to the property, particularly if the executors, being themselves beneficiaries, act in hostility to the creditors or any particular creditor. *Matter of Jacob*, 5 App. Div. 508, 514. So if the injury to the property results from willful or negligent failure to sell the same and realize the proceeds, it will be deemed an injury to the property within the meaning of this section. *Haight* v. *Brisbin*, 100 N. Y. 219, 223.

(4) *Where the executor or administrator is shown to be guilty of other misconduct in the execution of his office.* This is a very broad provision and may be held to embrace the various charges which may be made against an executor or administrator not expressly included under the other heads. Under this part of the subdivision the Surrogate must determine each case upon its particular merits. With regard to executors, since they have been designated by the testator presumably because of his trust and confidence in them, the court will require undoubted proof of misconduct amounting to unfitness for office before exercising the power to remove. See *Matter of Johnson*, 15 N. Y. St. Rep. 752. In respect to administrators generally, as they may be said within certain limits to be appointees of the Surrogate, the rules will be strictly applied (*Matter of Place*, 105 N. Y. 629, aff'g 4 N. Y. St. Rep. 533), particularly if it appears that

the administrator is profiting or endeavoring to profit individually from the administration of the trust and in a manner inconsistent with the due preservation of the rights of the creditors and persons interested. But neither of these propositions should be carried beyond their obvious intent. Where an executor asserted his individual claim to a large part of the supposed assets of the estate, and it appeared that he claimed title to them by virtue of an alleged contract made with the testator at a time when it was shown that his mental capacity was doubtful, the acts of the executor in taking these assets and in retaining all benefits derived therefrom was deemed to be sufficient to justify his removal on the ground of misconduct. *Matter of Gleason*, 17 Misc. 510. On the other hand, where an administratrix with the will annexed was accused of wasting the estate, and the revocation of her letters was sought upon allegations that she sold a piece of land far below its reasonable value, and the evidence on this point was conflicting, the Surrogate declined to revoke the letters, and the General Term in the First Department affirmed his decision. *Matter of Estate of Wood*, 70 Hun, 230. It has been held that the legislature intended by the broad and general language, "other misconduct in the execution of his office," to include all causes for the removal of an executor or administrator, growing out of his own conduct and attitude toward the estate for which he ought in good conscience to be removed, but which on account of the technical definition which the courts had irrevocably attached to the terms, "incompetent," "improvident," "disqualifying," and the like, had not up to that time been causes for which a Surrogate could remove an executor or administrator; or in other words to confer upon Surrogates' Courts in respect of misconduct and the consequent unfitness growing out of it, the same power which courts of equity have to remove any trustee. *Matter of Gleason*, 17 Misc. 510, 524. In the case last cited Surrogate Glass suggested that by this section the legislature intended to make removal possible and proper in any case where the interests of the representative as an individual and as an executor are diametrically opposed and thoroughly hostile upon an important matter affecting the rights of the estate and those interested in it. He based this statement upon the decision of the Supreme Court (*Matter of West*, 40 Hun, 291, aff'd 111 N. Y. 687), where an administratrix was removed where "by reason of misconduct in the execution of her office, she had become unfit for the due execution of the office." The misconduct proved was twofold.

(1) In claiming and receiving certain personal property as administratrix and subsequently assuming a different and hostile attitude in relation to the ownership of the same property, claiming that it belonged to her individually.

(2) In setting up and claiming title individually to certain other property shown to belong to the estate, thereby placing herself in conflict with and in antagonism to the trust estate, which she was in duty bound to protect and which she represented. See also *Lichtenberg* v. *Herdfelder*, 103 N. Y. 306; *Matter of Moulton*, 32 N. Y. St. Rep. 631.

(5) *Where the executor or administrator is unfit for the due execution of his office by reason of dishonesty, drunkenness, improvidence or want of understanding.* These grounds are identical with those which render an executor incompetent to receive letters, and, with the exception of dishonesty, which is not in terms named in § 2661, with those which render an administrator incompetent; so that the cases as to what constitutes disqualification, dishonesty, drunkenness, improvidence or want of understanding, discussed in that connection, are equally applicable here and need not be rehearsed. It may, however, be observed that a distinction might properly be claimed to exist between the Surrogate's attitude when letters are originally applied for and when an application is made to remove. This distinction, though not fully indicated in the cases, is believed to be proper, for this reason: when the application is made for letters the applicant stands either upon his right as the person designated by the testator, in which case he has the presumption of the testator's knowledge of his character and of the trust accordingly reposed in him; or he stands upon the statutory right of priority, which, as has been seen, is sufficiently strong to have led the courts to sustain the Surrogate in granting letters to persons whose moral character, to say the least, was not all that could be desired in one about to administer the trust. This is the basis of such decisions as were in that connection discussed, to the effect that moral guilt or delinquency was not a sufficient ground for denying letters to one entitled thereto under the will or under the statute. But while these same rules and the general theory underlying them are generally applicable in cases arising under § 2685, the Surrogate upon the application to revoke the letters has the benefit of his experience as judicial supervisor of the executor or administrator, which implies an opportunity of observing whether the moral guilt or delinquency has been such as to render the executor or administrator unfit for the due execution of his office. The question of statutory right or of designation by the will has merely a weakened force and operation at this stage, and the exercise of the Surrogate of his discretion is influenced chiefly by the question whether the dishonesty, drunkenness, or improvidence, or want of understanding, is such as to warrant the conclusion of law that he is unfit for the due execution of his office. That the presumption in favor of the executor still exists, though as above suggested in a weakened form, is manifest by the decisions in which, upon applications to remove an executor, the court requires clear and satisfactory proof of his unfitness in view of his having been solemnly chosen by the testator who was presumably acquainted with him and with his habits of life. See *Matter of Johnson*, 15 N. Y. St. Rep. 752. It is sufficient, therefore, in this connection in addition to the reference to the discussion under §§ 2612 and 2661 merely to summarize in general form what the courts have held.

Under want of understanding, it may be said that illiteracy or inability to read and write may not be deemed a sufficient reason for revoking letters, unless some real prejudice to the administration is shown to have

resulted or to be likely to result therefrom. *Hassey* v. *Keller*, 1 Dem. 577, 579, Rollins, Surr.

The improvidence contemplated by this section is that want of care or foresight in the management of property which does render or would be likely to render the estate and effects of the decedent unsafe and liable to be lost or diminished. *Matter of Cutting*, 5 Dem. 456, 457, citing *Coope* v. *Lowerre*, 1 Barb. Ch. 45; *Coggshall* v. *Green*, 9 Hun, 471; *McMahon* v. *Harrison*, 6 N. Y. 448; *Emerson* v. *Bowers*, 14 N. Y. 445; *O'Brien* v. *Neubert*, 3 Dem. 156; *Blanck* v. *Morrison*, 4 *id.* 297; *McGregor* v. *McGregor*, 1 Keyes, 133; *Hayward* v. *Place*, 4 Dem. 487, affirmed in Supreme Court and in Court of Appeals.

The drunkenness contemplated by this section should be such habitual indulgence on the part of the executor or administrator as to render him incapable of devoting the necessary time and the proper degree of attention to the administration of the estate. See *Matter of Cady*, 36 Hun, 122, aff'd 103 N. Y. 678. But the proof that the executor or administrator has been seen intoxicated from time to time is not sufficient. Surrogate Tucker held the statute contemplated "habitual, continued, inveterate and irremediable habits of drunkenness, incapacitating him for the transaction of business." *Elmer* v. *Kechele*, 1 Redf. 472.

The word "dishonesty" in this section is broad enough to cover all wrongful acts on the part of executors or administrators, such as conversion of the assets of the estate or any improper attempt on the part of the executor or administrator to derive some personal profit therefrom inconsistent with his trust.

He should not, by dealing with the trust property separately, or by mingling it with his own, seek to secure profits, bonuses, commissions or other extra compensation. According to the degree of his dereliction he may be either removed for doing it, or surcharged these profits on his accountings. *Matter of Sandrock*, 49 Misc. 371, citing Perry on Trusts, 427, 429; *Fulton* v. *Whitney*, 66 N. Y. 548.

A practice of doubtful propriety is that of an executor or trustee exacting personally commissions and other fees for lending the moneys of the estate in his hands for investment. It is a very general practice and supported by respectable authority and example. It tends to deteriorate the trustee's sense of values and to make loans attractive not so much for their intrinsic security as for the extra stipend they will net him. In such cases, if loss on the investment does occur, the trustee should be held to make good any deficiency.

The dishonesty, however, if alleged as the sole ground for revoking the letters, must be specifically proved and shown to be the result of intention. Proof of conviction of an infamous crime is sufficient proof of dishonesty; but as has been already observed mere moral guilt is not sufficient within the decisions. See *Coggshall* v. *Green*, 9 Hun, 471; *Matter of Moulton*, 32 N. Y. St. Rep. 631. It may be observed finally that acts may sustain a finding of improvidence or reckless management or of waste

or improper application of assets, which might not sustain a finding of dishonesty. It is good practice, therefore, to make the allegations in the wording of the subdivision, excluding merely such grounds as are incapable of proof, in view of the particular facts. The petition will then be capable of sustaining a decree in case of sufficient proof upon any one of the specific grounds alleged.

§ 655. **Subdivision 3.**

> Where he has wilfully refused, or without good cause, neglected, to obey any lawful direction of the Surrogate, contained in a decree or order; or any provision of law relating to the discharge of his duty.

This power, conferred upon the Surrogate's Court, to revoke the letters of an administrator or executor who disregards willfully or negligently any direction of the Surrogate made by him by virtue of his power to direct and control the conduct of executors and administrators under § 2472, or to require him to perform any duty imposed upon him by statute, or by the Surrogate's Court under authority of the statute, under § 2481, is wholly independent but in reinforcement of the power which the Surrogate has in any given case to punish for contempt or disobedience or disregard of his orders or decrees. It embodies a wholesome rule of law and is by its terms carefully limited, first by the words "any lawful direction of the Surrogate," and second, by the words "relating to the discharge of his duty." The disobedience or disregard contemplated by this subdivision must be of a lawful order of the Surrogate. *Matter of Pye*, 18 App. Div. 309. Consequently the mere failure of the executor or administrator to do an act in relation to the estate, notwithstanding that it is a duty imposed upon him by law, is not ground for the revocation of his letters, in the absence of an express direction from the Surrogate contained in a decree or order, whatever effect such omission may have as evidence of some incompetency or misconduct in the execution of his office, under other parts of § 2685. To illustrate: The statute requires an executor to file an inventory of the estate; the Surrogate has power under § 2716 to compel the filing of this inventory when it has not been done within the period described by law; the failure to perform this duty by the executor merely presents an occasion for the exercise by the Surrogate of his power to direct the performance thereof; when he has so directed if the executor or administrator still willfully refuses or without good cause neglects to obey the Surrogate's order, an occasion is then afforded fully within subd. 3 of § 2685. *Moulton's Estate*, 10 N. Y. Supp. 717. The same distinction would be applicable in case the refusal of an executor or an administrator with the will annexed in the first instance related to the carrying out of some explicit direction in the will. The improper refusal to perform the behests of the testator might be grounds for his removal under other subdivisions of this section, but not under subd. 3, unless, at the instance of a creditor or person interested, the Surrogate had made some direction

in the premises embodied in a lawful decree or order. And even in such cases where the ground for revocation alleged is the refusal of the executor or administrator with the will annexed to carry out the directions of the will, it must appear that the directions alleged to be disregarded are imperative, for where the executor is given by the will a discretion as to time or circumstances, the exercise of his judgment in good faith is conclusive. *Haight* v. *Brisbin*, 96 N. Y. 132. See also *Haight* v. *Brisbin*, 100 N. Y. 219.

If the operation of an order or decree containing a direction to an executor or administrator to do some particular act or thing, is suspended by an appeal duly perfected, the disregard of its provisions pending the action of the Appellate Courts must not be deemed willful refusal or neglect without good cause to obey. And in such a case the Surrogate has no power pending such duly perfected appeal to revoke the letters under this subdivision, and should they be so revoked, the proper remedy is by motion to vacate the order or decree revoking the letters. *Vreedenburgh* v. *Calf*, 9 Paige, 128.

But where letters of an executor or administrator have been revoked it has already been noted that an appeal from the decree does not stay the execution of the decree or order appealed from (see § 2583; *Estate of Fernbacher*, 8 Civ. Proc. Rep. 349; *Halsey* v. *Halsey*, 3 Dem. 196; *Angevine's Estate*, 1 Tucker, 245), and the powers of the executor or administrator cease (§ 2603).

By the words, "lawful direction of the Surrogate," the statute safeguards the rights of the executor or administrator in refusing to obey a direction which the Surrogate has not the power to make. This right must be asserted promptly by means of the institution of an appeal and the perfecting of such an appeal for the purpose of staying the execution of the order or decree containing the direction. See *Matter of Pye, No.* 2, 18 App. Div. 309, 310.

§ 656. **Subdivision 4.**—Subdivision 4 is as follows:

> Where the grant of his letters was obtained by a false suggestion of a material fact.

The authority conferred by this section existed under the Revised Statutes, under which it was held, that Surrogates have power to revoke letters wherever it shall appear to them that they have been granted on or by reason of false representations made by the person to whom the same were granted. *Perley* v. *Sands*, 3 Edwards Ch. Rep. 325; *Proctor* v. *Wanmaker*, 1 Barb. Ch. 302. The authority at present existing is solely derived from this section (*O'Brien* v. *Neubert*, 3 Dem. 156; *Corn* v. *Corn*, 4 Dem. 394), and the expression of subd. 4 first came upon the statute book at the adoption of the Code, being substituted for that of the Revised Statutes. Laws of 1837, ch. 460, § 34. In *Proctor* v. *Wanmaker*, *supra*, it was held that, independently of this statute of 1837, the Surrogate had

power to revoke the letters of administration where there had been a false suggestion of a material fact or a lack of notice to parties rightfully entitled to administration.

The chancellor in his decision cited certain English cases in all of which letters had been revoked upon a discovery that false representations had been made "to the tribunal by which such letters had been granted," or that from such tribunal the lack of proper notice had been concealed. Upon this fact Surrogate Rollins (*Corn* v. *Corn, supra*) based a ruling that a false suggestion of a material fact not made to the tribunal granting the letters sought to be revoked is not such a suggestion as will warrant the Surrogate in revoking letters.

The case before the learned Surrogate was one where the petitioner had been induced to agree to a joint administration where she was entitled to sole administration, and, moreover, to agree that her coadministrator should have sole care and custody of all the property of the estate, upon false representation that under the law it was necessary, none of which facts, of course, came to the knowledge of the Surrogate who appointed the administrators. But in a similar case in the same year (*Matter of West*, 40 Hun, 291, 296), where similar coadministration was consented to by one entitled to sole administration, upon a false representation of fact of which the court had no knowledge, the General Term held that it was sufficient, under this subdivision of § 2685, to justify a revocation of letters. The representation in this case was to the husband of the decedent inducing him to consent to associate with himself his sister-in-law as coadministrator upon the representation that in that case there would be no conflict of interest as to the estate, whereas, as was proved, no sooner had the appointment been made, than the relations of the two administrators developed continual friction caused by unreasonable and violent conduct on the part of the administratrix associated with the husband.

The rule declared by the General Term is believed to be more consistent with the intent of the broad language of subd. 4. The grant of the letters is as much obtained by a false suggestion of a material fact to a person whose opposition is thereby removed, in a case where his opposition would have been fatal to the application for letters, as it is by a false suggestion made to the court itself. The language of the subdivision is broad enough to cover both, and it should not be limited. See also *Matter of Wood*, 8 N. Y. Supp. 884. Where letters were obtained by one who claimed to be the wife of the intestate, that fact is a material fact, and may properly be said to be made to the court; and the court, if it be made to appear that the applicant was not in fact the wife of the intestate, may revoke the letters under this subdivision.

Under this head, however, it must be noted that the word "false" means legal falsity, which implies an intent to deceive or mislead. In *Matter of Rathyen*, 115 App. Div. 644 *suppressio veri*, in a material respect, is held equivalent to *suggestio falsi*, under this section. In this case the intent was immaterial, for however honest the concealment the fact concealed

would if disclosed have shown the court to be powerless to act as it did. See *Kerr* v. *Kerr*, 41 N. Y. 272, 276.

But if the fact be immaterial, e. g., age of a party (provided it does not introduce element of infancy) or *quantum* of estate (not in order to avoid penalty of bond) it is not within the purview of the act. *Matter of Campbell*, 123 App. Div. 212, rev'g 56 Misc. 229. See also *Matter of Ciotto*, 105 App. Div. 143.

Cases have arisen, however, where a person has claimed to occupy a relation to the decedent entitling him or her to letters, which relation on inquiry by the court, is shown not to have existed in law; such a case while it does not involve a willful intent to deceive on the part of the applicant falls in law under this head of false suggestion of fact. For example, where a woman secured letters of administration as widow of the decedent they were revoked upon proof of the following facts:

She had previously been married to another man from whom she separated and who disappeared within a year after their marriage; not knowing what became of him and hearing nothing of him, after the lapse of five years she married the deceased with whom she cohabited as his wife until his death. *Matter of Hetherington*, 25 Weekly Dig. 4. Surrogate Daly, in the exercise of his incidental power to pass upon the validity of the relation of the administratrix to the deceased, received in evidence a judgment of a court of competent jurisdiction in an action in which her first husband who had disappeared was plaintiff, which divorced him absolutely from her on the ground of her alleged adultery in the second alleged marriage. It also appeared that she had not defended such action, nor had asserted the honesty and good faith of her second marriage, which, under the law of the State would have been deemed void only from the time its nullity should have been pronounced by a court of competent jurisdiction. The Surrogate accordingly found upon these facts that her allegation that she was the widow of the decedent was untrue and revoked her letters. *Oram* v. *Oram*, 3 Redf. 400. See opinion. So Surrogate Rollins (*Stanley* v. *Stanley*, 4 Dem. 416) revoked the letters of one who had secured the administration, claiming to be the widow of decedent, in proceedings begun by another woman, who alleged and proved that she was the lawful wife of the decedent at the time of his death. See also *Matter of Ward*, 50 Misc. 483.

Where the executor never really became a legally constituted executor of the testator's will, although he may have been regarded and treated as such, the Surrogate is without jurisdiction to entertain proceedings for his removal on the ground of a false suggestion of material fact. *Matter of Richardson*, 8 Misc. 140. No court can remove a person from an office he has never held, nor revoke letters which have never been issued, nor can letters be revoked on such an allegation in any proceeding other than a direct one for that purpose. Thus, upon an application to vacate a final accounting the Surrogate found, that an allegation in the administrator's petition stating his relationship to the testator was false, and accordingly annulled the letters of administration as well as the decree passing and

settling his accounts. The General Term of the First Department (*Matter of Peterson*, 79 Hun, 371) reversed that part of the decree vacating the letters on the ground of lack of jurisdiction in the Surrogate so to act. See opinion of Follett, J., at p. 375. *Matter of Schmid*, 116 App. Div. 706, presented a complex situation, disclosed upon the accounting of an executor. His testator left to his daughter, who died in Germany, a legacy of $4,000. The German court appointed an administrator without notice and without requiring a bond.

A. secured letters in Kings County, ancillary to the foreign probate, in order to secure this $4,000 legacy. About a month later, the sister of the deceased legatee petitioned the same court and secured general letters of administration.

Both these representatives appeared on the original executor's accounting and the legacy was awarded to the sister as administratrix. The other administrator took no appeal, but petitioned to revoke these later letters. Upon appeal from decree denying his petition the Appellate Court held it was against public policy to turn the legacy over to a representative who had filed no bond, and that anyhow he had waived his rights by acquiescing in the decree in the executor's accounting. The court held, citing *Power* v. *Speckman*, 126 N. Y. 354, 357, that this double appointment of administrators was not void as to either, but merely irregular and subject on proper application to revocation as to either.

§ 657. **Subdivision 5.**—The fifth subdivision of § 2685 is as follows:

> In the case of an executor, where his circumstances are such that they do not afford adequate security to the creditors or persons interested, for the due administration of the estate.

The fifth subdivision is made to relate solely to executors and for this reason, that the bond required by the Surrogate from an administrator is deemed to be sufficient to protect the creditors and persons interested, particularly in view of his power to require a new bond or an increased bond, or new sureties, in case it appears to be at any time necessary. It must also be noted that this subdivision gives the Surrogate a power in addition to that conferred under §§ 2597 to 2599, inclusive, whereunder a new bond or new sureties may be required of an executor, or administrator, or guardian, and upon his failure to comply with the order or decree of the Surrogate, he may remove the delinquent from office and revoke the letters issued to him.

The circumstances authorizing the Surrogate to revoke letters must be something more than mere poverty or insolvency on the part of an executor. *Matter of Hart*, 6 N. Y. St. Rep. 535. At common law a person named as executor was entitled to letters even though he might be notoriously insolvent. But where the executor neglects the estate and petitions in bankruptcy besides, his letters may be revoked. *Matter of Truesdell*, 40 Misc. 336.

In 1880 prior to the going into effect of ch. 18, of the Code, Surrogate

Calvin, interpreting the words in relation to an executor, "that their circumstances are so precarious as not to offer adequate security for their due administration," held that, although the testator might have been aware of the precarious condition of executor, nevertheless, upon proof that the executors were without responsibility, he would have to require them to give security. *Freeman* v. *Kellogg*, 4 Redf. 218, 225, distinguishing *Shields* v. *Shields*, 60 Barb. 56, and following *Wood* v. *Wood*, 4 Paige, 299.

In 1882 Surrogate Rollins, passing upon this section of the Code, disapproved of the word "circumstances," although not in this precise connection, and stated that the question for the Surrogate to determine was not the relative poverty or wealth of the representative, but whether it were "safe to put this estate in the hands of the person named as executor; can he be trusted to administer it faithfully and honestly as directed by the will?" And he observed, "thrift, integrity, good repute, business capacity, and stability of character, for example, are circumstances which may be very properly considered in determining the question of adequate security." *Martin* v. *Duke*, 5 Redf. 597, 600.

And in a later case, passing upon the very subdivision of § 2685, where the allegation in the petition was that the executors were, "Men of inconsiderable means, not themselves transacting any business or having any place of business," it was held that this allegation was not sufficient under subd. 5; nor were the proofs offered in support thereof sufficient to warrant the removal of the executors. *Postley* v. *Cheyne*, 4 Dem. 492, citing *Grubb* v. *Hamilton*, 2 Dem. 414. In this latter case the allegation was in the words of the subdivision. The learned Surrogate held such an allegation unaccompanied by a more specific statement to be too vague and general to grant the relief which the petitioner asked. But the proof, it appeared, merely related to the poverty of the executor as contrasted with the amount of the estate which he had been appointed to administer.

It would be difficult to state a general proposition applicable to all cases that may arise under this subdivision further than to say, that each case must depend upon its own circumstances. Executors may be shown to be persons possessing honesty, integrity and business qualifications and yet there may be such proof of pecuniary irresponsibility as to warrant the Surrogate in directing the revocation of their letters in order adequately to secure the persons interested. The execution of such a decree can always be avoided under § 2687 by giving a bond as therein prescribed. See *Matter of O'Brien*, 19 N. Y. Supp. 541.

§ 658. **Subdivision 6.**—Subdivision 6 is as follows:

> In the case of an executor, where he has removed or is about to remove from the state, and the case is not one, where a nonresident executor would be entitled to letters without giving a bond.

The nonresidence of an applicant for letters testamentary is no reason for refusing to issue letters testamentary to him unless at the time such

letters are granted some person interested in the estate or a creditor interposes and maintains an objection as prescribed in § 2636, *supra*.

It has already been noted under § 2683 that where the objection is that the executor is a nonresident of the State the executor may nevertheless entitle himself to letters testamentary by giving a bond. If, however, there is no objection filed under § 2636 letters may issue to a nonresident without a bond, in the discretion of the court. *Estate of Demarest*, 1 Civ. Proc. Rep. 302; *Estate of Vernon*, *id.* 304, note; *Postley* v. *Cheyne*, 4 Dem. 492, 495. Therefore if letters have been issued to a nonresident without a bond, the mere fact of nonresidence at or before the time of receiving letters, is no ground for the revocation of letters under subd. 6. Subdivision 6 is in express terms limited to a case where an executor's removal or intended removal from the State occurs, or is contemplated after the issuance of letters. *Postley* v. *Cheyne*, 4 Dem. 496. When letters have been issued to a nonresident executor they cannot be revoked merely because of his continued nonresidence, nor can any bond be for that cause required of him. A temporary nonresident, because of ill health in his family is not sufficient as a basis of intent to remove from the State, under § 2687. *Matter of M'Knight*, 80 App. Div. 284. See also *Matter of Magoun*, 41 Misc. 352. But in any case not falling within the exception expressly stated, the removal or contemplated removal of the executor from the State presents a case where the Surrogate must revoke the letters, as it does not come within the case hereafter noted under § 2687, where the Surrogate may allow the letters to remain unrevoked. *Estate of Sohn*, 1 Civ. Proc. Rep. 373. See *In re Emery*, 13 Civ. Proc. Rep. 365; *Van Wyck* v. *Van Wyck*, 22 Hun, 9.

§ 659. **Subdivision 7.**—Subdivision 7 is as follows, and requires no discussion:

> In the case of an executor, where, by the terms of the will, his office was to cease upon a contingency, which has happened.

The Surrogate must have proof that the contingency has actually happened.

§ 660. **Subdivision 8.**—Subdivision 8 has already been discussed under the head of temporary administration:

> In the case of a temporary administrator, appointed upon the estate of an absentee, where it is shown that the absentee has returned; or that he is living, and capable of returning and resuming the management of his affairs; or that an executor, or an administrator in chief, has been appointed upon his estate; or that a committee of his property has been appointed by a competent court of this state.

§ 661. **Procedure.**—The procedure indicated by the Code upon an application for the revocation of letters is, that first a written petition be filed duly verified setting forth the facts and circumstances showing that the case is one falling under § 2685 and praying for a decree revoking the letters

and that the executor or administrator may be cited to show cause why a decree should not be made accordingly. See §§ 2685, 2686.

Petition; citation thereupon.

A petition, presented as prescribed in the last section, must set forth the facts and circumstances, showing that the case is one of those therein specified. Upon proof, by affidavit or oral testimony, satisfactory to the surrogate, of the truth of the allegations contained in the petition, a citation must be issued according to the prayer thereof; except that, where the case is within subdivision fifth of the last section, and the executor has given a bond, as prescribed in article first of this title, the surrogate may, in his discretion, entertain or decline to entertain the application. **§ 2686, Code Civil Proc.**

The exact grounds on which removal is sought must be specified. *Matter of Burr*, 118 App. Div. 482.

This section should be discussed in connection with § 2687, which prescribes the action the Surrogate must take in the premises.

Hearing; decree.

Upon the return of a citation, issued as prescribed in the last section, if the objections, or any of them, are established to the surrogate's satisfaction, he must make a decree, revoking the letters issued to the person complained of. But the surrogate may, in his discretion, dismiss the proceedings, upon such terms, as to costs, as justice requires, and may allow the letters to remain unrevoked, in either of the following cases:

1. Where the case is within subdivision third of the last section but one, if the direction of the surrogate or the provision of law is obeyed, and suitable amends made to each person injured by the neglect or refusal to obey it.

2. Where the case is within subdivision fourth of that section, if the person cited is entitled to letters, notwithstanding the false suggestion.

3. Where the case is within subdivision fifth of that section, if the executor gives, within a reasonable time, not exceeding five days, a bond, as prescribed in article first of this title. **§ 2687, Code Civil Proc.**

The effect of § 2687 is to prevent the working of hardship in the cases covered by subds. 3, 4 and 5 of § 2685, that is to say, if the complaint is that the executor or administrator has refused or neglected to obey some lawful direction of the Surrogate. Such executor or administrator by prompt compliance with the direction or with the provision of law which he has disregarded may secure the dismissal of the proceedings, upon making suitable amends to each person injured by such neglect or refusal. It is of course for the Surrogate to determine what constitutes suitable amends. In the second place where a false suggestion of fact is alleged, the Surrogate is entitled to disregard it if it appear that the representative was entitled to letters, notwithstanding the false suggestion. In the third place where the only cause for the revocation of the letters is under subd. 5 that the creditors or persons interested in the estate are not adequately secured by reason of the circumstances of the executor, the proceedings may be dismissed and the letters remain unrevoked upon the filing of a bond within a reasonable time not exceeding five days. The Sur-

rogate has no power to extend this time. *Matter of Filley*, 20 N. Y. Supp. 427.

§ 662. **Same subject continued.**—It has already been stated that an application for the revocation of letters should be a proceeding by itself, and the relief is not one that can be asked for incidentally. The proceeding is peculiar in this respect that before the citation prayed for in the petition can issue, proof must be made under § 2686 by affidavit or oral testimony satisfactory to the Surrogate of the truth of the allegations contained in the petition. Although the petition when verified may be deemed an affidavit under § 3343, subd. 11, of the Code; still the petition itself is manifestly not such proof of the truth of the allegations contained therein as is contemplated by this section. *Moorhouse* v. *Hutchinson*, 2 Dem. 429, 432, Rollins, Surr. This section is different in the language used from § 2661, which provides, upon an application by a person entitled to administration by written petition duly verified, praying for a decree awarding letters, "that a citation shall not be issued until the petitioner presumptively proves by affidavit or otherwise, to the satisfaction of the Surrogate the existence of all the jurisdictional facts." Under this section it is held that the Surrogate is not bound to issue the citation upon the mere presentation of a written petition, but may require additional proof, in his discretion, of the existence of the jurisdictional facts. But by § 2686 he is required to be satisfied of the truth of the allegations contained in the petition, by affidavit or oral testimony, that is, by extrinsic and supplementary proof. The intent of this section is manifest, namely, that unless in addition to a verified petition showing formally the existence of facts bringing the case within one of the subdivisions of § 2685, the applicant can satisfy the Surrogate that he can make out a *prima facie* case, the executor or administrator will not be brought into court by the citation to show cause. See *Moorhouse* v. *Hutchinson*, *supra*. In a case where the allegations in the petition were merely on information and belief, and were all put in issue by the answer filed by the executor, Surrogate Rollins directed the petition to be supplemented by further allegations of the source of the information and the grounds of the belief of the petitioner before taking proof upon the issues raised. *Atkinson* v. *Striker*, 2 Dem. 261. And when issue of fact is thus duly raised the Surrogate must take evidence, and make findings and state conclusions of law, otherwise his decree has no foundation and must be reversed. *Matter of Dittrich*, 120 App. Div. 504. A duly verified petition within the meaning of §§ 2685 and 2686, is a petition verified as is any pleading in a court of record. By § 2534 of the Code the provisions of §§ 523, 524, 525 and 526, respecting the mode of verification of pleadings are made applicable to proceedings in this court. So if the attorney of record verifies the petition he must follow the provisions of § 526, and set forth the grounds of belief as to all matters not stated upon his knowledge as well as the reason why the verification is not made by the petitioner.

§ 663. **The petition.**—The form of a petition is here indicated.

Petition for revocation of letters.

Surrogate's Court,
County of

Title. }

To the Surrogate's Court of the county of

The petition of respectfully shows:

I. That your petitioner resides in and is (*describe petitioner as required by section* 2685, *either as creditor or person interested. If the latter, state character of interest, such as legatee, next of kin, etc.*), of late of deceased (*here specify whether decedent died testate or intestate; if testate, allege probate of the will and liber of record, and the issuance of letters testamentary; if intestate allege that fact and issuance of letters of administration*).

II. (*Here state the grounds for asking the revocation of letters testamentary or of administration.*) *As for example:* that at the time the aforesaid letters were issued to the said he was incompetent or disqualified by law to act as such, and the objection was not taken by your petitioner (*or by any person whom he represents*) upon the hearing of the application for letters, and that the facts by reason of which he was incompetent or disqualified by law to act as such executor or administrator were (*here allege facts*): (*If the ground for revocation is any of the other grounds specified under section* 2685 *make the allegation primarily and substantially in the language of the Code, and then add the specific facts, concisely stated, constituting the alleged disqualification or ground for revocation of letters*).

Wherefore, your petitioner prays for a decree revoking the said letters testamentary, *or* of administration, and that the said executor (*or administrator*) may be cited to show cause why a decree should not be made accordingly (*it is proper to pray in a necessary case for an order temporarily restraining the representative from acting in the meantime*).

(Signature.)

(Verification.)

Where the petition contains a prayer for the restraining order pending the determination of the proceeding, the order may be submitted with the petition and usually contains a recital of the grounds for revocation set forth in the petition, and the further recital that it appears to the Surrogate that there are good grounds for such complaint and that he has issued the citation to the executor or administrator to show cause accordingly. The order merely restrains him from acting in the premises until the determination of the petitioner's application. It will be noted that the Surrogate will not make the order until he has decided to issue the citation, prior to which, as is elsewhere shown, he may require the proof by affidavit or

oral testimony of the truth of the allegations contained in the petition. § 2686, Code Civ. Proc.

§ 664. **The citation.**—If the Surrogate is satisfied of the truth of the allegations contained in the petition, the citation must be issued according to the prayer thereof, that is to say, a citation addressed to the executor or administrator to show cause why a decree should not be made revoking his letters for the cause specified in the petition. The allegation of the mistake, or incompetency, or other reason which is claimed to be proper cause for the revocation of letters may properly be made in the language of the statute, and it is proper practice to add words specifying more fully in what the particular incompetency or mistake consisted. For example, if it be alleged in the case of an executor under subd. 5 of § 2685 in the words of the subdivision that "his circumstances are such that they do not offer adequate security for the due administration of the estate to the petitioner," it is proper to add "in that he is," etc., giving a concise and specific statement of the nature of the circumstances alleged. The citation should be served according to the general rules covering the service of citations. The jurisdiction of the Surrogate in these cases is to revoke letters, and if the citation is served in a manner authorized by law, and the practice of the court, the Surrogate has sufficient jurisdiction over the proceeding, even though the executor or administrator does not appear, to make a decree revoking the letters. For example, where a citation in such a case was served upon an administrator, who had left the State, by leaving the same at his residence within the State as required by statute, it was held that the Surrogate had acquired jurisdiction of his person and that if he had transcended the limitation of the statute in his subsequent decree revoking his letters, the only remedy was by appeal or by motion before the Surrogate and that it could not be attacked collaterally or for want of jurisdiction. *Harrison* v. *Clark*, 87 N. Y. 572.

§ 665. **The decree.**—If the inquiry by the Surrogate, subsequent to the return day, establishes the mistake, incompetency, or other ground for revoking the letters and the necessity for his action is not obviated in the manner provided for by § 2687, he must make the decree revoking the letters issued.

This decree rests, not on the preliminary affidavits, but on evidence of the facts put in issue. Hence, as already noted, findings of fact and conclusions of law must be made. *Matter of Dittrich*, 120 App. Div. 504, citing *Matter of Monroe*, 142 N. Y. 484; *Matter of Scott*, 49 App. Div. 130.

If, on the other hand, an executor whose circumstances are shown to be such as not to afford adequate security for the due administration of the estate decide to give a bond, he must do it within the time specified by § 2687, subd. 3. The Surrogate has no power to extend this time beyond the five days, for the language of the section is explicit; but, if the executor not having filed such a bond, a decree is made by the Surrogate under § 2687 revoking the letters, he still has power to relieve the executor from the decree taken against him upon satisfactory proof that the failure to

file the bond occurred through mistake, inadvertence, or excusable negligence, that is to say, that the decree revoking letters like another decree of the Surrogate made under § 2481, subd. 6, be opened, vacated, or modified or a new hearing be granted for fraud, newly discovered evidence, error or other sufficient cause. See *In re Filley's Estate*, 20 N. Y. Supp. 427, and cases cited. In *Matter of Kasson*, 46 App. Div. 348, it was held proper to permit an executor sought to be removed, to file a bond within thirty days after entry of the order of the Appellate Division, where the court was satisfied that the testator knew he had little or no property and that the only charge of improvidence against him was of an improper investment made by him as guardian, the loss on which was made good by estate of testator who had been his surety.

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Decree revoking letters. Title.

a person interested in (*or creditor of*) the estate of late of deceased, having presented a petition to this court praying for a decree revoking letters testamentary (or of administration) granted to by this court, on the day of and the Surrogate, being satisfied of the truth of the allegations contained in the petition, having issued a citation according to the prayer thereof,

Now, on reading and filing proof of the due and personal service of the said citation upon (*describing him as executor or administrator, as the case may be*); the said having appeared and (*if not state the fact*) and the petitioner having also appeared, and the proofs and allegations of the parties having been heard, and it appearing upon due consideration that (*here state the grounds under section* 2685 *which have been shown to exist*), it is

Ordered, Adjudged, and Decreed, that the letters (*testamentary or of administration*) heretofore issued to said be and they hereby are revoked (*or if the revocation can be avoided by the filing of a bond add: Unless the said gives within a reasonable time not exceeding five days from the date of this decree, a bond*) (*here insert requirements as to bond.* See sections 2645 and 2664).

Where the Surrogate permits the letters to remain unrevoked under section 2687, it will be noted that he may dismiss the proceedings and impose such terms as to costs as justice requires.

§ 666. **Revocation of letters does not affect testamentary trust.—**

Decree not to affect testamentary trusts.

Where an executor or an administrator is also a testamentary trustee, a decree revoking his letters does not affect his power or authority as testamentary trustee, except in the case specially prescribed for that purpose, in title sixth of this chapter. § **2688, Code Civil Proc.**

The offices of executor and trustee are distinct. If a person has been executor of a will and also one of the trustees thereunder he may upon proper cause being shown under § 2817 be removed as trustee and continue to act as executor (*Deraismes* v. *Dunham*, 22 Hun, 86), or on the other hand he may be removed as executor without affecting his right to continue to execute his office as trustee. *Matter of Estate of Hood*, 98 N. Y. 363. The mere settlement of the accounts of an executor as such, which does not discharge him, is no bar to a subsequent proceeding to remove such executor for waste or misconduct although the executor may have intended his acts, subsequent to the judicial settlement of the account, to be those of a trustee; the jurisdiction of the Surrogate continues over him as executor until he is removed or discharged. *Matter of Estate of Hood, supra.* See also same case, 104 N. Y. 103, 107.

In the discussion under the head of testamentary trustees under §§ 2817 to 2820 of the Code of Civil Procedure, it will be noted that provision is made, that if a person is both executor and testamentary trustee proceedings taken by or against him as trustee do not affect him as executor or administrator unless in the proceedings to revoke his letters, the facts entitling him to resign or entitling the petitioner to have him removed are set forth in the decree asking for the revocation of his letters; that is to say, the proceedings may be consolidated and full relief obtained as to the person seeking to resign or sought to be removed in both his capacity as representative and that of trustee. *Quackenboss* v. *Southwick*, 41 N. Y. 117; *Deraismes* v. *Dunham*, 22 Hun, 86.

§ 667. **Effect and contents of decree revoking letters.**

Upon the entry of a decree, made as prescribed in this chapter, revoking letters, issued by a surrogate's court to an executor, administrator, or guardian, his powers cease. The decree may, in the discretion of the surrogate, require him to account for all money and other property, received by him; and to pay and deliver over all money and other property in his hands into the surrogate's court, or to his successor in office, or to such other person as is authorized by law to receive the same; or it may be made without prejudice to an action or special proceeding for that purpose, then pending, or thereafter to be brought. The revocation does not affect the validity of any act, within the powers conferred by law upon the executor, administrator, or guardian, done by him before the service of the citation, where the other party acted in good faith; or done after the service of the citation, and before entry of the decree, where his powers with respect thereto were not suspended by service of the citation, or where the surrogate, in a case prescribed by law, permitted him to do the same notwithstanding the pendency of the special

proceeding against him; and he is not liable for such an act, done by him in good faith. § 2603, Code Civil Proc.

Under this section it is proper that the decree direct the person removed to pay over the money accounted for *into the Surrogate's Court*, if the facts are such that there is no propriety in appointing a successor in office, as where a ward has come of age and secures a removal of the guardian, and yet where a payment to "such other person" may be premature by reason of possible outstanding claims against the fund. *Matter of Hicks*, 54 App. Div. 582; *Matter of Moehring*, 154 N. Y. 423.

The last section qualified.

This last section does not affect the liability of a person, to whom money or other property has been paid or delivered, as husband, wife, next of kin, or legatee, to respond to the person lawfully entitled thereto, where letters are revoked, because a supposed decedent is living; or because a will is discovered, after administration has been granted in a case of supposed intestacy, or revoking a prior will, upon which letters were granted. § 2604, Code Civil Proc.

§ 668. **Application by executor or administrator for revocation of letters.**—The representative himself, in the second place, may apply for leave to account and be discharged. The proceedings in such a case are assimilated to proceedings for a voluntary final accounting, and reference should be had to the discussion in Part VIII in that regard.

It is provided, first, that

An executor or administrator may, at any time, present to the surrogate's court a written petition, duly verified, praying that his account may be judicially settled; that a decree may thereupon be made, revoking his letters, and discharging him accordingly; and that the same persons may be cited to show cause, why such a decree should not be made, who must be cited upon a petition for a judicial settlement of his account, as prescribed in article second of title fourth of this chapter. The petition must set forth the facts upon which the application is founded; and it must, in all other respects, conform to a petition praying for a judicial settlement of the account of an executor or administrator. The surrogate may, in his discretion, entertain or decline to entertain the application. § 2689, Code Civil Proc.

It has been questioned whether this section was intended to include temporary administrators. *Bible Society* v. *Oakley*, 4 Dem. 450. There can be little doubt but that it does. The Code provides that the expression "letters of administration" includes "letters of temporary administration." § 2514, subd. 5. This is an indication of the legislative intent to include under administrators, as a generic term, temporary administrators.

In the case just cited, however, Surrogate Rollins held that a temporary administrator had not an absolute right to demand a settlement of his account under § 2699 with a view to his discharge, but that the Surrogate might, as to him also, entertain or decline to entertain the application.

§ 669. **Sufficient reason to be shown.**—The reasons to be assigned by

such executor or administrator as may petition for his discharge must be "sufficient." The application is addressed to the discretion of the Surrogate, and he will not lightly relieve one who has assumed a trust from discharging its duties to the end. See *Becker* v. *Lawton*, 4 Dem. 341. It is made incumbent on the Surrogate to determine, judicially, that "sufficient reasons exist for granting the prayer of the petition." This is by § 2690, which is as follows:

> If the surrogate entertains an application, made as prescribed in the last section, the proceedings thereupon must be, in all respects, the same, as upon a petition for a judicial settlement of the petitioner's account; except that, upon the hearing, the surrogate must first determine, whether sufficient reasons exist for granting the prayer of the petition. If he determines that they exist, he must make an order accordingly, and allowing the petitioner to account, for the purpose of being discharged. Upon his full accounting, and paying over all money which is found to be due from him to the estate, and delivering over all books, papers, and other property of the estate in his hands, either into the surrogate's court, or in such a manner as the surrogate directs, a decree may be made, revoking the petitioner's letters, and discharging him accordingly. **§ 2690, Code Civil Proc.**

The Surrogate may inquire, in the case of executors, whether they are performing any testamentary trusts, and whether, in such case, their functions as executors and as trustees are separable and distinct. As testamentary trustees their right to resign is covered by other sections of the Code. § 2814, Code Civ. Proc.; *Tilden* v. *Fiske*, 4 Dem. 357, 359. See Part VII, *post*. They are, it is true, by virtue of § 2819, entitled to obtain relief in both capacities by instituting a single proceeding for that purpose. But the courts have maintained a distinction between the relations to the estate administered of a trustee and of a mere administrator; they have shown more reluctance to release an executor or a trustee named by a testator, than to release an appointee of the Surrogate himself. The considerations stated by Rollins, Surr., in the *Tilden* case, 4 Dem. 357, illustrate the attitude of a careful Surrogate in this respect. Weight will be given to objections to such discharge on the part of the *cestuis que trustent*. *Baier* v. *Baier*, 4 Dem. 162; *Tilden* v. *Fiske*, *supra*. In the case first cited the Surrogate declined to sustain as sufficient the reason that petitioner was "too busy with her own private matters, and no longer desired to be busied" with the trust. In the other case where the petitioner had for many years discharged every duty of the trust with fidelity, prudence and thoroughness, and was about to remove his residence to another country, the request for discharge was granted, even against the beneficiaries' desire.

One who never was legally constituted an executor, as, for example, one who never actually qualified or received letters, has not the standing which entitles him to apply to a Surrogate for leave to resign. *Matter of Richardson*, 8 Misc. 140, 142. Such a one is merely an executor *de son tort*, and subject to all the consequences flowing from that relation. *Ibid.* The Surrogate has not even power to remove him from an office he never legally held.

The liability of such persons is defined by § 2706, which provides for holding them accountable for the full value of all property held or attempted to be administered by them, to every person entitled thereto; and they are by the same section prohibited from retaining or deducting, upon so accounting, any debt due them from the testator or intestate.

§ 670. **One who has qualified and seeks discharge must proceed under §§ 2689, 2690.**—These sections provide not only ample procedure but an exclusive procedure. An executor who has received letters cannot secure a discharge by renunciation. Renunciation and retraction of renunciation are by their very nature assumed to take place before letters are granted. *Matter of Suarez*, 3 Dem. 164.

One who has exercised at any time the functions of executor loses thereby the right to renounce. *Ibid.*, and cases cited.

Moreover, a resignation acted upon by the Surrogate under §§ 2689 and 2690 cannot, after the discharge of the resigning executor, be retracted. *Matter of Beakes*, 5 Dem. 128, 130.

§ 671. **Revocation of letters, as of course, without petition or citation.**—There are cases in which it is made the duty of the Surrogate to revoke letters testamentary or of administration, upon the occurrence of the facts or conditions specified in § 2691 of the Code. That section is as follows:

> In either of the following cases, the surrogate must make a decree, revoking letters testamentary or letters of administration, issued from his court, without a petition or the issuing of a citation:
>
> 1. Where the person, to whom the letters were issued, is not a resident of the state, or is absent therefrom; and, upon being duly cited to account, neglects to appear upon the return of the citation, without showing a satisfactory excuse therefor; and the surrogate has not sufficient reason to believe that such an excuse can be made.
>
> 2. Where a citation, issued to such a person, in a case prescribed by law, cannot be personally served upon him, by reason of his having absconded or concealed himself.
>
> 3. Where, by reason of his default in returning an inventory, such a person has remained, for thirty days, committed to jail, under the surrogate's order, granted in proceedings taken as prescribed in § 2715 of this act.
>
> 4. In the case of a temporary administrator, where an order has been made and served, as prescribed in § 2679 of this act, directing him to deposit money, or show cause why a warrant of attachment should not issue against him; and a warrant of attachment, issued thereupon, has been returned not served upon him. **§ 2691, Code Civil Proc.**

This power of summary removal vested in the Surrogate enables him to protect estates which are being administered by persons who have proved themselves unamenable to the Surrogate's authority. There is no occasion in such cases for the delay of proceedings to revoke the letters. The facts upon which he may act are brought to his notice directly, and require no additional proof beyond the affidavit of failure to serve the citation or

warrant as the case may be. Under subd. 1 the Surrogate takes notice of the default of the person cited to account, upon the return day. Under subd. 2 he will doubtless require an affidavit setting forth the facts, in substance, sufficient to warrant the inference that the respondent has absconded or concealed himself. A verified petition alleging that respondent "has absconded and is a fugitive from justice" was held sufficient. *Sutherland* v. *St Lawrence County*, 42 Misc. 38, 44. Under subd. 3 no difficulty can present itself. Under subd. 4 no prejudice can be wrought to the temporary administrator for the original order under § 2679 must have been duly served, so that his failure to attend and show cause which occasions the issuance of the warrant leaves him without ground of complaint.

§ 672. **Effect of revoking letters of one of two or more executors or administrators.**

Remaining executors may act, where letters of one revoked.

Where one of two or more executors or administrators dies, or becomes a lunatic, or is convicted of an infamous offence, or becomes otherwise incapable of discharging the trust reposed in him; or where letters are revoked with respect to one of them, a successor to the person, whose letters are revoked, shall not be appointed, except where such an appointment is necessary, in order to comply with the express terms of a will; but the others may proceed and complete the administration of the estate, pursuant to the letters, and may continue any action or special proceeding, brought by or against all. **§ 2692, Code Civil Proc.**

This section expressly prohibits the appointment of a successor to one of several executors or administrators, upon the revocation of his letters, unless such appointment is required by the express terms of a will. *Hood* v. *Hayward*, 124 N. Y. 1, 10.

If not so required, it is only when all the executors or administrators die or become incapacitated, or the letters of all of them are revoked, that letters will be granted to one or more persons as their successors. *Ibid.* See also § 2693, Code Civ. Proc.

CHAPTER X

BONDS OF EXECUTORS, ADMINISTRATORS, ETC.

§ 673. **Representative's bond.**—Some representatives must before receiving letters give a bond conditioned in a given sum, with proper security, for the faithful performance of the trust. Others need not do so, either before or after letters, except in the precise cases covered by law. The several classes are treated in the following sections.

§ 674. **Bond of executor.**—In 1867, Surrogate Tucker, in a case where a testator by his will directed his executors therein named to give security in the sum of $1,000, declared, that there was no provision in the statute under which he could require or receive a bond from executors to the people, as it neither appeared that there was any objection made to the executors by any person in interest, nor did it appear that the circumstances of the executor were such as not to afford adequate security for due administration, but he had a perfect right to withhold letters testamentary until a bond should be given by the person applying for them conditioned *to the legatees* by name, in the penalty designated by the will, for the payment of all legacies and bequests and for the due administration of the estate. This decision seems to regulate the form of security which can be required where, under the will, the executor is required to give a bond. *Matter of Shipman*, 53 Hun, 511, 515. So Judge Barrett, after distinguishing executors from testamentary trustees, observed: "There is no rule of law or requirement of public policy which, under such circumstances (to wit: the circumstances of an ordinary executorship pure and simple) and in the absence, as matter of fact, of any necessity, authorizes the court to require security from the executor." In this case the Surrogate had required an executor as a condition of retaining the corpus of the estate to give security to protect the remaindermen, and in default of giving such bond to deposit the entire fund with the chamberlain. The court further declared, "It seems quite plain to us that this part of the decree was without authority. The Surrogate thereby attached to the executorial office a condition imposed neither by law nor by the testatrix. The Surrogate's power is limited to the revocation of the letters testamentary for one of the causes specified in § 2685 of the Code of Civil Procedure."

Where objections are filed to one or more persons named as executors in a will under § 2636 of the Code, and it appears upon the ensuing examination into the facts by the Surrogate, that the objection is legal and sufficient, then, under § 2688 of the Code already discussed, the person named as executor may still entitle himself to letters under the will by giving a bond. These cases are two,

(1) Where the objection is, that his circumstances are such that they do not afford adequate security to the creditors or the persons interested in the estate for the due administration of the estate.

(2) Where the objection is, that he is not a resident of the State and he is a citizen of the United States. See *People ex rel. Patrick* v. *Fitzgerald*, 73 App. Div. 339, 347.

In this latter case, however, if the person objected to has an office for the regular transaction of his business in person within the State and the will contained an express provision that he may act without giving security, he is entitled to letters without giving a bond. Section 2638 of the Code.

§ 675. **Same subject.**—When proceedings have been initiated to revoke the letters of an executor upon the ground that his circumstances are such that they do not afford adequate security to the creditors or persons interested for the due administration of the estate, the Surrogate may, under § 2687 of the Code, dismiss the proceedings upon the executor giving, within a reasonable time, not to exceed five days, a bond as prescribed in art. 1 of title 3.

§ 676. **When bond required before letters.**—When the occasion exists for requiring a bond of an executor, if the will contains explicit provision for a bond and specifies the amount thereof, the Surrogate is without discretion and the will of the testator controls; the bond in such a case is, as has been stated, to the legatees, and not to the people. If the provision in the will as to a bond is or becomes onerous, while the Surrogate is probably without power to reduce the penalty of the bond except as hereinafter shown, the executor may either renounce, or resign if he has qualified, and the administrator with the will annexed can be required only to give the reasonable bond conditioned upon the amount of the property which constitutes the estate to be by him administered.

But where either of the conditions mentioned in the first section exist or occur, then the bond must be of the character and amount indicated in art. 1 of title 3, that is to say, the bond is to the people and is similar as to its form to that prescribed by § 2664 for an administrator. The language of the Code in this connection is as follows:

> An executor from whom a bond is required as prescribed in this article, or an administrator with the will annexed, must, before letters are issued to him, qualify as prescribed by law with respect to an administrator upon the estate of an intestate and the provisions of article fourth of this title (*which includes section* 2664), with respect to the bond to be given by the administrator of an intestate apply to a bond given pursuant to this section; except that in fixing the penalty thereof, the surrogate must take into consideration the value of the real property or of the proceeds thereof which may come to the hands of the executor or administrator (*with the will annexed*) by virtue of any provision contained in the will. **§ 2645, Code Civil Proc.**

See *Holmes* v. *Cock*, 2 Barb. Ch. 426. It must be borne in mind that the property which by its amount determines the penalty of the bond must be

property, to the actual possession of which the decedent was entitled as the legal owner thereof; thus, where it was alleged that a decedent had divested himself of legal title in his lifetime, the transfer being procured by fraud, it was held by Surrogate Coffin (*Peck* v. *Peck*, 3 Dem. 548, 551), that the Surrogate's Court being unable to try the question involved, the property so transferred, whether by fraud or otherwise during the decedent's lifetime, could not be taken into account in fixing the penalty of the bond.

§ 677. **Reducing penalty of bond.**—Where an executor is required to give security there is no provision in the Code for reducing the penalty of the bond from the full amount required by law as in the case of an administrator even upon consent of the legatees (see *Estate of Weeks*, 1 Civ. Proc. Rep. 164, referring to administrator's bond and equally applicable to executor's bond), except in the case provided for by § 2595, which is as follows:

> *Deposit of securities to reduce penalty of bond.*
>
> In a case where a bond, or new sureties to a bond, may be required by a surrogate from an *executor*, administrator, guardian or other trustee, if the value of the estate or fund is so great, that the surrogate deems it inexpedient to require security in the full amount prescribed by law, he may direct that any securities for the payment of money, belonging to the estate or fund, be deposited with him, to be delivered to the county treasurer, or be deposited, subject to the order of the trustee, countersigned by the surrogate, with a trust company duly authorized by law to receive the same.
>
> After such a deposit has been made, the surrogate may fix the amount of the bond, with respect to the value of the remainder only of the estate or fund.
>
> A security thus deposited shall not be withdrawn from the custody of the county treasurer or trust company, and no person, other than the county treasurer or the proper officer of the trust company, shall receive or collect any of the principal or interest secured thereby, without the special order of the surrogate, entered in the appropriate book.
>
> Such an order can be made in favor of the trustee appointed, only where an additional bond has been given by him, or upon proof that the estate or fund has been so reduced, by payments or otherwise, that the penalty of the bond originally given, will be sufficient in amount, to satisfy the provisions of law relating to the penalty thereof, if the security so withdrawn is also reckoned in the estate or fund. **§ 2595, Code Civil Proc.**

In this connection must be noted Rule 15 of the rules of the Surrogate's Court of the county of New York, which is as follows:

> "The deposit of securities for the payment of money belonging to an estate or fund, as provided in section 2595 of the Code of Civil Procedure, for the purpose of reducing the bond of an executor, administrator or other trustee, shall be made, under the order of the Surrogate, in the United States Trust Company, the New York Life Insurance and Trust Company, Farmers' Loan and Trust Company, the Union Trust Company, the Mercantile Trust Company, the Central Trust Company of New York, State Trust Company, or

Knickerbocker Trust Company, subject to the order of the trustee, to be countersigned by the Surrogate, or the special order of the Surrogate, and not otherwise."

In another connection under § 2678 we have noted that the depositary is *pro hac vice*, an officer of the court, and if it pay out money in disregard of the safeguard of countersignature or special order, it may be joined in any proceeding against the representative and his surety, to establish or defend the legality of the payments. *Matter of Rothschild*, 109 App. Div. 546. The depositary is therefore entitled to compensation for faithful custody. *Matter of Butman*, 130 App. Div. 156.

§ 678. **The procedure: precedents.**

Petition for leave to deposit securities to reduce penalty of bond, under § 2595, C. C. P.

Surrogate's Court,
County of

Title. }

The petition of as executor under the last will and testament of late of deceased, respectfully shows to this court and alleges:

I. That he is (one of) the executors named in the last will and testament of late of deceased, which was duly admitted to probate by the Surrogate of the county of on the day of and letters testamentary upon said will were duly granted to your petitioner, who has since continued to act thereunder.

II. That such proceedings have been had in this court at the instance of (*describe status of applicant*) as that your petitioner has been directed by the Surrogate to give a bond conditioned for the faithful discharge of the trust reposed in your petitioner as such executor, and for his obedience to all lawful decrees and orders of the Surrogate's Court touching the administration of the estate committed to him.

III. Your petitioner further shows, that the estate committed to him under the said last will and testament consists of the following property:

(*a*) Of the personal property of which the decedent died possessed, consisting of stocks, bonds, goods and chattels, enumerated in schedule A hereto annexed and hereby referred to as fully as if incorporated at length herein.

(*b*) Of certain rights or causes of action granted to your petitioner as executor by special provision of law as set forth in schedule B hereto annexed and hereby referred to as fully as if incorporated at length herein.

(*c*) Of real property the value of which or of the proceeds whereof may come to the hands of your petitioner as executor by virtue of provisions contained in the said will is set forth in schedule C hereto annexed and hereby referred to as fully as if incorporated at length herein (*note*).

Note. Where the application for the reduction of the bond is made prior to the issuance of letters, the allegations respecting the reduction of the penalty of the bond need not be set forth in a separate petition but incorporated in the application for letters, and the allegations of ¶ (*c*) may be changed, viz: "which have come or may yet come into the hands," etc.

IV. Your petitioner further shows that as appears from schedule A, hereto annexed, the value of stocks, bonds or other securities for the payment of money to be administered by your petitioner is upwards of thousand dollars, and that it would be onerous for your petitioner to give security in the full amount prescribed by law.

Wherefore, your petitioner prays for a direction of the court that the securities for the payment of money enumerated in schedule A as aforesaid and belonging to the estate or fund, be deposited with a trust company duly authorized by law (*or in N. Y. Co.*, designated by Rule 15 of this court) to receive the same, subject to the order of your petitioner, countersigned by the Surrogate of this county (*or* be deposited with the said Surrogate to be delivered to the county treasurer), and your petitioner further prays that the Surrogate may fix the amount of the bond to be given by your petitioner with respect to the value of the remainder only of the estate to be by him administered amounting to thousand dollars.

(Signature.)

(Verification.)

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Title. }

Order directing deposit of securities, under § 2595, C. C. P.

On reading and filing the petition of as executor under the last will and testament of deceased, verified the day of 19 and the schedules thereto annexed and made a part thereof by reference thereto, whereby it appears that the value of the estate is so great that the Surrogate deems it inexpedient to require security in the full amount prescribed by law, and whereby it further appears that said estate to the amount of about thousand dollars consists of securities for the payment of money,

Now, on motion of of counsel for the said as executor, it is

Ordered, that the following securities be deposited with (*here designate a trust company duly authorized by law to receive the same, noting in New York County the provisions of Rule* 15, *and in the outlying counties noting the provisions of section* 2595 *permitting their deposit with the Surrogate to be delivered to the county treasurer*) duly authorized by law to receive the same subject to the order of the said as executor, etc., duly countersigned by the Surrogate (*or where deposit is made with the Surrogate to be delivered to the*

county treasurer, say, subject to the further order and direction of the Surrogate); and it is

Further Ordered, that the securities thus deposited shall not be withdrawn from the custody of the said trust company (*or* of the county treasurer) and no person other than the said trust company by its proper officer (*or* the county treasurer) shall receive or collect any of the principal or interest secured thereby without the further and special order of the Surrogate (*note*); and it is

Note. If the penalty of the bond is sufficiently large at the time that order is made, it is proper to incorporate a direction whereunder the income of the securities may be collected by the executor or collected by the trust company and paid to the executor without further special direction of the Surrogate.

Further Ordered, that after such deposit has been made said as executor shall execute and file a bond with two or more sureties in the penal sum of thousand dollars (*here specify sum twice the value of the remainder of the estate as shown by the allegations of the petition and schedules after deducting the securities to be deposited*) conditioned that the said executor will faithfully discharge the trust reposed in him as such, and obey all lawful decrees and orders of the Surrogate's Court touching the administration of the estate committed to him.

(Signature.)
Surrogate.

Where such a deposit is made the securities accompanied by a certified copy of the Surrogate's order should be delivered to the trust company and a formal receipt required of such company by the executor, specifying the several securities and acknowledged through the proper officer of the company as a corporate deed is required to be acknowledged. This receipt, with proper copies of the papers in the proceeding, will serve as a formal voucher of the securities therein described until the accounting and decree of distribution.

§ 679. Form of bond.—The following official form of the Westchester Surrogate's Office can be adapted for use by executors, administrators, administrators with the will annexed, administrator *de bonis non*, temporary administrators and ancillary administrators.

KNOW ALL MEN BY THESE PRESENTS, that the

Note. Or, in a proper case, to the legatees and persons interested under the will of deceased.

are held and firmly bound unto (*note*) THE PEOPLE OF THE STATE OF NEW YORK in the sum of dollars, lawful money of the United States of America, to be paid to the said people; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated the day of one thousand nine hundred and

The condition of this obligation is such, that if the above bounden

above to be appointed of the of

late of deceased, shall faithfully execute the trust reposed in as administrat of all and singular the goods, chattels and credits of said deceased, and obey all lawful decrees and orders of the Surrogate's Court of the County of New York touching the administration of the estate committed to then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

I know the within-named sureties to be the identical persons that they represent themselves to be, and to be responsible parties, and I believe them to be worth at least $ each in good property.

_____

_____

_____

Surety's affidavit of sufficiency.

State of New York, } ss.:
County of New York, }

being duly sworn, deposes and says that he is one of the sureties named in the annexed recognizance; that he resides at No. Street, in the ; that he is a holder, and that he owns the following property consisting of and that the same is of the value of not less than dollars, and is subject to no incumbrance except a mortgage of and that there are no unsatisfied judgments or executions against him, and that he is under no recognizance, nor is he upon any bond, undertaking or written obligation whatever; excepting

and that he is worth in good property not less than dollars over and above all debts, liabilities and lawful claims against him, and all liens, incumbrances and lawful claims upon his property.

Sworn to before me, this day of 19 . } Surety.

.....
Notary Public, New York County.

§ 680. **Effect of bond.**—In addition to the express condition of the bond, to wit: that the executor or administrator shall faithfully discharge or execute the trust reposed in him in his representative capacity, and also that he will obey all lawful decrees and orders of the Surrogate's Court which grants him his letters, touching the administration of the estate committed

to him, provision is made for an additional liability extending to the sureties on the bond for money or other personal property received by the representative in any other capacity provided it belongs to the estate upon which he is to administer. This provision is as follows:

> A person to whom letters are issued, is liable for money or other personal property of the estate, which was in his hands, or under his control, when his letters were issued; in whatever capacity it was received by him, or came under his control. Where it was received by him, or came under his control, by virtue of letters previously issued to him, in the same or another capacity, an action to recover the money, or damages for failure to deliver the property, may be maintained upon both official bonds; but, as between the sureties upon the official bond given upon the prior letters, and those upon the official bond given upon the subsequent letters, the latter are liable over to the former. **§ 2596, Code Civil Proc.**

This provision, however, does not relate to the acts or defaults of an executor, as trustee. The sureties on an executor's bond are not bound thereby by any liability for his acts or defaults as trustee under the will (*Cluff* v. *Day*, 14 N. Y. St. Rep. 729), but the surety's liability continues until the bond is canceled or he is otherwise discharged. The death of the surety does not discharge the bond nor does it necessarily serve as an occasion for the filing of a new bond under § 2597, which provides, that the Surrogate may require a new bond to be given by an executor when it appears that a surety is insufficient, or that the bond is inadequate in amount, or that a surety has removed or is about to remove from the State. In *Stephens* v. *Stephens*, 2 Dem. 469, it was claimed that death should be deemed a removal from the State within the meaning of this section; but Surrogate Rollins held, "that the death of a surety does not relieve his estate of liability upon the bond even for the principal's after management of his trust" (citing *Mundorff* v. *Wangler*, 44 N. Y. Super. Ct. 495, and other cases), while the sureties are liable for all moneys or property in the hands of the executor or under his control. The courts have interpreted this provision: For example, it was sought to hold the sureties of an executor liable for the amount of a debt due by the executor to the estate of which he was executor and never paid by him personally to himself as executor by reason of his continuing insolvency. The Court of Appeals (*Baucus* v. *Stover*, 89 N. Y. 1, 4), while recognizing the provision of the Revised Statutes which abrogated the common-law rule, that the appointment of a debtor by his creditor as his executor extinguished the debt, and required that such executor's debt must be regarded as money in his hands for the purpose of administration, nevertheless held, that such debt would not for all purposes stand on the same footing as if he had actually received so much money. For example, if he was unable to pay the debt he could not be punished for embezzling the money, nor for contempt in not paying the money in pursuance of some direction of the Surrogate, as he could undoubtedly be, if the money had been received from some other debtor; in this case the court queried whether the sureties could be held for such a

debt as for so much money actually received by the executor, but the exact question was not involved in that case. It came up later in the same case (*sub nomine, Baucus* v. *Barr*, 45 Hun, 582, affirmed by the Court of Appeals on opinion of the general and special term), and it was held that an executors' sureties did not by their bond guarantee the payment of the executor's debt to the estate, or in other words "did not covenant to augment the testator's estate out of their own;" and the mere fact that the executor had been directed to pay this debt by the Surrogate, and that the sureties had bound themselves for his obedience to all orders of the Surrogate touching the administration of the estate committed to the executor, related only to the ordinary obligation to diligent, faithful, honest action touching the administration of the estate; and the debt of the insolvent executor being of no value did not enhance the estate in fact, nor constitute any valuable or available part of the estate committed to the executor. *Ibid.*, at p. 587. But where it is expressly found that the administrator could pay but did not, the sureties may be held. See *Keegan* v. *Smith*, 60 App. Div. 168 rev'g 33 Misc. 74, aff'g 31 Misc. 651. The recitals in the Surrogate's decree are *prima facie* conclusive on the sureties. They must set up and affirmatively prove any defense. See also *Matter of Strong*, 111 App. Div. 281.

See *Matter of Ablowrich*, 118 App. Div. 626, for distinction between status of a debtor "named executor in a will," under § 2714, and the common-law liability of a debtor appointed administrator of his creditor's estate.

Where, however, an executor gives a bond in pursuance of a Surrogate's order upon one of the conditions arising already referred to, such as his removal from the State, it has been held that his sureties cannot limit their liability to deficiencies or defalcations occurring after the giving of the bond. *Scofield* v. *Churchill*, 72 N. Y. 565. And the Court of Appeals distinguished the bond given in such a case from the bond executed for the faithful performance by a public officer of the duties of his office, the sureties upon which bond are only liable for defaults committed after the commencement of the term of office, for which they become responsible, and not for defaults committed by the principal for a prior term of office, citing *Bissell* v. *Saxton*, 66 N. Y. 55. But in the case of a bond required from an executor who has previously qualified and been acting, either because of alleged incompetency or where his circumstances are so precarious as not to afford adequate security for the administration of the estate, or where he has removed or is about to remove from the State, the object of the statute is, to furnish protection against any improper use of the fund which has transpired as well as any future misconduct or default of the executor. *Scofield* v. *Churchill*, *supra*, at p. 568. See also *Baggott* v. *Boulger*, 2 Duer, 160; *Gottsberger* v. *Taylor*, 19 N. Y. 150. . In the case just referred to the default of the executor was in not paying over certain moneys adjudged to be in his hands upon the accounting, which moneys were lost to the estate by the defalcation of the executor prior to the time when the bond sued on

had been filed, which was in certain proceedings to remove the executor in default of his filing security, and the court declared that the failure or neglect of the executor to obey the lawful order of the Surrogate touching the administration of the estate may make fixed and operative the obligation of the sureties, and that the decree of the Surrogate was conclusive upon the sureties and could not be impeached upon collateral proceedings; "the decree is final as to the obligation of the executor to pay and the sureties cannot go back of such judgment." *Ibid.*, p. 570, citing *Thayer* v. *Clark*, 4 Abb. (Ct. of App.) 391; *People* v. *Downing*, 4 Sandf. 189; *Baggott* v. *Boulger*, 2 Duer, 160. Under the rule established in this case and under § 2596, where one receives money belonging to an estate either as agent for a prior representative or in a temporary representative capacity and subsequently becomes himself administrator with the will annexed or sustains any other permanent representative relation to the estate, his sureties upon the bond furnished by him in his latter capacity are liable for his misuse or misappropriation of the funds theretofore received by him. See *Gottsberger* v. *Taylor*, 19 N. Y. 150. So a guardian's surety is liable for his misappropriation of moneys of the infant left in his hands when he is appointed. *Fardette* v. *U. S. F. & G. Co.*, 86 App. Div. 50.

§ 681. **Compelling executor to give bond.**—When proceedings are pending under which an executor may be required to give a bond by way of adequate security to the persons interested in the estate for the proper administration of his office, it will be noted, first, that the proceedings may be initiated by any person interested. This interest must be a real interest within the rules already stated in another connection, but the Surrogate acquires jurisdiction from a sworn allegation of interest to inquire into the facts and determine whether the circumstances are such as to require the relief sought. See *Cotterell* v. *Brock*, 1 Bradf. 148. It must be noted, secondly, that the allegations of lack of responsibility or of impecunious circumstances such as to imperil the estate, must be not only *prima facie* sufficient but must be affirmatively proved; the executor is not required to prove his responsibility merely on the filing of these allegations of irresponsibility. *Cotterell* v. *Brock, supra; Colegrove* v. *Horton*, 11 Paige, 261; *Freeman* v. *Kellogg*, 4 Redf. 218, 226. Where there are both adults and infants interested, there can be no doubt as to the right of the adult person interested to consent that executors, although insolvent, continue to administer without giving bond; but as to infants, their guardians, whether special or general, are without power to enter into such a consent; and if the condition of the executors is such as is contemplated by the decisions defining "improvidence" and "precarious circumstances" it is the duty of a guardian to make application to compel the executors to file security. In a case where there were both adults and infants, Surrogate Calvin held, that he could, where the adults did not insist upon a bond, restrict the penalty of the bond to cover the shares of the infants. *Freeman* v. *Kellogg, supra.*

Where a Surrogate compels an executor whose circumstances are shown

to be "precarious" within the meaning of the statute to give a bond, and it appears that there is no personal property left unadministered, but only real property of which he is receiving the rents, or the proceeds of which may come into his hands, the Surrogate is not bound by the same rule as in regard to personal property. Before § 2645 of the Code was enacted the chancellor had held (*Holmes* v. *Cock*, 2 Barb. Ch. 426), that while the statute fixed the penalty of the bond at not less than twice the value of the personal estate, it did not apply to real estate in terms, and if the amount of the real estate was very large, security to a limited amount beyond the fund to be administered should be deemed sufficient. And so Surrogate Coffin (*Matter of Hart*, 2 Redf. 156), where the annual rental value of the property in the hands of an executor whose circumstances were claimed to be so precarious as not to afford adequate security for his due administration of the estate, was about $30,000, held that a bond in the penalty of $50,000, was amply sufficient.

It will be noted that the cases where an executor is compelled to give a bond subsequent to his appointment, arise under subd. 5 of § 2685 of the Code of Civil Procedure, and while the proceeding is one for the revocation of his letters, on the ground that his circumstances are such that they do not afford adequate security to the creditors or persons interested for the due administration of the estate, and the relief asked in the petition (see form under § 17 of ch. 9), is the revocation of letters testamentary or of administration, the giving of the bond is the act of the executor respondent, and is merely a means by which he can avoid the necessity of the revocation of his letters. Or, a Surrogate may, in the proper case, direct the giving of a bond as the alternative of removal. *Matter of Wischmann*, 80 App. Div. 520.

§ 682. **Right of executor to indemnify his sureties.**—Where an executor furnishes individuals as sureties upon his bond, while he has undoubtedly a right to make an individual agreement to indemnify them against their possible liability, he has no right to transfer or pledge to them the assets of the estate for the purpose of such indemnity. It was held in an early case (*Sutherland* v. *Brush*, 7 Johns. Ch. 17), that where an executor transferred to his surety by way of indemnifying him certain assets of the estate, there being a good consideration, the surety took good title. And in a later case (*Rogers* v. *Squires*, 26 Hun, 388), it was held that where an administrator transferred certain promissory notes belonging to the estate to his sureties to secure them for their liability on the bond they had signed for him as administrator, the sureties became vested with a sufficient interest in the notes to enable them to maintain an action against the maker; but in that case the court remarked that the administrator had no legal right to divert these notes from their purpose as assets to be collected and disposed of according to law by any transfer of the same for his own benefit such as to indemnify his friends. And so it has since been held that such an attempted transfer is an illegal act and sufficient to justify the revocation of letters testamentary. See *Fleet* v. *Simmons*, 3 Dem. 542. It has been held by the

Court of Appeals, that a parol promise by an executor or administrator to a person whom he persuades to go upon his bond to indemnify his sureties against the consequences of the act, being a promise the sole object of which is to enable the promisor to accomplish a purpose of his own, is not within the statute of frauds, and that the surety could enforce the promise against his principal. *Tighe* v. *Morrison*, 116 N. Y. 263. This does not affect the right of any principal to make the agreement allowed by § 813 with his sureties as to deposit of funds or securities with a trust company or safe deposit company.

The customary method is for the surety company (which is now the equivalent by law of "two good and sufficient sureties") to exact as a safeguard that its countersignature be required on every check or draft upon the estate funds. But the surety's consent or refusal cannot interfere with the principal's compliance with the Surrogate's order to pay. *Matter of Chesterman*, 75 App. Div. 573.

§ 683. **Bonds of administrators.**—In contrast with executors, all administrators must give bonds. A Surrogate is without power to dispense with the bond required of an administrator. The form of the bond of an administrator as required by § 2664, is a joint and several bond executed by the administrator and two or more sureties in a penalty fixed by the Surrogate not less than twice the value of the personal property of which the decedent died possessed and of the probable amount to be recovered by reason of any right of action granted to an executor or administrator by special provision of law. This bond must be conditioned that the administrator will faithfully discharge the trust reposed in him as such, and obey all lawful decrees and orders of the Surrogate's Court touching the administration of the estate committed to him. § 2664, Code Civ. Proc. Where the offices of county judge and Surrogate are held by the same person, the condition in the bond that the administrator will obey all lawful decrees and orders of the county judge, is a substantial compliance with this section. *Farley* v. *McConnell*, 52 N. Y. 630, aff'g 7 Lansing, 428. If the bond incorrectly recites the Surrogate's official title it is not vitiated, but is merely irregular. The sureties' liability remains. *Gerould* v. *Wilson*, 81 N. Y. 573.

The sum to be fixed as the amount of the penalty, must be ascertained by the Surrogate. This inquiry he may conduct as he thinks proper. See § 2664, Code Civ. Proc.

Where, by special provision of law, the expectant administrator is to have a right of action and the probable amount to be recovered is such, that it appears impracticable for the administrator to give a bond sufficient to cover it, the Surrogate is given power by § 2664 to accept modified security. In such a case, however, the letters issued, in so far as the right of action is concerned, must limit the administrator to the prosecution of the action, restraining him, however, from compromising the action or enforcing any judgment recovered therein "until the further order of the Surrogate on additional, further satisfactory security." With regard to this

provision as to accepting modified security, it must be noted that the right of action contemplated is specified as one granted by special provision of law; this does not, therefore, include the ordinary rights of action which an administrator has upon debts due to his decedent. *Estate of Mallon*, 13 Civ. Proc. Rep. 205.

§ 684. **Same subject.**—Since 1882 Surrogates have been empowered upon the consent of all of the next of kin of the intestate to accept a modified security in a further case under § 2664, the latter paragraph of which reads as follows:

> In cases where all the next of kin to the intestate consent, the penalty of the bond need not exceed double the amount of the claims of the creditors, against the estate, presented to the surrogate, pursuant to a notice to be published twice a week for four weeks in the official state paper, and in two newspapers published in the city of New York, and once a week for four weeks in two newspapers published in the county where the intestate usually resided, and in the county where he died, reciting an intention to apply for letters under this provision, and notifying creditors to present their claims to the surrogate on or before a day to be fixed in such notice, which shall be at least thirty days after the first publication thereof; but no bond so given shall be for less than five thousand dollars; and such bond may be increased by order of the surrogate for cause shown.

The consent required under this section should be in writing and duly acknowledged and should be filed with the application for letters. While this application is pending it is provided that no temporary administrator shall be appointed except on the petition of all the next of kin of the intestate. See § 2664. It was held at first (*Estate of Le Roy*, 16 Civ. Proc. Rep. 343) that this provision did not extend to administrators with the will annexed; but Surrogate Bergen (*Curtis* v. *Williams*, 3 Dem. 63, 67) held that an administrator with the will annexed could avail himself of the benefit of this section. This undoubtedly stated the correct rule, as § 2645, which requires an administrator with the will annexed to qualify as prescribed by law "with respect to an administrator upon the estate of an intestate," distinctly provides that the provisions of art. 4 of title 3, which includes § 2664, apply to a bond given pursuant to § 2645; and it has been held that these two sections must be read together and construed as though they had both been adopted at the same time. See *Curtis* v. *Williams*, *supra; Haight* v. *Brisbin*, 7 Civ. Proc. Rep. 152.

§ 685. **Temporary administrator.**—Section 2670 requires a temporary administrator to qualify just as if he were administrator in chief. The bond which he is required to give contains the recital, that the Surrogate is about to issue letters of temporary administration. *Dayton* v. *Johnson*, 69 N. Y. 419, 424. And the sureties upon the bond become liable for the defaults and misconduct of the administrator for moneys belonging to the estate and received by him before his appointment. *Gottsberger* v. *Taylor*, 19 N. Y. 150. See also § 2599, Code Civ. Proc.

§ 686. **Bond of administrator with will annexed.**—Section 2645,

which has been already quoted, must be construed with § 2664 (former § 2667) which requires an administrator with the will annexed to give a bond such as an administrator in chief is required to give. It has been noted in another connection, that modified security may be accepted on consent of all the next of kin. It was suggested by Surrogate Bergen, while holding that under § 2664, then known as § 2667, he had power to accept modified security upon consent of all the next of kin, that it might be well to amend the section by requiring the consent of all the legatees where an administrator with the will annexed is concerned. See *Curtis* v. *Williams*, 3 Dem. 63, reported *sub nomine, Estate of Allen*, 7 Civ. Proc. Rep. 157. This amendment, however, was never made; and it has in fact been held that the amount of the bond cannot be reduced by consent of all the legatees. See *Estate of Weeks*, 1 Civ. Proc. Rep. 164. It must also be borne in mind, that the provisions of the Code as to the deposit of securities, where the estate is very large, for the purpose of reducing the penalty of the bond, and which provisions have been already discussed, apply to an administrator with the will annexed. See § 2595, Code Civ. Proc.

Where the administrator with the will annexed is also an administrator *de bonis non*, the intent of the Code that he is required to give a bond in at least double the amount of the personal property of which the decedent died possessed, coupled with the provision in § 2645, that the Surrogate must take into consideration the value of the real property or the proceeds thereof which may come into his hands by virtue of any provision contained in the will, must be construed in connection with the intent of the legislature in regard to the bond required of the administrator of an estate partially unadministered. Thus Surrogate Livingston remarked (*Sutton* v. *Weeks*, 5 Redf. 353): "It could not have been the intention of the legislature to compel an administrator with the will annexed to give security for property which had been administered by his predecessor and never could come into his possession and no such construction of § 2645 would be warranted. The provisions of § 2667" (now § 2664) "in respect to the bond to be given by an administrator, must be applied to the bond required from an administrator with the will annexed, in conformity with and not contrary to, the manifest intention of the legislature; and this construction requires only that an administrator with the will annexed, like an administrator, shall give a bond in double the value of whatever property may come into his possession to be administered." This rule embodies § 2693 as amended in 1889, which relates to the appointment of successors where all executors to whom letters have been issued die, become incapable, or have their letters revoked, it being by said section provided that the same security shall be required of the successors as in a case of intestacy, "except that the Surrogate may in his discretion, in case where the estate has been partially administered upon by the former representative or representatives fix as the penalty of the bond to be given by such successor or successors, a sum not less than twice the value of the estate remaining unadministered."

In a case where letters of administration with the will annexed were to be

issued, Surrogate Rollins in fixing the penalty of the bond, noted that before probate of the will, letters of administration as in case of intestacy had been issued whereunder the estate had been fully administered before the letters were revoked by reason of the probate of the will. One of the legatees under the will not having received her legacy, it was held that the amount of that legacy should determine the penalty of the bond, which should be double such amount, inasmuch as the testatrix with the will annexed had a right of action against the former administrator for the amount of this legacy unpaid by reason of his distribution of the estate among the next of kin prior to the probate of the will. *Matter of Nesmith*, 6 Dem. 333.

§ 687. **Bond of administrator de bonis non.**—The same rule as to the penalty of the bond obtains in the case of an administrator of a partially administered estate. The Surrogate has discretionary power to fix the penalty at "a sum not less than twice the value of the assets of the estate remaining unadministered." See § 2693, Code Civ. Proc.

§ 688. **Bond of ancillary administrator.**—In the chapter on Letters of Ancillary Administration, § 2699 of the Code has been quoted (*q. v.*). Under this section the Surrogate is entitled to require a bond as in the case of an administrator upon the estate of an intestate, but has the discretionary power to reduce the penalty of the bond to "such a sum not exceeding twice the amount which appears to be due from the decedent to residents of the State as will in the Surrogate's opinion effectually secure the payment of those debts; or the sums which the resident creditors will be entitled to receive from the persons to whom the letters are issued upon an accounting and distribution either within the State or within the jurisdiction where the principal letters were issued." Where the Surrogate exercises this discretionary power he may properly ignore disputed claims when it is not shown that they are probably enforceable. *Matter of Musgrave*, 5 Dem. 427, Rollins, Surr. Under § 2699, the Surrogate has power to require a bond in double the amount of the personal property in this State. It has been intimated, that he ought to fix it at that sum where it appears that under the original letters in the foreign State the penalty of the bond given was determined by the value of the property in that foreign State. See *Matter of Prout*, 128 N. Y. 70. As a rule, the purpose of ancillary administration being to protect local creditors, the Surrogate is perfectly justified in fixing the penalty with a view to the decedent's local debts. See *Matter of McEvoy*, 3 Law Bulletin, 31. But where the assets in this State are less than the amount of the indebtedness and the ancillary administrators give bond upon receiving their letters in double the amount of the local assets they cannot subsequently be required to give increased security upon allegations, that there are debts due from the decedent to local creditors largely in excess of the amount of the local assets. See *Govan's Estate*, 2 Misc. 291. The purpose of the statute was not to enable the Surrogate to require increased security but modified security.

§ 689. **Bond of testamentary trustee.**—Although ordinarily a testamen-

tary trustee stands upon the same footing as an executor by reason of the special confidence reposed in him by the testator, yet the court provides for the furnishing of security by a testamentary trustee in certain cases. These provisions are as follows:

Petition for security from testamentary trustee.

Any person, beneficially interested in the execution of the trust, may present to the surrogate's court a written petition, duly verified, setting forth, either upon his knowledge, or upon his information and belief, any fact, respecting a testamentary trustee, the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for such a person to give security, in order to entitle himself to letters; and praying for a decree, directing the testamentary trustee to give security for the performance of his trust; and that he may be cited to show cause, why such a decree should not be made. Upon the presentation of such a petition, the surrogate must issue a citation accordingly. Upon the return of the citation, a decree, requiring the testamentary trustee to give such security, may be made, in a case where a person so named as executor can entitle himself to letters testamentary, only by giving a bond; but not otherwise. **§ 2815, Code Civil Proc.**

Security; how given.

The security, given as prescribed in the last section, must be a bond to the same effect, and in the same form, as an executor's bond. Each provision of this chapter, applicable to the bond of an executor, or to the rights, duties, and liabilities of the parties thereto, or any of them, including the release of the sureties, and the giving of a new bond, apply to the bond so given, and to the parties thereto. **§ 2816, Code Civil Proc.**

Section 2815 has been held to be limited to the original testamentary trustee named in the will (*Matter of Whitehead*, 3 Dem. 227), and this has been so held notwithstanding the definition in § 2514 of a testamentary trustee as including every person except an executor, an administrator with the will annexed, or a guardian who is designated by a will, or *by any competent authority* to execute a trust created by a will. Surrogate Rollins so held, calling attention to the provision of § 2514, that the rule of interpretation therein set forth should not be observed where a contrary intent is expressly declared in the provision to be construed or plainly apparent from the context thereof; and stating that from a careful examination of the context in § 2815, it was to his mind plainly apparent that the section contemplated only a trustee named in the will, and he adds: "The Code says in effect, considering its various provisions as a whole, that persons named as executors in a will are entitled to letters testamentary without giving bond, unless when their right thereto is challenged it appears that they reside out of the State, or that their circumstances do not afford adequate security for their due administration of the estate (citing §§ 2685, 2686, 2687), and it substantially says also, that persons named as trustees in a will are entitled to exercise the functions of their office without security subject only to the same limitations that are established in the case of executors" (citing §§ 2815, 2816, 2817), and he concludes, "as to the succes-

sors of such trustees I am convinced that the Surrogate may in all cases lawfully require security at the time of their appointment."

But where the testator's widow who was given by the will power to appoint a trustee or trustees in the place of such as should die, or be unwilling or incompetent to execute the trust designated a trustee, to fill a vacancy, Surrogate Coffin held that this power was independent of the interference of the court, and that he had no power to exact a bond from him upon his entering upon the discharge of his duties; but should he accept the appointment and enter upon the discharge of his duty and subsequently an application be made under § 2815 of the Code, and one of the cases therein contemplated be shown to exist, a bond could properly be required. *Rogers* v. *Rogers*, 4 Redf. 521, 523.

§ 690. **Same subject.**—It will be noted that the provisions of § 2815 make generally applicable the discussion already had with regard to the furnishing of bonds by executors; but it has been held (*Kelsey* v. *Van Camp*, 3 Dem. 530) that the Surrogate's power to require this security is not limited to a proceeding initiated by a person beneficially interested in the execution of the trust proceeding under § 2815, but may be exercised in any proper case where the testamentary trustee is the petitioner, if the circumstances are called to the Surrogate's notice by objections duly filed. Where there are several testamentary trustees acting together, each one stands upon his individual footing so far as § 2815 is concerned; consequently such a trustee cannot obviate the necessity of his giving a bond by establishing that his cotrustee is solvent and responsible. *Matter of Sears*, 5 Dem. 497, Rollins, Surr., applying *McGregor* v. *Buell*, 24 N. Y. 166. In *Matter of Weil*, 49 App. Div. 52, application was made under § 2815 to compel a testamentary trustee to give security on the ground that his circumstances were such as not to afford adequate security to the beneficiaries for the due administration of the estate. The application was denied on proof that the incumbent was worth $100,000 in excess of his liabilities and had given up business and devoted himself exclusively to the management of the trust. The question for the court in such a case is the fitness and capacity of the trustee. His circumstances and not those created by the scheme of the will are to determine whether he must give security. *Ibid.*

§ 691. **Section 2816.**—Under § 2816 it is unnecessary to add anything further than to say, that the provision of § 2595 as to a deposit of security to reduce the penalty of a bond is applicable. See *Palmer* v. *Dunham*, 24 N. Y. St. Rep. 997.

§ 692. **Bond by guardian.**—Under the power which the Surrogate's Court has to appoint guardians of infants, full power is given by art. 1 of title 7 of ch. 18, to require and fix the amount of security necessary to protect the infants' interests.

The sections of the Code (see §§ 2530 *et seq.*) as to appointment of a special guardian by a Surrogate, contain no provision as to the filing of a bond by a guardian *ad litem*. The affidavit which the guardian is required to furnish upon his appointment, furnishes the safeguard by which the Surrogate

is enabled to ascertain that the guardian is able to respond to the infant in damages in the event of any default or mistake on his part, and the right to hold such a guardian responsible is undoubted. See *Spelman* v. *Terry*, 74 N. Y. 448. In this respect the practice in Surrogates' Courts differs from those in other courts of record where it is provided by the Code (see §§ 474 and 475), that such guardian may not receive money or property of the infant other than costs or expenses allowed by the court to the guardian, until he has given security to be approved by a judge of the court or a county judge to account for, and apply the same, under the direction of the court. The character of this bond is fixed by § 475. See also Hun's Rules, 41, 54, and § 476. But where a guardian of the person or of the property of an infant is appointed, the case is different. A guardian of property of an infant before he can take his letters of guardianship must execute a bond, the requirements as to which are defined by § 2830 of the Code. which is as follows:

Qualification of guardian of property.

Before letters of guardianship of an infant's property are issued by the surrogate's court, the person appointed must, besides taking an official oath, as prescribed by law, execute to the infant, and file with the surrogate, his bond with at least two sureties, in a penalty fixed by the surrogate, not less than twice the value of the personal property, and of the rents and profits of the real property; conditioned that the guardian will, in all things, faithfully discharge the trust reposed in him, and obey all lawful directions of the surrogate touching the trust, and that he will, in all respects, render a just and true account of all money and other property received by him, and of the application thereof, and of his guardianship, whenever he is required so to do, by a court of competent jurisdiction. But the Surrogate may, in his discretion, limit the amount of the bond to not less than twice the value of the personal property, and of the rents and profits of the real property for the term of three years. But in case where it appears to be impracticable to give a bond sufficient to cover the whole amount of the infant's personal property, the surrogate may, in his discretion, accept security, to be approved by the surrogate, not less than twice the amount of the particular portion of the infant's property which the guardian will be authorized under the letters to receive; and issue letters thereon limited to the receiving and administering only such personal property for which double the security has been given, and restraining the guardian from receiving any other personal property of the infant until the further order of the surrogate on additional further satisfactory security. **§ 2830, Code Civil Proc.**

§ 693. **Same subject.**

Inquiry as to value of property.

Where a general guardian of the property of an infant is appointed, as prescribed in this article, the surrogate must inquire into the infant's circumstances, and must ascertain, as nearly as practicable, the value of his personal property, and of the rents and profits of his real property. **§ 2829, Code Civil Proc.**

The bond of the guardian must be filed in the county of the Surrogate

having jurisdiction to appoint him. If, however, as such guardian, he applies for moneys belonging to his infant in a county other than that over which the Surrogate appointing him has jurisdiction, the Surrogate of the county in which he makes application will require an additional bond in a penalty dependent upon the amount of the legacy or other moneys which he asks to have paid to him and conditioned for the faithful application thereof. See *Rieck* v. *Fish*, 1 Dem. 75, where Surrogate Rollins stated that this was necessary under 2 R. S., ch. 6, title 3, § 47, the provisions of which were neither altered nor superseded by the Code of Civil Procedure. It is hardly necessary to add that the provision in all these cases as to a bond with two sureties is fully met by a bond of a duly authorized and approved surety or fidelity company. See § 811, Code Civ. Proc.; *Travis* v. *Travis*, 48 Hun, 343.

Prior to the enactment of § 2596 of the Code, which makes the sureties of a person to whom letters are issued liable for money or other personal property in his hands or under his control, when his letters were issued in whatever capacity it was received by him or came under his control, it was held that a surety for a general guardian was not liable for money received by him, as a special guardian of the same infant. See *Muir* v. *Wilson*, 1 Hopkins' Ch. 512. It will be recalled, that under § 2596, it has also been held that the sureties on a bond of an executor cannot be held accountable for his acts or defaults as trustee under the same will. It would appear, however, that § 2596 would cover the case where one takes letters of guardianship of the property of an infant having already in his hands or under his control, in the language of § 2596, money or other personal property of the estate at the time his letters were issued. The words "in whatever capacity it was received by him or came under his control" are explicit. See *Fardette* v. *U. S. F. & G. Co.*, 86 App. Div. 50. So, in *Rouse* v. *Payne*, 120 App. Div. 667, the sureties were held liable for moneys which their principal, a general guardian, failed as administratrix to pay over to her account as guardian, citing *Matter of Noll*, 10 App. Div. 356, aff'd 154 N. Y. 765.

Where a surety had gone upon the bond of two joint guardians, it was held that upon the death of one of the guardians the surety continued to be liable for the acts of the survivor. *People* v. *Byron*, 3 Johns. Cases, 53. The sureties on the bond of a general guardian are liable for his use of money which came into his hands from the sale of his infant's realty, if these proceeds are turned over to him for the support and maintenance of the infant. *Allen* v. *Kelly*, 171 N. Y. 1, 7, rev'g 66 App. Div. 623, and 30 Misc. 377. The money was turned over to him without additional security which the court held was proper under §§ 2348, 2360, 2361 of the Code and General Rules of Practice, 59. The sale was made on the report of a referee that the proceeds of such sale were absolutely necessary for the support and maintenance of the ward.

§ 694. **Guardian of the person of the infant.**—Where the guardian is guardian of the *property*, the Surrogate *must* exact a bond; but where he is

guardian of the *person* of the infant, the Surrogate *has discretion* whether or not to exact a bond, and also has discretion as to the penalty of the bond and whether there shall be sureties.

Qualification of guardian of person.

Before letters of guardianship of an infant's person are issued by the surrogate's court, the person appointed must take the official oath as prescribed by law. The surrogate may also require him to execute to the infant a bond, in a penalty fixed by the surrogate, and with or without sureties, as to the surrogate seems proper; conditioned, that the guardian will in all things faithfully discharge the trust reposed in him, and duly account for all money or other property which may come to his hands, as directed by the surrogate. **§ 2831, Code Civil Proc.**

§ 695. **Bond of testamentary guardian.**—The Surrogate's Court has power to exact a bond from the guardian appointed by will or deed under §§ 2853 and 2854, which are as follows:

When security required from guardian appointed by will or deed.

Where a guardian of an infant's person or property has been appointed by will or by deed, the infant, or any relative or other person in his behalf, may present, to the surrogate's court in which the will was admitted to probate; or to the surrogate's court of the county in which the deed was recorded; a written petition, duly verified, setting forth, either upon his knowledge, or upon his information and belief, any fact, respecting the guardian, the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for such a person to give a bond, in order to entitle himself to letters; and praying for a decree, requiring the guardian to give security for the performance of his trust; and that he may be cited to show cause why such a decree should not be made. Upon the presentation of such a petition, and proof of the facts therein alleged, to the satisfaction of the surrogate, he must issue a citation accordingly. Upon the return of the citation, a decree requiring the guardian to give security may be made, in the discretion of the surrogate, in a case where a person so named as executor, can entitle himself to letters testamentary only by giving a bond; but not otherwise. **§ 2853, Code Civil Proc.**

What security to be given.

The security to be given, as prescribed in the last two sections, must be a bond to the same effect, and in the same form, as the bond of a general guardian, appointed by the surrogate's court. Each provision of this chapter, applicable to the bond of such a guardian, and to the rights, duties and liabilities of the parties thereto, or any of them, including the release of the sureties, and the giving of a new bond, applies to the bond so given, and the parties thereto. **§ 2854, Code Civil Proc.**

It will be noted under these sections, that just as the office of testamentary trustee and the executor are distinct whether they are held by the same person or not, so the office of executor and testamentary guardian are distinct and the immunity from furnishing a bond which an executor ordinarily enjoys does not extend to the individual acting as testamentary guardian. Consequently, where as executor he transfers

moneys or property to himself as testamentary guardian, he may be required to give the usual security in the latter capacity before receiving the fund. See *Matter of Bettels*, 4 N. Y. Supp. 393, Ransom, Surr.

§ 696. **General regulations respecting bonds and undertakings.**—Section 810 of the Code of Civil Procedure requires all bonds given in special proceedings to be acknowledged, or proved and certified, in like manner as a deed to be recorded. The further provisions of art. 5 of ch. 8, governing bonds in general, are as follows:

> Where a provision of this act requires a bond or undertaking, with sureties, to be given by, or in behalf of a party or other person, he need not join with the sureties in the execution thereof, unless the provision requires him to execute the same; and the execution thereof by one surety is sufficient, although the word "sureties" is used, unless the provision expressly requires two or more sureties; and the execution or any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties; and such company, if excepted to, shall justify through its officers or attorney in the manner required by law of fidelity and surety companies. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking. **§ 811, Code Civil Proc.**
>
> A bond or undertaking, executed by a surety or sureties, as prescribed in this act, must, where two or more persons execute it, be joint and several in form; and, except when executed by a fidelity or surety company, or when otherwise expressly prescribed by law, it must be accompanied with the affidavit of each surety, subjoined thereto, to the effect that he is a resident of and a householder or a freeholder within the state, and is worth the penalty of the bond, or twice the sum specified in the undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution. A bond or undertaking given by a party without a surety must be accompanied by his affidavit to the same effect. The bond or undertaking except as otherwise expressly prescribed by law, must be approved by the court before which the proceeding is taken, or a judge thereof, or the judge before whom the proceeding is taken. The approval must be indorsed upon the bond or undertaking. The surety or sureties or the representatives of any surety or sureties upon the bond heretofore or hereafter executed of any trustee, committee, guardian, assignee, receiver, executor, administrator or other fiduciary, shall be entitled as a matter of right to be, and shall be, discharged from liability as hereinafter provided, and to that end may on notice to the principal named in such bond apply to the court that accepted such bond or to the court of which the judge that accepted such bond was a member, or to any judge thereof, praying to be relieved from liability as such surety or sureties for the act or omission of such principal occurring after the date of the order relieving such surety or sureties hereinafter provided for and that such principal be required to account and give new sureties. Such notice of such application may be served on said principal personally, within or without the state,

or, not less than five days prior to the date on which such application is to be made, unless it satisfactorily appears to the court, or a judge thereof, that personal notice cannot be given with due diligence within the state, in which case notice may be given in such manner as the court or a judge thereof directs. Pending the hearing of such application the court or judge may restrain such principal from acting, except to preserve the trust estate until further order. Upon the hearing of such application, if the principal does not file a new bond in the usual form to the satisfaction of the court or judge the court or judge must make an order requiring the principal to file a new bond within such reasonable time, not exceeding five days, as the court, or judge in such order fixes. If such new bond shall be filed upon such hearing or within the time fixed by said order the court or judge must thereupon make a decree or order requiring the principal to account for all his acts and proceedings to and including the date of such order and to file such account within a time fixed, not exceeding twenty days, and releasing the surety or sureties making such application from liability upon the bond for any act or default of the principal subsequent to the date of such decree or order. If the principal fails so to file such new bond within the time specified, a decree must be made revoking the appointment of such principal or removing him and requiring him to so account, and file such account within twenty days.

If the principal fail to file his account as in this section provided, such surety or sureties, or representatives thereof, may make and file such account with like force and effect as though made and filed by such principal, and upon the settlement thereof credit shall be given for all commissions, costs, disbursements, and allowances to which the principal would be entitled were he accounting, and allowance shall be made to such surety or sureties or representative for the expense incurred in so filing such account and procuring the settlement thereof. And after the filing of an account as required, or permitted, in this section, the court or judge must upon the petition of the principal or surety or sureties or the representatives of any such surety or sureties, issue an order requiring all persons interested in the estate or trust funds to attend a settlement of such account at a time and place therein specified and upon the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all further liability and the court or judge shall settle, determine and enforce the rights and liabilities of all parties to the proceedings in like manner and to the same extent as in actions for an accounting in the supreme court. And upon demand made in writing by the principal, such surety or sureties, or representatives thereof, shall return any compensation that has been paid for the unexpired portion of such suretyship. **§ 812, Code Civil Proc.**

But where the penalty of the bond, or twice the sum specified in the undertaking is five thousand dollars or upwards, the court or judge may, in its or his discretion, allow the sum in which a surety is required to justify to be made up by the justification of two or more sureties each in a smaller sum. But in that case a surety cannot justify in a sum less than five thousand dollars, and when two or more sureties are required by law to justify, the same person cannot so contribute to make up the sum for more than one of them. It shall be lawful for any party of whom a bond or undertaking is required to agree with his sureties for the deposit of any or all moneys for which such sureties are or may be held responsible with a trust company authorized by

law to receive deposits, if such deposit is otherwise proper, and for the safe-keeping of any or all other depositable assets for which such sureties may be held responsible, with a safe-deposit company, authorized by law to do business as such, in such a manner as to prevent the withdrawal of such moneys and assets, or any part thereof, except with the written consent of such sureties, or an order of the court made on such notice to them, as it may direct. **§ 813, Code Civil Proc.**

Where a bond or undertaking has been given, as prescribed by law, in the course of an action or a special proceeding, to the people or to a public officer, for the benefit of a party or other persons interested and provision is not specially made by law for the prosecution thereof; the party or other person so interested may maintain an action in his own name for a breach of the condition of the bond, or of the terms of the undertaking; upon procuring an order granting him leave so to do. The order may be made by the court in which the action is or was pending; the city court of the city of New York, or a county court, if the bond or undertaking was given in a special proceeding, pending before a judge of that court; or in any other case, by the supreme court. Notice of the application therefor must be given, as directed by the court or judge, to the person interested in the disposition of the proceeds. **§ 814, Code Civil Proc.**

A bond or undertaking, given in an action or special proceeding, as prescribed in this act, continues in force, after the substitution of a new party in place of an original party, or any other change of parties; and has thereafter the same force and effect, as if then given anew in conformity to the change of parties. **§ 815, Code Civil Proc.**

A bond or undertaking, required to be given by this act, must be filed with the clerk of the court; except where, in a special case, a different disposition thereof is directed by the court, or prescribed in this act. **§ 816, Code Civil Proc.**

Official bonds, including bonds of administrators and executors or guardians, when ordered by the Surrogate, must be recorded in the Surrogate's office. L. 1887, ch. 372, and L. 1890, ch. 367.

In connection with these sections it may be noted, first, that a fidelity or surety company is equivalent to the two sureties usually required. See *Travis* v. *Travis*, 48 Hun, 343; *Matter of Fitler*, 11 Abb. N. C. 107; *Hurd* v. *Railroad Company*, 33 Hun, 109. Further, the fee paid to a surety company for its bond given on behalf of a guardian, trustee, executor or administrator, may be allowed to such representative as a lawful disbursement, provided it does not exceed one per cent per annum upon the amount of the bond. See Amendment of 1892 to § 3320 of Code of Civil Procedure.

§ 697. **Amount of justification of sureties.**—It will be noticed from the wording of § 813 that where the penalty of the bond amounts to $5,000 or more (this sum was formerly fixed at $20,000 or upwards), the court may in its discretion allow the sum in which each surety is required to justify to be made up by the justification of two or more other sureties each in a smaller sum, provided the same person does not contribute to make up the necessary amount for more than one of the original sureties.

It is the rule that each surety must justify either individually or in the manner permitted by § 813 in the full penalty required; where one is able to justify in a much larger amount, and the other falls far short of the statutory standard, it is not permissible to credit the deficient surety with the excess of justification of the other; this is contrary to the intent of the statute. The penalty must be twice made up, i. e.:

(*a*) By two persons each of whom is fully qualified.

(*b*) By one person who is sufficient by himself and two or more persons else who are unitedly sufficient.

(*c*) By two distinct sets of persons each of which sets can justify in combination in the full penalty of the bond. And this eking out of insufficient justification is allowed only in the case covered by § 813. See *Trask* v. *Annett*, 1 Dem. 171, 174, Rollins, Surr. See *per contra Matter of Thompson*, 6 Dem. 656, Coffin, Surr.

Consequently, where each of two sureties have justified in at least the amount of the penalty, the intent of the statute is that as there must be a continuing answerability, so there must be a continuous ability to justify. Therefore if one of the sureties subsequently becomes insolvent, additional security can be exacted. See *Sutton* v. *Weeks*, 5 Redf. 353. It has also been noted that while as has been heretofore observed it is not proper for an executor or administrator to make over property of the estate to indemnify his surety (*Deobold* v. *Oppermann*, 111 N. Y. 531), yet under § 813 it is lawful for him to agree with his sureties for the deposit of money or assets with a trust company or safe deposit company upon conditions recognizing the right of the sureties to safeguard the withdrawal of such money or assets by means of their countersignatures or written consent.

§ 698. **The Surrogate's custody of the bond.**—Section 2500 requires the Surrogate to carefully file and preserve in his office and deliver to his successor all bonds relating to any proceeding in his court, and all bonds required to be filed with him or in his office must be approved or acknowledged as deeds are required by law to be proved or acknowledged.

Section 812 above quoted requires the bond to be approved by the court before which the proceeding is taken or a judge thereof, which approval must be indorsed thereon. This provision is intended for the benefit of creditors and distributees. *Mundorff* v. *Wangler*, 44 N. Y. Super. Ct. Rep. 495. Consequently the failure to indorse such approval upon the bond, on the part of the Surrogate, is an irregularity of which the surety cannot take advantage in an action by the creditor upon the bond.

§ 699. **When new bond or new surety may be required.**—The Code contains explicit provisions as to maintaining the security afforded by the surety on the bond amply sufficient to protect the persons interested. These provisions are contained in §§ 2597, to 2599, inclusive, which are as follows:

When new bond or new sureties may be required.

Any person, interested in the estate or fund, may present to the surrogate's

court a written petition, duly verified, setting forth that a surety in a bond, taken as prescribed in this chapter, is insufficient, or has removed, or is about to remove, from the state, or that the bond is inadequate in amount; and praying that the principal in the bond may be required to give a new bond, in a larger penalty, or new or additional sureties, as the case requires; or, in default thereof, that he may be removed from his office, and that the letters issued to him may be revoked. Where the bond so taken is that of a guardian, the petition may also be presented by any relative of the infant. When the bond is that of an executor or administrator, the petition may also be presented by any creditor of the decedent. If it appears to the surrogate, that there is reason to believe that the allegations of the petition are true, he must cite the principal in the bond to show cause, why the prayer of the petition should not be granted. § 2597, **Code Civil Proc.**

When new bond or new sureties may be required; how principal may be required to give a new bond, etc.

Upon the return of a citation, issued as prescribed in the last section, the surrogate must hear the allegations and proofs of the parties; and if the objections, or any of them, are found to be valid, he must make an order, requiring the principal in the bond to give new or additional sureties, or a new bond in a larger penalty, as the case requires, within such a reasonable time, not exceeding five days, as the surrogate fixes; and directing that, in default thereof, his letters be revoked. § 2598, **Code Civil Proc.**

Decree revoking letters for failure to give new bond.

If a bond with new or additional sureties, or in a larger penalty, is approved and filed in the surrogate's office, as required by such an order, the surrogate must make a decree, dismissing the proceedings, upon such terms, as to costs, as justice requires; otherwise he must make a decree, removing the delinquent from office, and revoking the letters issued to him. § 2599, **Code Civil Proc.**

The facts alleged as the ground of application for a new bond or new sureties must be such as to bring the case clearly within the intent of § 2597. Thus it has been observed in another connection that the death of one of the sureties does not necessarily require a renewal of the bond in the first place, because his death is not within the meaning of the section a removal from the State; nor in the second place does his death relieve his own estate from liability upon his bond. *Stevens* v. *Stevens*, 2 Dem. 469. It has been held that the citation to the principal on the bond to show cause why a new bond or new surety should not be required, may be served upon him without the State, if served personally. *Stevens* v. *Stevens*, 3 Redf. 507. This decision was upon the ground that the executor had originally consented and subjected himself to the jurisdiction of the court in his appointment and qualification. There seems to be no provision for a reduction of the bond of an administrator or executor, except in the manner already discussed in connection with § 2595. Consequently, it is quite immaterial under these sections that the estate or the fund in process of administration has been diminished by necessary and reasonable causes, except, in so far as it applies to the sufficiency of the bond or sureties to protect the persons interested or the creditors against loss, in view of the diminished amount still involved. See *Matter of Patterson*, 39 N. Y. St.

Rep. 849. Where one of the sureties is shown upon a proceeding under these sections to be insufficient, and a new surety is required, it must be borne in mind that the surety not objected to, or not proven insufficient is not discharged of his liability by the execution of the new bond by the new surety. The discharged surety is still liable to be sued for any past act or omission of his principal although the Surrogate may discharge him from liability for any subsequent act, default or misconduct of such principal. The original bond still exists in all its integrity as to the other surety. See *In the Matter of the Administration of the Goods of David Patullo*, 1 Tucker, 140. It is perfectly competent upon the discharge of one surety in such a proceeding that the remaining surety and the new surety should together with the principal, execute a new bond, but this is not essential, nor would it affect the obligations and liabilities of the sureties.

In a recent case, *Matter of Goundry*, 57 App. Div. 232, the application to require increased bond was based on alleged assets not set out in the inventory, and as to which there was dispute whether they were in fact assets of the estate. It was held that as upon the accounting it *might* be proved to be an asset, it was proper for the Surrogate to require additional security, leaving the question of title to be passed upon when the administrator should account.

Upon proceedings to compel an executor to give a bond or to give a new surety, the following precedents are suggested:

Petition.

Surrogate's Court,
County of

Title. }

To the Surrogate's Court of the County of

The petition of of respectfully shows:

I. That your petitioner is a person interested in the estate of late of deceased, being (*here give status of petitioner, whether legatee under a will or next of kin of an intestate, specifying interest under which he has a right to make the application*).

II. That letters (*specifying whether testamentary or of administration*) were issued by the Surrogate of the county of to of on the day of 19 .

III. Your petitioner further shows that on the day of the said filed a bond in the office of the Surrogate of the county of executed by himself and by and as sureties thereon, which bond was in the penal sum of dollars and was conditioned for the faithful discharge by said of the trust reposed in him as such and for his obedience to all lawful decrees and orders of the Surrogate touching the administration of the estate committed to him.

IV. And your petitioner further shows that the said one of the above named sureties is now insufficient as a surety

by reason of the following facts (*here state facts showing insufficiency, such as insolvency, etc.*), (*or state that the surety has removed or is about to remove from the state*) *or state that the bond is inadequate in amount, stating the facts by reason of which it proves inadequate.*

V. And your petitioner further shows that his rights as well as those of other persons interested in the estate of the above named decedent are insufficiently protected by reason of the facts above set forth, and your petitioner is entitled under sections 2597, 2598, 2599 of the Code of Civil Procedure to an order of the Surrogate requiring the principal in the said bond to give new (*or* additional) sureties (*or* a new bond in a larger penalty *if the case so requires*) within a reasonable time, not exceeding five days, to be fixed by the Surrogate, and directing that in default thereof his letters be revoked.

Wherefore, your petitioner prays that the administrator (*or* executor) above named may be required by the Surrogate to give new (*or* additional) sureties on his said bond (*or* a new bond in the penalty of dollars) within such reasonable time, not exceeding five days, as the Surrogate may fix, or in default thereof, that he may be removed from his office and the letters issued to him as aforesaid may be revoked, and that the said administrator (*or* executor) as aforesaid, may be cited to show cause why the prayer of this petition should not be granted.

(Signature.)

(Verification.)

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Title.

Order.

On reading and filing the petition, duly verified, of a person interested in the estate of the decedent above named, praying that administrator, etc., may be required to give new (*or* additional) sureties (*or* a new bond in a larger penalty), or in default thereof that he be removed from his office and the letters heretofore issued to him be revoked; and upon the return of the citation duly issued thereon to the said the administrator, etc. (*or* executor), as aforesaid, and on reading and filing proof of the due service thereof upon the said and the said having appeared by his attorney, and the allegations and proofs of the parties having been heard and due consideration thereon having been had, and the objection set forth in said petition being found to be valid, and

Note. In case of the occurrence of such default this order is not sufficient to accomplish the removal of the ex-

ecutor or administrator, and a further decree must be made removing the delinquent from office and revoking the letters issued to him. See § 2599, C. C. P.

The form of this decree may readily be adapted from those in chapter on revocation of letters, varying practically only in the recital of the facts leading to the making of the decree.

it satisfactorily appearing that one of the sureties upon the bond of said as administrator, etc. (*or* as executor), (*here state the facts alleged as an objection constituting insufficiency of security, such as insolvency, or removal from the state, etc.*);

Now, on motion of attorney for the petitioner, it is

Ordered, that the said give new (*or* additional) sureties upon his bond as administrator (*or* as executor) (*or* that he give a new bond in the penalty of dollars, with two or more sureties in the penal sum of dollars, in the usual form, conditioned for his faithful discharge, etc., and that he file the same in the Surrogate's office) within days (*not exceeding five*) from the date of this order, or in default thereof that he be removed from his office and the letters issued to him revoked. (*Note.*)

§ 700. **Application for new sureties may be made by the former sureties.**—Section 2600 contains the statutory provision whereby sureties on a bond may determine their liability for any future breach of the condition of the bond by the executor, administrator, guardian or testamentary trustee. The section is as follows:

> Any or all of the sureties in a bond, taken as prescribed in this chapter, may present a petition to the surrogate's court, praying to be released from responsibility, on account of any future breach of the condition of the bond; and that the principal in the bond be required to give new sureties and to render and settle his account, and that a citation issue to said principal to attend on such application. The surrogate must thereupon issue a citation accordingly. **§ 2600, Code Civil Proc.**

It must be borne in mind that the application by the surety under § 2600 cannot be consolidated with the application by persons interested, or creditors or relatives of an infant under § 2597. The proceedings are distinct and contemplate distinct forms of relief. *Bick* v. *Murphy*, 2 Dem. 251. It has been held that under § 2600 any surety has a right to make this application whenever he shall desire to be released from responsibility on account of future acts or defaults of his principal. And it is consequently quite immaterial whether the surety has reasonable grounds for making the application or whether he is animated by unreasonable, petty or spiteful motives. See *Lewis* v. *Watson*, 3 Redf. 43. See also *Matter of American Surety Co.*, 61 Misc. 542, where Ketcham, Surr., discusses § 812 as amended in 1901 after the decision in *Matter of Thurber*, 162 N. Y. 244, and holds that the surety is to be relieved as a matter of right, not of discretion.

Section 2601 protects the surety in respect to future liability to the extent that if a new bond is not filed so as to enable the Surrogate to make the decree releasing the petitioner from such future liability the letters of the principal may be revoked and the surety's liability for future acts determined in that way. The section reads as follows:

Upon the return of a citation, issued as prescribed in the last section, if the principal in the bond does not file a new bond in the usual form with new sureties to the satisfaction of the surrogate, the surrogate must make an order requiring said principal to file such new bond within such reasonable time, not exceeding five days, as the surrogate fixes. Should the principal file such new bond within the time fixed by such order, the surrogate must thereupon make a decree releasing the petitioner from liability upon the bond for any subsequent act or default of the principal, and requiring the principal to render and settle his account to and including the date of such decree and to file such account within a time fixed, not exceeding twenty days from such date; otherwise he must make a decree revoking the delinquent's letters. **§ 2601, Code Civil Proc.**

When the representative files the account and no objection thereto is interposed it is unnecessary to cite the persons interested although either the representative or the surety could ask for it. The particular proceeding therefore can be closed by a decree "settling" the account as filed. Such decree is not of course binding on any not parties, but is by way of estoppel, in the nature of an informatory account. See opinion of Thomas, Surr., in *Matter of Sogaard*, 39 Misc. 519.

The following official forms of the Surrogate's Court in the County of Erie, may readily be adapted for use in any court in the State.

Surrogate's Court,
County of Erie,
State of New York.

Title. }

To the Surrogate's Court of said County of Erie:

The petition of of the of in the County of Erie, State of New York, respectfully shows:

That your petitioner is one of the sureties in the bond given by duly appointed by this Court as of and desire to be released from responsibility on account of any future breach of the condition of said bond.

Wherefore, your petitioner pray that may be released accordingly, and that the said be cited to show cause why should not give new sureties, and that such proceedings may be had herein as shall be proper and as the law requires.

Dated this day of 19

(Verification.)

Surrogate's Court
Caption.

Present:

HON. LOUIS W. MARCUS,
Surrogate.

Order for citation.

In Matter of the Estate
of
.....

On reading and filing the duly verified petition of

Ordered, that a citation issue requiring to show cause why he should not give new sureties as in the place of the petitioner who desire to be released.

Surrogate's Court
Caption.

Present:

HON. LOUIS W. MARCUS.
Surrogate.

Order releasing surety from future liability.

In the Matter of the Estate
of
.....

having heretofore presented duly verified written petition praying to be released from responsibility, on account of any future breach of the condition in the bond given by duly appointed by this Court, as the and a citation having thereupon issued accordingly, and satisfactory proof of the due service personally of said citation on said having been filed.

Now, upon the return of the said citation, the said having appeared in compliance therewith and having given new sureties in the place and stead of the surety petitioning to be released as aforesaid, to the satisfaction of the Surrogate, it is

Ordered, Adjudged and Decreed, that a surety upon a bond made by as principal and by and the said as sureties on the day of 19 and filed in the office of the Surrogate of the county of on the day of upon the granting to said of letters of administration, etc. (*or* testamentary, etc.), to the said by the Surrogate of the county of be and he hereby is released from liability for any breach of the conditions of said bond or for any act or default of his said principal subsequent to the date of this decree.

§ 701. **When bond may be prosecuted.**—The sections of ch. 18 referring to the prosecution of official bonds in the Surrogate's Court are §§ 2607, 2608, 2609, 2610, which are as follows:

> Where an execution, issued upon a surrogate's decree, against the property of an executor, administrator, testamentary trustee, or guardian, has been returned wholly or partly unsatisfied, an action, to recover the sum remaining uncollected, may be maintained upon his official bond, by and in the name of the person in whose favor the decree was made. If the principal debtor is a resident of the state, the execution must have been issued to the county where he resides. **§ 2607, Code Civil Proc.**

This section does not require the allegation of the facts *verbatim*. An allegation that execution was duly issued, warrants the presumption that it was issued to the proper officers. *Bamberger* v. *Amer. Surety Co.*, 48 Misc. 221, citing *Campbell* v. *Foster*, 35 N. Y. 363.

§ 702. **Death of delinquent.**—Where the delinquent representative is *deceased*, § 2606 is applicable, and the issue and return of execution unsatisfied is not a condition precedent to action against the sureties. *Allen* v. *Kelly*, 55 App. Div. 454.

Section 2606 which provides for an accounting by an executor of a deceased executor, contains the following provision:

> With respect to the liability of the sureties in, and for the purpose of maintaining an action upon the decedent's official bond, a decree against his executor or administrator, rendered upon such an accounting, has the same effect as if an execution issued upon a surrogate's decree against the property of decedent had been returned unsatisfied during the decedent's lifetime. So far as concerns the executor or administrator of decedent, such a decree is not within the provisions of section twenty-five hundred and fifty-two of this act.

This applies whether the proceeding was voluntary or compulsory. *Van Zandt* v. *Grant*, *infra*.

The wording of this section indicates that the issuing of an execution is not thereunder a condition precedent to the commencement of an action upon the official bond of a deceased executor, administrator or guardian. *Van Zandt* v. *Grant*, 67 App. Div. 70, 73, aff'd 175 N. Y. 150; *Allen* v. *Kelly*, 55 App. Div. 454, 457; *Martin* v. *Hann*, 32 App. Div. 602.

§ 703. **Successor may prosecute official bond.**

> Where letters have been revoked by a decree of the surrogate's court, the successor of the executor, administrator, or guardian, whose letters are so revoked, may maintain an action upon his predecessor's official bond, in which he may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him; and to the full extent of any injury, sustained by the estate of the decedent or of the infant, as the case may be, by any act of omission of the principal. The money, recovered in such an action, is regarded as part of the estate in the hands of the plaintiff, and must be distributed or otherwise disposed of accordingly; except that a recovery for an act or omission, respecting a right of action, or other property, appropriated by law for the benefit of the husband, wife, family, or next of kin of a decedent, or disposed of by a will for the benefit of any person, is for the benefit of the person or persons so entitled thereto. **§ 2608, Code Civil Proc.**

§ 704. Action on official bond when no successor is appointed.

Where the letters of an executor or administrator have been so revoked, and no successor is appointed, any person aggrieved may, upon obtaining an order from the surrogate, granting him leave so to do, maintain an action upon the official bond of the executor or administrator, in behalf of himself and all others interested; in which the plaintiff may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him, and to the full extent of any injury, sustained by the estate of the decedent, by any act or omission of the principal. The money recovered in such an action must be paid, by the sheriff or other officer who collects it, into the surrogate's court; and the surrogate must distribute it to the creditors or other persons entitled thereto. The proceedings for such a distribution are the same as prescribed in title fifth of this chapter, for the distribution of the proceeds of a sale of real property. **§ 2609, Code Civil Proc.**

Application of this article to executors, etc., heretofore appointed.

The provisions of this article apply to an executor, administrator, or guardian, to whom letters have been issued, and to a testamentary trustee whose trust has been created, before this chapter takes effect; except that it does not affect, in any manner, the liability of the sureties in a bond, executed before this chapter takes effect. **§ 2610, Code Civil Proc.**

§ 705. **Remedy on official bond.**—From the sections which have been quoted, it may be seen that an official bond may be prosecuted:

(*a*) By and in the name of the person in whose favor the decree was made upon which execution has been returned wholly or partially unsatisfied. (See § 707, below.)

(*b*) By the successor of the executor, administrator or guardian whose letters have been revoked. (See § 708, below.) *Flanagan* v. *Fidelity & Deposit Co.*, 32 Misc. 424. So an administrator *de bonis non* may sue the surety of the original administrator for moneys of the estate received by him and never accounted for. *Walton* v. *Walton*, 4 Abb. Ct. App. 512; *Dunne* v. *American Surety Co.*, 34 Misc. 584; *S. C.*, on prior appeal, 43 App. Div. 91, 100. This right of action is not affected by fact that original administrator removed to another State, died there and left no personalty or personal representatives in New York State. Leave to sue is not necessary. *S. C.*, 43 App. Div. 91, 95, and cases on p. 97. The administrator *d. b. n.* is the representative of the estate, and all rights of recovery for the benefit of the estate vest in him. *Dunne* v. *Amer. Surety Co.*, 43 App. Div. 91, 94, 100.

(*c*) By any person aggrieved, where no successor has been appointed to one whose letters have been revoked, in behalf of himself and all others interested.

In the latter case, however, leave from the Surrogate must be obtained to bring the action. *Dunne* v. *Amer. Surety Co.*, 43 App. Div. 91, 95. It has been held that where the bond is made to the people, it is proper to bring the action upon the bond in the name of the people, specifying the person interested in the recovery as relator. See *People* v. *Laws*, 4 Abb.

296. But in *Dunne* v. *Amer. Surety Co., supra,* Barrett, J., observes at p. 97, "Though the bond runs to the people, it so runs in form only, for the benefit of those *to whom the right of action* thereon *is given* by the statute." See § 709, below.

§ 706. **Prosecuting the bond.**—In respect to the procedure for prosecuting the sureties upon the bonds of executors or administrators in Surrogates' Courts, the Code seems to have made wide departures from the methods formerly in vogue. For example: §§ 63, 64 and 65 of ch. 460 of the Laws of 1837, as amended by ch. 104 of the Laws of 1884, established the practice for the issuance of executions upon Surrogates' decrees directing the payment of moneys by executors, administrators and guardians. The sixty-fifth section of the act of 1837 provided that, if such an execution should be returned unsatisfied, the Surrogate, upon due application, should assign the bond given by such delinquent officer to the person in whose favor the decree was made, upon which the execution was founded.

These acts of 1837 and 1844 were both repealed by ch. 245 of the Laws of 1880. In their place have appeared §§ 2553, 2554 and 2607 of the Code. The last-named section makes unnecessary an assignment of the bond, such as had been hitherto requisite. It provides that, "where an execution issued upon a Surrogate's decree against the property of an executor, etc., has been returned wholly or partially unsatisfied, an action, to recover the sum remaining uncollected, may be maintained upon his official bond, by and in the name of the person in whose favor the decree was made." Leave of the Surrogate need not, it would seem, be procured, before the commencement, under this section, of proceedings against sureties.

By § 21, title 3, ch. 6, part 2, of the Revised Statutes (3 Banks's 6th ed., 92), it was provided as follows: "In every case of revocation of testamentary letters or of letters of administration, for neglect or refusal to return an inventory, and *whenever directed by the Surrogate,* the bond given by such former executor or administrator shall be prosecuted, and a recovery shall be had thereon, ... and the moneys collected thereon shall be deemed assets in the hands of the person to whom such subsequent letters shall have been issued."

This provision was abrogated by the repealing act of 1880, and there appear, in its place, §§ 2608 and 2609 of the Code. The former section declares that, "where letters have been revoked by a decree of the Surrogate's Court, the successor of the executor, administrator or guardian, whose letters are so revoked, may maintain an action upon the predecessor's official bond," etc.

The statute is silent as to the necessity of preliminarily obtaining the Surrogate's leave, and purposely so, it would seem; for the very next section (§ 2609) declares that, if no successor to the removed officer has been appointed, such leave must be procured before a "person aggrieved" may maintain an action upon such officer's bond. *Scofield* v. *Adriance,* 1 Dem. 196; *Dunne* v. *Amer. Surety Co.,* 43 App. Div. 91.

§ 707. **Action by a person in whose favor the decree was made.**—Under

§ 2607 a creditor is included among those who can sue the sureties on the bond, provided he is the person in whose favor the decree in question was made. See *People* v. *Dunlap*, 13 Johns. 437. See also *People* v. *Barnes*, 12 Wend. 492. And one to whom a fund is directed to be paid by an executor or administrator whether he is to receive it in an individual or representative capacity, as, for example, a general guardian, comes within the meaning of this section, and may maintain an action upon the bond of the executor or administrator who fails to comply with the decree. *Prentiss* v. *Weatherly*, 68 Hun, 114; 144 N. Y. 707; *Van Zandt* v. *Grant*, 67 App. Div. 70, 74.

This right is assignable. *Bamberger* v. *Amer. Surety Co.*, 48 Misc. 221. There is some doubt as to whether the infant interested may sue directly by *guardian ad litem*. There would seem to be no good reason why he cannot so prosecute the bond. See *Prentiss* v. *Weatherly*, *Van Zandt* v. *Grant*, *supra*, *Perkins* v. *Stimmel*, 114 N. Y. 359; *Segelken* v. *Meyer*, 94 N. Y. 473. But in the Court of Appeals, in *Van Zandt* v. *Grant*, 175 N. Y. 150, 154, aff'g 67 App. Div. 70, held *Perkins* v. *Stimmel* does not require that such action *must* be by guardian *ad litem*. That any remark to that effect was *obiter*.

The first fundamental principle underlying actions upon bonds given in Surrogates' Courts is, that the sureties are concluded by proceedings against their principal provided the Surrogate had jurisdiction; and consequently the Court of Appeals has held that irregularities in the proceedings against the principal cannot be set up collaterally by the sureties when suit is brought upon the bond. See *Kelly* v. *West*, 80 N. Y. 139. If the Surrogate had jurisdiction to make the order, the neglect or refusal to comply with which occasions the loss or damage which is made the basis of the sureties' liability, and the order or decree is valid as against the principal, it is valid as to all others including the sureties upon the official bond. *Altman* v. *Hofeller*, 152 N. Y. 498, 502. The mere fact that the sureties are not parties to the proceeding is immaterial as they have no legal interest in the proceeding anyhow, and as Judge Earl says, in the case above cited, "Could properly in no way be made parties thereto." *Ibid.*, at p. 144. *Matter of Bodine*, 119 App. Div. 493.

If the principal wastes the estate and flees the jurisdiction, thus avoiding personal service, substituted service may be had under § 2521 (see *ante*) of papers in the proceeding to revoke his letters or to compel him to pay over moneys. On proof of such service the Surrogate may make his order, and on proof of noncompliance therewith, the surety may be sued. *Scharmann* v. *Schoell*, 38 App. Div. 528, 530, citing *Hunt* v. *Hunt*, 72 N. Y. 217; *Burton* v. *Burton*, 45 Hun, 68; *Cont. Nat. Bank* v. *Thurber*, 74 Hun, 632. See also *Scharmann* v. *Schoell*, 23 App. Div. 398.

But, conceding the jurisdiction of the Surrogate to warrant the prosecution of a bond, it is only necessary to show that the bond was forfeited by noncompliance with a lawful decree of the Surrogate on the part of the executor or administrator. The general rule is well settled, that the

sureties upon the bond of an executor or administrator are not liable until the default of their principal has been established before the Surrogate, or as it has been differently stated, that no action can be maintained against such sureties until either an accounting has been had against the executor or administrator or their personal representative in the event of their death, or until such executor or administrator or their personal representative have disobeyed some valid order or decree of the Surrogate's Court having jurisdiction touching the administration of the estate committed to their charge. *Bischoff* v. *Engel*, 10 App. Div. 241, 243. See *Hood* v. *Hood*, 85 N. Y. 561; *Haight* v. *Brisbin*, 100 N. Y. 219; *Perkins* v. *Stimmel*, 114 N. Y. 359; *French* v. *Dauchy*, 134 N. Y. 542. *Rouse* v. *Payne*, 120 App. Div. 667, 670, citing the foregoing and *Beider* v. *Steinhauer*, 15 Abb. N. C. 428. Nevertheless even where the default of the principal has not been established before the Surrogate, *exceptional circumstances* may exist sufficient to warrant the interposition of a court of equity and to establish a breach or default in some other manner, and give a remedy against the sureties without any order for the prosecution of the bond. *Bischoff* v. *Engel*, 10 App. Div. 240, 243. Such a case is presented where an administrator is dead and his estate wholly insolvent, and his personal representative is without the jurisdiction, and unless such an action could be maintained it is manifest that the sureties would permanently escape and the persons for whose benefit and security the bond was given would be wholly remediless. But in the ordinary cases, where this appeal to a court of equity is not made necessary, the default must be established, and when required by the Code, the direction of the Surrogate obtained to prosecute the bond. See *People* v. *Barnes*, 12 Wend. 492, and cases digested in note *a*. So where a guardian removed to another State and died there intestate, leaving no property in either State, the Court of Appeals held that an accounting need not first be had preliminary to a suit in equity against the sureties to have it adjudged what if any sum is due the ward from the guardian, and to charge the amount found so due upon the sureties. *Otto* v. *Van Riper*, 164 N. Y. 536, citing *Long* v. *Long*, 142 N. Y. 545. See also as to sureties of a defaulting nonresident trustee, *Yates* v. *Thomas*, 35 Misc. 552.

Where a general guardian was charged upon his accounting with certain moneys which in his previous capacity as administrator of the estate of the father of his wards, he had been directed by a decree settling his accounts as administrator to pay to himself as such guardian, which it then appeared he had not done having misappropriated them before his appointment as guardian, it was held that his sureties were liable for this default under § 2596 and that they could not evade their liability by reason of having petitioned after the decree settling their principal's account as administrator that he be required to give other sureties in default of which his letters as guardian had been revoked. *Matter of Noll*, 10 App. Div. 356, aff'd 154 N. Y. 765. In the case last cited Judge Bradley observes (at p. 360): "Where the obligation as administrator to pay, and the right and duty to

receive as guardian are united in the same person, as in the present case, he becomes charged in the latter capacity. And it is no objection, available to the sureties on his official bond as guardian, for them to allege that prior to that time or to the time of his appointment as guardian he had misappropriated and converted to his own use the fund which came to him as administrator, and to which his wards were entitled. As he had received such fund and had not disposed of it in the administration of the estate, he, in legal contemplation, had it in his custody at the time the decree was made. And, for the purpose of the effectiveness of the obligation assumed by the sureties in his official bond as guardian, his liability to account for it conclusively charges him with having the requisite fund." This is followed in *Rouse* v. *Payne*, 120 App. Div. 667. See also *Matter of Maybee*, 40 Misc. 518. The Surrogate may order the prosecution of an administrator's bond for nonperformance of a decree made against him on rendering an account or upon final settlement, or for the payment of a debt, legacy, or distributive share, without previous service of a copy of the decree or demand of the money or citation to show cause. *People* v. *Rowland*, 5 Barb. 449. And so it has been held that in an action on the bond, it is sufficient to allege that upon proper requisition to account an accounting was had, a balance was found, and a distribution made, and payment decreed and that the bond was forfeited by nonpayment and ordered by the Surrogate to be prosecuted. *People* v. *Falkner*, 2 Sandf. 81. So if judgment is recovered against an administrator, and the Surrogate directs him to pay the judgment by a decree, the creditor in case of nonpayment may immediately sue upon the bond. *Thayer* v. *Clark*, 48 Barb. 243.

§ 708. **Action by successor.**—There is nothing in the present statute requiring the assignment of the bond, to be sued upon, by an order of the Surrogate prior to its being prosecuted. The successor, it will be noted from the language of § 2608, is not required to obtain leave to maintain an action upon his predecessor's official bond. There is nothing necessary, in order to his doing so, further than that the condition of the bond shall have been broken by some act or default of the executor, administrator or guardian whose letters have been revoked. The successor of the superseded or removed executor or administrator, has not only a right, but it is his duty to prosecute the bond with a view to recovering any money or the full value of any other property which may have been received and not duly administered by his predecessor. The occasion for a suit by the successor usually arises after the accounting by the predecessor and the adjudication by the Surrogate that he pay over to his successor a given sum or deliver over certain property, the default to do which requires the action contemplated by § 2608. The sureties are bound by the decree because by their contract, as the Court of Appeals observes (*Casoni* v. *Jerome*, 58 N. Y. 315, and cases cited), they are privy to the proceedings against their principal, and when the principal is concluded, they in the absence of fraud or collusion, are concluded also. See *Harrison* v. *Clark*, 87 N. Y. 572, 575. Where the executor or administrator removed was one of several executors or adminis-

trators, the remaining executors or administrators are held to be, for the purpose of the trust, the successors of the one removed and might bring an action for the benefit of the estate under § 2608. See *Hood* v. *Hayward*, 124 N. Y. 1, and 48 Hun, 338. See also *Boyle* v. *St. John*, 28 Hun, 454.

So in a recent case the Court of Appeals in passing upon the right of one of two joint administrators to maintain an action against the sureties upon the joint bond of the two administrators held that although the co-administrators joined in the execution of the bond, it was not intended in requiring such a bond to be executed to change the liability or duties of the persons appointed from that which existed under the provisions of the statute independent of the bond.

"The bond was not intended to vary their obligation or their rights and duties as defined by law . . . . they were consequently jointly liable for joint acts, and severally liable for their own acts. . . . They each signed the bond as principal. Neither signed it as surety." *Nanz* v. *Oakley*, 120 N. Y. 84, 90. See also *Van Zandt* v. *Grant*, 175 N. Y. 150.

And the surety upon such a bond becomes liable for the joint acts of the individuals and for the individual defaults of each. In the case cited Judge Haight observes: "The question in reference to the liability of executors and administrators for the default of each other, independent of any bond, is well settled by the authorities. Each of several executors or administrators has the power to reduce to possession the assets and collect all the debts due the estate, and is responsible for all that he receives. The payment of money or delivery of assets to a co-executor or co-administrator will not discharge him from liability; for having received the assets in his official capacity, he can discharge himself only by a due administration thereof in accordance with the requirements of the law. Consequently one joint executor or administrator is not liable for the assets which come into the hands of the other, nor for the laches, waste, *devastavit* or mismanagement of his co-executor or co-administrator, unless he consents to or joins in an act resulting in loss to the estate, in which event he will become liable. In other words, co-executors and co-administrators may act either separately or in conjunction. They are jointly responsible for joint acts, and each is separately answerable for his separate acts and defaults. *Bruen* v. *Gillet*, 115 N. Y. 10; *Croft* v. *Williams*, 88 *id.* 384; *Ormiston* v. *Olcott*, 84 *id.* 339; *Adair* v. *Brimmer*, 74 *id.* 539; 2 Woerner's Law of Admin. § 348; Brandt Suretyship, etc., § 490."

§ 709. **Action by person aggrieved where no successor is appointed.**—It is necessary to get leave of the Surrogate to maintain an action under § 2609, upon the official bond of an executor or administrator where no successor has been appointed. *Dunne* v. *American Surety Co.*, 43 App. Div. 91. This action must be in behalf of the plaintiff and all others interested. The section provides for a very important class of cases. Where the letters of an executor or administrator have been revoked prior to his accounting, or prior to the entry of a judgment against him as such, the Surrogate has no power subsequently to compel him to account except upon petition of

a successor or of a former corepresentative under § 2605. So the court is equally without power to exercise any jurisdiction over the removed executor or administrator as such, and cannot, for example, direct him to pay the claim of a creditor. See *Breslin* v. *Smyth*, 3 Dem. 251. So, in the case just cited, Surrogate Rollins intimated a doubt, whether a judgment entered against the one so removed in his representative capacity *after* his letters had been revoked could be enforced against the estate (referring to §§ 2603 and 2604). But, he observes, that if the judgment debtor has a valid claim, either because of his judgment or of the demands upon which it is founded, "Section 2609 points out a method by which its collection may be enforced in case no successor has been appointed to the deceased administrator."

§ 710. **Liability of the sureties.**—The condition of official bonds in the Surrogate's Court is twofold, involving:

(*a*) The faithful discharge of the trust committed to him.

(*b*) Obedience to all lawful orders and decrees, etc. It may therefore be generally premised that, before a surety can be sued upon such a bond there must have been either a *devastavit* or disobedience. In a recent case the Court of Appeals indicated what would be sufficient proof of *devastavit* in an action against the sureties on a bond. *Potter* v. *Ogden*, 136 N. Y. 384, 389. The plaintiff was entitled to a distributive share in her grandmother's estate, and sued the executors of one of the sureties on the administrator's bond and proved the following facts:

(*a*) The appointment of the administrator.

(*b*) The execution of the bond.

(*c*) The receipt and possession of the estate by the administrator.

(*d*) The amount of his liability to plaintiff for her distributive share (which was proved by a decree of the Surrogate's Court upon an accounting).

(*e*) That nothing had ever been paid to or received by the plaintiff on account of such distributive share.

(*f*) The total waste of the fund and the insolvency of the administrator.

This, observes Judge Finch, showed a *devastavit* for which the bondsmen of the administrator were liable. The court commented in this case upon the difference between the procedure prior and subsequent to the Code in proving a *devastavit*. See p. 390 of opinion.

The only defense available for sureties where the bond is prosecuted for disobedience to an order or decree of the Surrogate is to show an absolute lack of jurisdiction to make the order, or that the order is in excess of the powers which the Surrogate had in the premises. The question occasionally arises as to the liability of sureties upon the bond of an executor who is a trustee of the same will. It has been already noted that sureties of an executor are not liable for his acts as trustee, but so long as the executor is not discharged as such, moneys in his hands as executor are presumed to continue in his hands until formally turned over to himself as trustee, and until his formal discharge as executor by a decree of the Surrogate upon his final accounting as such; and the liability of his sureties continues until

it can be shown that as executor he has lawfully parted with the fund. It therefore becomes important to note the exact terms of the decree settling the accounts of executors, as cases may turn upon whether they are or are not in fact discharged by the decree. See *Matter of Estate of Hood*, 98 N. Y. 363, and see same case, 104 N. Y. 303. See also *Laytin* v. *Davidson*, 95 N. Y. 263, *Matter of Willets*, 112 N. Y. 289, and *Cluff* v. *Day*, 124 N. Y. 195, 205. A mere adjudication of the settlement of the accounts of an executor cannot operate so as that he can be deemed to have ceased to hold the funds as such. As Judge Finch observes in *Johnson* v. *Lawrence*, 95 N. Y. 162, "The duties of the trustee must be actually entered upon and performance begun or the executor be wholly discharged by the decree of the Surrogate."

While as has been stated the foundation of the action, in the case of disobedience, is noncompliance with a lawful decree or order of the Surrogate, the decree alone is not sufficient evidence and is in fact inadmissible in the absence of the record showing service upon the parties and the actual acquiring of jurisdiction of the parties by the Surrogate's Court in the manner prescribed by law. The simple production of the decree proves nothing, if the objection be taken, that the judgment roll, or that the proceedings that resulted in the decree, must be produced, and accordingly it is error to overrule such an objection because the record in the action must show that the Surrogate had jurisdiction of the parties. This is necessary because should it appear from the record, that the proper proceedings had not been taken so as to confer jurisdiction upon the Surrogate to render the decree which he assumed to render, of course the decree could not be admitted in evidence. See *Nanz* v. *Oakley*, 60 Hun, 431, Van Brunt, P. J. This is not inconsistent with the proposition already laid down that the sureties are concluded by the decree against their principal (see *Field* v. *Van Cott*, 15 Abb. Pr. N. S. 349), but merely indicates the manner in which the one prosecuting an official bond must prove his case. Thus (*Scofield* v. *Churchill*, 72 N. Y. 565, 570), in an action upon an executor's bond, with the usual conditions, and where the breach was the failure of the executor to distribute and pay the sums found due upon an accounting, among others a legacy bequeathed to the plaintiff, the Court of Appeals declared, that as a breach of the condition had occurred within the letter of the bond, the positive undertaking of the surety had become fixed and operative by the Surrogate's decree. And Judge Miller observes: "In the absence of fraud or collusion between the executor and the legatee, the decree of the Surrogate is conclusive upon the sureties. It binds the sureties and the principal alike, and cannot be impeached in a collateral proceeding. While the most solemn judgments do not conclude those who are neither parties nor privies, yet, when an obligee undertakes the payment of a judgment which may be recovered against his principal, he cannot escape the effect of such judgment when recovered.

"He has bound himself to pay, and is indebted for the amount of the judgment when recovered, without regard to its legal merits. Such is the nature of this contract, and he must abide and stand by it, irrespective of

the consequences. He cannot go behind it, or allege that it was erroneous and embraced more than was intended. The decree is final as to the indebtedness of the estate, and the obligation of the executor to pay, and the sureties cannot go back of such judgment," citing *Thayer* v. *Clark*, 4 Abb. (Ct. of App.) 391; 48 Barb. 243; *The People* v. *Downing*, 4 Sandf. 189; *Baggott* v. *Boulger*, 2 Duer, 160.

The effect of this decision is merely to give the person injured by an executor's or administrator's default, the benefit of the adjudication that the default has occurred and the damage been suffered, the sureties being estopped from going back of the proceedings against their principal. But it does not mean, that the sureties are to be held liable under any or all decrees against their principal. The condition of the bond is that their principal shall obey all *lawful* orders and decrees. The word "lawful" contemplates that the decree or order shall have been made by a Surrogate having full and proper jurisdiction. It is therefore necessary to the plaintiff's case, in prosecuting such an official bond that he prove the regularity of the order or decree and establish affirmatively that it was a *lawful* order or decree.

§ 711. **Action against sureties.**—It follows from the broad language of the sections already quoted, that where a person aggrieved is given the right to prosecute the bond, *every* person aggrieved by the *devastavit* or disobedience of the executor or administrator may do the same. Though the bond runs to the people it is only a matter of form. *Dunne* v. *Amer. Surety Co.*, 43 App. Div. 91. In an early case it was held that where an administrator's account was judicially settled, the several next of kin were entitled to separate certificates fixing the amount of their respective shares, and that each might maintain an individual action upon the bond of the administrator. See *Bramley* v. *Foreman*, 15 Hun, 144. It is of course a defense available for the sureties if they can prove payment of the fund to a person lawfully entitled to receive it or substantial compliance with the lawful order or decree, but the burden of proving such payment or compliance is of course upon the defendants. See *Eagan* v. *Kergill*, 1 Dem. 464, 466, citing *McKyring* v. *Bull*, 16 N. Y. 297; *New* v. *Nicoll*, 73 N. Y. 132. See also *Dayton* v. *Johnson*, 69 N. Y. 419.

§ 712. **Date of devastavit, when important.**—The date when the *devastavit* occurred is competent to be shown when a substituted surety is sued. For if it took place while the predecessor surety was liable, it is pleadable and provable in defense. *Matter of Grant*, 122 App. Div. 602.

§ 713. **Other defense by surety.**—It is also a valid defense to prove a decree discharging the executor or administrator and his sureties. Where this defense was interposed in an action against the sureties upon an administrator's bond, and it appeared that the decree pleaded had been subsequently set aside for fraud by the Surrogate, it was claimed by the sureties that inasmuch as they had, subsequent to the making of the decree, parted with the indemnity theretofore held by them in the belief that their liability upon the bond had terminated, and inasmuch as they were not

made parties to or given any notice of the proceedings to set aside the decree discharging them, they were not bound by the last decree nor had the Surrogate power to reinstate them in any liability as sureties upon their bond. The Court of Appeals by Ruger, Ch. J. (*Deobold* v. *Oppermann*, 111 N. Y. 531, 536), held, that this claim on the part of the sureties was clearly untenable. That the decree discharging the administratrix and her sureties was, when made, assailable by any party thereby aggrieved, either by motion to set it aside, or by proceedings on appeal. And Judge Ruger remarks:

"In neither case was it necessary that the sureties should have notice of the proceeding. The sureties are the privies of the administratrix, and are precluded from questioning any lawful order made by the Surrogate in a proceeding wherein she is a party, if obtained without collusion between such administratrix and the next of kin or creditors of the estate. *Scofield* v. *Churchill*, 72 N. Y. 565; *Gerould* v. *Wilson*, 81 *id.* 573. See also *Keegan* v. *Smith*, 60 App. Div. 168, citing *McMahon* v. *Smith*, 24 App. Div. 25; and see, as to testamentary trustees, *Matter of Storm*, 84 App. Div. 552, 555, citing *Haywood* v. *Townsend*, 4 App. Div. 246; *Kelly* v. *West*, 80 N. Y. 139, 146.

"Their bond contemplates that they shall remain sureties *as long as the Surrogate retains jurisdiction of the proceedings in administration of the estate, and has power to make valid orders therein affecting the property administered upon.*

"Of course, the sureties should not be bound by an order which the Surrogate had no jurisdiction to make; but so long as his jurisdiction continues the liability of the sureties remains.

"The very language of the bond provides for orders made in proceedings *inter alios*, and for the liability of the sureties for a nonperformance by the administratrix of any decree or order made by the Surrogate's Court. The condition of the bond is that liability shall follow her infidelity to her trust, or disobedience of any lawful order or decree whenever made in the proceedings.

"It was, we think, never heard of in practice that sureties on an administrator's bond, should have notice of proceedings in the administration of an intestate's estate. . . .

"The decree under which the defendants claim discharge from liability was procured by fraud, practiced upon the Surrogate, through the presentation of papers fraudulently obtained and used by her. It was against the perpetration of such frauds that the defendants' bond was intended to protect the beneficiaries of the estate. The defendants had covenanted that the administratrix should faithfully execute the trust reposed in her, and obey all lawful decrees and orders of the Surrogate's Court. When she obtained, through fraud, the order of the Surrogate awarding the moneys of the estate to her, and canceling her bond, she violated the obligations of her trust, and the defendants became liable for the damages flowing from such breach of duty. That the defendants were deceived by the adminis-

tratrix constituted no protection to them, for they had guaranteed that she should deceive nobody in the administration of her trust. The liability of the sureties is coextensive with that of the administratrix, and embraces the performance of every duty she is called upon to discharge in the course of administration.

"It is quite absurd to say that the very fact which creates a cause of action against the sureties, should also operate as a defense to them. They cannot stand as innocent parties in relation to an action which they have covenanted to the plaintiff, and all others interested, should never be performed. And they have sustained no legal loss when subjected to a liability which they agree to assume in the event, which is now alleged as the cause of their misfortune."

§ 714. **Rights of sureties.**—While the liability of sureties is as appears from the foregoing sections rigidly enforced, where either a *devastavit* or disobedience to a lawful decree is shown, yet the liability of the surety will not be extended beyond the actual obligations of the bond. Thus he cannot be held liable to pay fines imposed upon his principal for contempt (see *Loop* v. *Northrup*, 59 Hun, 75), as, for example, in failing to account; nor can they be held liable for failure to comply with part of an otherwise lawful decree which the Surrogate has no power to make. Thus where a Surrogate, making a decree for distribution in a proceeding for a compulsory accounting, made an award of costs to an attorney personally, it was held that the sureties could not be held for the default of the administrator in declining to pay such costs. *McMahon* v. *Smith*, 20 Misc. 305, App. Term. So in the case just cited where the Surrogate had proceeded to make the decree for distribution, and failed to cause some of the next of kin to be cited as required by § 2743 of the Code of Civil Procedure, the Appellate Term held that the decree was not such a lawful decree or order of the Surrogate's Court, for failure to comply with which on the part of their principal the sureties defendant had bound themselves to pay. *Ibid.* See opinion of Bischoff, Jr., at p. 307. In *Baucus* v. *Barr*, 45 Hun, 582, aff'd 107 N. Y. 624, the sureties on an executor's bond were held entitled to show that the executor (who was ordered to pay his debt to the estate, which in a previous decision, *Baucus* v. *Stover*, 89 N. Y. 1, had been held to be an asset in his hands) was at the time insolvent. If so they were not liable.

A surety upon an official bond in a Surrogate's Court who has been required to pay upon a suit upon the bond, has undoubtedly the right to contribution from his cosurety, and it is the rule that if a surety be dead his estate continues liable for his obligation upon the bond, so his obligation for contribution continues.

"The death of the surety does not discharge his estate from liability to contribute to the payment of the amount paid to the other surety upon the joint obligation." *Bradley* v. *Burwell*, 3 Den. 61. See also *Norton* v. *Coons*, 3 Den. 130; *Cornes* v. *Wilkins*, 14 Hun, 428, 431. In the case last cited the Court of Appeals in affirming the judgment of the General Term (see 79

N. Y., 129, 136) did not pass upon this question of liability for contribution in view of the fact that the Statute of Limitations had run in the case against the surety who had paid the debt.

It is also equally clear that the surety upon such an official bond may call upon the principal to indemnify him, for by paying the debt the surety becomes subrogated to all rights respecting the enforcement of the same, and where there are two principals he may call upon either for indemnity. See *McCoun* v. *Sperb*, 53 Hun, 166. This has been held to be the law, even where of two joint administrators one was guilty of a *devastavit* in consequence of which the surety on the administrator's bond was held liable to make good the loss. Having done so the said surety sued the other principal who had been guilty of no wrongdoing. The General Term in the Second Department (*McCoun* v. *Sperb*, 53 Hun, 166), held that the action was maintainable although in effect it rendered the one administrator liable for the torts of his coadministrator. In *Sperb* v. *McCoun*, 110 N. Y. 605, the Court of Appeals passed upon the right of one administrator who had compelled his coadministrator to account under §§ 2603 and 2606 of the Code, and secured a decree for the payment and delivery of the fund to himself upon the revocation of the letters of his coadministrator to prosecute the official bond, it was held that he was authorized first, by § 2607 of the Code, to maintain an action upon the official bond which has been filed, to recover the sum thus decreed to be paid to him and which his coadministrator had failed to pay. Judge Earl commented upon the fact that the plaintiff, surviving administrator, was also one of the principals upon the bond, and that while in his representative capacity he had a right to prosecute the bond against the one who was his own surety as well as that of his former coadministrator, still when the surety had paid to the plaintiff in his representative capacity, the sum required to indemnify him for the default of his coadministrator he could then as surety enforce his remedy against the plaintiff individually as one of his principals for indemnity. "In this way the estate will be protected by the bond, and the defendant as surety will have all the indemnity which the law gives him." *Ibid.*, at p. 610, citing *Boyle* v. *St. John*, 28 Hun, 454. See *Nanz* v. *Oakley*, 120 N. Y. 84; *Matter of Adams*, 30 Misc. 184. In *Nanz* v. *Oakley* where the administrator of the executor who had been innocent of wrongdoing sued the surety of his decedent's coexecutor who had converted estate moneys, it was held, Haight, J., that the defendant signed as surety, "and as such, she became liable for the joint acts of the principals, and for the *individual defaults* of each."

§ 715. **Time limit in bond.**—The time during which the surety is liable for the acts of the principal is material. Where the engagement of the surety is for the future he cannot be made liable for the past, as to which he has not covenanted. *Thomson* v. *Am. Surety Co.*, 170 N. Y. 109, 113, aff'g 56 App. Div. 113; *Thomson* v. *MacGregor*, 81 N. Y. 592. But when the surety engages that the principal will account before a court of competent jurisdiction for the money or property coming to his hands by virtue

of the representative relation, the surety is then bound by any competent judgment determining the amount, and no defense is open to him unless he can show fraud or collusion. *Thomson* v. *Am. Surety Co.*, *supra*, at p. 114, citing *Annett* v. *Terry*, 35 N. Y. 256; *Scofield* v. *Churchill*, 72 N. Y. 565. See *Matter of Grant*, 122 App. Div. 602, as to substituted surety's right in this respect.

PART V

ADOPTION

CHAPTER I

JURISDICTION OF THE SURROGATE

§ 716. **Jurisdiction of the Surrogate.**—The jurisdiction of Surrogates over the adoption of children is now defined by the Domestic Relations Law, being ch. 14 of the Consolidated Laws, which jurisdiction is shared by the county courts. If one court makes an order, a review or abrogation thereof cannot be had in the other, except possibly in cases of fraud. *Matter of Ward*, 57 Misc. 328, citing *Corbin* v. *Casina Land Co.*, 26 App. Div. 410; *Matter of Trimm*, 30 Misc. 493. The adoption of children is a form of domestic relation unknown to the common law of England and existing in this country only by virtue of statute. *Matter of Thorne*, 155 N. Y. 140, citing *Carroll* v. *Collins*, 6 App. Div. 106. This explains the rule, reiterated in the cases, that one asserting the relationship must show compliance with the statute. See *Matter of Huyck*, 49 Misc. 391; *Heinemann* v. *Heard*, 62 N. Y. 448.

§ 717. **History of law.**—The first general statute on the subject enacted in this State was ch. 830 of the Laws of 1873 which was entitled "An act to legalize the adoption of minor children by adult persons." It defined adoption as provided for therein to be: "The legal act whereby an adult person takes a minor into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor." It prescribed who might adopt children, what consents were necessary, and when they might be dispensed with; and provided for the attendance of the parties before a county judge and the execution of the required consents and the agreement of adoption. The last section (§ 13) declared that "Nothing herein contained shall prevent proof of the adoption of any child heretofore made, according to any method practiced in this State, from being received in evidence, nor such adoption from having the effect of an adoption hereunder."

The precise meaning of this clause has been defined by the Courts of Appeals. *Matter of Thorne, supra.* It refers to those forms of adoption theretofore existing by virtue of special statutory enactments contained in the charters of charitable societies that receive destitute and homeless

children; and whose officers were permitted to execute agreements of adoption on their behalf with suitable persons willing to assume obligations of parents. An example of such an enactment may be found in ch. 244 of the Laws of 1819, in reference to the American Female Guardian Society, which was considered in a careful and able opinion by Judge Hamilton Ward of the eighth district in the case of *Simmons* v. *Burrell*, 8 Misc. Rep. 388. Except under particular statutes of this character, there appears to have been no such thing as an adoption which gave a child any right of inheritance known to the law of this State, prior to the act of 1873. See also *Carroll* v. *Collins*, 6 App. Div. 106, 110, citing and discussing *Morrison* v. *Morrison*, unreported; *Hill* v. *Nye*, 17 Hun, 457; *Simmons* v. *Burrell*, 8 Misc. 388. But the legislature did not have in contemplation by the act of 1873 to legalize private agreements executed without authority of law and containing no safeguard or restrictions of any kind as to the transmission of any property. *Matter of Thorne, supra.* So in *Smith* v. *Allen*, 161 N. Y. 478, 482, it was held that it is insufficient evidence of adoption to prove mere entry in books of Church Charity Foundation and the fact of living with testator, although his will referred to child as his "adopted daughter."

This act of 1873 was amended by ch. 703 of the Laws of 1887 in one respect. The 10th section, as it originally stood, provided that the child when adopted should take the name of the person adopting, and the two thenceforth should sustain towards each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation, excepting the right of inheritance and except as to the limitations over the real and personal property under deeds, wills, devises and trusts. The amendment of 1887 changed the phrase, "excepting the right of inheritance," so as to make it read "including the right of inheritance."

The important feature of this amendment was that the capacity of inheritance denied in the first act is granted in the second. *Brantingham* v. *Huff*, 174 N. Y. 53, 59; *Dodin* v. *Dodin*, 17 Misc. 35, 38. This provision giving the right to inheritance could have no *retroactive* effect, that is, so as to apply to adopted children whose parents died before the act went into effect. See *Dodin* v. *Dodin*, 16 App. Div. 42, 44, citing *Ely* v. *Holton*, 15 N. Y. 595; *Matter of Miller*, 110 N. Y. 216. But if the death occurred subsequent to the passage of the act, the right of inheritance being a right which accrues only at the death of the intestate, the provisions of the act would apply. *Dodin* v. *Dodin, supra*, at p. 45. *Brantingham* v. *Huff, supra*, is not in conflict with this rule, for in that case there was a written agreement, fixing a term of years expiring in 1879. This amendment of 1887 was in effect a modification of the statute of descents, giving to the word "children," as used in that statute, a meaning which includes adopted as well as children of the blood of the deceased. In *Matter of Hopkins*, 102 App. Div. 458, a stepchild, duly adopted, was held not to be within the term "children" in a will executed before the adoption. On the other hand, in *Theobald* v. *Smith*, 103 App. Div. 200, a child adopted just before the amendment of 1887 was held to acquire, *eo instante* of its

passage, the right of inheritance contemplated thereby. This is logical. The one case involved testator's intent when he made the will; the other, the general legislative intent. But it must be noted that to confer the capacity of inheritance is a prerogative of the legislature (*Dodin* v. *Dodin*, 17 Misc. 35, 39); the adopting parent has nothing whatsoever to do with it. Nevertheless, if a contract of adoption is made whereby the child is promised property rights, or rights of inheritance, the rights of the child so adopted, irrespective of the statute and even in spite of the fact that the contract of adoption may not have been in conformity with the statute, are enforceable under the contract, the child has a right to a specific performance of the agreement. See below "Effect of Adoption." *Brantingham* v. *Huff*, involved an alleged oral agreement to will property to the adopted child which was held to be merged in a later written agreement, silent on that point. See also *Mahaney* v. *Carr*, 175 N. Y. 454, 462. See also *Hamlin* v. *Stevens*, 177 N. Y. 39, as to construction of agreements with decedents. Also *Killian* v. *Heinzerling*, 47 Misc. 511. See *Godine* v. *Kidd*, 64 Hun, 585. In this case an infant was held entitled to interpose a defense in an action of partition in effect demanding the specific performance of an agreement by the adopting parents that she should be made their heir as to all property they might have at their decease. And it has also been held that a parol agreement, that a child should have at the adopting parent's death all his property subject to the interest of the widow upon consideration of the adoption of the plaintiff, and her living with him as his daughter, was a valid agreement and imposed a trust upon such property, binding upon the heirs, devisees and even upon purchasers with notice, which is enforceable in a court of equity. *Heath* v. *Heath*, 18 Misc. 521, 522, citing *Gall* v. *Gall*, 64 Hun, 601; 19 Abb. N. C. 19, and note; *Godine* v. *Kidd*, 64 Hun, 585; *Sherman* v. *Scott*, 27 *id.* 331; *Parsell* v. *Stryker*, 41 N. Y. 480; *Scott* v. *Missionary Society*, 41 N. J. Eq. 115; *Roehl* v. *Haumesser*, 114 Ind. 311; *Sharkey* v. *McDermott*, 91 Mo. 647. See *Gillian* v. *Guaranty Trust Co*, 186 N. Y. 127, for review of history of law.

But since the adoption of children is wholly regulated by statute and the right of inheritance depends upon the regularity of the proceedings in compliance with the statute, it is manifest that where a child stands upon the rights of an adopted child compliance with the statute must be affirmatively shown if controverted. See *Hamlin* v. *Stevens*, 177 N. Y. 39, where "our children" was held not to include a "nephew" never formally adopted. And it has been held error for a court to allow a plaintiff claiming to be adopted to amend his complaint and set up an agreement to adopt. *Carroll* v. *Collins*, 6 App. Div. 106. This would entirely change the cause of action.

The operation of the present act, is expressly limited by § 110, as follows:

> Proof of the lawful adoption of a minor heretofore made may be received in evidence, and any such adoption shall not be abrogated by the enactment of this chapter and shall have the effect of an adoption hereunder. Nothing

in this article in regard to an adopted child inheriting from the foster parent, applies to any will, devise or trust made or created before June 25, 1873, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created.

Thus, while adoption creates a mutual right of inheritance *from* one another yet the child may not inherit *through* the parent from strangers to its blood. See *Kettell* v. *Baxter*, 50 Misc. 428.

§ 718. **Definition.**—"Adoption is the legal act whereby an adult takes a minor into the relation of child, and thereby acquires the right and incurs the responsibilities of parent, in respect to such minor." Section 110 Dom. Rel. Law.

Voluntary adoption is any other than that of an indigent child or one who is a public charge from an orphan asylum or charitable institution. *Ibid.*

The person adopting is designated the foster parent. *Ibid.*

The persons designated by the act as capable of exercising the right of adoption thereunder, that is, of becoming foster parents, are:

(*a*) An adult unmarried person,

(*b*) An adult husband,

(*c*) An adult wife, or

(*d*) An adult husband and his adult wife together.

§ 719. **Consents.**—Prior to the proceeding for adoption certain consents are required. This is covered by § 111 of the Domestic Relations Law.

Consent to adoption is necessary as follows:

1. Of the minor, if over twelve years of age.

2. Of the foster parent's husband or wife, unless lawfully separated, or unless they jointly adopt such minor.

3. Of the parents or surviving parent of a legitimate child, and of the mother of an illegitimate child.

4. Of a person of full age having *lawful* custody of the child, if any such person can be found. This is required when the father or mother is not living, or, if living, is under one of the conditions warranting a dispensing with her or his consent.

The statute dispenses with the consent of

(*a*) A parent who has abandoned the child (as to what will constitute abandonment, see *Matter of Larson*, 31 Hun, 539; 96 N. Y. 381),

(*b*) A parent who is deprived of civil rights,

(*c*) A parent divorced for his or her adultery or cruelty,

(*d*) A parent adjudged to be insane,

(*e*) A parent adjudged to be an habitual drunkard,

(*f*) A parent judicially deprived of the custody of the child for cruelty or neglect.

§ 720. **Proceedings before the Surrogate.**—Where the adoption is sought to be had in the Surrogate's Court (note the County Court has also equal jurisdiction) the foster parent or parents must attend in person be-

fore the Surrogate of the county in which they or either of them reside; with them must appear the minor, and also every person whose consent is required to be had. Exception, in the latter regard, as to the appearance, is made in the case of a parent, person or institution having the legal custody of the minor who resides in some other State or county. Provision is made (§ 112 of Domestic Relations Law) that the written acknowledged consent of such parent, person or officer of the institution (certified as conveyances are required to be certified to entitle them to record in a county of this State), is deemed equivalent to personal appearance. But where an appearance is made, an instrument must be presented to the Surrogate "containing substantially the consents required." Section 112, *id.* It must also contain an agreement executed by the foster parent or parents to the effect that he, or she, or they, will adopt the minor, and treat such minor as his, her, or their own lawful child. This instrument must be accompanied by a statement of the age of the child, "as nearly as the same can be ascertained." This statement, it is provided, "shall be taken *prima facie* as true."

Then the instrument must be signed by the foster parent, or parents, and every person whose consent is required, except as above excepted. "When a parent or person or institution having the legal custody of the minor resides in some other *country*, State, or county, his or their written acknowledged consent, or the written acknowledged consent of the officers of such institution, certified as conveyances are required to be certified to entitle them to record in a county in this State, is equivalent to his or their appearance and execution of such instrument." § 112, Dom. Rel. Law. The Surrogate is then required to take their several acknowledgments to the instrument. In *Von Beck* v. *Thomson*, 44 App. Div. 373, 378, where the practice is thoroughly described, it was held that actual acknowledgment before the judge making the order was not material where his order recited the execution of the instrument.

§ 721. **Petition.**—In New York County, the Surrogate's office requires a petition reciting the proper facts, and accompanied by the requisite papers, to be filed. This petition is sworn to before the Surrogate. The printed rules do not cover this, but the practice is proper, and makes a complete record.

§ 722. **The order.**—Thereupon the Surrogate *if satisfied that the moral and temporal interests of the child will be promoted thereby*, must make an order of adoption. In order so to satisfy himself, the Surrogate will usually interrogate those appearing before him, and ascertain:

(*a*) The circumstances of the minor,

(*b*) The attitude and circumstances of his parents, if any;

(*c*) The character and ability of the foster parent or parents.

He should have an intelligent understanding of the situation, for as there is no provision for any special guardian to protect the minor's rights, the Surrogate is charged particularly with the responsibility of seeing to it that the contemplated adoption will promote the moral and temporal interests of the child.

The present act omits the words in § 113 with which the corresponding section (§ 9, ch. 830, Laws of 1873) began, "The judge shall examine all persons coming before him pursuant to the last section, each separately, and, if satisfied," etc.

This was doubtless omitted merely as superfluous. The Surrogate is bound, by the very nature of his jurisdiction over infants, to make such examination as will suffice to satisfy him.

§ 723. **Contents of the order.**—The order in form allows and confirms the adoption. It must, where the minor is an orphan, and no person can be found having lawful custody of it, recite this fact. Section 111, *id.* It must also recite the reasons for the order, that is, the reasons which satisfy the Surrogate that the moral and temporal interests of the child will be promoted by the adoption. Section 113. Immaterial facts need not be recited. Thus the fact that the child adopted is an illegitimate child, should such fact develop on the examination, need not appear on the face of the order of adoption. It is quite immaterial what its previous condition or relations were, "if the Surrogate is satisfied" as to the adoption. See *Matter of Gregory*, 13 Misc. 363, Arnold, Surr.

The directing clause directs " that the adoption of said A by said B, the foster parent, be and the same hereby is in all respects allowed and confirmed," and that the minor shall thenceforth be regarded and treated in all respects as the child of the foster parent or parents. The New York Surrogate also adds, "and that the said B be and he hereby is deemed to have incurred the responsibilities of a parent in respect to such minor;" also "that the said minor be hereafter called by the name of ——."

When signed, the order with the instrument, as well as the acknowledged consents of nonresident parties whose consent is necessary, where such has been required under § 62, must be filed and recorded in the county clerk's office.

The following precedents are suggested:

The petition where required by local practice can be readily adapted. Observe the clear requirements of §§ 110, 111 and 112 and recite the agreement and the consents as annexed. Section 113 as to the order to be made will necessitate alleging in the petition facts, proof of which will satisfy the Surrogate that the moral and temporal interests of the child will be promoted by the adoption prayed for.

Memorandum of agreement.

Surrogate's Court,
County of

In the Matter of the Adoption of a minor, by and foster parents.

AGREEMENT made the day of by and between residing at (and residing at) of the one part, hereinafter called the foster parents, and (*here specify the parents of the child if legitimate, or the mother of the child if illegitimate, un-*

less the consent be unnecessary under the exceptions specified in section 3 above) (*or, if the child has no father or mother living or whose consent is necessary then insert the name of a person of full age having lawful custody of the child*). *Note.*

Note. If the child has no father or mother living and no person can be found who has the lawful custody of the child, it would seem that the agreement should be made with the child itself as the party of the second part.

Whereas the said foster parents are desirous of adopting, pursuant to the provisions of the Domestic Relations Law, a (fe) male child of the age of years, and to treat such child as (his, her or) their own lawful child, and to extend to such child all the benefits, privileges and rights contemplated by such statute.

Whereas said parties of the second part approve of and consent to said contemplated adoption of said minor:

Now, in consideration of the premises, the said parties hereby mutually covenant, agree and consent as follows; that is to say:

First. The said foster parents hereby covenant and agree and each of them for himself and herself hereby covenants and agrees to adopt and treat the said minor as his, her, or their, own lawful child, hereby extending and assuring to such minor all rights, benefits and privileges incident to such relation; and hereby severally assume and engage to fulfill all the responsibilities and duties of parents in respect to such minor.

Second. And the said parties of the second part hereby consent (and each of them for himself and herself hereby consents) to such adoption, and covenants and agrees to acquiesce therein and to refrain from doing or causing to be done any act or thing whatsoever inconsistent or in any way interfering with the rights, privileges or duties of such child when adopted.

Note. Note the provisions of section 62 as to the written consent of parent, person or institution having legal custody of the minor when nonresident or located in some other state or county. Care should be taken as to county clerk's certificate and all the formalities required in the certification of conveyances.

In Witness Whereof the parties hereto have severally set their hands and seals the day and year first above written.

In presence of

Surrogate.

Signatures, e. g.

John Smith (foster parent).

Julia Ann Smith (foster parent).

Charles Peters (Smith) (the adopted minor in case he is over twelve years of age).

Or David Peters and Maria Peters (parents).

Timothy Wells (person having lawful custody of child. *Note.*

(Acknowledgment by all before Surrogate.)

Statement as to age of minor child under section 62, Domestic Relations Law.

Surrogate's Court,
County of

Title.

State of New York, County of } ss.:

being duly sworn deposes and says:

That he is well acquainted with the minor child above named (*state relationship of affiant if any to said minor*); and deponent further says on information and belief that said child was born on about the day of 19 and is now years of age; *or say:*

And deponent further says: That he has made diligent inquiry to ascertain the age of said minor child and as nearly as the same can be ascertained such age is years and months. (*Here state source of deponent's information and belief, such as inquiry from the mother if any, or from relatives.*)

Sworn to before me, this day of 19

(*Note.*)

Note. The Surrogate may supplement this affidavit by further examination upon the hearing before him, particularly if the age of the infant approximates twelve years, in order to determine whether or not the consent of the child to the adoption is necessary.

Order under section 63 of Domestic Relations Law.

Surrogate's Court,
County of

In the Matter of the Adoption of a minor, by and Foster Parents.

Where petition is filed, recite the fact, and the papers presented therewith. If none is required then say, e. g.

A and B, the foster parents above named having personally appeared before me and been examined in pursuance to the provisions of an act relating to the domestic relations constituting chapter 14 of the Consolidated Laws, and having presented to me an instrument containing substantially the consents required by said act, an agreement on the part of the foster parent (*or* parents) to adopt and treat said minor as (*his, her, or*) their own child, together with the statement of the age of such child as nearly as the same can be ascertained; and said instrument having been signed by said foster parents and by each person whose consent is necessary to the adoption, and severally acknowledged by said persons before me (*note*) (excepting the consent of the person having legal custody of said minor residing at Philadelphia in the State of Pennsylvania, which consent was presented to me in writing, duly acknowledged and certified as conveyances are required to be certified to entitle them to record in any county of this State);

And it appearing to my satisfaction from the examination had by me into the premises, that the moral and temporal

Note. If the child has no father or mother living and no person can be found who has the lawful custody of the child recite this fact in the order.

interests of the child will be promoted thereby, because of the following reasons: (*here recite the reasons, as for example,* that the child is a foundling and likely to become otherwise a charge upon the county, *or* that the parents have abandoned the child, *or* have been judicially deprived of the child on account of cruelty or neglect, *or* that the parents are indigent and unable to care for the child, *or any other sufficient reason*), it is

Ordered and Adjudged that said adoption of said by and the said foster parents, be and the same is hereby in all respects allowed and confirmed, and it is hereby

Further Ordered and Directed that said minor shall hereafter be regarded and treated in all respects as the child of said and foster parents, with all the rights and privileges conferred by law.

Surrogate.

This order with the instrument and consent must be filed and recorded in the office of the county clerk.

§ 724. **Adoption a statutory proceeding.**—Care must be taken to follow the statute exactly. *Matter of Thorne,* 155 N. Y. 140; *Matter of Mac Rae,* 189 N. Y. 142. From and after the 1st of October, 1896, when the Domestic Relations Law first went into effect, no child could or can be adopted "except in pursuance thereof." Section 60, now § 110. There is absolutely no method of adoption, now in this State, other than by statute, whereby a right of inheritance may be established. *Carroll* v. *Collins,* 6 App. Div. 106.

The prior act governing adoptions (ch. 830, Laws of 1873) legalized all adoptions theretofore made pursuant to any method practiced in the State. See *Hill* v. *Nye,* 17 Hun, 457; *Simmons* v. *Burrell,* 8 Misc. 388 (exhaustive discussion of prior practice as to adoption); *Dodin* v. *Dodin,* 17 Misc. 35, aff'd 16 App. Div. 42.

§ 725. **Effect of adoption.**—As to the effect on rights of both the foster parent and the adopted child, the statute provides by § 114:

Effect of adoption.

Thereafter the *parents* of the minor are *relieved from all parental duties* toward, and of all responsibility for, and have no rights over such child, or to his property by descent or succession.

Hence, if a second adoption be had, the natural parents thus ousted of all duty or right, need not be asked to consent in the new proceeding. *Matter of Mac Rae,* 189 N. Y. 142.

Where a parent who has procured a divorce, or a surviving parent, having lawful custody of a child, lawfully marries again, or where an adult unmarried person who has become a foster parent and has lawful custody of a child, marries, and such parent or foster parent consents that the person, who thus becomes the stepfather or the stepmother of such child, may adopt such child,

such parent or such foster parent, so consenting, shall not thereby be relieved of any of his or her parental duties toward, or be deprived of any of his or her rights over said child, or to his property by descent or succession.

The child takes the name of the foster parent. His *rights of inheritance and succession from his natural parents remain unaffected* by such adoption.

The foster parent or parents and the minor sustain toward each other the legal relation of parent and child and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, except as the same is affected by the provisions in this section in relation to adoption by a stepfather or stepmother, and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen.

See note following *Godine* v. *Kidd*, 29 Abb. N. C. 37, at p. 49 (*S. C.*, 64 Hun, 585), on the effect of adoption of children on law of succession. And *Brantingham* v. *Huff*, 174 N. Y. 53. In *Matter of Hopkins*, 43 Misc. 464, A left residuary to B, but if B died childless then to his surviving brothers and sisters. One of the latter died before time of distribution leaving adopted child C. Held C had no interest under A's will.

See *Matter of Cook*, 187 N. Y. 253 as to 1% transfer tax on legacy to such child or its issue.

The act of 1896, as the act of 1873, only applies to adoption made after its passage. *Hill* v. *Nye*, 17 Hun, 457.

The child may enforce an agreement, made at the time of adoption, by the parent to make it his sole heir. *Brantingham* v. *Huff*, 43 App. Div. 414. This was reversed in 174 N. Y. 53, on the ground that the agreement sued on was oral, hence merged in a later written one, silent on this point. And though the agreement of adoption contains no recital thereof it may be proved by parol. *Ibid.* See also *Winne* v. *Winne*, 166 N. Y. 263, 270. But agreements with decedents stand on a special footing. They must be established clearly and convincingly. If in writing, the proof is easy. But if not, the claimant must prove there was an agreement, and every substantial fact thereof. And in such respects the court should require disinterested corroboration. *Hamlin* v. *Stevens*, 177 N. Y. 39, and cases examined. Also *Rosseau* v. *Rouss*, 180 N. Y. 116; *Holt* v. *Tuite*, 188 N. Y. 17. So a parol agreement to support, educate and maintain a child and give it a natural child's share in the adopted parent's estate will be specifically enforced where there is performance sufficient to take it out of the Statute of Frauds. *Healy* v. *Healy*, 55 App. Div. 315.

An adopted child shares with the natural children in the proceeds of a policy of insurance on the father's life payable to the wife or her children, if the wife die before the husband. This right is not affected by the fact that the policy had been issued before the child was adopted. *Von Beck* v. *Thomson*, 44 App. Div. 373.

§ 726. **Transfer tax.**—An adopted child has the same privileges under the Collateral Inheritance Tax as the lawful progeny of the testator. *Matter of Cook*, 187 N. Y. 253. This has been held even in the case of a child adopted under the laws of another State. *Matter of Butler*, 58 Hun, 400. In this case, however, it appeared that the adoption proceedings in the adjoining State, Massachusetts, were substantially "in conformity with" the proceedings required by the law of this State; moreover, the decedent stood in the mutually acknowledged relation of a parent to the adopted child for over eleven years prior to his death.

The Law relating to Taxable Transfers (see separate chapter, *post*) contains the provision grouping with father, mother, husband, wife, child, brother, sister, etc., "any child or children adopted as such in conformity with the laws of the State of New York, or any person to whom the decedent for not less than ten years prior to death, stood in the mutually acknowledged relation of a parent." The Surrogate has power to pass upon the question whether a person claiming exemption under this part of the statute sustains the relation of an adopted child. See *Matter of Comins*, 9 App. Div. 492, holding that a Surrogate on a proceeding to compel the filing of an inventory, may investigate whether the petitioner's claim to be an adopted daughter is true. What facts will constitute sufficient proof that the decedent stood in the mutually acknowledged relation of a parent to the person interested, depends upon reasonable rules. Thus in a carefully reasoned case by the Surrogate of Madison County (*Spencer's Estate*, 4 N. Y. Supp. 395), it was held that the legatee was entitled to exemption where it appeared that she had lived with the testatrix, her aunt, for nearly twenty-eight years; that she had sustained to her a filial relation, "heeding and respecting her aunt's desires, confiding in her judgment, shaping her life and character under her control and influence, doing all that a child could have done for her comfort and happiness." In this case it was shown that the legatee had uniformly addressed the decedent as "Auntie," and never as "Mother," nor was she ever called "Daughter," but it also appeared that her father was living and that she had "sacrificed her home with her father in order to cheer the home of her aunt." The learned Surrogate says, in his opinion at p. 396, "the word home implies, 'the existence of parental relations,' and we cannot doubt (they) understood that in this exchange of homes, parental relations were to exist between them. That parental anxiety and solicitude would ever after be the duty of the aged [aunt] while she lived." The fact was also held to be material, that at no time had there been any suggestion or claim between the decedent and the legatee as to payment for her services. This case further substantially held that for the purpose of the Collateral Inheritance Tax there is a distinction between child and children, adopted as such in conformity with the laws of the State of New York and a person to whom the decedent stood in the mutually acknowledged relation of a parent; as to the latter it was held that such acknowledgment may be established by any mode of proof which would satisfy the court, i. e., by

an agreement in writing, or any verbal declarations, or statements in public, or to each other, or by evidence of life, acts and conduct of the parties. See also *Matter of Butler*, 58 Hun, 400.

§ 727. **Adoption from charitable institutions.**

An orphan asylum or charitable institution, incorporated for the care of orphan, friendless or destitute children, may place children for adoption, and the adoption of every such child shall, when practicable, be given to persons of the same religious faith as the parents of such child. The adoption shall be effected by the execution of an instrument containing substantially the same provisions as the instrument provided in this article for voluntary adoption, signed and sealed in the corporate name of such corporation by the officer or officers authorized by the directors thereof to sign the corporate name to such instruments, and signed by the foster parents or parent and each person whose consent is necessary to the adoption; and may be signed by the child, if over twelve years of age, all of whom shall appear before the (*county judge or*) surrogate of the county where such foster parents reside and be examined, except that such officers need not appear; and such (*judge or*) surrogate may thereupon make the order of adoption provided by this article. Such instrument and order shall be filed and recorded in the office of the county clerk of the county where the foster parent resides and the adoption shall take effect from the time of filing and recording. **§ 115, Dom. Rel. Law.**

§ 728. **Residence of foster parents.**—The language of the statute seems to intimate by the words, "county judge or Surrogate of the county where such foster parent resides," that the intent of the statute is at least impliedly to exclude nonresidents of the State from those entitled to exercise the act of adopting under its provisions. No such limitation is imposed by the words of § 110 which defines who are entitled to adopt a minor in pursuance of art. 7.

While, of course, if the intent of the act was clear, a reason for the act might be found in the advantages to be gained from the permanent supervision by the Surrogate having jurisdiction over the first proceedings, over the future interests of the child adopted, yet this is not a sufficient reason on which to base the assertion of a rule which might work a good deal of hardship.

The word "residence" has been variously interpreted according to the circumstances of particular cases. See *Cinn., H. & D. R. R.* v. *Ives*, 20 N. Y. St. Rep. 67. See definitions in opinion. Anderson's Dictionary of Law says: "Reside . . . . may import temporary sojourn or permanent domicil." It has been held in some connections that there must be a settled fixed abode and intention to remain permanently at least for a time for business or other purposes. *Matter of Austin*, 13 App. Div. 247, 249, citing *Frost* v. *Brisbin*, 19 Wend. 11; *Matter of Thompson*, 1 Wend. 45; *Bartlett* v. *Mayor*, 5 Sandf. 44; *Douglas* v. *Mayor*, 2 Duer, 110.

The word "permanently" in such a connection is used as the converse of transient. "It expresses the idea of an abode, which may be temporary, but is not transient; that is, an abode where one settles down with some

business or other object which requires it, and with the intention of remaining steadily in the place *until the object is accomplished.*" *Ibid.*, at p. 249.

For the purpose, therefore, of this act, nonresident parents (*in prospectu*) can acquire a residence temporary, but not transient, with the object of accomplishing the *voluntary* adoption of an infant within the State of New York, and an adoption had under the act whereby such nonresidents become foster parents would undoubtedly be sustained provided the circumstances were such that the Surrogate is satisfied that the interests of the child will be furthered by the adoption. There seems to be no case bearing directly on this point in the New York Reports. There is a Pennsylvania case (*Sankey's Case*, 4 County Court Reports, 624), where an order of adoption was made on petition of one alleging that he was a resident of San Francisco, California, but temporarily resident in Williamsport, Pennsylvania, and that as such latter resident he was desirous of adopting, etc. An adoption having been had in compliance with the statute in other regards, a motion was subsequently made that the decree be vacated, on the ground that the petitioner was not properly a resident of the county in which the decree was made. The court denied the application and held distinctly, that the statute contemplated a temporary as well as a permanent residence; that it did not require a residence for any specific time nor a residence amounting to citizenship. This decision was affirmed by the Supreme Court in *Matter of Wolf's Appeal*, 22 W. N. C. 93. The reasoning of this decision appears sound, and it would seem that in such a case in our courts, it would merely be incumbent upon the Surrogate to inquire more narrowly into the facts required to satisfy him under § 63, that the moral and temporal interests of the child will be promoted by such adoption.

Naturally in such a case the practitioner will be careful to inquire into the laws of the State of the permanent residence of the foster parents, so that the necessary confirmatory proceedings may be there taken to secure to the child its rights of inheritance in that State.

By ch. 264 of the Laws of 1898 (vol. 1, p. 780), the legislature by an act entitled, "An act to prevent Evils and Abuses in connection with the placing out of Children," provided that destitute children (i. e., an orphan, abandoned, or destitute minor, under the age of sixteen years, who is an inmate of a public or private charitable institution, or is maintained by or dependent upon public or organized charity), should not be placed out by any person or corporation other than a charitable or benevolent institution, society or association, or society for the prevention of cruelty to children duly incorporated under the laws of the State, or by a local officer charged with the relief of the poor and placing out in the manner now provided by law, *unless such person or corporation should be duly licensed* under this act to place out destitute children.

The term "place out" is defined as meaning the "placing of a destitute child in a family other than that of a relative within the second degree

for the purpose of providing a home for such child." The following limitation is contained in § 2 of the act: "Nor shall any local officer charged with the relief of the poor, directly, or indirectly, place out any child or children *into a family not residing within the State.*" So far, therefore, as such local officers are concerned, they are restricted to dealings with resident families. In view of the obvious purposes of the act, which is evidenced in § 5 relating to visitation of children so placed out by the State Board of Charities, it is doubtful whether the rules above discussed relating to persons acquiring a temporary residence here for the purpose of securing such an adoption, would be held applicable when children are "placed out." Chapter 264, L. 1898, however, does not even purport to relate to adoption, under the Domestic Relations Law.

§ 729. **Abrogation of voluntary adoption.**—A minor may be deprived of the rights of a voluntary adoption by the following proceedings only:

> The foster parents, the minor and the persons whose consent would be necessary to an original adoption, must appear before the county judge or surrogate of the county where the foster parent resides, who shall conduct an examination as for an original adoption. If he is satisfied that the abrogation of the adoption is desired by all parties concerned, and will be for the best interests of the minor, the foster parent, the minor, and the persons whose consent would have been necessary to an original adoption shall execute an agreement, whereby the foster parent and the minor agree to relinquish the relation of parent and child and all rights acquired by such adoption, and the parents or guardian of the child or the institution having the custody thereof, agree to reassume such relation. The judge or surrogate shall indorse, upon such agreement, his consent to the abrogation. The agreement and consent shall be filed and recorded in the office of the county clerk of the county where the foster parent resides, and a copy thereof filed and recorded in the office of the county clerk of the county where the parents or guardians reside, or such institution is located, if they reside, or such institution is located, within this state. From the time of the filing and recording thereof, the adoption shall be abrogated, and the child shall reassume its original name and the parents or guardians of the child shall reassume such relation. Such child, however, may be adopted directly from such foster parents by another person in the same manner as from parents, and as if such foster parents were the parents of such child. **§ 116, Dom. Rel. Law.**

§ 730. **Application in behalf of child for the abrogation of an adoption from a charitable institution.**

> A minor who shall have been adopted in pursuance of this chapter or of any act repealed thereby, from an orphan asylum or charitable institution, or any corporation which shall have been a party to the agreement by which the child was adopted, or any person on the behalf of such child, may make an application to the county judge or the surrogate's court of the county in which the foster parent then resides, for the abrogation of such adoption, on the ground of cruelty, misusage, refusal of necessary provisions or clothing, or inability to support, maintain or educate such child, or of any violation of duty on the part of such foster parent toward such child; which application

shall be by a petition setting forth the grounds thereof, and verified by the person or some officer of the corporation making the same. A citation shall thereon be issued by such judge or surrogate in or out of such court, requiring such foster parent to show cause why the application should not be granted. The provisions of the Code of Civil Procedure relating to the issuing, contents, time and manner of service of citations issued out of a surrogate's court, and to the hearing on the return thereof, and to enforcing the attendance of witnesses, and to all proceedings thereon, and to appeals from decrees of surrogates' courts, not inconsistent with this chapter, shall apply to such citation, and to all proceedings thereon. Such judge or court shall have power to order or compel the production of the person of such minor. If on the proofs made by him, on the hearing on such citation, the judge or surrogate shall determine that either of the grounds for such application exists, and that the interests of such child will be promoted by granting the application, and that such foster parent has justly forfeited his right to the custody and services of such minor, an order shall be made and entered abrogating the adoption, and thereon the status of such child shall be the same as if no proceedings had been had for the adoption thereof.

After one such petition against a foster parent has been denied, a citation on subsequent petition against the same foster parent may be issued or refused in the discretion of the judge or surrogate to whom such subsequent petition shall be made. **§ 117, Dom. Rel. Law.**

It is held that this provision gives exclusive jurisdiction to the county judge or Surrogate to order the abrogation of the adoption, and as between the two the power to abrogate rests with the court which made the order. *Matter of Trimm*, 30 Misc. 493. And it was intimated in the same case that if the one court made an order of abrogation from which no appeal was taken, it was improper for the other court subsequently to make a new order adopting the child to the same foster parents whose adoption of it had been abrogated because of their unfitness.

§ 731. **Application by foster parent for the abrogation of such an adoption.**

A foster parent who shall have adopted a minor in pursuance of this chapter or of any act repealed thereby, *from an orphan asylum or charitable institution*, may apply to the county judge or surrogate's court of the county in which such foster parent resides, for the abrogation of such adoption on the ground of the wilful desertion of such child from such foster parent, or of any misdemeanor or ill-behavior of such child, which application shall be by petition, stating the grounds thereof, and the substance of the agreement of adoption, and shall be verified by the petitioner; and thereon a citation shall be issued by such judge or surrogate in or out of such court, directed to such child, and to the corporation which was a party to such adoption, or, if such corporation does not exist, to the superintendent of the poor of such county, requiring them to show cause why such petition should not be granted. Unless such corporation shall appear on the return of such citation before the hearing thereon shall proceed, a special guardian shall be appointed by such judge or court to protect the interests of such child in such proceeding, and the foster parent shall pay to such special guardian such sums as the court

shall direct for the purpose of paying the fees and the necessary disbursements in preparing for and contesting such application on behalf of the child. If such judge or surrogate shall determine, on the proofs made before him, on the hearing of such citation, that the child has violated his duty toward such foster parent and that due regard to the interests of both require that such adoption be abrogated, an order shall be made and entered accordingly; and such judge or court may make any disposition of the child, which any court or officer shall then be authorized to make of vagrant, truant or disorderly children. If such judge or surrogate shall otherwise determine, an order shall be made and entered denying the petition. **§ 118, Dom. Rel. Law.**

§ 732. **Indenture of child as apprentice.**—It is sometimes convenient where a child is in an incorporated, or charitable or reformatory or other institution to resort to the expedient of indenture by the commissioners under the Poor Law or in the city of New York under §§ 664 *et seq.*, of the charter. Extended discussion of these laws is not necessary in this book as the Surrogate has no relation to the matter. See art. 8 of Dom. Rel. Law, entitled "Apprentices and Servants," being §§ 120–127 inclusive, of that law. See also *People* v. *Weissenbach*, 60 N. Y. 385.

Attention may properly be called in this connection to §§ 211 and 215 of the Penal Code, which are important in this connection only as bearing upon the conducting of these proceedings in bad faith. It has been held (*People* v. *Bloedel*, 4 N. Y. Supp. 100), that precise compliance with the terms of such an act as this, is not essential to the validity of the proceeding unless so declared by the statute, and in the absence of bad faith a substantial compliance with the terms and intent of the law suffices to sustain the proceedings upon a subsequent attack. And Surrogates where the question comes up before them, as, for example, where the right of the adopted child to share in the parent's estate is put in issue, will undoubtedly follow this liberal rule of construction, particularly where there is nothing in the circumstances of a suspicious character. This right to pass upon the status of the alleged adopted child is unquestionable. For example, where an alleged adopted daughter made an application to a Surrogate to compel the filing of an inventory, and her status as an adopted child was put in issue, the Appellate Division held (*Matter of Comins*, 9 App. Div. 492) that the Surrogate should inquire into the facts and determine her status before proceeding to make an order in the premises.

PART VI

ADMINISTRATION BY EXECUTOR AND ADMINISTRATOR

CHAPTER I

ASCERTAINING THE ESTATE

§ 733. **How the estate to be administered is ascertained.**—After letters have been issued to an executor or administrator, it becomes his duty to ascertain the character or amount of the estate which he is to administer. There are three proceedings in this connection to be noted.

(*a*) Proceedings to discover property withheld.

(*b*) Inventorying and appraisement of the estate, and

(*c*) Proceedings for the appraisement of the estate with a view to fixing the transfer or succession tax.

This latter is the subject of a separate chapter. If the existence of assets comes to his knowledge it is his duty to try to reduce them to possession, and if he does not do so he is chargeable with neglect of duty. *Matter of Johnston*, 60 Hun, 516; *Matter of Millard*, 2 Connoly, 91. Thus he is entitled to a savings bank deposit of his testator. If the pass book be lost he may nevertheless demand payment, and cannot be required to idemnify the bank as the book is not a negotiable instrument. *Mills* v. *Alb. Exch. Sav. Bk.*, 28 Misc. 251, 253, and cases cited. He may be excusable, if in good faith he refrains from acting upon the reasonable belief that it would be useless to do so. *Matter of Hall*, 16 Misc. 174. See *O'Connor* v. *Gifford*, 117 N. Y. 275. But the *onus* is upon the executor to show a fair reason why he did not commence proceedings to collect a debt. *O'Connor* v. *Gifford*, 117 N. Y. 271, at p. 279. In *Harrington* v. *Keteltas*, 92 N. Y. 40, it was held that an executor, hearing of a debt due the estate was bound to active diligence for its collection, and should not wait for a request from the distributees. An executor, accused of a *devastavit* in failing to collect in a debt, may show the absolute, irretrievable and hopeless insolvency of the debtor (*O'Connor* v. *Gifford*, *supra*), or such lack of legal proof as not to warrant his suing on the claim in the judgment of his counsel. *Ibid.*

This duty is not confined to New York assets. It is the executor's duty to "seek for assets where they may be found." *Estate of Stewart*

Newell, 38 Misc. 563. Attention is called to the various provisions of Decedent Estate Law, ch. XIII of Consolidated Laws, in art. 4 relating to Executors, Administrators and Testamentary Trustees, especially in relation to actions by or against them on contract or in tort. See particularly §§ 116, 117 and 118.

§ 734. **Proceedings to discover property withheld.**—But apart from actions by executors and administrators against debtors of their decedents, they are provided by the Code with a remedy, summary in its nature, to discover and to reduce to possession assets of their decedent. It is first provided:

> Every person becoming possessed of property of a testator or intestate, without being thereto duly authorized as executor or administrator, or without authority from the executor or administrator, is liable to account for the full value of such property to every person entitled thereto, and shall not be allowed to retain or deduct therefrom any debt due to him. **§ 2706, Code Civil Proc.**

In *Koenig* v. *Wagener*, 126 App. Div. 772, it was held, with two dissents, that the administrator of a deceased legatee, whose share had been directed to be paid by a decree which the defendant administrator had failed to perform, could sue on the decree in the Supreme Court for the amount. That § 1913, prohibiting actions on a judgment between "original parties" did not apply to the representatives of such parties, citing *Smith* v. *Britton*, 2 T. & C. 498; and that § 2706 did not afford any summary or exclusive method that ousted the Supreme Court of jurisdiction.

§ 735. **How to proceed to discover.**—The provisions of the Code defining the procedure for this discovery of property withheld, are contained in §§ 2707 *et seq.* Section 2707 is as follows:

> An executor or administrator may present to the surrogate's court, from which letters were issued to him, a written petition duly verified, setting forth, on knowledge or information and belief, any facts tending to show that money or other personal property which should be delivered to the petitioner, or included in an inventory or appraisal, is in the possession, under the control or within the knowledge or information of a person who withholds the same from him; or who refuses to impart knowledge or information he may have concerning the same, or to disclose any other fact which will aid such executor or administrator in making discovery of such property, so that it cannot be inventoried or appraised; and praying an inquiry respecting it, and that the person complained of may be cited to attend the inquiry and be examined accordingly *and to deliver the property if in his control* (so amended in 1903). The petition may be accompanied with an affidavit or other evidence, written or oral, tending to support the allegations thereof. If the surrogate is satisfied, on the papers so presented, that there are reasonable grounds for the inquiry, he must issue a citation accordingly; which may be made returnable forthwith, or at a future time, fixed by the surrogate, and may be served at any time before the hearing. Where the person, or any of the persons, to be cited does not reside, or is not within the county of the surrogate, the citation, in the surrogate's discretion, may require him to appear at a specified time and place

within the county where he resides or is served, before a judge, a justice of the peace, or a referee, designated in the citation, or before the surrogate of that county. **§ 2707, Code Civil Proc.**

§ 736. **Intent of the Code.**—The proceedings under §§ 2707 to 2709 of the Code of Civil Procedure are intended to provide a summary mode of discovering and reaching the property of the decedent in the hands of a third person (*Matter of Carey*, 11 App. Div. 289, 290, citing *Matter of Stewart*, 77 Hun, 564. See *Matter of Walker*, 136 N. Y. 29), and of enabling the executor or administrator of a decedent to obtain an order for the surrender and delivery of such money or other property belonging to his decedent's estate, as may be discovered to be in the hands or under the control of such person not lawfully entitled to possession thereof. *Matter of Knittel*, 5 Dem. 371, 372. But the procedure contemplated by this section is not designed to enforce the collection of debts, which can be collected by action. *Matter of Nay*, 6 Dem. 346; *Matter of Stewart*, 77 Hun, 564; *Matter of Cunard*, 2 Connoly, 16, aff'd 27 N. Y. St. Rep. 128, 129. See also *Matter of White*, 119 App. Div. 140, where payment of savings bank balance was sought to be compelled; the refusal being because bank was merely decedent's debtor (see cases cited at p. 142) nor to determine title (*Matter of Richardson*, 31 Misc. 666; *Matter of Curry*, 25 Hun, 321; *Matter of Walker, supra; Matter of Scott*, 34 Misc. 446; *Matter of Knittel*, 5 Dem. 372; *Matter of Stewart*, 77 Hun, 564), but a summary means of discovery, and in case of a mere naked possession of decedent's "money or other personal property" to compel delivery. *Ibid.* But possession is not necessary in the respondent. Section 2707 says, "is within the knowledge or information of a person who withholds the same." So discovery of information can be had hereunder. *Matter of O'Brien*, 34 Misc. 436, 438, aff'd 65 App. Div. 282; *Matter of Richardson*, 31 Misc. 666. See also *Matter of Gick*, 49 Misc. 32, aff'd 113 App. Div. 16.

Section 2707 contemplates a special proceeding, having for its object a trial and a decree; and therefore it has been held, that if there is more than one executor or administrator, the proceeding should be taken in the names of all the representatives. *Matter of Slingerland*, 36 Hun, 575, 577, 579.

§ 737. **Discussion of § 2707.**—Keeping in mind the object of this special proceeding, the following points should be noted:

The Surrogate must be satisfied upon the showing made by the petition and such affidavits as are filed with it, that there are reasonable grounds for the inquiry. And if the petition shows on its face, that the applicant is not entitled to the relief which he seeks, the petition should be dismissed. For example, a deposit of a certain sum of money had been made by a third person in trust for the benefit of a decedent, in the Bowery Savings Bank, and the administratrix of the decedent's estate instituted a proceeding, looking to the citation of the president of such bank to be examined in order that the petitioner might be fully advised as to said moneys and the detention by said bank of the same with a view to the payment of the

amount to such administratrix. Surrogate Rollins dismissed the proceedings upon the ground that it appeared upon the face of the petition, that assuming the truth of its allegations, it was clear, that no disclosure could be made upon the examination of the person sought to be cited, which would justify an order under these provisions of the Code; that the deposit with the bank merely created a liability on the part of the bank to pay thereafter an amount equal to the deposit, with interest thereon according to the terms of the contract under which the deposit was made; and that, to allow the petitioner to proceed, would be to give the representative of an estate, the right to examine a debtor of a decedent merely for the sake of ascertaining the nature and extent of such debtor's liabilities to the estate. This, he held, was not the object of the Code in these sections. *Matter of Knittel*, 5 Dem. 371, 373, Rollins, Surr.; *Matter of Carey*, 11 App. Div. 289, 290. *See Matter of O'Brien*, 65 App. Div. 283, and *Matter of White*, 119 App. Div. 140.

The allegations of the petition may be upon information and belief; this is now distinctly provided by the section; but Surrogate Rollins had held in 1884 (*Walsh* v. *Downs*, 3 Dem. 202) that he could direct the citation to issue, and cause the parties cited to be examined, whenever he was satisfied, that there were reasonable grounds for the inquiry, "and he may properly be satisfied of that fact, by allegations on the part of the petitioner of any circumstances which tend to show that property of a decedent's estate is in the possession or under the control of the respondent, and that too, whether the petitioner positively alleges the existence of such facts or merely avows his belief of their existence, because of information received by him from sources that he fails to reveal."

The language of § 2707, "a written petition setting forth on knowledge or information and belief any facts tending to show," etc., does not require the statement by the petitioner in his petition of the grounds or sources of his information and belief. *Ibid.*, and *Mead* v. *Sommers*, 2 Dem. 296.

§ 738. **The petition.**—The following is suggested as a form containing the substantial allegations:

Petition under section 2707.

Surrogate's Court,
County of

Title. }
}

To the Surrogate's Court of the County of

The petition of of respectfully shows:

I. That he is the (sole) executor of the last will and testament of late of deceased, and that letters testamentary were issued to your petitioner by this court on the day of 19 (*Note.*)

Note. Where the petition is made by an administrator, modify description accordingly.

II. Your petitioner further shows on information and belief that certain personal property consisting of (*here describe it*). (*Note.*) See next page.

Note. "The maintenance of these proceedings is contemplated only where the character of the property is definite, certain, and its ownership undisputed." *Matter of Carey*, 11 App. Div. 289, 290.

(*Or say* that certain moneys amounting to the sum of dollars) (*note*) and which should be delivered to the petitioner or included in his inventory (*or* included in the inventory or appraisal of the estate of the decedent, to be by him administered), is in the possession (*or* under the control, *or* within the knowledge or information) of C. D. of who withholds the same from your petitioner (*or* who refuses to impart knowledge or information he may have concerning the same or to disclose any other fact which will aid your petitioner in making discovery of such property) so that the said property (*or* money) cannot be inventoried or appraised.

III. That your petitioner has made diligent search and inquiry in regard to such property and is informed and verily believes, that the same was in the possession of the decedent within two years prior to his death (*note*) and came into the possession of the said at a time and under circumstances unknown to this petitioner. (*Note.*)

Note. See section 2709.

Note. If the circumstances are known, allege them concisely, noting that the allegation must be such as to show a right on the part of the executor to a discovery of the property by the respondent, and must not be such as to show merely a debt of the respondent to the estate. See text, *supra.*

IV. Your petitioner has demanded of the said the delivery of the said property (*or* that he impart knowledge or information he may have concerning the same, or disclose any other fact which will aid your petitioner in making discovery of such property) but that the said has wholly neglected and refuses to deliver the same (*or* to impart such knowledge or information, etc.).

V. (*If corroborative affidavits are to be presented with the petition it is proper to add a clause referring to the same as the sources of the petitioner's information and grounds for his belief; but under the decision above noted it is not essential that such grounds be disclosed, and in the absence of such corroborative affidavits such a paragraph is not vital.*)

Wherefore your petitioner prays for an inquiry respecting such property so withheld under article 1 of title 4 of chapter 18 of the Code of Civil Procedure; and further prays that the said the person hereby complained of may be cited to attend such inquiry and be examined accordingly, and that he be directed to deliver such property, if in his control; and that your petitioner have such further relief in the premises as may seem just.

Signature.

§ 739. **Object of proceeding to be kept in view.**—Section 2707 evidently contemplates that the representative of the estate is to be by this proceeding put in possession of the property, or of information which will enable him to cause it to be inventoried and appraised. It has consequently been held, that where the representative had already inventoried the estate, and the securities in regard to which information is sought, or the delivery of which is asked for, are afterwards specified in a petition under § 2707, the application will be denied. *Matter of Cunard*, 6 N. Y. Supp. 883, aff'd 27 N. Y. St. Rep. 128.

As these sections are intended merely to provide a machinery for discovery, they are not a substitute for the remedy by accounting, or for an action for the collection of a debt (see *Matter of Nay*, 6 Dem. 346, and § 736, *supra*), so that where a respondent appears to have come rightly into possession of the assets in question or to have a right of disposition of the same, and especially if it appears that the possession of the assets after the decedent's death was with the knowledge or consent of the representative, the proceeding will of course be dismissed. *Matter of Cunard*, *supra*, citing *In re Wing*, 41 Hun, 452. See as to where facts do not present occasion for this specific relief, *Matter of Haniman*, 50 Misc. 245.

In this proceeding the Surrogate is confined to a determination of the question of possession. He has no right to pass upon the question of title.

Mr. Throop in his note to § 2712, states: "Care has been taken to confine the decree to a determination of the question of possession." The decree which the Surrogate can make is only that possession be delivered to the representative of the deceased party; and he can only make such decree where it clearly appears that such possession is wrongfully withheld. See *Matter of Curry*, 25 Hun, 321, Davis, P. J. But since the amendment in 1903 (see italics in section as quoted above), it has been held that, although *title* is asserted by the one in possession, the Surrogate, having power to direct *delivery*, may proceed with the examination of the respondent. *Matter of Gick*, 113 App. Div. 16. The court says, "Of course, the Surrogate can make no order adverse to the person cited affecting the property in question, *unless it conclusively appears as matter of law* from the evidence produced that his claim of title is not well founded. The purpose of the statute is to enable the Surrogate to say whether the claim of title . . . . rests on a sound foundation, or is a mere subterfuge . . . . to deprive the executor . . . . of the property or of information, etc." *Matter of McGuire*, 106 App. Div. 131, is distinguished, since there the order directed delivery *without any examination*, though respondent answered setting up his claim of title.

The *Matter of Beebe*, 20 Hun, 462, was decided under the provisions of ch. 394 of the Laws of 1870, which was subsequently held unconstitutional and void. The present sections under discussion are a re-enactment with modifications of the provisions contained in that act.

The prayer of the petition should follow the language of the Code substantially, in which case the Surrogate can grant all relief which the Code authorizes. Where the prayer was that the respondent should account for, and deliver over, all personal property, etc., in his possession, etc., the petition was properly dismissed. *Estate of Coman*, 5 N. Y. St. Rep. 442.

Where prior proceedings of the same character have been had and never actually determined by a decree or order of discontinuance, it is competent for the Surrogate if the facts warrant it, and he is satisfied that there are reasonable grounds for further inquiry to make an order requiring a further attendance. *Matter of Spreen*, 1 Civ. Proc. Rep. 375.

§ 740. **The citation.**—"If the Surrogate is satisfied, on the papers so pre-

sented, that there are reasonable grounds for the inquiry, he *must* issue a citation accordingly." § 2707, Code Civ. Proc.; *Matter of Paramore*, 15 N. Y. St. Rep. 449.

The citation issued under § 2707 should be addressed to the person by whom it is claimed the property or information is withheld, and should command him to attend before the Surrogate at a given time and place upon the inquiry by said Surrogate and to be examined fully and at large respecting property of the decedent, or of which the decedent had possession at the time of or within two years before his death, alleged to be within the possession or under the control of the respondent. This citation, it is provided by § 2707, may be made returnable before a judge, justice of the peace, referee, or Surrogate of another county, if it appears that the respondent resides in such county and not within the county of the Surrogate.

It is manifest that this citation is not a citation to which the representative is entitled as a matter of course. The Code expressly provides, that the Surrogate must be satisfied upon the papers presented that there "are reasonable grounds for the inquiry." Consequently, the question whether in any particular case, a citation should or should not be issued, is one for the decision of which the judicial power of the Surrogate is invoked, a power which of course cannot be delegated to any of his subordinates; the clerk, therefore, cannot issue the citation by virtue of the powers conferred upon him by § 2509 of the Code of Civil Procedure. See *Mauran* v. *Hawley*, 2 Dem. 396, where Judge Rollins held that in such a proceeding as this no citation can properly be issued until the Surrogate has directed its issuance, after examination of the petition, and a determination that there are reasonable grounds for the inquiry sought to be made.

In addition to the citation it is provided that the Surrogate must annex to, or indorse upon, the citation an order requiring the parties cited to attend personally at the time and place therein specified. This is provided by § 2708, which is as follows:

> The surrogate must annex to or indorse upon the citation an order requiring the party cited to attend personally, at the time and place therein specified. The citation and order must be personally served, and service thereof is ineffectual, unless it is accompanied with payment or tender of the sum required by law to be paid or tendered to a witness who is subpœnaed to attend a trial in the supreme court.

This order, as provided, needs only to be indorsed upon the citation and may be substantially in the following form:

Order under section 2708.

Surrogate's Court,
County of

Title. }

It is hereby Ordered that the party cited by the within citation attend personally at the time and place herein specified.

Or, as is the frequent practice, the direction and signature without caption or title, is quite sufficient.

§ 741. **Mode of service to be strictly observed.**—The provisions of § 2708 have been somewhat strictly construed. It has been held that where the order is not annexed to, or indorsed upon, the citation, and properly served as required by § 2708 and by § 2520, it is proper for the respondent to appear and move to dismiss the proceedings. *Mauran* v. *Hawley*, 2 Dem. 389, 396.

In the case just cited, Surrogate Rollins held, that the citation must be served as required by § 2520; and that, as to the order, the original order must be exhibited if it is desired to bring the party served into contempt because of his disobedience of its directions, citing *Howland* v. *Ralph*, 3 Johns. 20; *Billings* v. *Carver*, 54 Barb. 40; *Gross* v. *Clark*, 1 Civ. Proc. Rep. 25, affirmed in Court of Appeals, 1 *id.* 469.

The provision in § 2708 that a failure to attend as required by a citation and order personally served may be punished as a contempt of court refers only to cases where the citation and order are duly served according to the provisions of the Code. Reference should be had to § 2520, which provides the mode of service. But it should be noted that this proceeding is one coming within the exception specified in § 2520 "except where special provision is otherwise made by law," for it is expressly provided by § 2707 that the citation made be made returnable "forthwith or at a future time fixed by the Surrogate, and may be served *at any time* before the hearing."

§ 742. **The hearing.**—Section 2709 was materially amended in 1903, ch. 526, and, to note the changes, they are italicized:

> On the attendance of a person to whom a citation is issued, as prescribed in this article, *he may submit an answer duly verified showing cause why the examination should not proceed. The surrogate may then dismiss the proceeding or direct the examination to proceed. In the latter case* he must be sworn to answer truly all questions put to him, touching the inquiry prayed for in the petition; and he may be examined fully and at large respecting property of the decedent, or of which the decedent had possession at the time of or within two years before his death. A refusal *to attend or* be sworn, or to answer a question which the *surrogate* determines to be proper, is punishable in the same manner as a like refusal by a witness subpœnaed to attend a hearing before the surrogate. *The extent of the examination shall be in the discretion of the surrogate. If the witness is examined concerning any personal communication or transaction between himself and the decedent, all objection under section eight hundred and twenty-nine to his testimony as to the same in future litigation is waived.* Either party may produce further evidence, in like manner and with like effect as on a trial. **§ 2709, Code Civil Proc.**

The changes thus are: (*a*) Surrogate is not necessarily ousted of jurisdiction by a verified answer. *Matter of Gick*, 113 App. Div. 16; *Matter of Packard*, 53 Misc. 163. In *Matter of Stiens*, 60 Misc. 631, it is said: "This section clothes the Surrogate with power to prosecute the inquiry to the point of determining the verity of the allegations of the answer."

(*b*) Part of former § 2708 is put appropriately in this section.

(*c*) The part as to § 829 is important. The waiver results, whoever interrogates. Thus in *Killian* v. *Heinzerling*, 114 App. Div. 410, the evidence was elicited by the Surrogate himself, while seeking the information requisite to enable him to decide the issues raised.

The waiver, moreover, lives, and can be asserted in "any other action" or proceeding respecting that property or transaction. *Ibid.*

§ 743. **Discussion of amended section.**—The first point to note under this section is that the rule that the proceedings must be dismissed as to the property claimed, if the person cited interpose a written answer duly verified claiming title, or a right to possession, or a lien, or special property in the property sought to be discovered is now repealed, making inapplicable cases cited in former editions, to that effect. *Matter of Walker*, 136 N. Y. 29; *Matter of O'Brien*, 65 App. Div. 283, aff'g 34 Misc. 436; *Estate of Hastings*, 6 Dem. 423; *Public Administrator* v. *Elias*, 4 Dem. 139; *Estate of Seaman*, 16 Wkly. Dig. 118.

Even when the rule was that a verified answer ended the matter in the Surrogate's Court the courts were not very strict in insisting upon the formality of the answer. These cases may still apply as to the formality of the answer now permitted. The Surrogate determines whether the answer filed is sufficient under the statute. A mere denial by the person cited that he has in his possession property of the decedent is not enough, as the Surrogate is to determine that upon his examination under oath. *Matter of O'Brien*, 65 App. Div. 283, 290; *Matter of Seaman*, 16 N. Y. Wkly. Dig. 118. The power to grant leave to amend has been exercised. *Public Administrator* v. *Elias*, *supra*. And answers which have not conformed to the exact wording of the section or have been "inartificially drawn," were sustained where they were sufficient to raise an issue as to title of the property, because of the original limitation by the decisions of the power of the Surrogate to the mere inquiry into the question of possession. See *Matter of Wing*, 41 Hun, 452, 453; *Matter of Masterton*, 6 Dem. 450.

In *Matter of Wing* the respondent's answer recited only that the property in question was placed in his hands by the decedent under an agreement that it should be held as security for advances made and to be made to the decedent, which advances were never repaid, and that respondent under the agreement disposed of the property in the lifetime of the decedent, and applied the whole of the proceeds towards his own reimbursement, and that none of such property remained in his possession. The Surrogate's order dismissing the proceeding was affirmed by the General Term. See *Estate of Cunard*, 2 Connoly, 16. Under the section as it now stands, and in view of the discretion to dismiss the Surrogate has, it is advisable for the respondent claiming a right of title or possession to assert it specifically and on adequate allegations of fact. For, if he makes a *prima facie* case of unimpeachable right the Surrogate will dismiss, and remit the petitioner to an action. In other words, using the obverse of the language of *Matter of Gick*, 113 App. Div. 16, if it conclusively appear as matter of law from the

sworn allegations of respondent's answer that his claim of title is well founded, the Surrogate may decline to try the question of title. But see § 746, below, under "Decree" as to "consent" to Surrogate's trying question of title.

§ 744. **Return day.—Hearing.**—The requirement of the citation that the respondent appear and be examined is one the operation of which terminates with the hearing, unless it is duly and formally adjourned, in which case the respondent is bound to attend upon the adjourned day. If formal adjournment is not had, or noted, the respondent cannot be punished for contempt for failure to appear at a subsequent date, and complete the examination. Nevertheless, the Surrogate's jurisdiction is not divested, he retains his jurisdiction until the proceedings determine in a decree or in a discontinuance; and if the respondent has been released from obligation to attend by inadvertent omission to take an adjournment, it will only be necessary to secure a further direction from the Surrogate requiring him to attend upon another return day. *Matter of Spreen*, 1 Civ. Proc. Rep. 375.

§ 745. **The answer.**—If the person cited has refused delivery because he is the "owner of the property, or entitled to possession thereof, by virtue of a lien thereon, or special property therein," the Code formerly permitted him to file a duly verified answer which ended the proceeding. But since the change in 1903 he is given greater latitude, in a sense. He may set up, by such answer, any facts "showing cause why the examination should not proceed." In *Matter of Gick*, 49 Misc. 32, the Surrogate points out the development of the proceeding, its increasingly inquisitorial character, and yet the protection of respondent in opening his mouth to testify to transactions with decedent in case he be examined on his assertion of title. It is also noted in the opinion that delivery of the property is only one form of the relief. Information respecting it, for inventory or appraisal, is also obtainable.

Therefore, we repeat, the respondent would better "put his best foot forward" in his answer, if he appeals to the discretion of the Surrogate. For that discretion is not only exercisable at the time of answer, but also where "the person who withholds" or who is "complained of" or "to be cited" becomes "the witness"; for at this stage "the extent of the examination shall be in the discretion" of the Surrogate. The answer may be substantially in the following form:

Answer under section 2709.

Surrogate's Court
County of

Title. }

The answer of the respondent in the above entitled proceeding respectfully shows to this Court and alleges:

1. That he has been served with a citation and order requiring him to attend personally at the time and place

therein specified and to be examined concerning certain money (*or* other personal property) of late of deceased, alleged to be in the possession or under the control of this respondent.

2. The respondent further shows that he is the owner of the property described in the petition filed herein upon which said citation was issued by reason of the following: (*Note.*)

[2*a*. *Or if the respondent does not claim ownership but merely the right to the possession of the property, state:* and the respondent further says, that he admits that property described in the petition upon which said citation was issued is in his possession; but he avers that he is entitled to the possession thereof by virtue of a lien thereon (*or* special property therein) arising out of and existing by reason of the following facts: (*here state concisely the circumstance entitling him to such possession*). (*Note.*)]

The respondent therefore alleges that the foregoing facts constitute cause why the examination in this Court should not proceed (*add if desired*) in that respondent is not willing to consent to the determination of his rights, if disputed, in this Court. He, therefore, prays that the proceeding be dismissed.

(Dated.) (Signature.)

(Verification.)

Note. The allegation of ownership was formerly held sufficient without showing how he became the owner; specific details were only required where the right to possession is claimed by virtue of a lien, etc. See, below, *Metropolitan Trust Co.* v. *Rodgers*, 1 Dem. 365. Now, it is advisable to plead the facts, e. g., in *Matter of Haniman*, 50 Misc. 245, respondent alleged an agreement in writing, vesting title in him.

Note. See *Matter of Motz*, 5 N. Y. St. Rep. 343; *Delamater* v. *M'Caskie*, 4 Dem. 549, 553, and *Matter of Hastings*, 6 Dem. 423.

§ 746. The decree.

If the facts admitted by the witness show that he is in the control of property to whose immediate possession the petitioner is entitled, the surrogate may decree that it be delivered to the petitioner. If the witness admits having the control of the property, but the facts as to the petitioner's right are in dispute, the proceeding shall end, unless the parties consent to its determination by the surrogate, in which case it shall be so determined. **§ 2710, Code Civil Proc.**

This section is part of the amendatory scheme of 1903. It emphasizes the discretion of the Surrogate. Under *Matter of Gick*, 113 App. Div. 16, delivery may be decreed (*a*) if admitted facts show witness to be in control; (*b*) of property to the *immediate* possession of which petitioner is *entitled.*

That is, it "conclusively appears as matter of law, that respondent's claim is not well founded.

But, conceding possession or control, respondent may still be asserting *right* to the property, which is disputed. Here the proceeding " shall end," unless by consent of both parties the Surrogate is asked to determine the issue. In that case "it *shall* be so determined."

This gives the one withholding the property a material advantage. For he may resist the proceeding, perhaps, merely to secure the benefit of the

waiver of § 829, and under this case just cited, he may assert the waiver in "any action" which is necessitated by his refusal to consent under § 2710.

The decree which the Surrogate is authorized to make in such a proceeding is based upon the examination had and other testimony taken. The Surrogate acts judicially, and the examination must proceed under the ordinary rules of evidence. *Tilden* v. *Ormsbee*, 70 N. Y. 609, aff'g 10 Hun, 7.

The following precedent is suggested:

Surrogate's Court
Caption.

Decree under § 2710, Code Civil Proc.

Title.

The petition of executor under the last will and testament of deceased, verified the day of having been presented to this court, from which letters testamentary duly issued to such executor, setting forth on knowledge (*or* information and belief) facts tending to show that money (*or* personal property) which should be delivered to such executor (*or*, included in an inventory or appraisal), was in the possession of (*or* under control of) who withholds the same from such executor, so that it cannot be inventoried or appraised; (*or* was within the knowledge or information of who refused to impart knowledge or information by him possessed concerning the same) and praying an inquiry respecting such property; and that the person complained of should be cited to attend the inquiry and be examined accordingly. (*Note.*)

Note. If affidavits or other evidence, written or oral, tending to support the allegations of the petition accompanied it, recite the same as having been read and filed.

And the Surrogate, being satisfied on the papers so presented, that there were reasonable grounds for the inquiry, having issued a citation accordingly; now on the due return of said citation, and on filing due proofs of the personal service upon said of said citation and of the order of the Surrogate indorsed thereon requiring the party cited to attend personally at the time and place therein specified on said return day, and the parties cited having attended as required by said citation and having submitted an answer duly verified praying that the examination should not proceed. (*Note.*) And the Surrogate, having directed the examination nevertheless to proceed, and said having thereupon been duly sworn and examined fully and at large respecting the property of the decedent, or of which the decedent had possession at the time or within two years of the time of his death;

Note. If the Surrogate, under, § 2709, dismiss at this step, provide accordingly. If not, proceed as in precedent suggested.

And it appearing from the facts admitted by the said the witness that he is in the control of the following property (*specify*) (*A*) to the immediate possession of which the petitioner is entitled:

Now, on motion of attorney for said executor, it is

Ordered, Adjudged and Decreed that the said de-

liver possession of the following property (*or* pay dollars) to the said as executor of the last will and testament of deceased; and it is further

Adjudged and Decreed (*here insert directions as to costs and disbursements*). (*Note.*)

Or, in proper case, substitute after (*A*) but the facts as to the petitioner's right being in dispute, and the parties not consenting as provided in section 2710 of the Code of Civil Procedure, it is, on motion of attorney for said

Ordered, Adjudged and Decreed that the proceeding be and the same hereby is dismissed (with costs, etc.). If the consent be given, modify the decree above by proper recital thereof, followed by such direction as the determination made by the Surrogate requires.

(Signature.)

Note. See *De Lamater* v. *M'Caskie*, 5 Dem. 8. Fifty dollars held reasonable as costs.

See also, *Estate of Nickerson*, 2 Connoly, 6, 9.

It is important that the decree should specify distinctly the property to be delivered; accordingly, an order including in addition to specific items "all other property, goods, chattels, credits and effects of deceased, in the possession or under the control of the respondent" will not be upheld. The order and the warrant issued under § 2710 must both be specific. *Tilton* v. *Ormsbee*, 10 Hun, 7, 9, aff'd 70 N. Y. 609.

§ 747. **Ascertaining the estate; inventory and appraisal.**—The second proceeding, above specified (see § 733), in ascertaining the estate is by inventory and appraisal.

The making of an inventory and the appraisal of the personal property exhibited thereby, is required and provided for by § 2711 of the Code, which is as follows:

> On the application of an executor or administrator, the surrogate, by writing, must appoint two disinterested appraisers, as often as may be necessary, to appraise the personal property of a deceased person, who shall be entitled to receive a reasonable compensation for their services, to be allowed by the surrogate, not exceeding for each, the sum of five dollars for each day actually employed in making appraisement, in addition to expenses actually and necessarily incurred. The number of days' services rendered, and the amount of such expenses, must be verified by the affidavit of the appraiser, delivered to the executor or administrator, and adjusted by the surrogate before payment of his fees.
>
> The executors and administrators, within a reasonable time after qualifying and after giving a notice of at least five days to the legatees and next of kin, residing in the county where the property is situated, and posting a notice in three of the most public places of the town, specifying the time and place at which the appraisement will be made, must make a true and perfect inventory of all the personal property of the testator or intestate; and if in different and distant places two or more such inventories as may be necessary.
>
> Before making the appraisement, the appraisers must take and subscribe an oath, to be inserted in the inventory, that they will truly, honestly and impartially appraise the personal property exhibited to them, according to the best of their knowledge and ability.

They must in the presence of such of the parties interested as attend, estimate and appraise the property exhibited to them, and set down each article separately with the value thereof in dollars and cents, distinctly, in figures opposite to the articles respectively. Service of the notice above mentioned may be either personal, or in the manner prescribed by section 797, subdivision 1, and section 798 of this act. **§ 2711, Code Civil Proc.**

§ 748. **Precedents suggested.**—The application of the executor or administrator for appointment of appraisers may be in the following form:

Application for appointment of appraisers.

Surrogate's Court,
County of Westchester.

In Matter of the Estate of }
Deceased. }

To the HON. FRANK V. MILLARD, Surrogate:

Application is hereby made by as of the estate of late of the of deceased, to have appraisers appointed to estimate and appraise the personal property of said deceased, which consists of

Dated 19

.....

The order of the Surrogate is thereupon entered and may be substantially in the following form:

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Order appointing appraisers.

In the Matter of the Estate of }
Deceased. }

Upon the application of the of the of late of the of in said County of Erie, deceased.

It is Ordered, that and two disinterested persons, be and they are hereby appointed appraisers of the personal property of said deceased.

Surrogate.

The notice which the executor or administrator is required to give to the legatees and next of kin, under § 2711, may be in the following form:

Notice under section 2711.

To all persons interested in the estate of late of the of County of Erie, N. Y., deceased:

Notice is hereby given that the undersigned, as the of the of said deceased, with the aid of the appraisers appointed by the Surrogate of said County, will on the day of 19 at o'clock in the noon at the late residence of the said deceased, in said pro-

ceed to make an appraisement and inventory of all the goods, chattels and credits of said deceased, according to law.

Dated this day of 19

.....

The oath of the appraisers is usually printed at the head of the official form of inventory furnished by most of the Surrogates' Courts, and is to the effect that the appraiser "will truly, honestly and impartially appraise the personal property of the decedent which shall be exhibited to him, according to the best of his knowledge and ability."

§ 749. **The inventory.**—The inventory as it appears from § 2711 must be made by the executors or administrators within *a reasonable time* after qualifying. It is the duty of an executor or administrator to make and file an inventory. So far as the representative is concerned, it consists of a statement of the assets, but prior to its being returned and filed, it must include the appraisal by the appraisers appointed by the Surrogate under § 2711. In preparing the inventory, posting the notice, giving notice to the legatees and next of kin, and other proceedings required by the statute, care must be taken to conform to the requirements of the Code. If any of the steps required are dispensed with, the appraisement is invalid, and the disbursements made by the representative for an invalid appraisal, will not be allowed, but must be borne by the representative personally. *Salomon* v. *Heichel*, 4 Dem. 176, Rollins, Surr.

The statute regulating these provisions for the preparation and return of the inventory, do not seem to contemplate any interference by legatees or next of kin with the action which the executors or administrators aided by the appraisers are required to take. *Vogel* v. *Arbogast*, 4 Dem. 399, 401. The representative must act upon his own responsibility and under the sanction of his official and special oath. The only right of persons interested to interfere is provided by § 2715 discussed below, whereunder a creditor or person interested may present to the Surrogate's Court proof by affidavit, that the representative has failed to return an inventory, or a sufficient inventory, in which case the Surrogate is authorized to require performance of this duty by order. See *Forsyth* v. *Burr*, 37 Barb. 540; *Schmidt* v. *Heusner*, 4 Dem. 275. Therefore, where parties interested desire to impeach the accuracy of an inventory, they cannot do so in a direct proceeding for the purpose. If the inventory is properly verified by the oath of the executor or administrator, the proper practice is to await the accounting, whereupon all disputed questions respecting the existence of assets or their valuation can be determined. *Vogel* v. *Arbogast*, *supra*, at p. 403, citing *Thomson* v. *Thomson*, 1 Bradf. 24; *Montgomery* v. *Donning*, 2 Bradf. 220; *Waring* v. *Waring*, 1 Redf. 205; *Sheerin* v. *Public Administrator*, 2 Redf. 421.

Section 2714 provides what the inventory must contain and is as follows:

The inventory must contain a particular statement of all bonds, mortgages, notes and other securities for the payment of money belonging to the de-

ceased, known to the executor or administrator; with the name of the debtor in each security, the date, the sum originally payable; the indorsements thereon, if any, with their dates and the sum which, in the judgment of the appraisers, is collectible on each security; and of all moneys, whether in specie or bank-bills, or other circulating medium, belonging to the deceased, which have come to the hands of the executor or administrator, and if none have come into his hands, the fact shall be stated in the inventory.

The naming of a person executor in a will does not operate as a discharge or bequest of any just claim which the testator had against him; but it must be included among the credits and effects of the deceased in the inventory, and the executor shall be liable for the same as for so much money in his hands at the time the debt or demand becomes due, and he must apply and distribute the same in the payments of debts and legacies, and among the next of kin as part of the personal property of the deceased. The discharge or bequest in a will of a debt or demand of the testator against an executor named therein, or against any other person is not valid as against the creditors of the deceased; but must be construed only as a specific bequest of such debt or demand; and the amount thereof must be included in the inventory and, if necessary, be applied in the payment of his debts; and if not necessary for that purpose, must be paid in the same manner and proportion as other specific legacies.

If personal property not mentioned in any inventory come to the possession or knowledge of an executor or administrator, he must cause the same to be appraised as herein required, and an inventory thereof to be returned within two months after the discovery thereof; and the making of such inventory and return may be enforced in the same manner as in the case of a first inventory. **§ 2714, Code Civil Proc.**

THE FORM OF THE INVENTORY.

Inventory and appraisement.

Surrogate's Court,
County of
In the Matter of the Inventory and Appraisal of the Goods, Chattels, and Credits which were of late of Deceased.

State of New York, County of } ss.: Oath. (*Note.*)

Note. Each appraiser must take a separate oath.

I of the Town of in said County, Appraiser, duly appointed by the Surrogate of the said County of do and declare that I will truly, honestly, and impartially appraise the personal property of late of the said County of deceased, which shall be for that purpose exhibited to me, to the best of my knowledge and ability.

.....

Sworn to this day of
A. D. 19 before me.

A true and perfect inventory of all the goods, chattels, and

credits which were of late of the Town of in the County of deceased, made by the Administrat of the said deceased, with the aid, and in the presence of of the said County of they having been duly appointed and sworn Appraisers; containing a full, just and true statement of all the personal property of the said deceased, which has come to the knowledge of the said Administrat and particularly of all moneys, bank bills, and other circulating medium belonging to the said deceased, and of all just claims of said deceased, against said Administrat and of all bonds, mortgages, notes, and other securities, for the payment of money belonging to the said deceased, specifying the names of the debtors in each security, the date, the sum originally payable, the endorsements thereon, with their date and the sum which, in the judgment of the Appraisers, may be collectible on such security.

Upon the completion of this Inventory, duplicates thereof have been made, and signed at the end thereof by the Appraisers.

(*a*) List of exempted articles.

(Here specify, having reference to section 2713 of the Code, all items of property, preferably in the order of the subdivisions of that section, which the widow and children are entitled to have exempted, bearing in mind the limitations as to number or value fixed by that section.) (*Note.*[1])

Necessary food for Swine, for sixty days after the death of to wit:

Necessary food for Sheep, for sixty days after the death of to wit:

Necessary food for Cow, for sixty days after the death of to wit:

Necessary provisions and fuel for the Widow, or Child or Children, for sixty days after the death of to wit:

And also the following articles of Household Furniture, not exceeding One Hundred and Fifty Dollars ($150) in value:

Dollars.	Cts.		Dollars.	Cts.

In addition to the within enumerated articles exempt from

Note.[1] Where a man having a family shall die, leaving a widow or minor child or children, the following articles shall *not* be deemed assets, but shall be included and stated in the Inventory of the Estate, without being appraised.

Spinning Wheels.
Knitting Machine.
Weaving Looms.
1 Sewing Machine.
All Stoves put up or kept for use.
One Family Bible.
All Family Pictures and School Books.
Library Books, value $50.
10 Sheep, their Fleeces.
Yarn and Cloth from same.
One Cow.
One Table.
Six Chairs.
Twelve Plates.
One Sugar Dish.
Two Swine, and Pork of such Swine.
All necessary Wearing Apparel.
Beds.
Bedsteads and Bedding.
Necessary Cooking Utensils.
All Family Clothing.

All Clothes of the Widow, and her Ornaments, proper for her station.
One Teapot.
12 Knives and Forks, 12 Spoons.
2 Tea-cups and Saucers.
One Milk Pot.

appraisal, the Appraisers, in the exercise of their discretion, pursuant to the Statute, set apart the following articles of necessary Household Furniture, Provisions, and other Personal Property, for the use of the Widow and minor Children of the testator, the same not exceeding in value One Hundred and Fifty Dollars ($150): (*Note.*[2])

	Dollars.	Cts.		Dollars.	Cts.

(*b*) Articles of household furniture. (*Note.*[3])

Article.	Room in which Contained.	Value.

(*c*) Particular statement of all bonds, mortgages, notes, and other securities for the payment of money under section 2714.

Nature of Security.	Debtor.	Date.	Sum Originally Payable.

(*c*[1]) Promissory notes.

Debtor.	Date.	Sum Originally Payable.	Names of Indorsers.	Amounts Collectible.

(*c*)[2] Moneys belonging to the deceased which have come to the hands of the executor or administrator. (*Note.*[4])

(*d*) (Here include any lease, estate or interest in lands, crops, produce, accrued rents, goods, wares, merchandise, or other assets described in section 2712 not already enumerated.)

(*e*) Accounts receivable, considered good.

Name.	Original Amount Due.	Present Amount Due.	Date of Last Payment.	Amount of Last Payment.

(*f*) Accounts receivable, not considered good.

Name.	Original Amount Due.	Present Amount Due.	Date of Last Payment.	Amount of Last Payment.

(*g*) Chattels having no ascertainable value.

Under this head include all items not properly falling under any head previously described herein, unless they are of a character not to be readily appraised. Under this head will naturally come collections of autographs, butterflies, geographical specimens, having merely a local or special interest; if, however, the collection be one of stamps or of coins hav-

Note.[2] The widow is entitled to the exemption of property under subdivision 5 even though under the will she has been given all the household property. *Matter of Frazer*, 92 N. Y. 239, 246. See also *Lyendecker* v. *Eisemann*, 3 Dem. 72, 73.

Note.[3] Here give full schedule of the furniture and other household chattels, scheduling them under the various rooms of the house so as to be capable of identification by the appraisers upon their being exhibited to them. The inventory should be so ruled as to allow of the amounts being inserted by the appraisers opposite the respective items.

Note.[4] Specify whether this is specie, bank bills, or other circulating medium; and state where each is.

ing a regular market value, the appraisers should take the trouble to estimate its value at least approximately.

(*h*) Debts due by representative.

Under this head exhibit any just claims of the deceased against the representative, if there are any, specifying the date, amount due, original amount, as required by section 2714.

(Signature.)

Note. See 2 R. S., Tit. 3, Art. 1, Chap. VI, § 16, 8th ed., p. 2558.

OATH TO INVENTORY. (*Note.*)

State of New York } ss.:
County of }

being duly sworn, says: I am the executor of the last will and testament of late of deceased; the foregoing inventory by me made is in all respects just and true, it contains a true statement of all the personal property of the deceased which has come to my knowledge, and particularly of all money, bank bills and other circulating medium belonging to the deceased, and of all just claims of the deceased against me, according to the best of my knowledge.

(Signature.)

Sworn to before me, this }
day of 19 }

§ 750. **What shall be deemed assets.**—The Code provides distinctly what should be deemed assets and what articles are to be exempted from appraisement; this is by virtue of §§ 2712 and 2713.

The following shall be deemed assets and go to the executors or administrators, to be applied and distributed as part of the personal property of the testator or intestate, and be included in the inventory:

1. Leases for years; lands held by the deceased from year to year; and estates held by him for the life of another person.

2. The interest remaining in him, at the time of his death, in a term of years after the expiration of any estate for years therein, granted by him or any other person.

3. The interest in lands devised to an executor for a term of years for the payment of debts.

4. Things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support.

5. The crops growing on the land of the deceased at the time of his death.

6. Every kind of produce raised annually by labor and cultivation, except growing grass and fruit ungathered.

7. Rent reserved to the deceased which had accrued at the time of his death.

8. Debts secured by mortgages, bonds, notes or bills; accounts, money, and bank bills, or other circulating medium, things in action, and stock in any corporation or joint-stock association.

9. Goods, wares, merchandise, utensils, furniture, cattle, provisions, moneys unpaid on contracts for the sale of lands and every other species of personal property not hereinafter excepted. Things annexed to the freehold, or to a building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of this section. The right of an heir to any property, not enumerated in this section, which by the common law would descend to him, is not impaired by the general terms of this section. **§ 2712, Code Civil Proc.**

It may be observed that there is an additional statutory "asset" for the recovery and distribution of which an administrator may be appointed, to wit, a cause of action for decedent's death. See §§ 1902, 1903, Code Civ. Proc.

§ 751. **What has been deemed assets.**—Policy of life insurance: assets where "debtor" resides. *Steele* v. *Conn. Gen. Life Ins. Co.*, 22 Misc. 249, 253. See *Morschauser* v. *Pierce*, 64 App. Div. 558. The corporation's residence being determined for administration purposes by its representation within the State by an agent upon whom process may be served. *Id.*, and *Sulz* v. *Mutual R. F. L. Asso.*, 145 N. Y. 563, 571.

See *Leonard* v. *Harney*, 173 N. Y. 352, as to executor's title to an assignable policy willed to her "after the satisfaction of a debt" specified in will.

How question affected by physical location of policy. See *Holyoke* v. *Union, etc., Ins. Co.*, 22 Hun, 75, aff'd 84 N. Y. 648; *Morrison* v. *Mutual Life*, 57 Hun, 97; *Johnston* v. *Smith*, 25 Hun, 171.

Policy on life of husband and assigned to wife is an asset in her estate. *Morschauser* v. *Pierce, supra; Geoffroy* v. *Gilbert*, 154 N. Y. 741; *Matter of Knoedler*, 140 N. Y. 377; *Griswold* v. *Sawyer*, 125 N. Y. 411, 414.

See Domestic Relation Law, § 52 (old number 22) as to rights of widow under insurance on husband's life to extent of insurance, paid for by husband, in premiums up to $500 a year.

The excess is to be deemed a special fund in the husband's estate and primarily liable for his debts. See *Kittel* v. *Domeyer*, 175 N. Y. 205, rev'g 70 App. Div. 134. Of course if there are no debts, or a surplus left after paying them, the balance goes to the wife. *Ibid.*

But the excess is not *assets*. It neither belonged to the husband in life, nor is it a part of his estate. The words in *Kittel* v. *Domeyer, supra*, holding them applicable to creditors "in the event of the *other assets*" being insufficient are an inadvertence of the reporter in the headnote based on the language at p. 213 of the opinion. *Matter of Thompson*, 184 N. Y. 36. See p. 45, substituting "all the assets" for "the other assets."

The Surrogate has no power to try the question whether any part of the proceeds is charged with this statutory lien. *Ibid.*

Doubtless if the excess is paid to the representatives as indicated in *Kittel* v. *Domeyer*, the wife could require him to account for the "special fund" if any be undisposed of.

When payable to "legal representatives." *Sulz* v. *Mutual R. F. L. Asso., supra.*

Partnership property: only the net balance due decedent after partnership accounting. *Montgomery* v. *Donning*, 2 Bradf. 220; *Campbell* v. *Campbell*, 16 N. Y. Supp. 165.

Proceeds of milk taken from decedent's farm by farmers working it for decedent "on shares," is "avails of the personal estate of the intestate" and hence assets in the administrator's hands. *Matter of Strickland*, 10 Misc. 486, 489.

Commissions on transaction payable to decedent, but accruing after death. *Matter of Goss*, 71 Hun, 120.

Checks given to wife at time of decedent's death, unless gift or payment is proved. *Matter of James*, 146 N. Y. 78.

Rents accrued at decedent's death. *Miller* v. *Crawford*, 14 N. Y. Supp. 358. This includes rents payable in advance and thus due when he dies. *Re Weeks*, 5 Dem. 194.

Arrearage of rents and water rates. *Lyons* v. *Dorf*, 49 Misc. 652.

Damages appraised before decedent's death for property taken under condemnation proceedings. *Ballou* v. *Ballou*, 78 N. Y. 325.

Corn and other annual crops "produced by care and cultivation, and not growing spontaneously." *Matter of Chamberlain*, 140 N. Y. 390, 392; 1 Williams on Executors, p. 70; 2 R. S. 82, § 6, subd. 5; *State* v. *Wilbur*, 77 N. Y. 158; *Bradner* v. *Faulkner*, 34 N. Y. 347. But if not needed to pay debts they go to the devisee.

Such residue of the proceeds of a mortgage the testator's widow had a right to use for her support during her life, but remaining unexpended at her death became assets of the testator's estate. *Matter of Clark*, 34 N. Y. St. Rep. 523.

Rents and all proceeds of real estate is assets in executor's hands where all the residuary estate is made one fund and the realty subjected by the will to an equitable conversion. *Smith* v. *A. D. F. T. Founding Co.*, 16 App. Div. 428.

Ornaments of the wife are assets of her estate. *Matter of Whiting*, 19 Misc. 85.

Good will of business sold by representative. *Matter of Silkman*, 121 App. Div. 202; though not, it *seems* for purposes of transfer tax (*q. v. post*).

§ 752. **What has been deemed not assets.**—Proceeds of policy by its terms payable to "children." *Senior* v. *Ackerman*, 2 Redf. 302. Fire insurance policy proceeds on loss after assured's death belong to heirs. *Matter of Kane*, 38 Misc. 276, 280. While the administrator may sue on same he holds sum recovered as trustee for the heirs. *Lawrence* v. *Niagara F. I. Co.*, 2 App. Div. 267.

Funeral benefits from a beneficial association. *Leidenthal* v. *Correll*, 5 Redf. 267. See also *Matter of Smith*, 42 Misc. 639.

Benefits payable to family "of deceased" or to a specific beneficiary. *Matter of Palmer*, 3 Dem. 129, 134, citing *Brown* v. *Catholic Mutual, etc.*, 33 Hun, 263. See *Hellenberg* v. *Ind. Order of B'nai B'rith*, 94 N. Y. 580; *Matter of Gordon*, 39 N. Y. St. Rep. 909.

Whether proceeds of policy go to particular beneficiary or to the estate may depend not only on policy but on by-laws of company. *Sulz* v. *M. R. R. L. Asso.*, 145 N. Y. 563, 568.

So even when payable to "legal representatives" they will not be deemed assets if intent be shown that other than ordinary meaning be given to such words. *Griswold* v. *Sawyer*, 125 N. Y. 411; *Bishop* v. *Grand Lodge*, 112 N. Y. 627, 636.

Moneys deposited by a decedent in his lifetime "in trust" for designated beneficiaries. *Matter of Walker*, 17 N. Y. Supp. 666; *Matter of Collyer*, 4 Dem. 24; *Anderson* v. *Thompson*, 38 Hun, 394; *Crowe* v. *Brady*, 5 Redf. 1.

Deposit in savings bank for testator and his wife, upon proof it was to go to survivor it is not deemed part of decedent's assets. *Matter of Meehan*, 28 Misc. 167, 169.

Growing grass and fruits. *Kain* v. *Fisher*, 6 N. Y. 597; 2 R. S. 82, § 6, subd. 6; *Matter of Chamberlain*, 140 N. Y. 390, 392. See *Matter of Clemans*, 2 Connoly, 237.

Rents accruing after testator's death go to heirs, not to representative. *Priester* v. *Hohloch*, 70 App. Div. 256.

Mortgage payable to A and B "executors of and trustees under" a certain will, not necessarily assets if words are merely "*descriptio personarum.*" *U. S. Trust Co.* v. *Stanton*, 76 Hun, 32.

See as to when mode of transfer not sufficient to make property assets. *Van Slooten* v. *Wheeler*, 76 Hun, 55; *Frost* v. *Craig*, 28 N. Y. St. Rep. 157; *Tompkins* v. *Rice*, 55 Hun, 563.

Proceeds of promissory notes handed by a testator to his executors just before his death with the request to collect and expend upon his funeral expenses and a monument, is not assets so that a widow can claim any part of it. *Matter of Hildebrand*, 1 Misc. 245.

Funds set apart for specific purposes. *Fisher* v. *Fisher*, 1 Bradf. 335.

Assigned estate not assets in hands of administrator of a deceased assignee for benefit of creditors. *Hayne* v. *Sealy*, 22 Misc. 243.

Moneys deposited by decedent "as executor" with stockbrokers as margin for stock deals, when it did not appear that he was really executor of any estate, and he expressly stated he was not. *Mittnacht* v. *Bache*, 16 App. Div. 426.

§ 753. **Exemption for widow and children.**—(See *post*, under Accounting, as to neglect to set apart exempt property.)

> If a man having a family die, leaving a widow or minor child or children, the following articles shall not be deemed assets, but must be included and stated in the inventory of the estate without being appraised:
>
> 1. All spinning-wheels, weaving-looms, one knitting-machine, one sewing-machine, and stoves put up or kept for use by his family.
>
> 2. The family Bible, family pictures and school-books, used by or in such family, and books not exceeding in value fifty dollars, which were kept and used as part of the family library.

3. Sheep to the number of ten, with their fleeces, and the yarn and cloth manufactured from the same; one cow, two swine, and the pork of such swine, and necessary food for such swine, sheep or cow for sixty days, and all necessary provisions and fuel for such widow, child or children for sixty days after the death of such deceased person.

4. All necessary wearing apparel, beds, bedsteads and bedding, necessary cooking utensils, the clothing of the family, the clothes of the widow and her ornaments proper for her station; one table, six chairs, twelve knives and forks, twelve plates, twelve tea cups and saucers, one sugar dish, one milk-pot, one tea-pot and twelve spoons and other household furniture not exceeding one hundred and fifty dollars in value.

5. Other necessary household furniture, provisions or other personal property, in the discretion of the appraisers, to the value of not exceeding one hundred and fifty dollars. Such articles and property shall remain in the possession of the widow, if there be one, during the time she lives with and provides for such minor child or children. If she ceases so to do, she shall be allowed to retain as her own, her wearing apparel, her ornaments and one bed, bedstead and the bedding for the same, and the property specified in subdivision five; and the other articles so exempted shall then belong to such minor child or children. If she lives with and provides for such minor child or children until it or they become of full age, all the articles and property in this section mentioned shall belong to the widow. If there be a widow and no minor child, all the articles and property in this section mentioned shall belong to the widow. *If a married woman die, leaving surviving her a husband, or a minor child or children, the same articles and personal property shall be set apart by the appraisers with the same effect for the benefit of such husband or minor child or children.* **§ 2713, Code Civil Proc.**

See *Matter of Koch's Estate*, 9 N. Y. Supp. 814, opinion of Ransom, Surr., discussing provisions of Revised Statutes.

Subdivision 5 gives the widow absolute title where there is no minor child, to the articles and property mentioned in this section. See *Crawford* v. *Nassoy*, 173 N. Y. 163. The widow takes title absolutely by the express terms of the statute, and no discretion remains to be exercised by the appraisers. As to such property the administrator and appraisers are only entitled to reasonable, temporary possession or opportunity for inspection to enable them to enumerate the same in the inventory. *An action for conversion* of property of this class will doubtless lie against the administrator individually or in his official capacity if he converts such property to his own use, sells the same or declines to deliver the property to the widow *after demand and a reasonable opportunity to inventory* the same. *Ibid.*, citing *Fox* v. *Burns*, 12 Barb. 677; *Kapp* v. *Public Admr.*, 2 Bradf. 258; *Vedder* v. *Saxton*, 46 Barb. 188.

Where the will of the testator leaves all his household property to the widow she is entitled to additional exemption out of other personal property available for the purpose. *Matter of Accounting of Frazer*, 92 N. Y. 239, 246.

This was a case where, by the will, the widow was given "all of the household property in the dwelling house." Finch., J, held that this was

broad enough to include coal and wood provided for the use of the family, and also the shotgun, in the absence of proof showing that it was not kept for the defense of the house. He further held, that a setting apart by the appraisers as exempt and for the use of the widow, of a horse, phaeton and harness, of the value of $150, was proper, and should be sustained. And he distinguished the case of *Peck* v. *Sherwood*, 56 N. Y. 615, where the Court of Appeals had held that the widow was not entitled to an exemption for household furniture where she had been left a life estate in all the real and personal property of her husband, except a certain legacy bequeathed him by a relative and not paid over at his death. So "household furniture" has been held to include a piano. *Matter of Allen*, 36 Misc. 398.

The language of § 2713 "if a man having a family die leaving a widow" covers any case where the relation of husband and wife continued unbroken by law to the time of the decedent's death. Consequently a mere separation by agreement of the parties, and not under any decree of the court, will not dissever the family within the meaning of the statute. See *Matter of Shedd*, 60 Hun, 367, aff'd 133 N. Y. 601. This was a case where the testator and his wife had ceased to live together for about ten years prior to his death; and for eight years preceding his death the husband had not contributed to the support of his wife. Nevertheless the Surrogate directed an inventory to be filed, on the ground that the decedent did have a family. This decision was affirmed in the General Term and in the Court of Appeals. The General Term declined to follow the decision of an Iowa court (*Linton* v. *Crosby*, 56 Iowa, 386), where it had been held, under a similar statute, that where a husband and wife had lived separate and apart for several years preceding his death, and he neither contributed nor was asked to contribute to her support, and boarded in the family of others, he was not at the time of his death a head of a family within the meaning and intent of the statute relating to exemptions in favor of widows and minors in that State.

§ 754. **Pecuniary equivalent of nonexisting articles.**—There has been some confusion as to whether the widow, or widower, is entitled to the money equivalent of exempt property, specified in the five subdivisions of § 2713, where as a matter of fact they are not in existence. Two considerations may have operated at first to allowing such equivalent. One is the increasing centering of living in cities, where families do not keep sheep, cows or swine. The other is the idea underlying the widow's quarantine (see below) or right to forty days, "food and fuel," ensuing the bereavement. At least, it is significant that the pecuniary equivalent was given under subd. 3, which gives "all necessary provisions and fuel for such widow, etc., ... for sixty days." So, it was held if the specific articles named in subd. 3 do not exist, allowance may be made pecuniarily equivalent. *Matter of Williams* (2d Dept.), 31 App. Div. 617. The next case went further and held the same where there are none of the articles specified in subd. 4. *Matter of Hembury*, 37 Misc. 454. In this case the Surrogate al-

lowed $150 as equivalent to articles in subd. 4; $200 as equivalent to those in subd. 3, and $150 as equivalent to those in subd. 5.

The next case, *Matter of Perry*, 38 Misc. 167, Reynolds, Surr., declined to follow these cases, and refused pecuniary equivalent of nonexistent articles specified in subds. 1, 2, 3 or 4. He cited and relied on *Baucus* v. *Stover*, 24 Hun, 109, which the *Williams* case points out reversed the Surrogates, who had made pecuniary equivalent allowance which in turn was reversed by Court of Appeals, 89 N. Y. 1, on another point.

The next case, *Matter of Hulse*, 41 Misc. 307, Petty, Surr., allowed pecuniary equivalent under subd., 1, 2, 3 and 4.

The next case, *Matter of Keough*, 42 Misc. 387, Woodbury, Surr., in a well-reasoned opinion, discussing the interpretation of statutes of exemption, and the history of § 2713 came to the opposite conclusion.

In *Matter of Sprague*, 41 Misc. 608, Simonds, Surr., guided by the prior discussion, refused pecuniary equivalent to articles in subds. 1, 2 and 4; limited the allowance under subd. 3 to "food and fuel" and under subd. 5, under "other personal property" (which includes cash?) to $150, in the discretion of the appraisers. Followed in *Matter of Campbell*, 48 Misc. 278 and *Matter of Griffith*, 49 Misc. 405.

In *Matter of Weaver*, 53 Misc. 245, Thomas, Surr., without any discussion rejected pecuniary allowance under subds. 3 and 4.

In *Matter of Berns*, 52 Misc. 426, Church, Surr., followed *Matter of Williams*.

The *Libolt* case, 102 App. Div. 29 (2d Dept.) had in the meantime been decided. But this was under the Transfer Tax Law, and it was held to be a different principle entirely where, as against the State, exemption was demanded under each subdivision, and the court refused to allow it.

Then came the case of *Matter of Griffin* (3d Dept.), 118 App. Div. 515. Here the appraisers set off the specific items mentioned in subds. 1, 2, 3 and 4. Under subd. 4 there was only $28.40 in value of household furniture, and this they pieced out by $137.60 worth of cows and "other property." Then under subd. 5 they set off $150 of "other property." The appellate Division reversed the $137.60 allowance in "cows and other property" as not equivalent to household furniture.

§ 755. **Summary statement.**—It seems, that leaving out transfer tax cases, and dealing only with the family right, the rule in the *Sprague* case is correct. In brief, pecuniary equivalent ought to be allowed for articles specified in subd. 3, under "food and fuel" theory even though nonexistent. And, also, under subd. 5 under "other property," which reasonably includes cash.

Whereas under subds. 1, 2 and 4, the remedy under the law as it reads, as remarked by one court, is with the legislature and not with the courts. This rule, I find, is embodied in *Matter of Baird* (2d Dept.), 126 App. Div. 439.

Where decedent's property was held jointly with another, then at his

death no "setting apart," delivery or money equivalent can be made. *Matter of Hallenbeck,* 119 App. Div. 757, 761.

§ 756. **Widow's quarantine.**—Goodrich, P. J., in the *Williams* case, *supra,* traced the doctrine of a widow's quarantine back to Magna Charta, (ch. VII) (see opinion). He compares the evident object of the dower quarantine statute and of § 2713. They are equally addressed to "provide in all cases a reasonable support for a short time for the widow and children dependent upon a husband and father, and left without means of support other than his estate.

This quarantine is given by § 204 (formerly § 184) of Real Property Law (ch. 50 of Consolidated Laws) which provides, that "a widow may remain in the chief house of her husband forty days after his death, whether her dower is sooner assigned to her or not, without being liable to any rent for the same; and in the meantime she may have her reasonable sustenance out of the estate of her husband."

In the *Williams* case, above cited, it was held that as testator died seized of no real estate, this section was not applicable. But the court, holding that remedial statutes are to be construed largely and beneficially, decided that a pecuniary equivalent to articles which might have been (but were not) set apart under subd. 3 of § 2713 could be allowed and paid to the widow. This was "reasonable sustenance." Thus, for forty days after the death of a husband a widow has a right, called the right of quarantine, to occupy the main dwelling house owned by the decedent at his death. This right is said to be confined to lands in which the widow is entitled to dower (see *Voelckner* v. *Hudson,* 1 Sandf. 215), as well as to the husband's actual residence. See Kerr on Real Property, p. 737. So Mr. Kerr says (*Ibid.*): "A woman living separate and apart from her husband at the time of his death is not entitled to quarantine. . . . Where a wife is entitled to quarantine, it is not subject to be taken on execution, because it is a mere personal right, and gives her no estate in the lands subject to levy on execution." And the same author says (see p. 836): "After the expiration of the quarantine, the heir could at any time put the widow out of possession and drive her to her suit for dower, but the wife's mere right to occupy the dwelling and farm attached of her deceased husband, until dower is assigned her, gives her no estate in the lands." See *Corey* v. *The People,* 45 Barb. 262. See also 4 R. S. (8th ed.) 2556, § 17.

This right of quarantine is a personal right. Thus Chancellor Walworth (*Johnson* v. *Corbett,* 11 Paige, 265, 276), says: "The allowance is only intended to apply *to the sustenance of the widow herself.* No provision is made by law for the maintenance of the children of her deceased husband out of an insolvent estate beyond the exempt articles allowed to the widow for that purpose." But the chancellor expressly held that the provisions of the Revised Statutes (1 R. S. 745, § 17), were general and must be construed as applicable to the case of a solvent as well as an insolvent estate.

The Court of Appeals (*Peck* v. *Sherwood,* 56 N. Y. 615) held where the testator devised a life estate in all of his real and personal property except-

ing solely a legacy coming to him from the estate of a relative; and where after his death the widow remained in the dwelling house enjoying the use of the personal property and received additional moneys from the estate, that she was not entitled either to an allowance of her quarantine or to the $150 for household furniture. See headnote, p. 616; cf. *Matter of Frazer*, 92 N. Y. 239, 246. See *Matter of Schroeder*, 113 App. Div. 204, where widow was allowed to remain while lease of house was expiring. But, if a widow accepts a devise "in lieu of dower and *all statutory allowances*" she waives all these exceptions under § 2713 and under "Quarantine." *Matter of Mersereau*, 38 Misc. 208. Query, since quarantine is personal to widow, this seems correct; but as to children, if any, can she cut off their rights under § 2713?

§ 757. **The duty of the appraisers.**—The duty of the appraisers is set forth in their oath, namely, that they "will truly, honestly, and impartially appraise the personal property of the deceased which shall be exhibited to them for that purpose according to the best of their knowledge and ability." See § 2711.

The Code provides that the legatees and next of kin are entitled to notice of the appraisement; this notice must be given by the executor or administrator, within a reasonable time after qualifying, and must be a notice of at least five days; it must be either personal, or "in the manner prescribed by § 797, subd. 1, and § 798," of the Code. The parties interested are entitled to attend at the appraisement, and the appraisers in their presence must estimate and appraise the property exhibited to them. The executor is under no obligation to set any estimate of value opposite the items included in the inventory. The only duty of the representative is to make a true and perfect inventory of all the personal property of the testator or intestate. Section 2711, and *Matter of McCaffrey*, 50 Hun, 371.

The Surrogate has no authority to direct the appraisers as to the manner in which they are to estimate the value of the property. *Matter of McCaffrey, supra.* But § 120, Dec. Est. Law (formerly L. 1891, ch. 34, § 1, in part) directs that they shall value "all such property, stocks, bonds, or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the markets and the average of prices as thus found, running through a reasonable period of time.

Where the deceased was a member of a partnership, his interest in the partnership may be estimated in the inventory, but the Surrogate has no power to compel the surviving partner to produce and deposit for inspection in the Surrogate's office the partnership books; nor have the appraisers the right to interfere with, or require the production of, the partnership assets, for the purpose of including the same in the inventory; it is sufficient for all purposes if the fact appear in the inventory that there is such a partnership interest, but the right of possession of the partnership property and the winding up of the partnership affairs at the decedent's death devolves upon the surviving partner. The interest of the estate in

the partnership is usually fixed by means of an accounting or settlement of the partnership affairs. See *Thomson* v. *Thomson*, 1 Bradf. 24; *Waring* v. *Waring*, 1 Redf. 205, 207; *Camp* v. *Frazer*, 4 Dem. 212. See *Matter of Weir*, 59 Misc. 320, Ketcham, Surr.

When the executor or administrator comes to make his account, it is then competent for parties in interest to prove that he has not charged himself with all the property that came or should have come into his hands, or with the true value thereof. *Vogel* v. *Arbogast*, 4 Dem. 399, 403. But it is his inventory as executor that is there the basis of account and attack; not the inventory he may previously have made in another capacity, e. g., as temporary administrator. *Matter of Tisdale*, 110 App. Div. 857.

The appraisers can only appraise existing assets. Consequently where there are no assets to be appraised it is useless to require the filing of an inventory or the appointment of appraisers. Surrogate Calvin accordingly held (*Matter of Robbins*, 4 Redf. 144) upon a motion to compel an administratrix to file an inventory, that it would be a farce to grant the motion when it appeared that all the assets which had come into the administratrix's hand, and of which she had any knowledge, had been disposed of in paying funeral expenses and claims against the estate. And he observes: "The only remedy in such a case, appears to be to require the representatives of an estate thus situated to make, under oath, a statement, in the nature of an account, of the property that came into their hands as such, its value, and its disposition, and what has become of the proceeds. This seems to have been done by the administratrix in this case. If the parties interested desire to test the accuracy of her statement, they may require her to account in the usual way, and, in the absence of any inventory, it will be incumbent upon the administratrix to show what she has received, and the disposition thereof, which any parties interested may contest and falsify. The affidavit of the administratrix, in this matter, should stand as her statement of the value of the assets which came to her hands."

In the later case of *Silverbrandt* v. *Widmayer*, 2 Dem. 263, upon an application for an attachment against the administrator for failure to file an inventory, where the administrator filed an affidavit stating that, with the assent of the next of kin and before his appointment, he had sold the furniture, stock in trade, and the lease of saloon belonging to the decedent, and had applied the proceeds upon certain indebtedness owing to himself from the decedent, and that there were no other assets to be inventoried, Surrogate Rollins held, that this affidavit did not show sufficient cause why the petition should be denied and overruled the decision of Surrogate Calvin in *Matter of Robbins*, saying, "the late Surrogate seems to have overlooked the case of *Butler's Estate*, 38 N. Y. 397." This, however, does not seem to bear upon the exact point at issue. The question involved in that case being, "can an executor of a deceased resident of this State holding domestic letters testamentary be required to include in his inventory assets belonging to the deceased situate in another State." The objection raised in that case was that, as the statute required the appraisers to appraise personal

property exhibited to them, and as such personal property out of the State could not be exhibited to them, therefore they could not be required to appraise it. The Court of Appeals very properly held that there was no restriction or qualification in the statute as to the actual production of assets before appraisers, but merely that all the goods, chattels and credits of the testator should be exhibited upon the inventory. The correctness of this decision is manifest from the character of the property deemed assets under § 2712 and the securities for the payment of money required to be included in the inventory under § 2714. The decision in the *Robbins* case, therefore, does not seem to be inconsistent with the decision in the *Matter of Butler's Estate*, and whether they are as a matter of fact inventoried here or elsewhere the remedy of any person interested to compel the filing of an account of assets, claimed to have been disposed of by the administrator, is a sufficient remedy for his protection. But in the case before Surrogate Rollins the administrator claimed to have paid his own claim only. This distinguishes the case from the *Robbins* case, where the assets were shown to have been applied generally to pay decedent's debts and the funeral expenses.

An application to compel the filing of an inventory was not allowed when made thirty years after the death of the testator. *Thomson* v. *Thomson*, 1 Bradf. 24.

§ 758. **Power of appraisers as to oaths.**—It seems that the appraisers have no power to administer oaths. As, for example, for the purpose of ascertaining the ages of widows of husbands dying intestate so as to estimate the value of their dower interest under Rule 70 of the Supreme Court. *Steward's Estate*, 10 N. Y. Supp. 24, 28. This is a judicial act and the matter should be ascertained by the Surrogate as incident to the order appointing the appraisers. *Ibid.* And the order should contain a recital of the Surrogate's finding to serve as instruction to the appraisers. In this request they differ from appraisers in transfer tax proceedings, who have this power expressly by statute. See chapter on Transfer Tax.

§ 759. **Return of inventory.**

> Duplicates of the inventory must be made and signed by the appraisers, one of which must be retained by the executor or administrator, and the other returned to the surrogate within three months from the date of the letters. On returning such inventory, the executor or administrator must take and subscribe an oath, indorsed upon or annexed to the inventory, stating that the inventory is in all respects just and true, that it contains a true statement of all the personal property of the deceased which has come to his knowledge, and particularly of all money, bank bills and other circulating medium belonging to the deceased, and of all just claims of the deceased against him, according to the best of his knowledge. Any one executor or administrator, on the neglect of the others, may return an inventory; and the executors or administrators so neglecting shall not thereafter interfere with the administration or have any power over the personal property of the deceased; but the executor or administrator so returning the inventory shall have the whole administration, until the delinquent return and verify an in-

ventory, in accordance with the provisions of this article. **§ 2715, Code Civil Proc.**

The importance of making and returning the inventory is emphasized by the provisions about to be noted, whereby the making and returning of the inventory can be compelled under § 2716. The inventory is not conclusive against the successor of the executor and does not bind him presumptively. *Solomons* v. *Kursheedt*, 3 Dem. 307, 313. But in all actions and special proceedings affecting the estate, the inventory is presumptive evidence of the amount and value of the estate, both for and against the executor. It would often be extremely difficult, if not impossible, to prove what property came into his possession, if he were to be excused from making and returning an inventory thereof. Consequently, it has been held that it is against public policy to provide by will that the executors shall not be obliged or compelled to file with the Surrogate any inventory of the estate. *Potter* v. *McAlpine*, 3 Dem. 108, 128. See *Brainerd* v. *Birdsall*, 2 Dem. 331. If a testator were allowed to dispense with the making of an inventory by his will, many of the safeguards thus thrown around the estate which comes to the hands of an executor would be thrown down and fraud and misappropriation of the trust property would be rendered much easier and less liable to detection than at present. *Ibid.* It is perfectly competent before the inventory is returned, to amend it by striking out items improperly inserted or by inserting items inadvertently omitted. See *Matter of Payne*, 78 Hun, 292. The importance of returning a true and accurate inventory is not only shown by the rule above stated that it will be presumptive evidence both for and against the executor; but because, also, if shown to be insufficient or inaccurate, the filing of a new inventory can be compelled and, if the errors in the first inventory are shown to be gross or negligent errors, the costs of the proceedings may be imposed personally upon the executor.

Moreover, an accurate inventory with a fair appraisement is a protection to the executor in dealing with the persons interested in the estate; "and the omission to exhibit an inventory, which every executor ought, especially in a deficient estate, is an imputation against him, which always inclines the court to bear harder on such an executor." *Hart* v. *Ten Eyck*, 2 Johns. Ch. 62, 80.

§ 760. **Debts of the representative to the decedent.**—(See provision of § 2714, *ante*, and discussion under accountings, *post.*) It is the duty of the executor to include in his inventory any just claim which the decedent had against him (*Burkhalter* v. *Norton*, 3 Dem. 610) or against a firm of which such executor is a member. *Matter of Consalus*, 95 N. Y. 340. See § 2714. An administrator is under the same obligation. *Matter of Griffith*, 49 Misc. 405. Where the representative includes in his inventory such a debt there is a strong presumption raised that the debt is a subsisting and valid one (*Lloyd* v. *Lloyd*, 1 Redf. 399); and if there is any valid set-off or defense to the indebtedness in favor of the executor he should for his own protection specify it in the inventory, for while he might not be

estopped from setting up subsequently a defense in bar of the claim, such as payment or satisfaction, nevertheless the unexplained omission of any set-off in the inventory which specifies the claim, would be conclusive evidence against the executor, that at the time the inventory was made he did not think of setting up any claim as against the indebtedness. *Lloyd* v. *Lloyd*, 1 Redf. 399, 404. The strong presumption furnished by the inventory in the absence of any set-off or defense therein stated, would have to be overcome by clear and convincing evidence, if subsequently, as upon his accounting, the executor claimed a reduction or discharge of the debt by reason of some set-off or defense. *Bellinger* v. *Potter*, 36 N. Y. St. Rep. 601. This rule is illustrated by the fact that the courts have held, that if an executor or administrator includes in his inventory a note from himself to the decedent, against which the Statute of Limitations may have run, and does not set forth this fact in the inventory, his act in including it among the credits will operate as a sufficient written acknowledgment to remove the bar, and the executor or administrator will not be heard later, as upon his accounting, to set up the statute. See *Matter of Daggett*, 1 Misc. 248, Davie, Surr., at p. 252, citing *Ross* v. *Ross*, 6 Hun, 80; *Morrow* v. *Morrow*, 12 Hun, 386; *Clark, Adm.*, v. *Van Amburgh*, 14 Hun, 557; *Bryar* v. *Willcocks*, 3 Cow. 159; *Stuart* v. *Foster*, 18 Abb. Pr. 305. See as to power of Surrogate, nevertheless, to try the issue upon the accounting, *Matter of Leslie*, 3 Redf. 280.

So if the executor or administrator is insolvent he must nevertheless return his debt as an asset. *Baucus* v. *Stover*, 89 N. Y. 1. Upon his accounting his insolvency can be shown and the debt can be adjudged uncollectible. *Burkhalter* v. *Norton*, 3 Dem. 610. Or, if ordered to pay, it may be set up in relief against arrest under § 2286; *Matter of Strong*, 111 App. Div. 281. But the representative stands in the same position as any other debtor, so that should he become possessed of means subsequently to pay the indebtedness he may be compelled by the parties in interest to account for, and pay over, the amount thereof in the same manner as if he had after an accounting recovered a doubtful claim from a third person for which he had received credit on the accounting. 3 Dem. *supra* 612.

§ 761. **Compulsory filing of inventory.**—Of the two duplicate inventories made and signed by the appraisers, § 2715, *supra*, requires the executor to retain one and to return the other to the Surrogate within three months from the date of his letters. The penalty for failing to return the inventory is that the executor so failing has no power to deal with the personal estate, nor in any way to interfere with the administration of another executor who has joined in the inventory. Section 2715. This embodies a rule formerly declared by the courts. *Jeroms* v. *Jeroms*, 18 Barb. 24. Where both executors join in the inventory it will be evidence sufficient to sustain a finding by the Surrogate, that they received and hold the assets therein specified jointly. *Glacius* v. *Fogel*, 88 N. Y. 434. But it will not be conclusive against either of them so as to preclude inquiry, by other evidence, as to the actual fact, that one or the other of them received the en-

tire fund. *Taylor* v. *Shuit*, 4 Dem. 528, 530. Where, however, the executor or administrator neglects to comply with the requirements of the statute as to the return of the inventory, he may be compelled to do so by virtue of § 2716 of the Code, which is as follows:

> *Return of inventory; how compelled.*
> A creditor or person interested in the estate may present to the surrogate's court proof, by affidavit, that an executor or administrator has failed to return an inventory, or a sufficient inventory, within the time prescribed by law therefor. If the surrogate is satisfied that the executor or administrator is in default, he must make an order requiring the delinquent to return the inventory, or a further inventory, or in default thereof, to show cause, at a time and place therein specified, why he should not be attached. On the return of the order, if the delinquent has not filed a sufficient inventory, the surrogate must issue a warrant of attachment against him, on which the proceedings are the same as on a warrant issued for disobedience to an order, as prescribed in title twelfth of chapter seventeenth of this act. A person committed to jail on the return of a warrant of attachment, issued as prescribed in this section, may be discharged by the surrogate or a justice of the supreme court, on his paying and delivering, under oath, all the money and other property of the decedent, and all papers relating to the estate under his control, to the surrogate, or to a person authorized by the surrogate to receive the same. **§ 2716, Code Civil Proc.**

In the county of New York it is provided by Rule 13 that, "no costs will be allowed to the petitioner who takes proceedings to compel the filing of an inventory by an executor or administrator, unless such executor or administrator shall have unreasonably delayed to make and file such inventory *after having been duly requested to do so* by or in behalf of the petitioner."

§ 762. **By whom return can be compelled.**—Section 2716 provides that a "creditor" or "person interested" may compel the filing of the inventory. With regard to a person interested, it must be again noted, that under subd. 11 of § 2514 the person interested need only submit an allegation of his interest duly verified. This serves although his interest is disputed, unless he has been excluded by a judgment, decree, or other final determination, and no appeal therefrom is pending. The word "creditor" is in the same section, subd. 3, defined as, "every person having a claim or demand upon which a judgment for a sum of money could be recovered in an action." In *Matter of Huntington*, 39 Misc. 477, Thomas, Surr., held that a stockholder, claiming that decedent as director had made improper profits which he was seeking to recover, was not within the intent of the Code a "creditor" of his estate. See opinion as to Surrogate's power to compel inventory, even on petition of creditors on unproved or rejected claim. Where a creditor, therefore, applies for the compulsory return of an inventory, and his allegation of interest is disputed, and the indebtedness under which he claims is put in issue, the Surrogate is without power to pass upon the validity of the claim, but the Surrogate will not for that reason decline

to entertain the application although he will require some proof of the facts upon which the applicant bases his claim. *Creamer* v. *Waller*, 2 Dem. 351, 353, Rollins, Surr., citing *Wever* v. *Marvin*, 14 Barb. 376; *Burwell* v. *Shaw*, 2 Bradf. 322; *Thomson* v. *Thomson*, 1 Bradf. 24; *Cotterell* v. *Brock*, 1 Bradf. 148.

In the last case Surrogate Bradford held, that the establishment of a *prima facie* claim showing an apparent interest, was all that could be reasonably considered as requisite to justify the institution of such a proceeding. And he says at p. 150, "The creditor does not seek for payment, but shows he has a demand, which if uncontradicted, may be recovered in another court. He thus becomes interested in having the estate preserved safely in the hands of a responsible executor." But he must distinctly declare himself to be such a creditor or allege facts which show him to be entitled as such. *Pendle* v. *Waite*, 3 Dem. 261, 263.

The inventory which can be required under this section is the statutory inventory. Where a testatrix by will prescribed the making of an inventory by her executors, with a view to the appraisement thereon being final and conclusive against the heirs, representative and legatees, and limiting the liability of the executor, such an inventory is not one which the Surrogate has power under the Code to enforce at the instance either of a creditor or person interested in the estate. See *Brainerd* v. *Birdsall*, 2 Dem. 331, 332. The only condition requisite to secure the order compelling the return of the inventory is, that the Surrogate be satisfied that the executor or administrator is in default. That is to say, that he has filed no inventory at all, or that the inventory filed is not sufficient. See § 2716. The motive of the creditor in making the application is wholly immaterial. *Forsyth* v. *Burr*, 37 Barb. 540. But he may be denied the right if he delay unreasonably, as, for example, thirty years. *Thomson* v. *Thomson*, 1 Bradf. 24.

§ 763. **The procedure.**—The application for a compulsory return of inventory is begun by an affidavit containing allegations sufficient to satisfy the Surrogate that the executor or administrator has failed to return an inventory or a sufficient inventory within the time prescribed by law therefor. It should be substantially in the following form:

Affidavit under section 2716.

Surrogate's Court,
County of

In the Matter of the Estate of late of Deceased.

being duly sworn, deposes and says:

I. That he resides in and is a creditor of the decedent above named, by virtue of two certain promissory notes made by said decedent, on the day of and the day of respectively. (*Add details of the notes, or otherwise describe the nature of his claim or demand by virtue of which he is a creditor.*)

II. That on the day of 19 letters testamentary on the estate of said decedent were granted by the Surrogate's Court of the county of to and executors named in the last will and testament of said under a decree of said Surrogate made and entered on the day of granting probate of said will.

III. That the said executors above named have not nor has either of them returned any inventory of all the personal property of the said testator as required by section 2711 of the Code of Civil Procedure, and that more than three months have expired from the date of the issuance of the said letters testamentary.

Or, where an inventory has been filed but is claimed to be insufficient, say:

III*a*. That on the day of the said executors above named returned an alleged inventory purporting to contain a true statement of all the personal property of the said decedent which had come to their knowledge, and particularly of all moneys, bank bills and other circulating medium belonging to the deceased; and of all the just claims of the decedent against said executors; but that, as the deponent is informed and verily believes, the said inventory was not a sufficient inventory of all the personal property of said deceased, as required by section 2711 of the Code of Civil Procedure, in that it wholly failed to contain any statement of the sum of dollars belonging to said decedent; and now, as deponent is informed and verily believes (*here state where the money is alleged to be*), and in that further it failed to set forth as required by law a certain debt or demand of the testator against one of the executors above named in the sum of dollars, which amount as deponent is informed and verily believes was justly due from the executor above named to the said decedent at the time of his death.

(Jurat.) (Signature.)

While a *prima facie* allegation of interest of an enforceable claim or demand against the estate will be sufficient to make good the status of the applicant in these proceedings, it does not necessarily follow that the mere fact that the applicant has a sufficient status to warrant him in presenting the affidavit required by § 2716 deprives the Surrogate of discretion whether or not to make the order which he is authorized to make under the same section. This particular authority conferred upon the Surrogate, is one of those powers which the Surrogate has to direct and govern the conduct of an executor or administrator; it is therefore subject to the limitation that the Surrogate may only order him to do what is just and lawful, and the Surrogate, therefore, cannot be required to direct him to return an inventory under this section where it does not appear either just or reason-

able that he should do so. Consequently, if the executor upon such an application shows in opposition thereto that the estate has been settled, and satisfies the Surrogate that the provisions of the will have been executed; and all the beneficiaries therein named have receipted for their shares and released the executor, it is obviously the duty of the Surrogate in the exercise of his discretion to deny the application. *Matter of Wagner*, 119 N. Y. 28. See opinion of Gray, J., and cases discussed.

The order made upon this affidavit should be substantially as follows:

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Order to compel filing of inventory under section 2716.

Title.

Upon reading and filing the affidavit of verified the day of whereby it appears to the satisfaction of the Surrogate that and executors of the last will and testament of deceased, have failed to return an inventory (*or* a sufficient inventory) of all the personal property of said deceased, within the time prescribed by law therefor and are in default.

Now on motion of attorney for the said a creditor (*or* person interested in) the estate of said deceased, it is

Ordered, that the said and executors as aforesaid, return an inventory of all the personal property of said testator, as required by law, within days after the personal service of a (certified) copy of this order upon them and each of them; and it is

Further Ordered, that in default of such return by said executor they and each of them show cause before me on the day of at o'clock in the noon, at my office in why a warrant of attachment should not issue against them and each of them.

(Signature.)

It is to be noted with respect to the order that it must be personally served. For the order for which § 2716 provides is one of those mandates which must be issued as the result of a judicial determination. *White* v. *Lewis*, 3 Dem. 170, citing *Mauran* v. *Hawley*, 2 Dem. 396.

The inventory required by this order to be filed is of course such an inventory as is contemplated by the Code to be originally returned by the executors. Consequently the filing of an unverified list of assets by the executor will not be deemed a compliance with the order. *Loesche* v. *Griffin*, 3 Dem. 358.

The application to compel the return of the inventory should be timely. Where an application was made twenty-nine years after the administra-

tion of the estate commenced it was held that a formal inventory could not be compelled. *Leroy* v. *Bayard*, 3 Bradf. 228.

It was, however, in this case held, that if it was alleged that there were assets recently realized and properly applicable to the payment of the claim of the creditor, he should be permitted to examine the executors personally touching their administration of the estate, and the then existence of assets, personal or real. But upon an application to compel the filing of a further inventory, it was held that the application must be denied if the executor or administrator denied the existence of assets other than those already inventoried. *Matter of McIntyre*, 4 Redf. 489. The reason for this was stated to be, that the inventory required must be under oath; that the court cannot order assets to be inserted in an inventory without such oath, nor could it compel the executor or administrator to swear to assets, possession of which he denies. Accordingly, Surrogate Calvin held, that § 2715 not having changed the rule previously existing (see *Thomson* v. *Thomson*, 1 Bradf. 24), the court had no power to require any examination of the parties or witnesses for the purpose of testing the correctness of the inventory filed, and that any errors in the inventory must be corrected at the accounting, and that the answer of the administrator duly verified alleging that he had already included in his first inventory all the property that belonged to the estate of the decedent was a complete defense to the application and the petition should be dismissed. So, where, on an application to compel an inventory, the answer put in denies that the property sought to be included belongs to the estate, the Surrogate must postpone adjudicating upon such issue until the accounting. *Matter of Goundry*, 57 App. Div. 232.

The form of answer for the executor or administrator may be substantially as follows:

Answer of executor or administrator upon application to compel the return of inventory under section 2716.

Surrogate's Court,
County of

Title. }
}

of being duly sworn deposes and says:

I. That he is the executor of the last will and testament of deceased; that on the day of he was personally served with a copy of the order made by the Surrogate of the county of requiring deponent to return an inventory (*or* a further inventory) of the personal property belonging to the estate of deceased, or in default thereof to show cause why he should not be attached.

II. And deponent further says, in answer to the allegations of the affidavit of verified the day of upon which said order purports to have been made, that this deponent included all the personal property of the said deceased which has come to deponent's knowledge in the true and perfect inventory thereof by him duly made and signed as required by law and returned to the Surrogate of the County of

on the day of 19 (and that the alleged assets specified in the said affidavit of do not in fact form part of the personal property that belonged to the estate of the said decedent).

III. And deponent asks accordingly that the application be denied with costs.

(Jurat.) (Signature.)

It is competent for the executor or administrator upon the application to compel the filing of an inventory to allege in such answer, if such be the fact, that distribution or division of the estate has already been had by common consent of all persons interested; this would certainly be a complete answer to the application, which should in such case be denied with costs (see *Ledyard* v. *Bull*, 119 N. Y. 62), unless it be made to appear that theretofore undiscovered assets have been discovered and taken into possession by the representative.

§ 764. **Conclusiveness of inventory.**—It has been noted that the inventory returned by the executor may not be impeached in proceedings in relation to the inventory itself, but upon the accounting of the executor or administrator it is entirely competent for legatees, next of kin or creditors, to impeach it, by proving omission of assets received or which ought to have been received. *Montgomery* v. *Dunning*, 2 Bradf. 220. But even on an accounting where it is attempted to falsify the executor's inventory of assets incorporated into his accounting, the one seeking to surcharge him, has the burden of proof. *Marre* v. *Ginochio*, 2 Bradf. 165.

The values estimated by the appraisers are *prima facie* to be taken as the actual value of the items appraised. But they do not conclude creditors (*Willoughby* v. *McCluer*, 2 Wend. 608), and not always the executors. *Ames* v. *Downing*, 1 Bradf. 321. Where, therefore, upon the subsequent accounting, it appears that certain items have realized much less than their inventoried value the executor or administrator, in order to avail himself of the rule that he should "sustain no loss by decrease without his fault of any part of the estate, but shall be allowed for such property perished or lost without his fault, upon the settlement of his account," must show affirmatively the facts in regard to the alleged depreciation or loss. *Underhill* v. *Newburger*, 4 Redf. 499, 507, citing *Matter of Jones*, 1 Redf. 263.

The rule as to the conclusiveness of an inventory may be reduced to the simple proposition, that, whoever seeks to overcome the presumption as to value raised by recitals in the inventory, must substantiate his claim by affirmative proof.

The Court of Appeals has stated the rule to be, that the inventory is *prima facie* evidence both as to the extent and value of the personal property left by the decedent, and casts the burden upon one seeking to impeach it, to show either that articles were omitted therefrom, or that a greater sum was realized than the appraised value. *Matter of Rogers*, 153 N. Y. 316, 328, citing *Matter of Mullon*, 145 N. Y. 98. See also *Matter of Van Sise*, 38 Misc. 155.

§ 765. **The Surrogate's power.**—The Surrogate has no power, as has been already stated, to try any question of title, in proceedings relating to the inventorying and appraisal of the estate (see *Matter of Goundry*, 57 App. Div. 232; *Greenhough* v. *Greenhough*, 5 Redf. 191; *Vogel* v. *Arbogast*, 4 Dem. 399); and where a Surrogate assumed to make an order requiring an administrator to inventory certain bonds of the decedent's estate, it was held, that the administrator was not thereby concluded from asserting and proving his personal ownership of the securities. See *Young* v. *Young*, 5 Wkly. Dig. 109. (Affirmance in 80 N. Y. 422, did not involve the point under discussion.) The General Term modified the order of the Surrogate in this case, which required the administrator to amend his inventory and insert the bonds by striking out all findings of fact and law contained therein, and ordered that the decree be amended by adding at the end thereof, that it was without prejudice to any claim or right of Young, the administrator to the same, which claim or demand the administrator was at liberty to state in his inventory thereof, if he chose so to do, and to prosecute and have determined in any court having cognizance thereof. Judge Boardman, in delivering the opinion of the court, said, that it was going very far in guarding the rights of the contestants, to permit the order to stand requiring a description of the bonds to be put in the inventory, even "without prejudice" to the rights of the claimants, and even with the specification of the nature and extent of the claim. See *Greenhough* v. *Greenhough*, *supra*, at p. 194.

It is of course competent for the Surrogate upon an application to compel the return of an inventory, to determine whether the applicant comes within the description of persons entitled under the Code to compel the return. Therefore, where the applicant claims to be an adopted daughter, and her claim is put in issue by next of kin, the Surrogate has full power to determine the right of the petitioner to the remedy sought and prayed for, before entering an order upon the application. See *Matter of Comins*, 9 App. Div. 492.

In the case cited, the Surrogate had granted the application of a person claiming to be an adopted daughter and only heir-at-law or next of kin of the intestate, upon the ground that he was bound to act upon the simple statement of the petitioner without any other proof, by reason of the provisions of § 2514, subd. 11. The Appellate Division reversed the order and remitted the matter to the Surrogate to determine judicially whether or not the applicant was the adopted daughter of the intestate. See opinion of Judge Patterson at p. 494, and *Matter of Wagner*, 118 N. Y. 28. One of the reasons for this decision was that, prior to the act of 1887, the act of adoption gave no inheritable right, and that the applicant was presumably a stranger in blood, and would have no right in the premises, unless there were an adoption valid in the law to give her a proper status.

Where the applicant claims by virtue of a provision in the will of the decedent, and his rights thereunder are put in issue, it is doubtless compe-

tent for the Surrogate to determine judicially whether or not the applicant has such a status under the will as entitles him to make the application.

In the case of *Wilde* v. *Smith*, 2 Dem. 93, the applicant claimed to be a beneficiary, by virtue of a certain clause of the will containing precatory words, which it was claimed constituted a trust in favor of the applicant. Surrogate Bergen expressed a doubt as to his power to construe the will upon such an application. It is, however, submitted, that it is perfectly competent for the Surrogate so far to construe the will as to determine the status of the applicant, although it is certainly questionable whether the determination as to the status of the petitioner would be conclusive upon the accounting and in framing the decree of distribution.

§ 766. **Attachment of the representative.**—Section 2716 gives the Surrogate power to punish a delinquent executor or administrator by warrant of attachment. The proceedings are the same as upon a warrant issued for disobedience to an order. See, accordingly, part II, ch. IV.

It is only proper here to note, that preliminary to proceedings for such punishment, it must appear that the order requiring the representative to return the inventory, was actually personally served upon him. *White* v. *Lewis*, 3 Dem. 170.

§ 767. **Dealing with decedent's debtors; prudent settlements.**—Among the assets to be administered by the representatives of a decedent are moneys due and owing to such decedent, or payable to his estate. These the representatives must collect in with all convenient speed, and may of course, when advisable and necessary, bring actions to that end. This duty of pursuing estate debtors carries with it the power to discharge and release such debtors upon payment being made.

Cognate to the power, discussed in the next section, but independent of statute, the executor has power to make "honest and prudent settlement." The headnote of *Matter of Thomas*, 39 Misc. 223, well states the rule:

"Disbursements honestly and properly made by a personal representative, in asserting by litigation a right of the estate or in defeating an attack upon it or in buying peace for it, should be allowed the representative." This is true on accounting, as well as on the appraisal under the Transfer Tax Law. See cases cited by Thomas, Surr., on p. 225.

But, on the other hand, the representative, finding notes or other evidences of indebtedness or receiving them, is at once chargeable with them as assets. He must be diligent in collecting them. If he fails in this duty and *in consequence* the amount is lost he will be liable. *Matter of Kemp*, 49 Misc. 396, citing *Shultz* v. *Pulver*, 11 Wend. 363; *Harrington* v. *Keteltas*, 92 N. Y. 40. The burden of proving the insolvency of a debtor or that of each and every joint debtor is always on the representative. *Id.* citing *Matter of Hosford*, 27 App. Div. 427; *O'Connor* v. *Gifford*, 117 N. Y. 275.

§ 768. **Power to compromise and compound debts.**—By statute, the representatives of decedents, whether testate or intestate, are given power to realize on uncollectible, stale or doubtful debts for less than their full amount. The original statute read:

"Executors and administrators may be authorized by the Surrogate, or the officer authorized to perform the duties of Surrogate, in the county where their letters, testamentary or of administration, were issued, on application, and good and sufficient cause shown therefor and on such terms as such Surrogate or officer shall approve, to compromise or compound any debt or claim, or to sell at public vendue, on such notice of sale as said Surrogate or officer may prescribe, any uncollectible, stale, or doubtful debt or claim, belonging to the estate of their testator or intestate." L. 1847, ch. 80, as amended by L. 1888, ch. 571.

"§ 2. Nothing in this act contained shall prevent any party, interested in the final settlement of said estate, from showing, on the final settlement of the accounts of said executor or administrator, that such debt or claim was fraudulently, or negligently compromised or compounded." *Ibid.*

This act was amended by ch. 100, L. of 1893, by adding to § 1 the words, "or to compromise or compound any debt or claim owing by the estate of their testator or intestate." This act went into effect March 8, 1893.

On May 11, 1893, ch. 686 of the Laws of that year became operative, which repealed ch. 80 of the Laws of 1847 and ch. 571 of the Laws of 1888, explicitly, and therefore impliedly repealed ch. 100 of the Laws of 1893. This appears, now, from revisers' schedule to Decedent Estate Law. Chapter 686 of 1893 amended § 2719 of the Code, providing for the payment of a decedent's debts, the latter part of which section was evidently intended to be a substitute for the acts repealed and reads as follows:

"The Surrogate may authorize the executor or administrator to compromise or compound a debt or claim, on application, and for good and sufficient cause shown, *and* to sell at public auction, on such notice as the Surrogate prescribes, any uncollectible, stale or doubtful debt or claim *belonging to the estate;* but any party interested in the final settlement of the estate may show on such settlement that such debt or claim was fraudulently or negligently compromised or compounded."

This statute as embodied in the Code is the source of the Surrogate's power to authorize a representative to accept less than the whole of a debt due his decedent and to discharge the whole. But it is held that it confers no new power on the representative himself, but merely affords him additional protection when acting in good faith in the exercise of his common-law powers. *Gillespie* v. *Brooks*, 2 Redf. 349, 362, citing *Choteau* v. *Suydam*, 21 N. Y. 179; *Matter of Scott*, 1 Redf. 234. So where executors made a settlement with testator's surviving partners in good faith, it was held to bind the estate, and to be conclusive against creditors. *Sage* v. *Woodin*, 66 N. Y. 578. On the other hand, where one executor pays his coexecutor's claim, which had not been proved to or allowed by the Surrogate, and to much of which defenses were available, he was held chargeable. *Matter of Burr*, 48 Misc. 56. To compromise or compound a debt means to accept a part in satisfaction of the whole. *Matter of Loper*, 2 Redf. 545, 546. Consequently, the entering into a creditor's composition deed is not within this definition. *Ibid.*

Nor does the act confer on the Surrogate the power to enforce an executory agreement by an executor to pay a specific sum in compromise and satisfaction of a judgment against his testator. *Matter of Bronson*, 69 App. Div. 487.

The duty resting on the executor is to act as a discreet and prudent man would act if the debt were his own. *Leland* v. *Manning*, 4 Hun, 7, 11; *Matter of Scott*, 5 Legal Obs. 379; *Murray* v. *Blatchford*, 1 Wend. 583. In the case first cited, Brady, J., said: "An executor has not only the power, but is bound, to compound and release a debt, if the interest of the estate requires it." (In that case the compromise was of several litigated and other claims for a lump sum, for which the executors accepted the debtor's note. This was not disapproved.)

But the duty to compromise is one in performing which the executor is upheld if he exercise honest judgment, even though it subsequently appear the estate would have benefited more if he had acted differently—thus, where an executor refused to compromise a debt and subsequently fails to collect it at all the inquiry will be whether he used a sound discretion, or was guilty of culpable neglect. *In re Scott*, 1 Redf. 234, 236.

If an executor chooses to act on his own responsibility, and without applying to the Surrogate, under the statute quoted, for his approval, it will be his duty upon his accounting to establish affirmatively the propriety of the compromise, if objection be filed to it. *In re Quinn's Estate*, 9 N. Y. Supp. 550, 552, Ransom, Surr. In the absence of such proof, in such a case, the objection will be sustained. *Ibid.* In this case the executor held a judgment for his claim.

If the executor asks leave of the Surrogate, he must upon the application give the Surrogate the same evidence, to inform his mind, as if the compromise had been made and were being attacked upon the accounting (*In re Richardson's Estate*, 9 N. Y. Supp. 638); for the very reason that the statute permits any party interested in the estate to attack the compromise for the causes specified upon such accounting, regardless of the Surrogate's preliminary approval.

§ 769. **Asking leave of Surrogate to compromise.**—Therefore, upon an application under the statutes, facts, not conclusions, must be alleged. In the *Richardson* case, *supra*, the executor, in his petition, alleged that "after a thorough examination of the questions involved in the suit, and the responsibility of the defendant therein, and upon the advice of his attorney, he was fully satisfied that it was for the interest of the estate to accept the compromise." The affidavit of such attorney was also offered alleging that he had examined the questions involved, and considered the probability of collecting judgment, if any, and that he was satisfied, etc. Ransom, Surr., properly held that the statute contemplated good and sufficient cause being shown to satisfy the Surrogate, and to induce his approval. The Surrogate can base his judgment only upon facts, such as insolvency of debtor, unsettled state of law making prosecution of suit doubtful, lack of evidence or death of witnesses. These ought to be concisely alleged.

The Surrogate may require, when obtainable, the consent of the parties interested in the fund. If the claim is in litigation, the pecuniary interest of the attorney in the result should be disclosed. *Ibid.* The Surrogate must know what the net result to the estate may be expected to be. When, as is increasingly the case, the compromise relates to an action brought by the representatives to recover damages for occasioning the decedent's death, the Surrogate may be influenced by the fact that the decedent left his family without means, that they are in great need, and that the sum realized by the compromise submitted for his approval, will meet their pressing needs, while, if it be rejected, the delays and risks of litigation may entail severe suffering. Consequently the insolvency of the debtor is not a prerequisite. It was at first held so. *Howell* v. *Blodgett*, 1 Redf. 323. But this rule is no longer applied. The considerations above specified supply the reason. *Berrien's Estate*, 16 Abb. Pr. N. S. 23; *People* v. *Pleas*, 2 Johns. Cas. 376; *Shepherd* v. *Saltus*, 4 Redf. 232.

§ 770. **Precedents.**—The following will serve as precedents:

Petition for leave to compromise a claim.

Surrogate's Court,
County of

Title. }

A. B. as executor of the last will and testament of deceased, for his petition to this court respectfully alleges:

First. Your petitioner is the executor of the last will and testament of the decedent above named, which was duly probated, and your petitioner received letters testamentary thereunder on the day of 190

Second. That your petitioner filed his inventory of the estate committed to him on the day of 19 (*Note.*)

Note. See *Jeroms* v. *Jeroms*, 18 Barb. 24.

Third. That among the assets of the said estate is a certain promissory note (*here describe note, or state what the claim is which it is sought to compromise, giving full details of its character, amount and status. If it is in action state whether at issue, or whether an appeal is pending.*)

Fourth. That the debtor above named resides at and (*here state as nearly as possible the pecuniary condition of the debtor or defendant, his solvency or insolvency, whether there are prior judgments, whether there is an assignee or receiver in possession of his property. This may be done fully, or by reference to affidavits to be handed up with the petition*).

Fifth. And your petitioner further shows that an offer has been made by (*or* on behalf of) said debtor (*or* defendant) to pay to your petitioner as executor as aforesaid the sum of in consideration of the execution and delivery by your petitioner, as such executor, of a release of said claim in full.

Sixth. *Here state reasons additional to those above indicated, if any, why it would be to the best interests of the estate that the offer be accepted, as:* And your petitioner further shows that

he is without funds to pay two certain legacies under said will (*describe them*) aggregating ; that more than a year has elapsed since the granting of said letters testamentary and interest is accruing on said legacies, and your petitioner is advised by his counsel and verily believes (*note*) it to be advantageous and to the best interests of the estate to accept this offer at the present, and not to incur the risks of litigation (*or* not to suffer the disadvantages and possible risks of delay).

Note. The attorney's affidavit may be also submitted.

Wherefore, your petitioner prays an order of the Surrogate granting him leave to compromise the claim aforesaid at the sum aforesaid. (*Note.*)

Note. The prayer for citation of persons interested is not necessary. They are to be cited only if the Surrogate require it.

(Signature.)

(Verification.)

Order.

Surrogate's Court
County of
Title.

A petition having been presented to me, the Surrogate of the county of under section 2719, Code of Civil Procedure, by the executor of the last will and testament of the above named decedent, praying for an order of the Surrogate authorizing him to compromise a certain claim (*describe it*) for the amount of $ wherefrom, and from the affidavits of verified the day of 19 and of verified the day of 19 it appears to my satisfaction that good and sufficient cause is shown for the making of such order (*and if the Surrogate examined the executor or anyone in the premises, or referred the matter for the purpose, recite the facts*).

Now, on motion of attorney for said petitioner,

It is Ordered, that executor of be and he hereby is authorized to compound or compromise the said claim for the amount of $ (upon the following terms and conditions, *specifying them*), and to make, execute and deliver to the said debtor (*or* defendant) a release in full therefor upon receipt of the said amount.

Dated the day of 19

Surrogate.

§ 771. Apportionment of rents, annuities and dividends.

All rents reserved on any lease made *after* June seventh, eighteen hundred and seventy-five, and all annuities, dividends and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect *after* such date, shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from or in respect to which the same issues or is derived,

or on the determination by any other means of the interest of any such person, *he, or his executors, administrators or assigns*, shall be entitled to a *proportion* of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of such person, or of the determination of his or her interest, after making allowance and deductions on account of charges on such rents, annuities, dividends and other payments.

Every such person or his executors, administrators or assigns shall have the same remedies at law and in equity for recovering such apportioned parts of such rents, annuities, dividends and other payments, *when* the entire amounts of which such apportioned parts form part, *become due and payable* and *not before*, as he or they would have had for recovering and obtaining such entire rents, annuities, dividends and other payments, if entitled thereto; but the persons liable to pay rents reserved by any lease or demise, or the real property comprised therein shall not be resorted to for such apportioned parts, but the entire rents of which such apportioned parts form parts, must be collected and recovered by the person or persons who, but for this section, or chapter five hundred and forty-two of the laws of eighteen hundred and seventy-five, would have been entitled to the entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this section.

This section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description. **§ 2720, Code Civil Proc.**

It was the uniform and unbending rule of the common law, recognized both by courts of law and equity, that annuities were not apportionable in respect of time. *Kearney* v. *Cruikshank*, 117 N. Y. 95.

This rule of the common law has been changed from time to time by statutes making annuities apportionable in respect of time. The legislature of this State changed the rule in 1875 (Laws of 1875, ch. 542), but only as to annuities, dividends and other payments, made payable or becoming due at fixed periods under an instrument executed after the passage of that act. This statute was superseded by § 2720 of the Code of Civil Procedure, which by its terms is likewise confined in its operation to certain sums made payable or becoming due at fixed periods under an instrument executed since the passage of the act of 1875. *Matter of Kane*, 64 App. Div. 566, 569.

§ 772. **Same subject.**—In the case last cited, the testator had by agreement with his daughters an interest in certain dividends "declared upon said stock for the term of his life." He died November 15, 1897, having received a dividend October 28th. A dividend of $200 a share was declared November 24, 1897, and paid to the daughters. It appeared that the company paid dividends when earned, not necessarily at a fixed day, but in point of fact as a rule monthly. The Appellate Division reversed the Surrogate who charged the executors with seventeen-thirtieths of this dividend, and held that these dividends were not apportionable under § 2720.

In *Hopper* v. *Sage*, 112 N. Y. 530, 533, the court said: "That when a dividend is declared it belongs to the owner of the stock at that time, but that until such declaration the profits form part of the assets, and an assignment by a stockholder before such declaration carries with it his proportional share of the assets, including all undeclared dividends."

In *Hyatt* v. *Allen*, 56 N. Y. 553, 558, the learned judge who spoke for the court said: "A gift of the profits and dividends of stock for life would not, I think, be held to carry dividends declared after the death of the beneficiary, although made from profits accrued during his life."

This rule was also announced in *Hill* v. *Newichawanick Company*, 8 Hun, 459, aff'd 71 N. Y. 593; *Jermain* v. *Lake Shore & M. S. Ry. Co.*, 91 N. Y. 483; *Matter of Kernochan*, 104 N. Y. 618.

The declaration of a dividend is in legal contemplation a separation of the amount thereof from the assets of the corporation, which holds such amount thereafter as the trustee of the stockholder at the time of the declaration of the dividend. *Hopper* v. *Sage*, *supra*.

CHAPTER II

ASCERTAINING THE DEBTS

§ 773. **Duty of the executor or administrator.**—After the estate has been inventoried and appraised, and before the proceedings to fix the amount of transfer tax payable are initiated, it is the duty of the representative to ascertain the debts of the decedent. *Matter of Warrin*, 56 App. Div. 414.

It is advisable to do this before the transfer tax proceedings, because of the deduction to which the estate is entitled by reason of such debts, in fixing the net amount of the tax payable.

In the chapter on Accountings, *post*, will be found the discussion of the topic of disputed claims against the estate coming up upon the accounting for the estate. It is unfortunate that the power of the Surrogate to deal with claims against decedents' estates is so limited, and in so artificial a manner. His power upon accounting is complicated by restrictions. His power under § 2718*a*, a new section, is limited by consent required. His jurisdiction, laboriously invoked, may often be ousted, by its appearing that the claim is one he is powerless to determine. The legislature ought to confer on this able and thoroughly qualified class of judges, of *a court of record*, comprehensive powers to adjudicate whenever necessary all claims against decedent's estate. It would save time, money and costs, and facilitate administration. The limited jurisdiction in this respect is an anachronism. This chapter deals with the topic of the executor's or administrator's duty to ascertain his decedent's obligations as a preliminary to administration.

§ 774. **Ascertaining the debts.**—The Code prescribes the manner, in which the debts are to be ascertained, by § 2718, which is as follows:

> The executor or administrator at any time after the granting of his letters, may insert a notice once in each week for six months in such newspaper or newspapers printed in the county as the surrogate directs, requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor, to him, at a place to be specified in the notice, at or before a day therein named, which must be at least six months from the day of the first publication of the notice. The executor or administrator may require satisfactory vouchers in support of any claim presented and the affidavit of the claimant that the claim is justly due, that no payments have been made thereon, and that there are no offsets against the same to the knowledge of the claimant.
>
> If the executor or administrator doubts the justice of any such claim, he may enter into an agreement in writing with the claimant to refer the matter

in controversy to one or more disinterested persons, to be approved by the surrogate. On filing such agreement and approval in the office of the clerk of the supreme court in the county in which the parties or either of them reside, an order shall be entered by the clerk referring the matter in controversy to the person or persons so selected. On the entry of such order the proceeding shall become an action in the supreme court. The same proceedings shall be had in all respects, the referees shall have the same powers, be entitled to the same compensation, and subject to the same control as if the reference had been made in an action in which such court might, by law, direct a reference. In determining the question of costs the referee shall be governed by sections eighteen hundred and thirty-five and eighteen hundred and thirty-six of this act.

Judgment may be entered on the report of the referee and such judgment shall be valid and effectual in all respects as if the same had been rendered in a suit commenced by the ordinary process, and the practice on appeal therefrom shall be the same as in other civil actions.

If a suit be brought on a claim which is not presented to the executor or administrator within six months from the first publication of such notice, the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such suit was commenced. **§ 2718, Code Civil Proc.**

Under this section there are three points requiring discussion:

(*a*) The notice for claims.

(*b*) The presentation of claims.

(*c*) The reference of disputed claims.

§ 775. **A new, additional remedy.**—But, at this point, should be noted the new summary remedy (inserted by L. 1904, ch. 386; in effect Sept. 1, 1904) and entitled:

Claims against executor or administrator.

Upon the petition of an executor or administrator, after notice of publication to the creditors to present claims has been completed, a citation may be issued against any claimant directing him to present his claim to the surrogate for determination at a date not less than three months from the service of the citation upon him. If he shall not have commenced an action against the petitioner upon his claim prior to the return day, the claim shall be deemed forever barred unless on the return day he shall consent to its determination by the surrogate, in which case it shall be so determined. The word claimant within the meaning of this section shall be deemed to include every person claiming to be a creditor of the estate or claiming a right in or lien upon any personal property in the custody of the petitioner or any claim against the petitioner by reason of any act of his in the administration of the estate, or in his representative capacity. **§ 2718a, Code Civil Proc.**

By use of this remedy the executor can expedite matters, and force the creditor's hand, either compelling him to sue at once, or to submit to the Surrogate's award. This section is clear and explicit. But, it is a pity that many of these elaborate and sometimes confusing and intricate provisions

are not eliminated by conferring, by constitutional amendment, if need be, full, unlimited jurisdiction on Surrogates' Courts to adjudicate all matters arising in connection with decedents' estates, even to the construction of wills of real property. The limitations on the Surrogate's jurisdiction, once proper, and even necessary, are now neither. That a Surrogate in New York County is competent to construe a will as to a million of personalty, and not one affecting a thousand in realty is no more an anachronism than that a Surrogate up the State can decide as county judge what as Surrogate he cannot.

§ 776. **The notice for claims.**—Recurring to § 2718, the importance of giving the notice provided for by § 2718, is indicated in the closing paragraph of the section, to wit: If suit be brought on a claim which is not presented to the executor or administrator within six months from the first publication of the notice, "the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claim, or of any legacies, or in making distribution to the next of kin before such suit was commenced." This means the executor or administrator shall not be chargeable therefor as executor, nor required to account therefor to such creditor. It does not mean, however, that the debt against the estate shall not be liquidated by a formal judgment. *Mayor* v. *Gorman*, 26 App. Div. 191, 197, 199. Read opinion of Barrett, J., pp. 197 *et seq.*, on history of this legislation.

The provision of the Code is merely for the protection of the representatives, and there is no absolute legal obligation to give the notice or advertise for claims against the estate. *Fliess* v. *Buckley*, 90 N. Y. 286, 292, citing *Bullock* v. *Bogardus*, 1 Denio, 276.

In the case last cited, it was held, that the executor is not bound to give this notice in any case, and that he violates no duty by its total omission. He may give notice for his own protection or for the benefit of the estate. And it was consequently held that costs could not be imposed upon the executor merely because he had published no notice for claims. *Id.*, note A. on p. 278.

The liability imposed upon the executors of a deceased stockholder, who was liable upon his stock under the statute, imposed by the Court of Appeals, in the case of *Veeder* v. *Mudgett*, 95 N. Y. 295, was a liability growing out of the provisions of the Manufacturing Corporation Act of 1848 and turned on the failure of the executors to comply with the statutory requirement, and is not inconsistent with the proposition above stated.

The notice to present claims should follow the statute. It appears first from § 2718 that application must be made to the Surrogate for his direction as to the newspaper or newspapers "printed in the county in which the notice is to be published." The function of the Surrogate is not to determine whether or not the notice should be published; that rests exclusively in the discretion of the representative, as does also the time when the publication of such notice shall commence, "which is any time after the granting of letters," but the Surrogate has power to designate the paper

in which the notice must be inserted. The application, therefore, need not be verified but may be substantially in the following form:

Application for order designating newspapers in which to publish notice for claims under section 2718 of the Code of Civil Procedure.

Surrogate's Court,
County of Westchester.

In the Matter of the Estate of
Deceased.

as the of deceased, hereby appl for an order of the Surrogate of the County of Westchester, designating the newspaper in which to publish notice to creditors of said deceased, to present their claims according to law.

Said deceased, at the time of death, resided in the of County of Westchester, and was engaged in (*note*).

Dated 19

(Signature.)
.....
.....

Note. Here state such facts in regard to the business of the decedent, its character and location, as to inform the Surrogate of the probable residence of creditors, this being requisite in order that he may determine in his discretion whether additional publication should be made in other counties of the notice for claims. The publication in such other counties is not imperative, but is within the power of the Surrogate to direct.

In the blank applications provided in the Franklin County Surrogate's Court appears an allegation by the executors, specifying the newspapers considered by him as likely to reach all creditors of the deceased. Such an allegation is helpful, but the designation of the paper is a "prerogative" of the Surrogate and he is not bound by the suggestion of the executor.

Upon the presentation of this application the Surrogate will make an order designating the newspaper or newspapers in which the notice is to be inserted.

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Order designating paper in which to publish notice for claims.

Title.

On reading and filing the application of executor of the last will and testament of deceased, for an order of the Surrogate designating the newspapers in which to publish the notice to creditors of said decedent to present their claims according to law, it is hereby

Ordered, that published in and published in be and they hereby are designated as the newspapers in which the said executor may insert a notice once in each week for six months, requiring all persons having claims against the said deceased to exhibit the same, with vouchers therefor, to such executor at a place to be specified

Note. The order may if desired spec-

ify the time and place of presentation of claims; but the form suggested is in the language of the Code and is sufficient.

in such notice, at or before a day therein named (*which must be at least six months from the day of the first publication of such notice*) (*note*) and it is

Further Ordered (*here insert provisions, if deemed necessary by the Surrogate, for publication in papers not published in the county of the Surrogate for the purpose of notifying creditors in other counties.*)

As soon as the order designating the newspaper has been entered publication of the notice may commence. The notice should recite the order of the Surrogate requiring persons having claims against the decedent to present them to the executor or administrator in person (*Hardy* v. *Ames*, 47 Barb. 413); and it is customary to designate as the place for presenting the claims the place of business of the executor; this, however, is not necessarily the residence or regular place of business of the executor, but may be the office of his attorney. The time within which the claims are required by the notice to be presented must be at least six months from the date of the first publication. It is proper that the notice should be signed by the executor or administrator and it is customary that the names and addresses of his attorneys should appear thereon. The notice may be substantially as follows:

Notice to creditors.

SMITH, JOHN HENRY, In pursuance of an order of Hon. Surrogate of the county notice is hereby given to all persons having claims against John Henry Smith, late of deceased, to exhibit the same with the vouchers therefor (*note*) to the undersigned executor of the last will and testament of said deceased, at street in the office of Messrs. A. & B., his attorneys (*or specify the executor's residence or place of business if desired*) on or before the day of 19

Dated the day of 19

Signature of
Executor.

A. & B.,
Attorneys for Executor,
Office Address.

.....

Note. By section 2718 the executor is entitled to require satisfactory vouchers in support of any claim presented with an affidavit of the claimant, that the claim is justly due, that no payment has been made thereon, that there are no offsets thereon to the knowledge of the claimant. In practice it is not customary to incorporate this requirement in the notice to creditors. The requirement can be made of the creditors when they file their proofs of claim.

§ 777. **Presentation of claims on or before the day named in the published notice.**—All persons having claims against the decedent should exhibit their claims to the executor or administrator at the place specified in the notice. The proof of claim should preferably be in the form of an account with the estate of the decedent, verified by an affidavit substantially in the language of § 2718, that the amount specified in the claim is justly due, that no payments have been made thereon (except as credited

in the statement), and that there are no offsets against the same to the knowledge of the claimant (or if there are, that they have been duly credited). The object of requiring the affidavit is not to prove the existence of the debt, but to safeguard the estate against the exhibition of fictitious claims, or such as may have been actually or in part discharged by him in his lifetime. *Osborne* v. *Parker*, 66 App. Div. 277. See *Matter of Goss*, 98 App. Div. 489, 492. The following is substantially the form in use in the Surrogate's Court in Erie County:

ESTATE OF....., DECEASED.

To.....

E. g. DR.

DATE		ITEM		AMOUNT	
1906 May	2	1 Promissory note		$ 00	
		Less payment on a/c		200	
1908 May	2	Balance and interest at 6% since May 2/08		$300	

State of New York, }
Erie County, } ss.:
City of Buffalo. }

being duly sworn, says that the foregoing claim against the estate of late of the of N. Y. deceased, is in all respects correct and justly due and owing this deponent; that no payments have been made thereon (other than those stated therein), that there are no offsets against the same to deponent's knowledge, and deponent is now the lawful owner of said claim.

And deponent further says, that said claim, is not nor is any part thereof, secured by judgment, mortgage, or expressly charged upon the real estate of said deceased.

Subscribed and sworn to before me, this day of 19 } .....
Affiant

.....
Officer administering the oath to sign here.

The failure of a creditor to present his claim within the time limited by the statutory notice operates to prevent any award of costs in his favor against the executor in subsequent proceedings to enforce his demand against the estate. *Horton* v. *Brown*, 29 Hun, 654; *Bullock* v. *Bogardus*, 1 Denio, 276. By service of his claim in due form, the creditor is put in the position of having his claim become a liquidated and undisputed debt against the estate, in case it is not rejected or disputed and referred under § 2718 by the executor or administrator. *Lambert* v. *Craft*, 98 N. Y. 342, 349, citing *Underhill* v. *Newburger*, 4 Redf. 499; *Magee* v. *Vedder*, 6 Barb.

352; *Matter of Prince*, 56 Misc. 222. The claim need only be presented at the place and to the persons specified in the notice. If there are two executors, service upon one of them is sufficient. *Knapp* v. *Curtiss*, 6 Hill, 388; *Lambert* v. *Craft*, *supra*. If a creditor present his claim he is deemed to present his full claim. So if his claim contain no demand for interest, and is allowed as presented, the claimant is not entitled to interest on the amount allowed. *Matter of Warrin*, 56 App. Div. 414.

Judge Woerner in his treatise on the American Law of Administration, vol. 2, ch. 41, suggests, that the representative should require literal compliance with the terms of the notice, and exactness in the proof of claim, because of the fact that he is representative not only of the estate, but of all the other creditors interested, and that a waiver of technical rights in behalf of one might well be prejudicial to the rights of others. Therefore a creditor should not rely upon the fact or supposed fact that the executor or administrator has knowledge of the existence of his claim. Such knowledge on the part of the executor or administrator of the existence of a claim against the estate does not avoid the necessity of its due presentation. See *Matter of Morton*, 7 Misc. 343, citing *Livingston* v. *Gardner*, 4 Redf. 517, and note. An administrator who has conformed to the requirements of the statute and has published the prescribed notice has a right to assume that all persons having claims against the decedent which they intend to enforce have presented the same and demanded payment thereof; and if he thereafter distribute the assets to those entitled to them, or distribute them in a manner to which they give approval and consent, he will not be held accountable for such distributed estate to a creditor who neither presented his claims nor took any legal proceedings to collect it while the funds were in the administrator's hands. See *O'Connor* v. *Gifford*, 117 N. Y. 275, 283; *Erwin* v. *Loper*, 43 N. Y. 521; *Field* v. *Field*, 77 N. Y. 294; *Matter of Gill*, 42 Misc. 457.

An oral conversation by the creditor with the executor or administrator, is not a sufficient compliance with the statute; the exhibition of the claim contemplated by the Code is not a mere conversation. The statute plainly intends that the claim shall be presented or exhibited in some writing, stating its nature and the amount, the name of the creditor and a demand for its payment. The personal representative of the estate is put by such a paper in possession of information which enables him to act intelligently either in admitting the claim or in taking such steps as are necessary to protect the estate against it. See *Matter of Morton*, 7 Misc. 343; *Cruikshank* v. *Cruikshank*, 9 How. Pr. 350, 351; *King* v. *Todd*, 27 Abb. N. C. 149, 150; *Robert* v. *Ditmas*, 7 Wend. 523; *Gansevoort* v. *Nelson*, 6 Hill, 392. See *Merino* v. *Munoz*, 99 App. Div. 201, as to effect of subsequent reference of claim informally presented.

§ 778. **Failure to present dangerous, not fatal.**—It must not be inferred from the rules above laid down that the rights of the creditor are impaired or precluded by a mere omission to present his claim (*Matter of Mullon*, 145 N. Y. 98, 104), but his chances of being paid out of the estate may be

lost. Without such presentation the creditor can still prosecute his claim after the notice to creditors has been published for the six months required, and his judgment when recovered against the executor or administrator is good as against the assets then in his custody. *Cotter* v. *Quinlan*, 2 Dem. 29, 33, citing *Erwin* v. *Loper*, 43 N. Y. 521; *Baggott* v. *Boulger*, 2 Duer, 160; 2 Story's Eq. Juris. §§ 1250 and 1251. So, in *Matter of Gill*, 183 N. Y. 347, notice was published. Creditor failed to present his claim. Executrix paid out all in her hands *pro rata* to other creditors. She had never accounted, however. Held creditor could, under § 2726, compel an accounting.

It is provided under §§ 1835 and 1836 of the Code, that in actions by creditors against the executor or administrator in which a judgment for a sum of money only is recovered, costs shall not be awarded against the representative unless it appears *first*, that the demand was presented within the time limited by the statutory notice duly published; and *second*, unless the executor unreasonably resisted or neglected the demand so presented. See *Supplee* v. *Sayre*, 51 Hun, 30; *Horton* v. *Brown*, 29 Hun, 654; *King* v. *Todd*, 27 Abb. N. C. 149, 150.

A creditor sued the executors of his debtor for the amount of a note, which was to be delivered by one of the executors to the creditor in case of his death, but in case of his recovery from the illness from which he was then suffering, it was to be returned to the testator. The testator died in that illness, and the executor to whom it was delivered retained the note. The notice for the presentation of claims was duly published, but no proof of claim was made by the creditor except a demand made by him upon the executor to deliver up the note. The General Term held, that this was not a sufficient presentation of the claim against the estate to constitute a compliance with the requirements of the statute. *Niles* v. *Crocker*, 88 Hun, 312, 315, and cases discussed.

§ 779. **Action by the executor or administrator upon the claim.**—Before proceeding to the third subdivision of this topic, the reference of disputed claims, it is proper to note what the courts have held to be the effect of action by the executor upon claims duly presented to him. When a claim is presented the representative owes the duty to the estate, to the creditor and to the other creditors, all of whom, in a sense, he represents, to pass on the validity of the claim, and either allow or reject it. *Matter of Warrin*, 56 App. Div. 414; *McNulty* v. *Hurd*, 72 N. Y. 518. In case of nonaction by the executor, it was held by the Court of Appeals, in *Lambert* v. *Craft*, 98 N. Y. 342, 349, that if after a reasonable opportunity for examination into the validity and fairness of a duly presented claim, the executor does not offer to refer it on the ground that he doubts its justice or disputes it as unjust, it acquires the character of a liquidated and undisputed debt against the estate. Danforth, J., citing *Underhill* v. *Newburger*, 4 Redf. 49, and *Magee* v. *Vedder*, 6 Barb. 352. The case of *Schutz* v. *Morette*, 146 N. Y. 137, reversing 81 Hun, 518, although involving a different point, somewhat limited the rule previously laid down. This was an action by a creditor as upon an account, stating his claim had been presented to the executor who

acknowledged its receipt, and although he had a reasonable opportunity to examine into its validity and fairness, neither disputed nor rejected the same, although he declined to pay it. In this case, however, it appeared that the claim upon its face was barred by the Statute of Limitations, at least in part, at the time of the death of the testatrix. The Court of Appeals held, that the executor could neither by his promise nor acknowledgment, oral or written, revive a debt against the estate of his testator which was barred (citing *Bloodgood* v. *Bruen*, 8 N. Y. 362), and that against such a claim so barred he was bound to plead the statute (citing *Butler* v. *Johnson*, 111 N. Y. 204) and Andrews, C. J., said (146 N. Y. at p. 143): "In view of the power and duty of an executor or administrator, the inference from his silence merely of an agreement on his part to pay a debt so situated, would be unreasonable. . . . The statutory system for the presentation and adjustment of claims against the estate of a decedent furnishes a summary and inexpensive method by which claims can be adjusted without action, or by reference. The executor or administrator may, on being satisfied of the justice of a claim presented, admit it, or if he doubts its justness, may reject it and leave the creditor to his remedy by action if a reference is not agreed upon. But the presentation of a claim, followed by inaction, the executor or administrator neither rejecting or admitting it, does not, we think, bind the estate as upon an account stated. It may be justly claimed that the executor or administrator ought, in the fair discharge of his duty both to the creditor and to the estate, to examine the claim within a reasonable time and make known his position in respect to it. But it would be hazardous, in view of the ignorance or inexperience of the persons called upon to act as executors or administrators, to construe mere silence on his part as an admission that the claim was a valid one. The creditor must see to it that the claim is admitted and allowed by the executor or administrator, and an implied admission from silence is not sufficient. In *Reynolds, Admr.*, v. *Collins*, 3 Hill, 36, it was held that the presentation of a claim under the statute does not bar the Statute of Limitations, and if the executor neither allows nor rejects it, the creditor 'must take care to have the matter adjusted or commence his action within the period of the statute or he will be too late.' " See *Matter of Goss*, 98 App. Div. 489; *Matter of Jacobs*, 109 App. Div. 293; *Matter of Van Voorhees*, 55 Misc. 185.

And in a still later case (*Matter of Callahan*, 152 N. Y. 320, 352), the same judge, referring to the case of *Schutz* v. *Morette*, remarked "we are of opinion that mere silence on the part of an executor or administrator after the presentation of a claim under the statute, accompanied by lapse of time, will not in any case preclude the representative from thereafter contesting its validity. See *Matter of Pierson*, 19 App. Div. 478; *Matter of Whitehead*, 38 App. Div. 319, 321; *Matter of Brown*, 60 Misc. 35. If the claim is not rejected, and on an accounting no objection is taken to its allowance, then the Surrogate will be authorized to treat it as an admitted claim and direct its payment. But the claim does not become established from mere silence

of the executor or administrator. *Matter of Brown, supra.* See also *Matter of Doran,* 38 N. Y. Supp. 544.

§ 780. **Forcing creditors to sue or submit to Surrogate.**—Under § 2718*a*, the executor may, if unwilling to allow a claim, expedite its judicial ascertainment. This is a distinct special proceeding, upon petition by the representative, and upon citation to be issued "against the claimant. The petition may be filed as soon as publication of notice has been completed. It prays (and the citation directs) the claimant shall present his claim *to the Surrogate for determination* at a date not less than three months after he is served.

Thereupon the creditor is confronted with the defeat of his claim. For it shall be forever barred on such return day, unless

(*a*) He shall have commenced suit on that claim before such day, or unless

(*b*) He shall then, *on such return day,* consent to its determination by the Surrogate.

Since, to avoid the barring of his claim, where he has not begun suit upon it, the creditor must consent, it is very doubtful whether he can extend this limitation period by having the return day adjourned. The creditor should, therefore, be vigilant to sue or consent *within* the time limited.

Secondly. We note the extended meaning, in § 2718*a*, given to "claimant." The Surrogate, by virtue of this notice, is given right to cite "any claimant." This is not limited to creditors of decedent who have presented their claims. It is to include claimants against the estate *or its representatives* for his acts as such. This extends the Surrogate's power, in this particular, and by not limiting the jurisdiction to the accounting proceeding.

The threefold course open to a creditor, who has had his claim rejected, is summarized in *Clark* v. *Scovill,* 191 N. Y. 8 as:

(*a*) To refer, under § 2718;

(*b*) To sue, under § 1822;

(c) To consent to its determination by Surrogate on accounting.

Now, however, without awaiting an accounting, he can, by consent, and the executor being the moving party, have a determination by the Surrogate under § 2718*a*. Query, since the three months' limit of notice required in the citation is obviously for the protection of the creditor, why can he not waive the issuance and service of the citation, under § 2528, and secure an immediate adjudication?

§ 781. **Claims by the executor against the estate.**—(See *post,* as to power of Surrogate upon the accounting to adjudicate such claims.) An executor or administrator in his individual capacity as creditor of the estate, has the same right with every other creditor of presenting his claim duly vouched and proven, and of being paid *pro rata* with the other creditors. *Williams* v. *Purdy,* 6 Paige, 166; *Clark* v. *Clark,* 8 Paige, 152. But this does not mean that he is to be paid on his mere verified claim. In fact, his verification of a written claim is held incompetent under § 829. *Matter of Smith,* 75 App. Div. 339.

It is expressly provided by § 2719, that "an executor or administrator should not satisfy his own debt or claim out of the property of the deceased, until proved to, and allowed by, the Surrogate; and it shall not have preference over others of the same class." There is this difference, however, that by § 2731 provision is made that "on the judicial settlement of the account of an executor or administrator he may prove any debt owing to him by the decedent." And if any contest arises between the accounting party and any of the other parties respecting a debt alleged to be due by the decedent to the accounting party, the contest *must* be tried and determined in the same manner as any other issue arising in the Surrogate's Court, except where the claim is made in a representative capacity, in which case it *may* be so tried. This section enacts the rule under the former statutes. See *Barras* v. *Barras*, 4 Redf. 263.

It was held prior to the amendment of § 2719 in 1893, that a Surrogate had no power to entertain an individual proceeding for the purpose of establishing a decedent's debt to the representative. *Matter of Rider*, 3 Silvernail, Ct. of Appeals, 607. But it is now settled that he may do so. *Matter of Marcellus*, 165 N. Y. 70, 75; *Kyle* v. *Kyle*, 67 N. Y. 400, 408; *Shakespeare* v. *Markham*, 72 N. Y. 400; *Boughton* v. *Flint*, 74 N. Y. 476. Claims which the executor may have against the estate fall under two classes, the first, claims for moneys advanced by him to pay legacies or debts before he has realized on the assets of the estate; and the second, debts owing to him as an individual by the decedent at the time of his death. In respect to the first class of debts it is to be stated that the payment of legacies or debts by an executor before ascertaining what is due to the creditors and thus, before being in a position to know whether the balance of the estate will be sufficient to pay both debts and legacies, is at his peril. *Glacius* v. *Fogel*, 88 N. Y. 434, 444.

Surrogate Bradford, in *Clayton* v. *Wardell*, 2 Bradf. 1, 7, held, that where executors had made distribution of some part of the estate among children and legatees, and it subsequently appeared that the undivided residue was insufficient to pay all creditors, the executors were nevertheless liable to the creditors and should be allowed for such debts as they had paid in full only the amount to which the creditors so paid would be severally entitled ratably with the other creditors upon the final decree for the settlement of the account. He observed:

"The losses suffered by the executors by these overpayments, could easily have been avoided by reserving the funds necessary to meet all claims of which notice had been received. The advertisement for claims under the statute, affords sufficient protection to the executor or administrator, if he pays or distributes after the period for the advertisement to run has expired. If he pays before, it is at his own risk, and he should suffer, in preference to an innocent creditor."

Where an executor personally makes advances to legatees, so far as the estate is concerned he is entitled merely to be subrogated to the rights of the legatees and to a repayment from the shares of such legatees only, and

if after the payment of debts it becomes necessary to scale down the legacies *pro rata*, the right of the executor, independently of his ultimate remedy against the legatee, is merely to that *pro rata* share of the assets available for distribution among the legatees to whom he has made advances. *Tickel* v. *Quinn*, 1 Dem. 425, 432. See also *Estate of Randall*, 8 N. Y. Supp. 652. But for advances made by an executor to pay debts of a solvent estate, he is entitled to reimbursement. *Livingston* v. *Newkirk*, 3 Johns. Ch. 312; *Yeddo* v. *Whitney*, 17 Weekly Dig. 120.

In regard to the second class of claims, debts due to the executor or administrator by the testator at the time of his death, it may be observed first, that such debts will be scrutinized with great care. *Wright's Accounting*, 4 Redf. 345. They should be established by very satisfactory evidence, in the absence of which it is the Surrogate's duty to reject them. *Matter of Marcellus*, 165 N. Y. 70, 76; *Matter of VanSlooten* v. *Wheeler*, 140 N. Y. 624, 633; *Matter of Furniss*, 86 App. Div. 96; *Matter of Arkenburgh*, 58 App. Div. 583. Formerly the executor or administrator had a right to retain sufficient assets to satisfy his claim, for he then had no other way of satisfying it (*Rogers* v. *Hosack*, 6 Paige, 415; see *Wood* v. *Rusco*, 4 Redf. 380, 384), for he could not sue himself in any court; but the present rule, before quoted, prohibiting an executor or administrator from retaining any assets to satisfy his claim, until it should be proved to, and allowed by, the Surrogate, in the manner and at the time therein provided, puts him in a different position than that formerly occupied. The provision suspending the running of the Statute of Limitations from the time of the decedents' death to the time of the judicial settlement of the accounts of the executor or administrator, takes away the reason for the former rule. In scrutinizing the claim of the representative, the court will regard it with some degree of suspicion where it is not based upon some written obligation of the decedent, and in view of the fact that the representative alone remains to give his version of the matter. The fact must be established to the satisfaction of the Surrogate by clear and convincing proof; this is what is contemplated by the words "proved to and allowed by the Surrogate." *Wood* v. *Rusco*, *supra*.

Where the debt is based on a written obligation, the executor is entitled to the benefit of the usual presumptions. He is not bound, therefore, to prove affirmatively that the note has not been paid. *Macomber's Estate*, 11 N. Y. Supp. 198, citing *Egan* v. *Kergill*, 1 Dem. 464; *McKyring* v. *Bull*, 16 N. Y. 297; *Lerche* v. *Brasher*, 104 N. Y. 157, 161.

It is perfectly competent for an executor to assign his claim against the estate, and the assignee may maintain an action thereon as any other creditor could, and is not confined to the remedy provided by the Code. This has been explicitly held by the Court of Appeals (*Snyder* v. *Snyder*, 96 N. Y. 88), where two brothers being the executors of the estate and one having a claim against the testator (their father) assigned it to his wife, who presented the claim to the executors; but the brother of the assignor refused to allow or refer the same. Danforth, J., observes (at p. 92):

"If Philip (the husband) had not qualified, Sylvester would have been sole executor; and then, of course, his remedy for the debt due him would have been the same as that of any other creditor. Philip, the creditor, could have sued Sylvester, the executor, in the Supreme Court. Becoming executor, he forfeited no right as creditor, but assumed another character. He could not as creditor sue himself as executor. Before the statute, however, he could have paid himself, but since the statute he could not do so. (2 R. S. 88, § 33.) A remedy was, however, provided by statute. Upon citation duly issued and served on parties interested he might have a hearing, and his claim, if just, might be allowed by the Surrogate. (*Ibid.*, and also New Code, § 2739.)

"The plaintiff, however, is under no disability. As Philip, in the case supposed, could have sued Sylvester, she could sue both, and either could defend. No reason, therefore, is perceived why the doors of the Supreme Court should be closed against her. She is the real party in interest—has the legal as well as the equitable right of her assignor, whose presence as party plaintiff is in no degree necessary to a complete determination of all the questions involved. She is personally qualified to sue in any court, and cannot be defeated because the person under whom she claims would, if he had sued as plaintiff, have been disqualified by reason of his relation to the parties named as defendants. It is immaterial, therefore, to inquire whether the debt accrued to the plaintiff by contract with the testator—she might have contracted with him—or by assignment from Philip Snyder through Barber."

§ 782. **Reference of disputed claims.**—Section 2718, *supra*, provides:

> If the executor or administrator doubts the justice of any such claim, he may enter into an agreement in writing with the claimant to refer the matter in controversy to one or more disinterested persons, to be approved by the surrogate. On filing such agreement and approval in the office of the clerk of the supreme court in the county in which the parties or either of them reside, an order shall be entered by the clerk referring the matter in controversy to the person or persons so selected. On the entry of such an order the proceeding shall become an action in the supreme court. **§ 2718, Code Civil Proc.**

In *Bucklin* v. *Chapin, Administratrix*, 1 Lans. 433, it was held that a reference under the statute stands in place of an action, and the entry of an order to refer must be deemed its commencement.

In *Tracy* v. *Suydam*, 30 Barb. 110, it was held that where parties agree to refer under the statute "the agreement to refer need not notice matters of defense to the claim. The account presented is, in effect, the plaintiff's complaint, and there being no pleadings, and no provision in the statute for pleadings, the defendant is limited to no particular defense; and consequently, any and every legal defense against the claim must necessarily be available." And it was also said in that case: "And every species of legal proof adapted to show the injustice of the claim, or its invalidity as a whole, or in degree or amount, is admissible." And the executors are "at liberty

to make any defense that their testator or intestate could himself make, if alive, and the same were properly pleaded, in an action upon such claim."

In *Roe* v. *Boyle*, 81 N. Y. 305, 307, a similar reference had been ordered, and the court said: "This is not an ordinary proceeding. It is specially regulated by statute. 2 R. S. 89, 90. It cannot be commenced by summons. It can only be commenced by the consent of the parties and the approval of the Surrogate. It can be tried in no other way than before a referee. There are no pleadings, and the representatives of the estate proceeded against can prove against the claim any defense which they have without pleading it in any form."

In *Mowry* v. *Peet*, 88 N. Y. 454, it was said that "in trying and adjudicating upon these matters which are within the scope of the reference, the statute (2 R. S. 88, § 36) confers upon the referee and the court the same powers as if the reference had been made in an action. But the proceeding is not an action."

Section 36 of the Revised Statutes [vol. 3 (7th ed.), p. 2299] provided for an agreement being entered into and for the entry of an order; and § 37 provided that the referee should "proceed to hear and determine the matter," and that the proceedings should be the same in all respects, and the referee should have the powers and be entitled to the same compensation and be subject to the same control "as if the reference had been made in an action in which such court might, by law, direct a reference." In references under that statute it was held by the Court of Appeals in two cases that a bill of particulars could not be required (*Townsend* v. *N. Y. Life Ins. Co.*, 4 N. Y. Civ. Proc. Rep. 401; *Eldred* v. *Eames*, 115 N. Y. 403), and in the latter case it was held that the referee "could not change the items of an account presented and referred. The exercise of such power by the referee would enable a claimant to obtain a reference of claims against an estate without the consent of the defendant or the approval of the Surrogate, which is made by the statute the condition of such a proceeding. It is the claim which is rejected by the executor that may be referred and none other." See also *Hermann* v. *Wagner*, 81 Hun, 431.

In *Gilbert* v. *Comstock*, 93 N. Y. 484, it was held that, prior to the Code of Civil Procedure, "a contestant of a claim presented by an executor against the estate was not required to present a written answer or formal objections; the claim was open to any answer or defense, and was subject to be defeated if, at the testator's death, the Statute of Limitations had run against it."

§ 783. **Same subject.**—The cases referred to in the last section, indicate that, prior to the amendment of § 2718 by ch. 683 of the Laws of 1893, it was not competent to permit an amendment of the creditor's statement of claim in these proceedings; but the Code, as amended by that statute, now provides that "on entry of the order of reference in such a case the proceeding becomes an action in the Supreme Court." *Fowler* v. *Hebbard*, 40 App. Div. 108. And there is a further provision to this effect, "The same proceedings shall be had in all respects. The referees shall have the

same powers, be entitled to the same compensation and subject to the same control, as if the reference had been made in an action in which such court might by law direct a reference." See Code Civ. Proc. § 2718. This amendment, in the first place, extended the definition given to an action by § 3333 by including this proceeding, in which no pleadings are necessary or can be required. And it has been held also to have brought this proceeding within the provision of the Code, that the court may at any stage, before or after judgment, in furtherance of justice, amend any pleading or other proceeding by inserting any allegation material to the case. See Code Civ. Proc. § 723; *Lounsbury* v. *Sherwood*, 53 App. Div. 318, 319. So also the referee may pass on the question of costs. *Jenkinson* v. *Harris*, 27 Misc. 714.

Moreover, it becomes also competent to issue a commission to take testimony, on oral or written interrogatories, of foreign witnesses. *Deery* v. *Byrne*, 120 App. Div. 6. See also *Paddock* v. *Kirkham*, 102 N. Y. 597.

The method of instituting the proceeding remains as before the amendment. The reference by the approval of the Surrogate is made upon the agreement in writing of the creditor and personal representatives of the decedent, founded upon the presentation of the claim verified, and the doubt entertained by the latter of its justice. See *Lee* v. *Lee*, 85 Hun, 588, 590.

In the case last cited it was suggested that caution should be exercised in allowing amendment of claims in such cases, and it should be done only when essential to the promotion of justice. See also *Lounsbury* v. *Sherwood*, *supra*.

As soon as the order of reference has been entered, the proceeding becomes an action in the Supreme Court; consequently the entry of the order has the same effect as the service of a summons under § 416 of the Code. All of the subsequent proceedings in the action thus commenced are subject to the exercise of every power of the court to which they would be subject in any other action referred to a referee for trial. See *Adams* v. *Olin*, 78 Hun, 309; *Hustis* v. *Aldridge*, 144 N. Y. 508.

Consequently, if after the entry of the order under which three referees are designated, one or more of them should refuse to serve, the court must appoint another referee under § 1011 of the Code. The power, under that section, is not discretionary. The section is mandatory and the court *must* appoint. And it has consequently been held that, to vacate the original order of reference against the consent of the creditor or the executor would be beyond the power of the court and without warrant of law. *Hustis* v. *Aldridge*, *supra*.

A proceeding to compel an executor to pay over moneys in his possession is not within the purview of § 2718. The remedy in such a case is by proceeding before the Surrogate. This section is limited to claims accruing or existing against the decedent in his lifetime. *Shorter* v. *Mackey*, 13 App. Div. 20; *Fowler* v. *Hebbard*, 40 App. Div. 108, 109. It does not extend to claims against the representatives allowed by § 2718*a*.

Nor does it extend to claims to be reimbursed for decedent's funeral

expenses. *Genet* v. *Willock*, 93 App. Div. 588. This is now covered in § 2729, subd. 3.

§ 784. **The procedure.**—The form of the notice which the executor or administrator is required to give may be substantially as follows:

Notice of dispute and offer to refer.

In the Matter of the Administration of the Estate of Deceased.

To (name of creditor).

You will please take notice, that I doubt the justice of your claim of dollars against the above named estate, and I hereby dispute the same and offer to refer the matter in controversy to one or more disinterested persons as referee or referees to be approved by the Surrogate.

(Date.)

(Signature and address of executor or administrator.)

After service of such notice, it is proper to make the agreement in writing contemplated by § 2718. This should be in the form of an instrument, which should recite the presenting of the claim and the dispute thereof, and contain a stipulation or agreement, that the matter in controversy be referred to a person or persons named to hear and determine the same. It is proper under the decision in *Hustis* v. *Aldridge*, 144 N. Y. 508, 511, to provide by the agreement for alternate referees, in the event that the referee designated declined to serve. In the case cited, the Court of Appeals held that the provision of § 1011 of the Code, by which the court was bound to appoint a referee, if the referee named in the stipulation refuses to serve "unless the stipulation expressly provides otherwise," worked no hardship since it was always within the power of the parties to protect themselves by "inserting a precautionary provision in the stipulation." The form of the agreement may be substantially as follows:

Agreement to refer claim under Section 2718.

Memorandum of agreement between executor of the last will and testament of deceased and a creditor of said deceased made under section 2718 of the Code of Civil Procedure.

Whereas the said creditor has presented to the said executor of the last will and testament of deceased his claim against the estate of the decedent for dollars, a copy whereof is hereto attached, together with vouchers in support thereof, and

Whereas the said executor doubts the justice of such claim and has notified the said creditor of his willingness to refer the matter in controversy under section 2718 of the Code of Civil Procedure,

It is hereby, in consideration of the premises, mutually stipulated and agreed that the matter in controversy be referred to (*here designate one or more disinterested persons*) as (sole) referee, if approved by the Surrogate of the county of to hear and determine the same.

(And it is further stipulated and agreed that if the said shall be unable or decline to serve that the matter in controversy be referred to in his place and stead.)

(*If it is desired to stipulate the details of the reference as to time and place of hearing, it is proper, though not necessary, to incorporate the stipulation in the agreement.*)

(*Date.*) (*Signature.*)

It is customary for the Surrogate to indorse upon the agreement his approval of the referee named and the date. After such approval of the Surrogate has been indorsed, the agreement must be filed in the office of the clerk of the Supreme Court in the county in which either of the parties reside; and upon such filing the clerk *must* enter the order of reference which gives the proceeding the character of an action in the Supreme Court. This order may be substantially in the following form:

Supreme Court,
County of
Title.

On reading and filing the agreement of executor, etc., of deceased, with a creditor of said deceased, dated the day of and the indorsed approval thereon of Hon. Surrogate of the county of by which agreement said executor and said creditor agree to refer the matter in controversy between them to as (sole) referee to hear and determine the same; now, on motion of attorney for the said executor, it is

Ordered, that the said Esq., be and he is hereby appointed referee to hear and determine the matter in controversy described in said agreement hereto annexed. (*Note.*)

(Date.)

(Signature of the county clerk.)

Note. If the stipulation provides in detail for the place, dates, etc., of the hearing, it is proper to incorporate such provisions in a further clause of the order.

§ 785. **The hearing.**—The rules governing the hearing upon the reference of a disputed claim against a decedent's estate are made, by virtue of § 2718, the same as those governing any reference to hear and determine in an action in the Supreme Court. This has been held, as elsewhere noted, to include the power to obtain the testimony of absent witnesses by commission. *Deery* v. *Byrne*, 120 App. Div. 6. See *Paddock* v. *Kirkham*, 102 N. Y. 597, 600, where the court held that this power was given not so much by the provision that in case of such reference "the referee shall have the same powers" as from the further express provision, "the same proceedings shall be had in all respects" as if a reference has been made in an action. See also *Matter of Bingham*, 127 N. Y. 296, 313. It is the duty of the referee to scrutinize closely the testimony introduced in support of a disputed claim. If the claim is not based upon any written instrument or evidence of claim, his duty is particularly clear under the decisions; but, if the evidence is satisfactory to the referee, in the absence of palpable error his

findings will not be disturbed by the Appellate Courts. See *O'Neill* v. *Barry*, 20 App. Div. 121, 123, citing *Titus* v. *Perry*, 13 N. Y. St. Rep. 237; *Rossa* v. *Smith*, 17 Hun, 138; *Teeter* v. *Teeter*, 47 N. Y. St. Rep. 580; *Stanley* v. *National Union Bank*, 115 N. Y. 122; *Sackett* v. *Thomas*, 4 App. Div. 448. It is also his duty to scrutinize with special care claims against the estate withheld during the life of the alleged debtor. Such claims, sought to be enforced when death has silenced his knowledge and explanation, are always to be carefully scrutinized, and admitted only upon very satisfactory proof. *Kearney* v. *McKeon*, 85 N. Y. 137, 139; *Ulrich* v. *Ulrich*, 17 N. Y. Supp. 721, and cases cited; *Ellis* v. *Filon*, 85 Hun, 485, 487. If the claim is verified, the burden of proving payment is on the executor. *Matter of Rowell*, 45 App. Div. 323; *Lerche* v. *Brasher*, 104 N. Y. 157; *Hicks* v. *Walton*, 14 App. Div. 199.

It is the object of the statute to protect estates "against unfounded and rapacious raids." *Matter of Van Slooten* v. *Wheeler*, 140 N. Y. 624, 633; *Yates* v. *Root*, 4 App. Div. 439. See also *Kearney* v. *McKeon*, 85 N. Y. 137; *Rowland* v. *Howard*, 75 Hun, 1. If the Statute of Limitations is set up by way of defense, the entry of the order of reference is deemed the date of commencement of the action as regards the statute. *Hultslander* v. *Thompson*, 5 Hun, 348; *Leahy* v. *Campbell*, 70 App. Div. 127, 129.

§ 786. **Costs.**—Section 2718 provides that the provisions of §§ 1835 and 1836 are applicable to proceedings upon the reference of disputed claims. These are the sections which provide that, where a judgment for a sum of money only is rendered against an executor or administrator in an action brought against him in his representative capacity, costs shall not be awarded against him except as provided in § 1836. Section 1836 is as follows:

> Where it appears in a case specified in the last section that the plaintiff's demand was presented within the time limited by a notice published as prescribed by law, requiring creditors to present their claims and that the payment thereof was unreasonably resisted or neglected, or that the defendant did not file the consent provided in section eighteen hundred and twenty-two, at least ten days before the expiration of six months from the rejection thereof, the court may award costs against the executor or administrator, to be collected either out of his individual property or out of the property of the decedent as the court directs, having reference to the facts which appear upon the trial. Where the action is brought in the supreme court, or any county court, the fact must be certified by the judge or referee before whom the trial took place. **§ 1836, Code Civil Proc.**

It will be noted that these provisions for costs do not apply to testamentary trustees, suits against whom are on claims on contracts made by them *after* decedent's death. *O'Brien* v. *Jackson*, 42 App. Div. 171.

In view of the fact that, by § 2718, the reference of a disputed claim against the decedent's estate is an action, these provisions would seem to be applicable even if not expressly referred to in that section. This was so held in *Henning* v. *Miller*, 83 Hun, 403. It is essential in passing on this

question of costs to ascertain whether the executor or administrator has *unreasonably* resisted or neglected the payment of the claim successfully prosecuted upon the reference. It is manifest in the first place, that if the executor defeats the creditor upon the reference he is entitled to costs against such creditor as a matter of course. *Adams* v. *Olin*, 78 Hun, 309; *Munson* v. *Howell*, 12 Abb. Pr. 77; *Boyd* v. *Bigelow*, 14 How. Pr. 511; *Lamphere* v. *Lamphere*, 54 App. Div. 17.

If, on the trial, the claim is materially reduced, either by amendment, or by proof, there can be no proper finding of "unreasonable resistance." *Holcombe* v. *Nettleton*, 41 Misc. 504. If the referee charges the executor or administrator with costs for unreasonably resisting or neglecting payment, he must find such unreasonable resistance or neglect as a matter of fact, for on such finding alone can the imposition of costs be based. See *Ellis* v. *Filon*, 85 Hun, 485; *Whitcomb* v. *Whitcomb*, 92 Hun, 443; *Matson* v. *Abbey*, 141 N. Y. 179. While it need not be incorporated into his report, it must be made *in some form*. *Brainerd* v. *De Graef*, 29 Misc. 560, 563; *Lounsbury* v. *Sherwood*, 53 App. Div. 318. Thus, his certificate to that effect is adequate. *Brainerd* v. *De Graef*, *supra*; *Darde* v. *Conklin*, 73 App. Div. 590.

The rule as to what will entitle a plaintiff to costs in such proceedings has been carefully and clearly stated in *Niles* v. *Crocker*, 88 Hun, 312, 314. "Under the statute two things are necessary to entitle the plaintiff to costs: First, that the demand must be presented within the time limited by a notice, published as prescribed by law; and second, the demand must be unreasonably resisted or neglected," citing *Supplee* v. *Sayre*, 51 Hun, 30; *Horton* v. *Brown*, 29 Hun, 654; *King* v. *Todd*, 21 Civ. Proc. Rep. 114. See also *Radley* v. *Fisher*, 24 How. Pr. 404.

Where the refusal of an executor to pay a claim is based upon the fact that the claim includes a charge for interest, in excess of the legal rate, he will not be charged with costs if he succeeds in reducing the claim to the proper amount. *Davis* v. *Myers*, 86 Hun, 236; *Daggett* v. *Mead*, 11 Abb. N. C. 116. It has been held that it is proper for the representative to defend where suit is brought within the year given him in which to pay debts. *Patterson* v. *Buchanan*, 40 App. Div. 493, 497.

Where a creditor whose claim was rejected by the representative, made a parol offer to refer, which was refused, and the creditor brought an action for the claim, in which he was successful, it was held he was entitled to costs. *Roberts* v. *Pike*, 19 Civ. Proc. Rep. 422. Prior to the amending of § 2718 in 1893 it was held that the costs in proceedings upon a reference of a disputed claim were not covered by §§ 1835 and 1836, and that the court could impose costs regardless of whether the claim was presented within the time limited by the notice. *Denise* v. *Denise*, 110 N. Y. 562, headnote.

Section 1836 gives the court discretion as to whether to charge the estate or the executor personally with the costs. *Osborne* v. *Parker*, 66 App. Div. 277, 283. See *Holcombe* v. *Nettleton*, 41 Misc. 504, as to when mere refusal to refer will not involve *personal* costs.

Section 1822, quoted at p. 816, provides a six months' limitation for beginning suit on a disputed or rejected claim unless "a written consent shall be filed by the respective parties with the Surrogate that said claim may be determined and heard by him upon the judicial settlement of the accounts of said executor or administrator as provided by § 2743." Therefore, § 1836 gives a right to costs unless the defendant filed such consent "at least ten days before the expiration of six months from the rejection" of the claim. That is, if within five months and twenty days the consent under § 1822 is not filed, the creditor has still ten days in which he may begin suit, with an absolute right to costs in the event of recovery. *Hart* v. *Hart*, 45 App. Div. 280; *Hoye* v. *Flynn*, 30 Misc. 636. If he sues prior to that time, he waives this statutory right. *Id.*, p. 282. *Holcombe* v. *Nettleton*, *supra*. Provided, however, the executor files the consents in due time. *De Kalb* v. *Kelk*, 30 Misc. 367. See *Adler* v. *Davis*, 31 Misc. 47.

The executor is entitled to "one lawful trial" and to exemption from costs until he has had it. *Benjamin* v. *Ver Nooy*, 168 N. Y. 578, 583, modifying 36 App. Div. 581. Thus if he appears and a new trial is ordered, the executor cannot be directed to pay costs for the first trial, nor for the appeals resulting in the new trial. *Ibid.* This is so, in spite of fact that Court of Appeals order directing a new trial provided "costs to abide the event." "Event" in such a case means not only final success in the action, but also a valid award of costs under § 1836. *Ibid.*

The creditor must recover more than $50 in order to get costs. Otherwise under § 3229 he must pay costs. The holder of a small claim should decline the reference and sue in a justice's court. *Lamphere* v. *Lamphere*, 54 App. Div. 17.

§ 787. **The right to disbursements.**—Section 317 of the Code of Procedure contained the following provision: "And whenever any claim against the deceased person shall be referred, pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law."

Section 3, subd. 8, ch. 245 of the Laws of 1880, an act repealing the Code of Procedure, contained the following provision: "The repeal effected by the first section of this act (which included the Code of Procedure) is subject to the following qualifications: . . . . 8. It does not affect the right of a prevailing party to recover the fees of referees and witnesses and his other necessary disbursements, upon the reference of a claim against a decedent, as provided in those portions of the Revised Statutes left unrepealed after this act takes effect."

The provisions of art. 2, title 3, ch. 6, part 2 of the Revised Statutes, providing for and regulating the reference of a claim against the decedent, were not at that time repealed. While the law stood thus, it was held that upon such a reference the prevailing party was entitled to recover his necessary disbursements, and that the provisions of the Code of Procedure allowing such disbursements were not taken away by the repealing act

of 1880, ch. 245, but the right thereto was preserved by subd. 8 of § 3 of that act. *Larkins* v. *Maxon*, 103 N. Y. 680. See also *Hallock* v. *Bacon*, 64 Hun, 90, and cases cited in the opinion of Hardin, P. J.

In 1893 the legislature passed an act amending the Code of Civil Procedure by making those provisions of the Revised Statutes a part of the Code of Civil Procedure, ch. 686 of the Laws of 1893. Section 2718 now contains substantially the same provisions as were contained in the Revised Statutes as to the reference of claims against the decedent, and the provisions of the Revised Statutes which related to such a reference were repealed.

The question arose subsequently to this amendment of § 2718 (*Niles* v. *Crocker*, 88 Hun, 312) as to whether that section being substantially a re-enactment of the Revised Statutes by making them a part of the Code, and the part of the Revised Statutes so re-enacted being repealed, the rule was thereby changed in regard to referees' and witness's fees paid or incurred by the party on the reference of a claim against the decedent. The General Term in the Fourth Department by Judge Martin held as follows (at p. 316):

"We have found no statute which repeals the portion of § 317 of the Code of Procedure, to which we have referred, except ch. 245 of the Laws of 1880, and in that, as we have already seen, the right to referees' fees, witness's fees and other disbursements paid or incurred by the prevailing party on the reference of such a claim is preserved, nor have we been able to find that subd. 8 of § 3 of ch. 245 of the Laws of 1880 has been repealed. Assuming that these provisions of the statute are unrepealed the question is whether they apply to a reference under § 2718 of the Code of Civil Procedure.

"We are disposed to think the provisions of those statutes are still in force. The purpose of the statute of 1880 was to retain the provision of the Code of Procedure which gave the right to a prevailing party to recover his necessary disbursements upon a reference of a claim against a decedent. It is true that the act added a description of the statutes under which such a reference might then be had; but when the legislature in substance re-enacted the same law, making it a part of the Code of Civil Procedure, and did not repeal the provisions of the Code of Procedure referred to, nor the provision of the repealing act of 1880, which preserved the right to such fees and disbursements, we are inclined to the opinion that it indicated an intent upon the part of the legislature to leave the provisions as to disbursements, in such proceedings as they originally existed." So also, it is held that even where plaintiff is not allowed costs he may, in a proper case, recover his necessary taxable disbursements. *Osborne* v. *Parker*, 66 App. Div. 277, 283; *Whitcombe* v. *Whitcombe*, 92 Hun, 443, 447; *Lounsbury* v. *Sherwood*, 53 App. Div. 318.

§ 788. **Action by creditor on rejected claim.**—It is perhaps pertinent to refer in this connection to the provision of the Code with regard to the action which must be brought by a creditor whose claim has been rejected,

although this is not cognizable in the Surrogate's Court. The provision is contained in § 1822 of the Code which is as follows:

> Where an executor or administrator disputes or rejects a claim, against the estate of a decedent, exhibited to him, either before or after the commencement of the publication of a notice requiring the presentation of claims, as prescribed by law, unless a written consent shall be filed by the respective parties with the surrogate that said claim may be heard and determined by him upon the judicial settlement of the accounts of said executor or administrator as provided by section twenty-seven hundred and forty-three, the claimant must commence an action for the recovery thereof against the executor or administrator within six months after the dispute or rejection, or, if no part of the debt is then due, within six months after a part thereof becomes due; (A) in default whereof he, and all the persons claiming under him are forever barred from maintaining such an action thereupon, and from every other remedy to enforce payment thereof out of the decedent's property. **§ 1822, Code Civil Proc.**

While this provision should be strictly construed (*Potts* v. *Baldwin*, 67 App. Div. 434, 437), nevertheless it has been held, under the provision of the Revised Statutes for which this section has been substituted, that the failure of the creditor to sue within the time limited after his claim has been rejected not only bars his action against the executor or administrator but also his action against the heirs and next of kin. *Selover* v. *Coe*, 63 N. Y. 438.

It is to be noted, however, that a claim consisting of a judgment against the estate of a decedent, is not barred under this short Statute of Limitations. See *Estate of Lyman*, 60 Hun, 82.

To avoid confusion § 2718*a* must also be read with § 1822. In effect it would read into § 1822 at the point marked (A) above, the words "or within three months of the service upon him of a citation issued pursuant to § 2718*a*, unless on the return day he shall consent to its determination by the Surrogate."

§ 789. **Form of claim and of rejection.**—Section 1822 refers to a claim "exhibited" to the executor or administrator. An oral claim is incapable of being so exhibited. *Ulster Co. S. I.* v. *Young*, 161 N. Y. 23, 33. So in *Matter of Morton*, 58 N. Y. S. R. 515, 517, it was said: "The statute plainly intends that the claim shall be presented or exhibited in some writing, stating its nature and amount, the owner's name and demanding its payment. The personal representative of the estate is then in possession of information which will enable him to act intelligently, and either to admit the claim or take such steps to protect the estate against it as he shall deem prudent and necessary." The following cases are to the same effect: *Cruikshank* v. *Cruikshank*, 9 How. Pr. 350, 351; *King* v. *Todd*, 27 Abb. (N. C.) 149; *Robert* v. *Ditmas*, 7 Wend. 523; *Gansevoort* v. *Nelson*, 6 Hill, 392; *Niles* v. *Crocker*, 88 Hun, 312.

There is no statute or rule of law which requires the notice of rejection to be in writing, see *Matter of Jacobs*, 109 App. Div. 293, or in any par-

ticular form. *Peters* v. *Stewart*, 2 Misc. 257, rev'g 1 Misc. 8. Here the claim had been presented orally and the rejection was oral. Judge Bookstaver added: "If the agent presenting the claim had authority to present it to the administrator, it necessarily follows that he had authority to receive on plaintiff's behalf notice that he accepted, or disputed and rejected it. Where a creditor sends a person to collect a claim of a debtor, the latter certainly is authorized to receive and receipt for any money that may be paid to him on account of that claim; and where one sends an agent to make a demand of any kind, the answer of the person on whom the demand is made is good when given to the agent and in law is considered as if given to the principal personally. '*Qui facit per alium facit per se*' is one of the oldest and best established maxims of the law. Hence we think the statute commenced to run at the time of the verbal notice that the claim was disputed and rejected." In *Lockwood* v. *Dillenbeck*, 104 App. Div. 71, the notice of rejection was sent to the attorneys whose names were indorsed upon the claim. Held binding upon claimant, although her attorneys failed to notify her of such rejection.

To same effect see *Heinrich* v. *Heidt*, 106 App. Div. 179; *Gardner* v. *Pitcher*, 109 App. Div. 106, citing also *Cox* v. *Pearce*, 112 N. Y. 637.

Where the notice of rejection is actually received, on the other hand, it is immaterial whether it be directly from the executor, or from the executor through his attorney. *Wintermeyer* v. *Sherwood*, 77 Hun, 193; *Selover* v. *Coe*, 63 N. Y. 438. Merely filing a notice of rejection in a proceeding to which creditor is a party raises no presumption that he received personal notice thereof. *Potts* v. *Baldwin*, 67 App. Div. 434, 437.

The executor, of course, cannot revive a claim barred by the statute by any act under this section or any other; nor can the executor's agreement to refer subsequently made revive a claim barred under § 1822. *Flynn* v. *Diefendorf*, 51 Hun, 194, followed in *Gardner* v. *Pitcher*, *supra:* see also *Matter of Neher*, 57 Misc. 527.

Sections 2817 and 1822 treat of entirely separate and independent subjects. Section 2817 provides for the case of a doubt in the executor's mind as to the validity of a claim, not sufficiently well established to justify its absolute rejection, and enables him, under such circumstances, to notify the claimant that he doubts the justice of his claim, for the purpose of effecting an agreement to refer the same. For this purpose, there is no limit of time and the agreement may be made at any time between the parties. If an executor desires to set in operation the short Statute of Limitations, his attitude towards the disputed claim must not be susceptible of any doubt in the mind of the claimant, and his dispute or rejection of the claim must be in the most absolute and unqualified terms. *Matter of Eichman*, 33 Misc. 322. Section 1822 in its present form is to be read and construed in connection with § 2743, not § 2718. *Ibid.*

If the executor seeks to rely upon the limitation imposed by § 1822 he must prove an explicit or decisive rejection of the claim. A mere statement by the executor no matter how formally made, that he doubts the

justice of a claim and invites a reference of it, is not the dispute or rejection which is contemplated by § 1822 of the Code of Civil Procedure. *Matter of Eichman, supra,* citing *Matter of Edmonds,* 47 App. Div. 229. It has been held that the notice of rejection or dispute must be absolute and unequivocal. *Hoyt* v. *Bonnett,* 50 N. Y. 538. See *Kidd* v. *Chapman,* 2 Barb. Ch. 414; *Reynolds* v. *Collins,* 3 Hill, 36. And it is competent for the Surrogate to pass upon the question whether there has been such a rejection or dispute of the claim upon the judicial settlement of the executor's account. *Bowne* v. *Lange,* 4 Dem. 350; *Potts* v. *Baldwin,* 67 App. Div. 434, 437; *Matter of Miles,* 33 Misc. 147; *Matter of Vonder Lieth,* 25 Misc. 255; *Matter of Pfyfe,* 5 N. Y. Leg. Obs. 331; *Wilcox* v. *Smith,* 26 Barb. 316, 334. So he may adjudge it to have been allowed, where it was duly presented and rejection was unduly delayed. *Potts* v. *Baldwin, supra.* This short Statute of Limitations must be pleaded as a defense by the executor. *Williams* v. *McIntyre,* 16 Weekly Dig. 651.

In *Matter of Smith,* 58 Misc. 493, the Surrogate of Franklin County held that serving the notice of rejection *by mail* doubled the creditor's time to sue or file his consent under § 1822. He based his decision on § 2538, which makes applicable to Surrogate's Court §§ 796–809 covering "Service of Papers" which is held applicable to notices of rejection in *Peters* v. *Stewart,* 2 Misc. 357. The writer does not concur in this view, nor believe that it applies to transactions between parties prior to there being any proceeding or action to the procedure in which the Code limitations could alone apply.

§ 790. **The judgment.**—With regard to the entry of judgment upon the report of the referee, the language of § 2718 is explicit, to wit: "Judgment may be entered on the report of the referee, and such judgment shall be valid and effectual in all respects, as if the same had been rendered in a suit commenced by the ordinary process, *and the practice on appeal therefrom shall be the same as in other civil actions.*" In order to the validity of a judgment entered upon the report of a referee upon the reference of a disputed claim against the estate of a decedent, there must be strict compliance with all statutory directions of the statute. *Burnett* v. *Gould,* 27 Hun, 366. But it does not invalidate the proceedings if the executor consents to refer the claim without first requiring a production of vouchers or an affidavit of the justice of the claim, for the estate would not be prejudiced thereby. *Russell* v. *Lane,* 1 Barb. 519.

It has been held that no claim against the estate can be referred in this manner, unless they are such as had accrued or were accruing while the decedent was alive. *Shorter* v. *Mackey,* 13 App. Div. 20, 23, citing *Godding* v. *Godding,* 17 Abb. Pr. 374; *Smith* v. *Patten,* 9 Abb. N. S. 205; *Skidmore* v. *Post,* 32 Hun, 56; *Matter of Van Slooten* v. *Dodge,* 145 N. Y. 327, 332. And a claim for a tort committed by a decedent has been held to be referable under the statute. *Brockett* v. *Brush,* 18 Abb. Pr. 337. But the objection that the claim is not referable should be taken promptly or it may be held to have been waived. *Weller* v. *Weller,* 4 Hun, 195.

In this connection it must be borne in mind that the statute was devised for the summary and speedy determination of claims held against the decedent, and the whole proceeding being instituted exclusively for this purpose, the statutory limits are not to be transgressed. Claims, therefore, by an executor for disbursements made by him as executor are not referable under this statute. See *Stewart* v. *O'Donnell*, 2 Dem. 17, 18.

§ 791. **Proceeding technical—Further discussion.**—It must further be noted as primary to the validity of the judgment that the proceeding is essentially a voluntary one, in that it implies an agreement between the executor and creditor to refer. If the creditor declines to agree, he has his remedy by action, although in such a case he might lose his right to costs. If the executor declines to agree, the creditor is merely remitted to his right of action, and the executor may become liable for costs. If the executor offers to refer to a person objectionable to the creditor, he cannot force the creditor to accept the referee named, and such an offer will not relieve the executor from costs. In any event the suggestion of a referee must be approved by the Surrogate; but he is simply authorized to approve the name or to withhold his approval. If he approves the agreement, the order directing a reference is entered as of course in the Supreme Court.

In *Gorham* v. *Ripley*, 16 How. Pr. 314, a creditor, whose demand agalnst a decedent's estate had been rejected by an executor, offered to submit it to referees "to be approved by the Surrogate," employing, in such offer, the very words of the statute.

The executors, instead of acceding to this proposal, offered to refer the matter to three particular persons, whom they themselves named, such persons "to be approved by the Surrogate." Neither party accepted the proffer of the other, and, in a subsequent action wherein the claimant was successful, it was held that the executors had "refused to refer," and so had become liable for costs. The court says: "The language of this provision is not very explicit, but I think it was intended that the parties should mutually agree in writing to refer the claim, and in case they should fail to select referees for themselves, that the selection should be made by the Surrogate. It cannot be that it is a sufficient compliance with the statute for the executors to offer to refer the claim to three referees named by themselves. When this proposition was rejected, and it was proposed that the parties should appear before the Surrogate, for the purpose of having referees selected, it was the duty of the defendants to accept the offer. Their omission to do so has rendered them liable for costs."

But where the creditor made an offer to certain executors to refer his claim against the estate as provided by law, to which the executors replied by their counsel, that they consented to refer the claim, and the parties presented a proposed order of reference, into which the Surrogate inserted the name of a referee, which order was signed by the Surrogate and filed in the office of the county clerk, it was properly held upon a motion to vacate said order, that the Surrogate had no authority to make selection

in such a way or to sign such an order. *Tilney* v. *Clendenning*, 1 Dem. 212. But if the offer is made and accepted to refer the claim "to one or more disinherited persons to be approved by the Surrogate," and the parties by consent omit to designate the referee or referees, the designation of such referee or referees by the Surrogate is not so much an official act, as the act of the parties through him. His only official act required by the Code is the indorsement of the approval upon the agreement. The order of reference being a Supreme Court order is entered as of course by the county clerk.

Where the disputed claim is thrown out by the referee, it has been held that he may report a counterclaim in favor of the estate, but as to such counterclaim or set-off *he is limited to the amount of the creditor's claim;* and the referee has no power to render an affirmative judgment for the executors and against the claimant, or to certify a balance in their favor and render judgment therefor. If the executors have a demand against the claimant exceeding the amount claimed by him, they cannot resort to this special proceeding for its recovery. Their accomplishment of that purpose must be either by bringing their own action or by putting the claimant to an action by not agreeing to refer under the statute.

The provision of the Code in respect to counterclaims cannot be availed of in this proceeding. No mode is therein provided for setting up or giving notice of a claim for affirmative relief against the claimant or for bringing in additional parties. See *Mowry* v. *Peet*, 88 N. Y. 453, 457; *Skidmore* v. *Post*, 32 Hun, 54.

§ 792. **The procedure in taking an appeal.**—Section 2718 provides, in part:

> Judgment may be entered on the report of the referee and such judgment shall be valid and effectual in all respects as if the same had been rendered in a suit commenced by the ordinary practice; and the practice on appeal therefrom shall be the same as in other civil actions. **§ 2718, Code Civil Proc.**

This section of the Code is new, and was intended to make definite the practice, which was formerly greatly confused by reason of the distinction between actions and special proceedings. A reference of a disputed claim had been held to be a special proceeding (*Roe* v. *Boyle*, 81 N. Y. 305); and it had been further held that § 1002 of the Code (requiring notice of motion for a new trial to be given before the expiration of the time within which an appeal could be taken from the judgment) did not apply upon an appeal from the judgment entered upon a referee's report. See *Denise* v. *Denise*, 41 Hun, 9, aff'd 110 N. Y. 562. And it was held that the motion for a new trial could be made within a reasonable time, and that what was a reasonable time depended upon the circumstances of each case. The provisions, however, of § 2718 conform the practice to that on appeal from the judgment in an action and make applicable those provisions of the Code which relate to appeals from a judgment entered after a trial by a referee.

It is the usual and customary practice for the defeated party to move upon a case containing exceptions for a new trial at the same time that a motion is made for the confirmation of the referee's report. All the questions involved, that is to say, the regularity of the proceedings and whether the conclusions of law are sustained by the facts appearing in the report as well as the rulings made upon the hearing in the admission and rejection of evidence, and the question whether the evidence sustains and justifies the finding of fact, can all be determined upon the one motion. *Eighmie* v. *Strong,* 49 Hun, 18. But it seems that the motion for a new trial upon a case and exceptions need not necessarily be made at the same time but may be made after the referee's report has been confirmed or even after the judgment has been entered. *Baumann* v. *Moseley,* 63 Hun, 492, 493.

In *Smith* v. *Velie,* 60 N. Y. 106, the Court of Appeals intimated that, to preserve the right to review upon an appeal from the judgment entered upon the report of a referee in these proceedings, the aggrieved party must move at Special Term, upon a case or otherwise, to set aside the report or for a new trial, or must appear and oppose its confirmation and take the proper exceptions.

CHAPTER III

PAYMENT OF DEBTS

§ 793. The representative having ascertained the estate, and the debts being known, either by presentation of verified claims, or by judgments on disputed claims, or decrees in special proceedings determining them by the Surrogate, the representative is still confronted with the relative priority of these debts, in case the estate is insufficient to pay them all.

We pass over, for the time being, the transfer tax proceeding, often prior in time, and we defer to the chapter on Accountings the Surrogate's then disposition of claims still in dispute. We also cover, in a separate chapter (VII, below) the proceedings whereby the realty may be resorted to.

§ 794. **Order of priority of debts.**—The provisions of the Code as to the payment of debts and the preferential order in which they must be paid, are contained in § 2719, which is as follows:

> Every executor and administrator must proceed with diligence to pay the debts of the deceased according to the following order:
>
> 1. Debts entitled to a preference under the laws of the United States.
> 2. Taxes assessed on the property of the deceased previous to his death.
> 3. Judgments docketed, and decrees entered against the deceased according to the priority thereof respectively.
> 4. All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts.
>
> Preference shall not be given in the payment of a debt over other debts of the same class, except those specified in the third class. A debt due and payable shall not be entitled to a preference over debts not due. The commencement of a suit for the recovery of a debt or the obtaining a judgment thereon against the executor or administrator shall not entitle such debt to preference over others of the same class. Debts not due may be paid according to the class to which they belong, after deducting a rebate of legal interest on the sum paid for the unexpired term of credit without interest. An executor or administrator shall not satisfy his own debt or claim out of the property of the deceased until proved to and allowed by the surrogate; and it shall not have preference over others of the same class.
>
> Preference may be given by the surrogate to rents due or accruing on leases held by the testator or intestate at the time of his death, over debts of the fourth class, if it appear to his satisfaction that such preference will benefit the estate of the testator or intestate.
>
> The surrogate may authorize the executor or administrator to compromise or compound a debt or claim, on application, and for good and sufficient cause shown, and to sell at public auction, on such notice as the surrogate prescribes, any uncollectible, stale or doubtful debt or claim belonging to the

estate; but any party interested in the final settlement of the estate may show on such settlement that such debt or claim was fraudulently or negligently compromised or compounded. **§ 2719, Code Civil Proc.**

Apart from these statutory directions, there is a disbursement which it is the duty of the representatives to bear, namely, the funeral expenses of the decedent.

§ 795. **Priority of funeral expenses, by the Code.**—In 1901, by ch. 293, the legislature added to § 2729 relating to form of an account, etc., the following amendment: (See also § 797 below, for further provision.)

3. [Added 1901.] Every executor or administrator shall pay, out of the first moneys received, the reasonable funeral expenses of decedent, and the same shall be preferred to all debts and claims against the deceased. If the same be not paid within sixty days after the grant of letters testamentary or of administration, the person having a claim for such funeral expenses may present to the surrogate's court a duly verified petition praying that the executor or administrator may be cited to show cause why he should not be required to make such payment and a citation shall be issued accordingly. If upon the return of such citation it shall appear that the executor or administrator has received moneys belonging to the estate which are applicable to the payment of the claims for funeral expenses, the surrogate shall, unless the validity of the claim and the reasonableness of its amount are admitted by such executor or administrator, take proof as to such facts, and if satisfied that such claim is valid shall fix and determine the amount due thereon and shall make an order directing the payment within ten days after the service of such order with notice of entry thereof, upon such executor or administrator of such claim or such proportion thereof as the money in the hands of the executor or administrator applicable thereto, may be sufficient to satisfy. If it shall appear that no money has come into the hands of the executor or administrator the proceeding shall be dismissed without costs and without prejudice to a further application or applications showing that since such dismissal the executor or administrator has received money belonging to the estate. Such application shall be made upon a duly verified petition stating the facts upon which the belief of the petitioner that there are moneys in the hands of such executor or administrator applicable to the payment of his claim, is based. Upon such further application the issuance of the citation shall be in the discretion of the surrogate and no such application shall be made less than three months after the granting or denial of any previous application. If upon any accounting it shall appear that an executor or administrator has failed to pay a claim for funeral expenses, the amount of which has been fixed and determined by the surrogate as above set forth or upon such accounting he shall not be allowed for the payment of any debt or claim against the decedent until said claim has been discharged in full; but such claim shall not be paid before expenses of administration are paid. **§ 2729, Code Civil Proc. subd. 3.**

Why this provision was not prefaced to § 2719 where it belongs is an inscrutable problem. It, in effect, creates by statute a priority obtaining as above noted under the common law. It defines, however, the method of compelling payment, which must now be strictly pursued.

This act went into effect September 1, 1901, and hence was inapplicable

to affect lawful acts of a representative prior to that day. *Matter of Kalbfleisch*, 78 App. Div. 464. The amendment was a mere regulation of procedure. *Matter of Kipp*, 70 App. Div. 567.

§ 796. **Funeral expenses—General subject.**—The following discussion will show how the rule, now embodied in § 2729, developed. The reasonable and necessary expenses of the interment of the dead body of the deceased are a charge against his estate although not strictly a debt due from him. See *Patterson* v. *Patterson*, and review of the cases by Folger, J., 59 N. Y. 574, 583. Where the owner of some estate dies the duty of the burial is upon the executor. *Ibid.* Thus in the case cited Judge Folger observed:

Our Revised Statutes (2 R. S. 71, § 16) recognize this duty, in that the executor is prohibited from any interference with the estate until after probate, except that he may discharge the funeral expenses. From this duty springs a legal obligation, and from the obligation the law implies a promise to him who, in the absence or neglect of the executor, not officiously, but in the necessity of the case, directs a burial and incurs and pays such expense thereof as is reasonable. *Tugwell* v. *Heyman*, 3 Camp. 298. It is analogous to the duty and obligation of a father to furnish necessaries to a child, and of a husband to a wife, from which the law implies a promise to pay him who does what the father or the husband, in that respect, omits. And so, in *Rogers* v. *Price*, 3 Younge & Jervis, 28, it was held that an executor, with assets, is liable to a brother of the deceased for the proper expenses of a funeral, ordered and paid for by the latter in the absence of the former. In *Hapgood* v. *Houghton's Executors*, 10 Pick. 154, it was held that the law raises a promise on the part of the executor or administrator to pay for the funeral expenses as far as he has assets, and that if he have no assets he should plead that fact in bar, and that if he has, the judgment must be against them in his hands. In *Patterson* v. *Buchanan*, 40 App. Div. 493, it is said that where an executor or administrator has sufficient assets in his hands, and refuses to pay the funeral expenses of his decedent he may be held personally liable, citing *Benedict* v. *Ferguson*, 15 App. Div. 96. And in *Adams* v. *Butts*, 16 Pick. 343, it was held that an account for the funeral expenses of a deceased person might be set off by the defendant in an action against him by an administrator for the work and labor of the deceased in his lifetime. *Price* v. *Wilson*, 3 N. & M. 512, is sometimes cited as an authority that "there is no case which goes the length of deciding that if the funeral be ordered by another person, to whom credit is given, the executor is liable." Patterson, J., did there use the language. But in *Green* v. *Salmon*, 8 Ad. & E. 348, he limits the expression, saying: "The judgment there probably means that the executor, where credit has been given to another person, is not liable to the undertaker; if it lays down more, the law stated is extra-judicial." See also *Rappelyea* v. *Russell*, 1 Daly, 214, where the subject of the liability of a personal representative is well considered by the learned chief justice of the New York Common Pleas.

To a claim for the payment of such expenses by an executor, it is not a valid objection, that the rule of distribution of assets will be improperly interfered with if the claim is allowed and paid. In the same case quoted from, Judge Folger observes (p. 584): "Unless there is some objection arising out of statutory provisions, these expenses must be preferred to all other debts (citing Toller on Exrs. 245), not excepting debts due by record, even to the sovereign. . . . *Even in the case of an insolvent estate* the executor has been allowed the reasonable expenses of the funeral of his testator, on a plea of *plene administravit,*" citing *Edwards* v. *Edwards*, 2 Cr. & M. 612.

The statutory provisions above quoted (§ 2719) as to the priority of payment, although they include no provision for a priority of funeral expenses, were held not to abrogate the common-law rule. *Patterson* v. *Patterson, supra,* at p. 585. This was said to be on the theory that such expenses are not treated as a *debt* against the estate, but as a *charge* upon the estate, the same as the necessary expenses of administration; on the same ground, that expenses of probate of the will are allowed to an executor on an accounting, so should funeral expenses be, it being a matter of concern that the dead should have decent burial. The Revised Statutes impliedly gave discretion to the executor, even before probate, to pay the funeral charges; and notwithstanding the statute setting out the order of payment, if he pay such charges the amount must be allowed to him as part of his expenses of his trust, with the restriction always that the amount is no greater than is necessary. If, however, they be paid by another than the executor, and he reimburse such person, he is entitled to credit for such reimbursement precisely as if he had paid the amount himself. *Ibid.; Blood* v. *Kane*, 130 N. Y. 514, 520; *Ferrin* v. *Myrick*, 41 N. Y. 315; *Austin* v. *Munroe*, 47 N. Y. 360. This rule, however, is modified where a third person unnecessarily interferes and gives directions as to expenditures of interment; for such person may by his officiousness relieve the executor and the estate from liability and become personally and ultimately liable for the amount thereof. *Quinn* v. *Hill*, 4 Dem. 69, 70. See also *Rappelyea* v. *Russell*, 1 Daly, 214. It depends, therefore, on the circumstances of the case whether a third party can be made liable for such expenses, and it is the duty of the executors, where such circumstances exist, to avail themselves of the opportunity to relieve the estate from the disbursement. See also Appendix to 4 Redf. at p. 527. So it has been held that the law implies a promise on the part of an administrator having assets to reimburse a person by whom funeral expenses are paid. *Matter of Miller*, 4 Redf. 302, 304, citing Dayton on Surrogates, 285; *McCue* v. *Garvey*, 14 Hun, 562. This, of course, implies that the liability has not been assumed so as to relieve the estate by some third person. The further restriction must also be constantly borne in mind that necessary and reasonable expenditures alone will be allowed to the executor or administrator as against creditors, and particularly in case of a small estate. So where an executor paid $250 to a commandery for parading at decedent's

funeral, and it appeared the same had not been demanded, but was gratuitously paid, the executor was refused credit for the payment. *Matter of Reynolds*, 124 N. Y. 388. But the undertaker's right *ex contractu* against one assuming to employ him enables him to recover any part of his bill which the executor does not, or is forbidden to, pay. See *Ruggiero* v. *Tufani*, 54 Misc. 497 (App. Term).

Where a brother and only next of kin of the decedent contracted for the burial of his brother with a cemetery association, and assigned in writing a part of a deposit left by his brother in a bank, it was held that this promise could be enforced in an action against the administrator of the decedent, on the theory that the instrument was operative as a valid assignment of the brother's interest as next of kin of the estate of the deceased, to the extent of the claim irrespective of whether an action would lie against the administrator in the first instance for services in the burial of the deceased, as the services were rendered, not on the credit of the estate but on that of the brother individually. *Congregation S. L. A. Sakoler* v. *Sindrack*, 15 App. Div. 82, 83, citing *Rappelyea* v. *Russell*, 1 Daly, 214; *Patterson* v. *Patterson*, 59 N. Y. 574; *Lucas* v. *Hessen*, 17 Abb. N. C. 271. But where a claimant elected to present his claim for funeral expenses to the administrator with the will annexed after they had advertised for claims, it was held that he took his place as a creditor with other creditors and, consequently, that the enforcement of his claim was subject to the six months' Statute of Limitations, which it was the duty of the administrators to set up in defense. *Koons* v. *Wilkin*, 2 App. Div. 13. See opinion of Adams, J., at circuit, quoted at p. 15, in which opinion it is said: "By the terms of § 16, ch. 6, title 2 of part of the Revised Statutes, an executor is permitted to pay the funeral expenses of the testator even before taking out his letters testamentary. These expenses, while in one sense not a debt against the estate, are treated as a charge upon the estate, and as such it is quite proper that they should be assumed and paid by the personal representative of the decedent, whose duty it sometimes becomes to see that proper funeral services are rendered. This view of the question is quite clearly presented in the case of *Patterson* v. *Patterson*, 59 N. Y. 574, 585, and has been adopted by the General Term of this department as the correct and proper one. *Dalrymple* v. *Arnold*, 21 Hun, 110; *Laird* v. *Arnold*, 25 *id.* 4; *Matter of Laird* v. *Arnold*, 42 *id.* 136.

That the plaintiff entertained the same idea is made apparent by the fact he presented the claim in suit to the defendants, as administrators, insisting that it was a demand against the estate of their testator which they were bound to pay; and if the authorities last cited are to be followed, rather than those which adopt the contrary rule (*Tracy* v. *Frost*, 11 N. Y. Supp. 561; *Murphy* v. *Naughton*, 68 Hun, 424), I can see no reason why he was not justified in taking this position.

At all events, having elected to treat the claim as one against the estate, and, when it was rejected, having neglected to bring suit against the administrators within six months thereafter, it would seem as though now

he ought to be precluded from any right to maintain an action thereon against the defendants individually. See also *Matter of Smith*, 18 Misc. 139, 140; *Griffin* v. *Condon*, 18 *id.* 236, 238. See *Kittle* v. *Huntly*, 67 Hun, 617. The rules in this regard are summarized by Surrogate Arnold, in *Matter of Flint*, 15 Misc. 598, 599, where he recognizes the common practice to be for the executor or administrator to pay these expenses before any others. But in that case the Surrogate held that the holder of a claim for funeral expenses was not a creditor or person interested in the estate within the meaning of the Code (§ 2722) so as to be able to compel the representative to account and pay his claim. In *Pache* v. *Oppenheim*, 93 App. Div. 221, the law is clearly reviewed by Patterson, J., and the court sustained the plaintiff (husband of decedent) in his suing in the Municipal Court.

In *Matter of Stadtmuller*, 110 App. Div. 76, the estate of a husband who died shortly after his wife, having, however, paid her funeral expenses, was held entitled to be repaid the same from her estate, but doctors' bills paid by him for her last illness were refused as a charge, citing *Freeman* v. *Coit*, 27 Hun, 447. This *Stadtmuller* case also held that carriages, flowers, music and other incidentals of the funeral were proper, if reasonable, citing *Matter of Ogden*, 41 Misc. 158.

In § 2749 of the Code which defines the claims which can be enforced by proceedings for the disposition of decedent's real property, the words "funeral expenses" are expressly defined as including a reasonable charge for a suitable headstone. In *Ferrin* v. *Myrick*, 41 N. Y. 318, the court illustrates this rule by example:

Expenditure of $1,050 for a monument out of estate of $1,240 will not be upheld. *Matter of Smith*, 75 App. Div. 339. In spite of explicit directions in will. Executor incompetent to testify under § 829 as to testator's wishes. In *Matter of Cauldwell*, 188 N. Y. 115, an executrix was refused credit for purchasing a burial plot, it appearing there was one already belonging to decedent, with room for further interment, otherwise it is intimated the cost would have been a proper charge (*id.*, p. 120, citing *Patterson* v. *Patterson*, *supra*). See also *Matter of Woodbury*, 40 Misc. 143, 152, when testator directed his burial in his father's plot and his widow assumed to buy a new one and bury him in that. The courts will, however, scrutinize disbursements of this character, having in mind not only the station in life of the decedent but also the amount of the estate. See *Matter of Erlacher*, 3 Redf. 8; *Matter of Mount*, *id.* 9*n.*; *In re Wood*, *id.* 9*n.*; *Matter of Rooney*, *id.* 15; *Matter of Chipman*, 82 Hun, 108; *Owens* v. *Bloomer*, 14 Hun, 296. See also *Murphy* v. *Naughton*, 68 Hun, 424. See *Matter of Primmer*, 49 Misc. 413, where executor was himself the undertaker, and sought to pay himself for testatrix' funeral, and also an outlawed bill, for her husband's funeral, eight years before, opinion by Heaton, Surr.

§ 797. **Funeral bill practically a lien on proceeds of action under § 1903.**—The legislature loves the undertaker for there is another and third source

of authority for the payment of funeral expenses. Section 1903 of the Code as amended in 1904 provides that the damages recovered in an action by an administrator for the negligent killing of the decedent is to be distributed "as if they were unbequeathed assets." But the plaintiff *may* deduct therefrom

(*a*) The expenses of the action,

(*b*) The reasonable funeral expenses of the decedent,

(*c*) His commission *upon the residue.* Held, in *Matter of McDermott,* 49 Misc. 402, that "may deduct" should be read "*must* deduct," reading it with § 2729, subd. 3, and that a judgment creditor for such funeral expenses could have leave to issue execution upon such fund. But in *Matter of McDonald,* 51 Misc. 318, Heaton, Surr., held the language was not imperative, and there was no legislative intent to charge funeral expenses upon the proceeds *if there were other general assets.* Certainly, the Surrogate has power to fix and order paid the claims on the funds for funeral expenses (*Alfson* v. *Bush,* 182 N. Y. 393) and in any case to fix and allow the "expenses of the action." *Matter of Snedeker,* 95 App. Div. 149. The *McDermott* case seems to state the real intent of the legislature because § 1903 says the plaintiff, i. e., the representative, "*may* deduct the reasonable funeral expenses . . . .; which *must* be allowed by the Surrogate. . . ." And the *Alfson* case seems to hold (p. 397) "the damages recovered . . . . are charged with . . . . the reasonable funeral expenses, etc."

§ 798. **Mourning for decedent's family—Wakes.**—Where the rights of creditors are not interfered with, a moderate allowance for mourning goods for the immediate family of the decedent has been sustained in England as a part of the funeral expenses. In *Matter of Allen,* 3 Dem. 524, the Surrogate held that while it was a question not covered by previous decisions in this State, he would sustain a reasonable item of this description incurred in providing mourning for the widow as incidental to the obligation on the part of the administrators or executors to bury the decedent according to the rank he occupied in life and according to the estate he left. He refers to *McCue* v. *Garvey,* 14 Hun, 562, where $47 was allowed as the expenses of a "wake." He also alludes to the provisions of § 2749 providing for the payment of funeral expenses including a reasonable charge for a headstone. (See case in previous section.) He held that funeral expenses are thus not necessarily confined to the mere interment of the remains and that where custom requires it and as it is the almost universal practice for the family of the decedent to wear mourning, "and a change of wearing apparel is thus rendered necessary as a part of the preparation for the funeral and as a mark of proper respect to the dead, this expense, when reasonably incurred by those whom he was bound to provide for during his lifetime, should be borne by his estate." He accordingly held that as the estate was apparently ample to pay debts that expenditure for a bonnet, dress, gloves, veil, cloak, etc., not disproportionate to the circumstances in life of the decedent and his family,

should be allowed. See also *Matter of Weaver*, 53 Misc. 244. But if not properly vouched, as any other expenditure must be, it may be disallowed. *Matter of Menschke*, 61 Misc. 9.

The only other case, apparently, in the State is *Matter of Wachter*, 16 Misc. 137, 141, in which the same result is reached upon equally satisfactory grounds. The learned Surrogate, Davie, observed at p. 141:

"The term 'funeral' embraces not only the solemnization of interment but the ceremonies and accompaniments attending the same; such ceremonies are prompted by affection and their character are to some extent determined by the religious faith and sentiment of the friends of the deceased; their extent and magnitude depending upon the condition of the estate and the station in life which had been occupied by the deceased, varying from the simpler bier to the imposing catafalque, from the informal liturgical service or scripture reading for the humble to the elaborate *orisons funebres* attending the obsequies of the renowned. So, in *McCullough* v. *McCready*, 52 Misc. 542, the Appellate Term recognized the propriety of the expenses of a 'wake' 'suitable to decedent's condition in life and necessitated by the racial custom and sentiment' of the family. See opinion by MacLean, J., and dissent by Gildersleeve, J.,

"The wearing of suitable mourning apparel is commonly regarded not only as a proper, but almost indispensable mark of affection and evidence of grief; the distribution of a decedent's estate among his next of kin without providing therefrom for the usual and conventional ceremonies in memory of the dead would seem not only parsimonious, but utterly repugnant to one's conception of justice and propriety." *Matter of Wachter*, *supra*. Where decedent had expressed a wish to be buried in her "best dress" and those in charge selected what they deemed to be such, and later it proved to be a dress specifically bequeathed to A: the Surrogate (Kings County) in a very interesting opinion upheld the executor in paying to A $500 as the equivalent of said gown used as a "burial robe" and charging it to "funeral expenses." *Matter of Pullen*, 52 Misc. 75.

§ 799. **Compromising debts.**—Chapter 80 of the Laws of 1847, amended by ch. 571 of the Laws of 1888 and ch. 100 of the Laws of 1893, provided authority for executors to compromise and compound debts due to their testator or intestate. These acts were repealed by ch. 686 of the Laws of 1883 as is pointed out in the chapter on the Ascertaining the Estate. A somewhat similar clause was substituted in § 2719 of the Code, which provides for the payment of the debts of the decedent. This substitutionary clause reads as follows:

> The surrogate may authorize the executor or administrator to compromise or compound a debt or claim, on application, and for good and sufficient cause shown, and to sell at public auction on such notice as the surrogate prescribes, any uncollectible, stale or doubtful debt or claim belonging to the estate; but any party interested in the final settlement of the estate may show on such

settlement that such debt or claim was fraudulently or negligently compromised or compounded.

It has been suggested that this did not extend to claims against the estate. Redf. Surr. Pr. § 629. The contrary would appear to be the case; for, in the first place, the provision falls under the section dealing with the payment of the debts of the decedent, and in the second place the Surrogate is given power to authorize the executor or administrator to compromise or compound "a debt or claim," *and* "to sell at public auction, etc., any uncollectible, stale or doubtful claim *belonging to the estate.*"

This appears most clearly to be in contradistinction to the prior words "a debt or claim" identified as a debt of the decedent by virtue of the heading of the section, and the whole context in which the clause is found. In *Matter of Gilman*, 82 App. Div. 186, the executors claimed that their decedent was the owner of a business; H asserted *per contra* that he was a partner of decedent, and brought a cross action enjoining the executors from interfering with the business. Held, Surrogate had power to approve a compromise whereby the estate and H divided the stock resulting from a sale of the business to a corporation. Later, and after the foregoing text was published, in *Matter of Gilman* (1st Dept.), 92 App. Div. 462, the court held explicitly that § 2719 "confers upon a Surrogate the power to permit an executor or administrator to compromise and compound a claim against the estate.

§ 800. **Arbitrating claims.**—The summary litigation of claims against the estate by disputing and referring the same or by consenting to their determination by the Surrogate is elsewhere covered. It may be observed casually that the Court of Appeals has held (*Wood* v. *Tunnicliff*, 74 N. Y. 38, 42, 43, and cases cited), that executors or administrators have the power to submit to arbitration disputed claims or demands in favor of or against the estate then represented, and that this right is founded upon their legal title to the assets of the decedent, their power of disposition, and their authority to adjust and settle claims in which the estate they represent is interested. The court points out that this right was a common-law right and is not taken away by the statutory provisions relating to the reference of disputed claims against the estate of a decedent. *Id.*, at p. 43. The court observes that the settlement of disputes by arbitration is encouraged, but it points out a rule which would probably discourage representatives from resorting to this very unsatisfactory method of adjusting a dispute. Andrews, J., observes: "They will be bound by an award made pursuant to a submission the same as other persons, although if the award is to the prejudice of the estate, as, for example, if the arbitrator gives to the executor less than is due, he will, it is stated, be accountable to the heirs or other persons interested in the estate as for a *devastavit.*"

Should this procedure be resorted to, it may be interesting to note that the fundamental idea of arbitration is its finality, and the practice in re-

gard thereto is very carefully reviewed in the recent case of *Dobson* v. *The Central R. R. of N. Y.*, 38 Misc. 582.

§ 801. **Diligent payment of debts.**—Section 2719 requires the executor or administrator to "proceed with diligence" to pay the debts of the deceased. This, however, must be taken with the reasonable restrictions which the foregoing discussion will suggest. An executor is not required to proceed to the payment of all debts until the full extent of the indebtedness of the deceased has been ascertained. Therefore until the period for ascertaining debts has expired which the provision of the statute indicates, the executor or administrator cannot be charged with lack of diligence if he refrains from paying debts. On the contrary, if he pay legacies and debts in full before ascertaining the whole amount of the indebtedness, he does so at his peril, and may be held liable to later discovered creditors for the amount they would have been entitled to ratably with the other creditors who have been paid in full, in the event that the assets do not prove sufficient to pay all in full. *Clayton* v. *Wardell*, 2 Bradf. 1, 7; *Glacius* v. *Fogel*, 88 N. Y. 434, aff'g 4 Redf. 516.

Moreover, the safeguards provided by the statute by means of the reference of disputed claims, enable the representative of the estate to secure an adjudication conclusive in its nature as to the validity of the claim and afford ample protection to the representative in the payment of it.

The provisions of § 2719 of course contemplate the payment only of valid subsisting claims. It has been noted in another connection that an executor or administrator has no power to allow claims barred by the Statute of Limitations. *Schutz* v. *Morette*, 146 N. Y. 137, 143; *Bloodgood* v. *Bruen*, 8 N. Y. 362; *Matter of Oosterhoudt*, 15 Misc. 566; *Spicer* v. *Raplee*, 4 App. Div. 471. It is his duty to set up the Statute of Limitations or any proper legal defense available against any claim presented. *Butler* v. *Johnson*, 111 N. Y. 204, cited in *Schutz* v. *Morette*, *supra*. *Matter of Goss*, 98 App. Div. 489. He should set it up by answer and not by motion to dismiss. *Matter of Jordan*, 50 App. Div. 244.

The rule has been concisely stated by Surrogate Silkman (*Matter of O'Rourke*, 12 Misc. 248, 250), "An executor or administrator has no power to waive, as against the heirs-at-law or devisees, any legal defense, either under the Statute of Limitations or the Statute of Frauds, and if they do so, it is at their peril." So, in *Matter of Burr*, 48 Misc. 56, where an executor paid his coexecutor $38,485.96, a claim much of which was barred by statute, he was surcharged the amount he had no right to pay.

But there is a plain distinction between the right of an executor to *revive* a claim so barred and his right to *acknowledge* or *keep alive* a valid and subsisting obligation by payments on account. *Holly* v. *Gibbons*, 176 N. Y. 520, 527, citing *McLaren* v. *McMartin*, 36 N. Y. 88; *Butler* v. *Johnson*, *supra*.

The law is well settled, that debts of the decedent become barred by the Statute of Limitations in six years and eighteen months from their maturity notwithstanding their presentation to and admission by the

representative of the estate. *Butler* v. *Johnson, supra.* To revive or continue the contract after this period there must be an acknowledgment or promise contained in a writing signed by the party to be charged thereby (§ 395, Code Civ. Proc.), or there must have been a payment made thereon within that period by the decedent, or by his executor or administrator. *McLaren* v. *McMartin, supra.*

The acknowledgment in writing may be either the express acknowledgment primarily contemplated by the Code, or it may be based upon proceedings brought by the representative looking to the payment of the claim; thus the acknowledgment may be based upon the allegations in the petition acknowledging the claim as a valid claim; this was so held in *Matter of the Estate of Robbins*, 7 Misc. 264, 266, where Surrogate Coleman held, that a petition for leave to sell a legacy for the purpose of paying certain claims against the estate was an acknowledgment, to the persons made parties to the proceeding, of their claims against the estate sufficient to take them out of the statute. But a decedent has perfect power by will to direct payment of a debt which has been barred by the Statute of Limitations. The executor has no option in such a case but to pay the debt if there are assets sufficient for the purpose. *Gilbert* v. *Morrison*, 53 Hun, 442. But if the executor or administrator does not raise the defense before judgment is entered, it is too late to raise it on appeal. *Faburn* v. *Dimon*, 20 App. Div. 529.

§ 802. **Priority of debts discussed in detail.**—Section 2719, *supra*, explicitly provides the order in which the decedent's debts must be paid. Aside from this statutory preference it is the intent of the whole statute relating to the payment of decedent's debts, that creditors shall stand upon an equality one with another. The representative, if he disregard a statutory order in paying claims against the estate, does so at his peril. 5 Am. & Eng. Ency. of Law, 236.

Subdivision 1 gives the first preference to debts entitled to a preference under the laws of the United States. All question as to conflict between Federal and State law in respect to such priority is removed by this provision of the statute. A disregard of this provision will subject the executor or administrator to personal liability for the amount of the debt due the United States, in case the estate of the decedent is insufficient to pay the same. But if the executor pays the claims against the estate in due time and order, without knowledge of the existence of a debt due to the United States, he will not be held liable for a *devastavit. U. S.* v. *Ricketts*, 2 Cr. Cir. Ct. 553. Debts due the United States are mainly debts due upon bonds by which the deceased may have obligated himself. Should the surety of the deceased on such a bond, discharge the liability by payment to the United States, he is subrogated to the rights of the United States under this section, and stands in the same order of priority as the United States would stand had the payment not been made.

§ 803. **Same—Taxes.**—"Taxes assessed on the property of the deceased previous to his death" stand next in the order of priority. The word

"taxes" must be taken in connection with the subject-matter of the whole section, which is the payment of the decedent's debts. It is necessary, therefore, to distinguish between taxes which the decedent was personally liable to pay and taxes upon the property for which the property alone could be made to respond; this distinction has been carefully drawn in the decisions. Thus taxes *assessed after* decedent dies are not to be paid by an administrator. *Matter of Sworthout*, 38 Misc. 56. The Court of Appeals, *Matter of Hun*, 144 N. Y. 472, 477, have held that: "In the case of taxes imposed for the general purposes of government, there is a personal obligation upon the citizen to pay, which may be enforced by distress and sale of his goods and by other remedies in the courts." On the other hand, the courts say: "Local assessments, imposed under municipal authority upon particular property benefited by the improvement, as distinguished from a general tax, are not . . . . a general or personal charge, in the absence of some statute making them such, but are only in the nature of a lien upon the specific property assessed, and the proceedings for their collection are *in rem.*" See opinion of O'Brien, J., p. 478, citing Cooley on Taxation, 675; Tiedeman on Mun. Corp. § 282; *Litchfield* v. *Vernon*, 41 N. Y. 134.

The statute requiring an executor to pay taxes imposed on the property of the testator, prior to his death, refers to the former and not to the latter class of burdens. *Matter of Hun, supra.*

In a prior case (*Smith* v. *Cornell*, 111 N. Y. 554, 557) the court held that, under the statute the executor was bound to apply the personal estate in his hands to the payment of such taxes next after debts entitled to a preference under the laws of the United States; and the court held that the taxes unpaid at the time of the decedent's death were personal debts, citing *Seabury* v. *Bowen*, 3 Bradf. 207; *Griswold* v. *Griswold*, 4 *id.* 216. These decisions, however, are merely to the effect that "taxes due at the death of the deceased person are payable out of his personal estate, and taxes accruing subsequently are chargeable upon the land." But in none of these cases was it intended to be held that the class of taxes referred to in *Matter of Hun*, were entitled to any priority under the statute.

In *Seabury* v. *Bowen, supra*, Surrogate Bradford held that a particular assessment upon decedent's premises, which had been duly confirmed prior to the decease of the testatrix, was by virtue of the statute under which it was made, not only a lien on the real estate, but also a personal debt of the testatrix, which she was liable to pay on demand, and which, in default of payment, could be recovered by levy and distress or by action, debt or assumpsit, citing Laws of 1813, ch. 86, § 186, vol. 2, p. 420. And the Surrogate continues, "The Revised Statutes place the payment of taxes in the second class of preference for the reason (as stated by the revisors, 3 R. S. 641, revisors' note) that the personal property is liable to be sold for taxes in the county, while those assessed in another county are charges upon the land only."

The decision in *Matter of Noyes*, 3 Dem. 369, 371, by Surrogate Rollins

that taxes and assignments levied and confirmed before the death of the testator are "debts which the executor is required by law to proceed with diligence to pay," does not purport to place these taxes in the preferential class of subd. 2. See also *Bates* v. *Underhill*, 3 Redf. 372; *Hone* v. *Lockman*, 4 *id.*, 61, 64.

In *Coleman* v. *Coleman*, 5 *id.* 424, Surrogate Rollins held under the provisions of the Revised Statutes for which subd. 2 of § 2719 has been substituted (3 R. S. 95, § 37, subd. 2) that taxes assessed during the lifetime of the deceased upon certain real property *in which he had a life estate*, were debts of the deceased which the administrator was not merely required to pay out of the personalty of the estate (see cases cited at p. 425), but were also taxes within the meaning of the statute entitled to preferential payment under subd. 2.

The Court of Appeals (*Matter of Babcock*, 115 N. Y. 450, 456), by Ruger, C. J., in construing the phrase "taxes assessed," defined it as referring to assessments for taxes made prior to the decease of the taxpayer. The statute for which the present section has been substituted read "taxes assessed upon the *estate* of the deceased previous to his death," the word "estate" now being substituted by the word "property." See *Coleman* v. *Coleman*, 5 Redf. 524, 525. Judge Ruger observes of these taxes: "They are described as being made upon his 'estate'; clearly implying an intention to charge the estate with their payment." After discussing the provisions of the New York tax law, he proceeds: "The plain meaning of the act is that assessments, so far completed that the name of the person named as owner cannot be changed or altered by the assessment officers before the death of such person, shall be payable from his estate in due course of administration. Any other rule would deprive the State of the personal responsibility of parties liable to the payment of taxes, who should die between the first Monday of January and the first Monday in September in each year. Such a construction is opposed to the manifest theory of the laws relating to assessments for taxation, and cannot be entertained." See *Kelly* v. *Pratt*, 41 Misc. 31, and cases cited. See also *Matter of Liss*, 39 Misc. 123, as to "taxes due and payable before decedent's death."

§ 804. **Same subject.**—In a well-reasoned opinion, Thomas, Surr., *Matter of Hoffman*, 42 Misc. 90, discusses the matter in the aspect presented by a payment of taxes and a claim to deduction in transfer tax proceedings from the net *quantum* of the estate. The distinction between taxes which are entitled to preferential payment and taxes which are merely debts of the estate in the sense that they are entitled to be paid out of the personalty, has been clearly drawn by Gaynor, J. (*Krueger* v. *Schlinger*, 19 Misc. 221, 222): "An executor has only to pay the debts of the decedent. General land taxes in the city of Brooklyn are not debts of the owner. They are not enforcible against him, either by levy of the tax collector upon his chattels, or otherwise. They are cast upon the land itself. Their payment can be enforced only by the sale of the land. The statute (Code

Civ. Proc. § 2719) requires that an executor or administrator 'must proceed with diligence to pay the debts of the deceased' in an enumerated order of preference, the second being 'Taxes assessed on the property of the deceased, previous to his death.' It is to be noted that this provision relates only to the 'debts of the deceased,' and taxes upon the property which are such debts, are taxes which are leviable against the personal estate. This is the only reason why the executor or administrator is concerned with them at all. The general system of taxation in this State makes the taxes collectible out of the chattels of the owner, and lands are not salable for non-payment, except in the case of lands of non-residents. Chapter 427, Laws of 1855; ch. 711, Laws of 1893. The provision above cited for the payment of taxes by an executor or administrator, has reference to that system, taxes under it being debts of the deceased." See *Matter of Franklin*, 26 Misc. 107, 109.

§ 805. **Priority of judgments.**—(See § 807, following.) The next class of debts entitled to priority are judgments docketed and decrees entered *against the deceased* according to the priority thereof respectively. The first point to note is that a judgment recovered *against the executor* does not give any priority to the judgment creditors. *Schmitz* v. *Langhaar*, 88 N. Y. 503; see opinion of Danforth, J., as to duty of judgment creditors of a decedent with reference to his claim. *Sippel* v. *Macklin*, 2 Dem. 219. A judgment against the representative for costs is not within §§ 2719 or 2722. *Matter of Mahoney*, 37 Misc. 472.

Under the common law, one judgment against a decedent docketed previous to his death had no preference in payment over another, but the order of payment of the debts of the deceased person was regulated and prescribed by our Revised Statutes (2 R. S. 87, § 27), in language which is substantially the same as the language in § 2719 of the Code of Civil Procedure, except that the word "entered" follows the word "decree" in the Code of Civil Procedure instead of the word "enrolled," used in the Revised Statutes; and the clause prohibiting preferences, except as to debts specified in the third class, is contained in a separate section in the Revised Statutes, while in the Code of Civil Procedure it is placed in the same section. That section of the Revised Statutes came under review by Chancellor Walworth, in the case of *Ainslie* v. *Radcliffe*, 7 Paige, 440.

The chancellor decided that by the provision of the Revised Statutes judgments docketed and decrees enrolled are entitled to preference in payment out of the personal estate of the deceased debtor, according to the priority in point of time to docketing the judgment or of enrolling the decree, and without reference to any supposed lien of the judgment or decree, upon the real estate of the decedent. And a judgment which has been docketed or a decree which has been enrolled more than ten years before the death of the decedent is, therefore, entitled to be paid out of his personal estate in preference to a junior judgment or decree which has been obtained within the ten years. *Matter of Townsend*, 83 Hun, 200, 202.

Section 2719 provides that a preference may be given in payment of

debts over other debts of the same class *in this third class alone.* The priority of payment of one such judgment over another is determined by the ordinary rule of priority of such judgments. Where the decedent owns property at the time the judgments, between which there is a question of priority, were entered against him, the date of the docketing will determine the priority.

To avoid confusion reference must be had to the provision of § 763 of the Code to the effect that, if either party to an action dies after an accepted offer to allow judgment to be taken, or after a verdict, report or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment in the names of the original parties.

Section 1210 provides that "where a judgment for a sum of money or directing the payment of money is entered against a party after his death, a memorandum of the party's death must be entered with the judgment in the judgment-book. . . . Such a judgment does not become a lien upon the real property or chattels real of the decedent, but it establishes a debt to be paid in the course of administration."

Surrogate Rollins discussing these sections and the provisions of the Revised Statutes corresponding to the present § 2719 of the Code, held, that where a judgment was entered after a party's death, an interlocutory judgment having been obtained against him before his death, such final judgment if duly docketed, had precisely the same force and effect that it could claim, if the deceased had died on the day after its entry. *Matter of Clark,* 5 Dem. 377, 381, citing *Nichols* v. *Chapman,* 9 Wend. 452, 456; *Salter* v. *Neaville,* 1 Bradf. 488; *Bernes* v. *Weisser,* 2 Bradf. 212; *Ainslie* v. *Radcliffe,* 7 Paige, 439.

In *Matter of Dunn,* 5 Redf. 27, 31, Surrogate Calvin similarly held that a judgment entered against the decedent after his death, under the conditions contemplated by these provisions of the Revised Statutes, incorporated in the section of the Code above quoted, comes within the provisions of the statute giving it a preference over ordinary liabilities of the estate. The judgment was held to relate back to the time of the verdict, citing Willard on Executors, p. 279. Surrogate Calvin called attention to the fact that there is nothing in the statute stating when the judgment should be docketed, or the decree enrolled; the only provision is that it should be against the deceased. See *Mount* v. *Mitchell,* 31 N. Y. 356. If the judgment be not duly perfected it can have no priority, but if the order for judgment has been made before the decedent's death and it only remains to tax the costs, the signing and filing of the record may be done after his death. *Salter* v. *Neaville,* 1 Bradf. 488.

In *Matter of Foster,* 8 Misc. 344, Surrogate Abbott held that when the ownership of the land follows the docket of the judgment, the conclusion seems reasonable that such ownership should relate back to the lien of all the docketed judgments equally, because the event which creates the lien in that case, is not the docketing of the judgment but the acquisition of the land, citing *Matter of Hazard,* 73 Hun, 22. See opinion by Van Brunt.

which held (see headnote) that, under the New York statutes, docketed judgments, where the judgment debtor has no property at the time of their respective docketing, become liens simultaneously on after-acquired real property of the judgment debtor. Consequently, where the property of the decedent can be shown to have been acquired after the docketing of several judgment claims against the deceased, the executor will not give priority to either of them as against the other, although they will all be entitled to priority as of the third class under § 2719 against inferior debts.

§ 806. **Executors bound to observe this priority.**—This statute as to priority of debts is mandatory. It is intended to be a direction to the executor and administrator as to the manner of performance of their duty, and it prescribes the order of preference to be observed by them in the payment of debts. This is its express object, and the executor and administrator, when they proceed to discharge their duty, are bound to obey this direction. *Mount* v. *Mitchell*, 31 N. Y. 356, 360. See *Allen* v. *Bishop*, 25 Wend. 414, opinion, Nelson, C. J.; *Matter of Chauncey St. John*, 1 Tucker, 126. The priority between judgments, however, as affected by the rule above stated as to the property acquired subsequently to the entry of judgment, does not affect the priority to which a judgment creditor is entitled as against the personal property of the deceased.

In *Matter of Townsend*, above cited (83 Hun, 200), where certain personal property had been acquired by the deceased prior to his death, the creditor whose judgment was prior in time, was held to be entitled to the satisfaction of his claim thereout ahead of the subsequent judgment creditor. And *Matter of Hazard*, 73 Hun, 22, was distinguished as relating to the lien of judgments against after-acquired real property. See also *Matter of Foster*, 8 Misc. 345. It was formerly held (*Ruggles* v. *Sherman*, 14 Johns. 446) that where creditors belonged to the same class as regarded priority, the one first commencing suit was entitled to priority of payment—but that the administrator could give the other when he sued a preference by confessing judgment—and if the assets were insufficient, he could plead this judgment, satisfied, in bar.

§ 807. **What judgments not entitled to priority.**—It is clear from what has already been stated that to entitle a judgment creditor to priority under § 2719, he must bring his judgment clearly within the intent of the statute.

The wording "judgments docketed and decrees entered against the deceased" does not include a judgment for a deficiency against the executors and trustees under the will of the decedent; *James* v. *Bessley*, 4 Redf. 236; *Matter of Weiner*, 9 App. Div. 621; nor is a judgment included which is recovered against an administrator upon a claim not existing when decedent died; *Hall* v. *Dusenbury*, 38 Hun, 125; *Matter of Foley*, 39 App. Div. 248; nor are costs included in a judgment against the representative entitled to priority of payment; *Shute* v. *Shute*, 5 Dem. 1; *Matter of Mahoney*, 37 Misc. 472; nor does it relate to judgments docketed elsewhere

than in the State of New York. *Brown* v. *Public Administrator*, 2 Bradf. 103.

Foreign judgments have no proper force of themselves here, except as *prima facie*, and perhaps with certain exceptions conclusive, evidence of a cause of action. *Cummings* v. *Banks*, 2 Barb. 602. In other respects they rank only as simple contract debts. Executors and administrators are not bound to take notice of such foreign judgments at their peril. These foreign judgments are not entitled to be docketed or enrolled in this State and therefore under the wording of § 2719 are not entitled to preference in payment.

Judgments of justices' courts can only be given priority as to the date of their docketing under the statute, so that a creditor under a justice's judgment which has not been docketed in the office of the county clerk gains no priority; his judgment cannot be docketed *nunc pro tunc;* nor can he by subsequently docketing his judgment relate back his claim so as to secure a priority. *Stevenson* v. *Weisser*, 1 Bradf. 343. See also *Sherwood* v. *Johnson*, 1 Wend. 445. The assignment of a judgment does not affect its priority unless the circumstances be such as to extinguish the same, therefore a judgment by a surety who takes an assignment thereof for his own benefit does not disturb the right to priority contemplated by the statute. *Goodyear* v. *Watson*, 14 Barb. 481.

§ 808. **Fourth class of preferred debts.**—The fourth class of preferred debts are "recognizances, bonds, unsettled instruments, notes, bills, and unliquidated demands and accounts." The first thing to note in regard to this class is, that preference shall not be given in the payment of such debts over any other debts of the same class, nor are debts due and payable entitled to a preference to debts not due. See § 2719. As to the latter they may be paid according to the class to which they belong, after deducting a rebate of legal interest on the sum paid for the unexpired term of credit without interest. *Ibid.* This same section permits the Surrogate "if it appear to his satisfaction that such preference will benefit the estate" to give preference over debts of this fourth class to rents due or accruing on leases held by the testator or intestate at the time of his death. He is to do this, however, only if satisfied that the estate will be benefited thereby. *Hovey* v. *Smith*, 1 Barb. 372.

"Unliquidated demands and accounts" includes such as the representative in that capacity must pay. So an administrator, who has no title to realty, is not to pay interest on a mortgage thereon which accrues after decedent's death. *Matter of Sworthout*, 38 Misc. 56.

The bonds contemplated by subd. 4 of § 2719 are primary bonds, for a good and valid consideration, by which the deceased was obligated. Bonds, although voluntary and without valuable consideration, are nevertheless valid and operative against the estate unless they were obtained by fraud and undue influence, or unless the testator was *non compos mentis* at the time of giving them; but the Surrogate will not allow them to be paid in the course of administration in preference to claims of creditors having

debts for a valuable consideration; the executor must postpone such bonds even to simple contract debts. *Isenhart* v. *Brown*, 2 Ed. Ch. 341, 344. The vice chancellor, however, held that in respect to legacies such bonds could have a preference, for the reason that "a bond, however voluntary, transfers a right in the lifetime of the obligor whereas a legacy arises from the will, which takes effect only from the testator's death, and, therefore, ought to be postponed to a right created in the testator's lifetime."

In *Matter of James*, 146 N. Y. 78, 93, the Court of Appeals held that "a gift of bonds by a decedent to his wife, which were secured by mortgages upon real estate without the State, under which there had been a foreclosure, amounted simply to a promise on the part of the decedent to pay at some future day a given sum without any consideration to support that promise." It was held that such a promise could not be enforced against the executor or administrator of the donor, citing Pom. Eq. Juris. § 1148; Story's Eq. Juris. § 987. See opinion of Brown, P. J., in the case at General Term, 78 Hun, 121, 124, citing *Harris* v. *Clark*, 3 N. Y. 93; *Holmes* v. *Roper*, 141 N. Y. 64; *Wilson* v. *Baptist Ed. Society*, 10 Barb. 308; *Anthony* v. *Harrison*, 14 Hun, 198; *Whitaker* v. *Whitaker*, 52 N. Y. 368.

The rule is now clear that an executory agreement supported by a meritorious consideration only cannot now be enforced in this State in law or in equity. *Wilber* v. *Warren*, 104 N. Y. 195; *Twenty-third St. Bap. Church* v. *Cornell*, 117 N. Y. 601.

While it has been held, as above noted, that a judgment against the executor or administrator is not such a judgment as to give priority, yet the recovery of a judgment against the executor or administrator by a creditor having a right of priority on his claim will not impair that right of priority which the creditor had at the time of the decedent's death. *Hardenberg* v. *Manning*, 4 Dem. 437, 441.

§ 809. **Preference of landlord of deceased, over debts of the fourth class.**—The preference above referred to which may be given by the Surrogate to rents due or accruing on leases held by the testator or intestate at the time of his death, is one the granting of which rests entirely in the discretion of the Surrogate. The condition of his exercise of discretion is that it shall be made to appear to his satisfaction that it shall be for the benefit of the estate; if he decide against the granting the preference, then the landlord will stand in precisely the same condition with any other creditor. The Surrogate should be satisfied by affidavits setting forth facts in detail showing how the benefit to the estate will result. The mere opinion of the executor or of his attorney will not be sufficient. See *Harris* v. *Meyer*, 3 Redf. 450, 455; *Cooper* v. *Felter*, 6 Lansing, 485, 488. In the latter case it was suggested that the fact that a valuable lease might be forfeited, was such as would tend to show that the payment might be beneficial; but where no proof at all was offered and no facts stated in the petition tending to prove that the estate would be benefited, the application should be denied. The petition in this case merely contained an allegation that the debt "was entitled to a preference in pay-

ment under the statute, it being for the interest and benefit of said estate that the same be paid;" this was held insufficient.

It must of course appear to the satisfaction of the Surrogate that the rent for which a preference is claimed over debts of the fourth class is of the character contemplated by the statute. For example, where the rent claimed to be due was pew rent payable to a church, it was held that they had no right to a preference unless it was on a lease of the pew for a term of years in which case the lease would go to the executor or administrator as a part of the personal estate. See *Johnson* v. *Corbett*, 11 Paige, 265, 276.

§ 810. **Sale of personal property to pay debts.**—The Code provides that an executor after ascertaining the debts may sell personal property, if he has not sufficient moneys in hand to pay the debts against the deceased person and the legacies bequeathed by him. This is by § 2717, which is as follows:

> If an executor or administrator discover that the debts against any deceased person and the legacies bequeathed by him cannot be paid and satisfied without a sale of the personal property of the deceased, the same, so far as may be necessary for the payment of such debts and legacies, must be sold. The sale may be public or private, and except in the city of New York, may be on credit not exceeding one year, with approved security. The executor or administrator is not responsible for any loss happening on the sale when made in good faith and with ordinary prudence. Articles not necessary for the support and subsistence of the family of the deceased, or not specifically bequeathed, must be first sold; and articles so bequeathed must not be sold until the residue of the personal estate has been applied to the payment of debts. **§ 2717, Code Civil Proc.**

It has been held that administrators have always had the right to sell personal property of their intestate. This was formerly by § 25, 2 R. S. 87, in lieu of which this section of the Code now stands. *Sherman* v. *Willett*, 42 N. Y. 146, 150. It was held, in the case cited, that they had such right to sell both for the payment of debts and legacies and for the purpose of distribution. It was further held, that where they sell for the purpose of paying debts or legacies, they are not required to get an order of the Surrogate authorizing the same, and when they sell, it will be presumed, in the absence of any proof to the contrary, that they acted legally and that the exigencies existed authorizing the same. See also *Matter of Robbins*, 7 Misc. 264, 266. In *Huck* v. *Kraus*, 50 Misc. 528, it is held that irrespective of § 2717 executors may sell choses in action belonging to the estate; and that the title of a purchaser was valid.

In a recent case (*Matter of Woodbury*, 13 Misc. 474), Surrogate Kennedy held that an executor has no right to sell *upon credit* under § 2717 except the sale be for the payment of debts and legacies of the deceased. Therefore, if an executor or administrator undertakes to sell upon credit, the necessity for the sale must be one capable of proof to the satisfaction of the Surrogate, otherwise the executor may be held responsible for loss happening on the same.

The provision in § 2717, that the executor or administrator is not responsible for any loss happening on the sale when made in good faith and with ordinary prudence contemplates of course a sale made within the intent of § 2717. This would probably be held to indicate that the occasion for such a sale will not necessarily arise until the time for the payment of debts and of legacies arrives. It is clear that a sale by an executor upon credit immediately after the decedent's death, except, of course, of perishable property, would not be upheld, unless in the first place there were legacies requiring immediate payment and in the second place unless he discovered that such legacies could not be paid and satisfied without such sale. Moreover, the sale must be limited to sufficient personal property to meet the debts or legacies which have to be paid.

As to sales upon credit, which are permissible outside of the city of New York, the Code requires "approved security."

In *Matter of Woodbury, supra*, the court discussed at length the question of what will constitute such approved security (see 13 Misc. 477, 478), the gist of which is contained in the headnote of the case as follows: "The 'approved security' which an executor is required by § 2717 of the Code to take upon a sale on credit consists only of national and state bonds and mortgages on real estate, and does not include notes, stocks or bonds, and must be approved by the Surrogate before it is accepted."

This limitation is based upon the distinction between security in commercial dealings and security in legal proceedings. In the latter the law requires security of a character over which the courts have control, that is to say, a security which makes the debt assured and its payment certain, and guarantees against loss from insolvency or otherwise. It is manifest that notes, bonds, stocks, and other forms of contract, which are accepted in commercial dealings do not come up to this standard and should be excluded from the "approved security" which is required by this section.

Attention should be called to the wording of § 2717, to wit: "The sale . . . . *except in the City of New York* may be on credit."

The section when thus enacted contemplated the city of New York as coterminous with the county of New York. The recent enlargement of the city of New York cannot be said to have contemplated any conflict of jurisdiction between the Surrogates of the county of New York with the Surrogates of any other county wholly or partially within the enlarged city.

As to sales by executors or administrators subject to the jurisdiction of Surrogates in Richmond, Kings, or Queens counties, it is manifest that this restriction was not originally intended by the legislature to apply to them; and it is probable that the section will be amended by changing the word "city" to "county," which would remove all doubt in the premises.

No forms need be suggested, as the proceedings are voluntary on the part of the representative and out of court. The property may be sold at public or private sale. The executor or administrator will be held liable by the Surrogate to the persons interested for good faith and diligence in regard to such sale; so that if they sell assets at an inadequate price they

may be held chargeable for the reasonable value of the same. *Matter of Saltus*, 3 Keyes, 500. And they are of course answerable for whatever amount is received upon the sale, although it may have been largely in excess of the market value of the property; they must account for all the proceeds. *Hasbrouck* v. *Hasbrouck*, 27 N. Y. 182; *King* v. *King*, 3 Johnson, 552. And so a sale by an executor or administrator may not be exercised in his own favor either directly or indirectly, and should he sell to himself below the inventoried price personal property of the estate, he will be charged with the full reasonable value of the property, unless he sustains in full measure the burden of showing that the sale was *bona fide* and the consideration adequate. *Schenck* v. *Dart*, 22 N. Y. 420; *Orcutt* v. *Orms*, 3 Paige, 464.

§ 811. **Payment of decedent's debts out of personal estate.**—Section 2717 of the Code recognizes the rule that the personal property of a decedent constitutes a primary fund for the payment of his debts and legacies (see *Jouffret* v. *Loppin*, 20 App. Div. 455, 457), for it was a rule of the common law that land descended or devised was not liable to simple contract debts of the ancestor or testator. See *Rice* v. *Harbeson*, 63 N. Y. 493, 498. This rule, however, was not of universal application, and is now modified by the provisions of the Code to be later on discussed providing for the sale of a decedent's real estate for the payment of his debts. But § 2717 practically contemplates that the personal property of a decedent shall be available for the payment of debts and legacies even though it be necessary to sell the same for the purpose of realizing funds with which the executor or administrator may pay and satisfy such debts and legacies. The section expressly provides, that articles bequeathed specifically must not be sold for the purpose contemplated by the section until the residue of the personal estate has been applied to the payment of debts. One of the exceptions to the general rule of the common law above noted was, that it should not be applied if thereby the payment of any legacies should be prevented. See *Rice* v. *Harbeson*, *supra*.

Under a will the question is easily framed when there are debts and legacies, and the estate is both real and personal.

After eliminating specific bequests it may be asked: is the personalty, or any part, so exonerated from the usual burden as to be free from application first to debts? This exoneration may be by express disposition of all the personalty leaving the realty as the only property applicable, or by charging the payment of debts or of particular legacies expressly or by necessary implication upon the realty. This exoneration is the same in substance though reached in either way. See, e. g., *Matter of Bergen*, 56 Misc. 92.

The exception in § 2717 is not only reasonable but explicit and must be observed by the executor or administrator. See *Toch* v. *Toch*, 81 Hun, 410.

The whole estate, personal and real, is subject to the debts of the decedent; and all the provisions of the Code in this regard are consistently

designed to protect creditors as against legatees, devisees, next of kin or heirs. See *Young* v. *Young*, 2 Misc. 381.

Chancellor Kent observed, "It is too well settled to be questioned that the personal estate is to be first applied to the payment of debts and legacies and that a mere charge on the land will not exonerate the personal estate nor anything short of express words or a plain intent in the will of the testator." *Livingstone* v. *Newkirk*, 3 Johns. Ch. 312, 319. And he stated the further rule, that on failure of the personal estate land descending should be applied to the discharge of debts before land devised, and that if it became necessary to resort to lands devised they should be applied only so far as it was requisite to make up the deficiency. This order of application of assets has not been changed and will not be changed by the courts except in giving effect to an express declaration or plain manifestation of interest on the part of a testator. See *Rogers* v. *Rogers*, 3 Wend. 503, 518.

Chancellor Kent held in an early case (*Cumberland* v. *Codrington*, 3 Johns. Ch. 229, 252) that where a decedent had taken a conveyance of land subject to a mortgage covenanting to indemnify his creditor and save him, his heirs, executor, etc., harmless from all suit and demands by reason of the bond and mortgage, he did not thereby make the mortgage debt his own so far as to render his personal estate chargeable as the primary fund to be applied to its payment in exoneration of the land. As between the representative of the real and personal estate he held the land to be the primary fund and that the personal estate should be resorted to only as auxiliary. See discussion of English cases, pp. 252 *et seq.* Where the proceeds of lands without the State, devised to specific persons, are brought into the State, they are not thereby subjected to the demands of creditors, even though the New York assets are insufficient and the creditors' claim allowed, unless by the laws of the State where the lands were situated the decedent's debts are made a charge on the lands. *Deyo* v. *Morss*, 30 App. Div. 56, and cases cited.

§ 812. **Same subject.**—The claims of creditors of a deceased person are preferred to those of his legatees or devisees, for the only interest in his property that the testator can transmit to the latter is what remains after the payment of his just debts. *Platt* v. *Platt*, 105 N. Y. 488; *Rosseau* v. *Bleau*, 131 N. Y. 182. The right of a creditor to resort to any but the personal estate of the deceased debtor did not exist at the common law. *McLaury* v. *Hart*, 121 N. Y. 636. And at common law the heirs and devisees took the real estate of a decedent free from his general debts. *Kingsland* v. *Murray*, 133 N. Y. 170, 174. And the real property can now be taken for the payment of debts only by virtue of the statute, the provisions of which must be strictly pursued. And, as will be more fully set forth in ch. 7, *infra*, it is a prerequisite to the proceedings under §§ 2759 *et seq.*, that it be established to the satisfaction of the Surrogate among other things: "That all the personal property of the decedent, which could have been applied to the payment of the decedent's debts and funeral ex-

penses, *has been so applied;* or, that the executors or administrators have proceeded with reasonable diligence in converting the personal property into money and applying it to the payment of those debts and funeral expenses; *and that it is insufficient for the same.*" And the rule in this connection has been carefully stated by Judge Earl, in *Kingsland* v. *Murray*, 133 N. Y. 170, 174:

"If the decedent at the time of his death left sufficient personal property which could have been applied to the payment of his debts and funeral expenses, in the exercise of reasonable diligence on the part of his executor or administrators, then resort cannot be had to the statutes for the sale of his real estate for the payment of his debts. In that event the personal property is the fund for the payment of his debts, and the creditors must resort to that through the executors or administrators. If they waste or squander the personal property so that it becomes insufficient for the payment of the debts, the only resort of the creditors is to them to enforce their personal responsibility, and they cannot in that case cause the real estate to be sold under the statutes referred to. But if the personal property left by the decedent at the time of his death was insufficient to pay his debts, or if the executors or administrators proceed with reasonable diligence in applying it to the payment of his debts, and it proves insufficient for that purpose, then, *and then only*, a case is made for the sale of the real estate. So in the language of this section, before the Surrogate can make a decree for the sale of the real estate the petitioner must establish that all the personal property of the decedent which *could* have been applied to the payment of the decedent's debts and funeral expenses has been so applied. If he establishes that, then he need go no further, and the Surrogate is authorized to make the decree. If he cannot establish that, but establishes the other alternative, that the executors or administrators have proceeded with reasonable diligence in converting the personal property into money and applying it to the payment of the debts and funeral expenses, and that it is insufficient for the payment of the same, then, if it has not all been so applied, at the time of the petition, the Surrogate is authorized to make the decree." See also *Hogan* v. *Kavanaugh*, 138 N. Y. 417, 422; *O'Flynn* v. *Powers*, 136 N. Y. 412; *In re Powers*, 124 N. Y. 361; *Long* v. *Long*, 142 N. Y. 545, 552. See also *Matter of City of Rochester*, 110 N. Y. 159, and cases discussed by Gray, J.

The principle which has the greatest influence on the determination of this question, which has been uniformly supported by all the cases, is that it is not enough for the testator to have charged his real estate with or in any manner devoted to it the payment of his debts and legacies. The rule of construction is such as aims at finding not that the real estate is charged, but that the personal estate is discharged. In other words, it is not by an intention to charge the real, but by a plain intention to discharge the personal estate that the question is to be decided. *Matter of Neely*, 24 Misc. 255, 257, citing Williams on Executors (6th Am. ed.), p. 1810; *Dodge* v. *Manning*, 1 N. Y. 298; *Kelsey* v. *Western*, 2 *id.*, 500. In a

recent case, *Little Falls Nat. Bk.* v. *King*, 53 App. Div. 541, the court says:

"The law is distinct in providing that in the transmission of the property of a deceased debtor to his heirs-at-law or devisees it is charged with the payment of his debts. (*Hogan* v. *Kavanaugh*, 138 N. Y. 317, 422.) The rights of creditors of a decedent attach to his real estate as a statutory lien immediately upon his death. (*Rosseau* v. *Bleau*, 131 N. Y. 177, 182; *Platt* v. *Platt*, 105 *id.* 488.) The order of payment is prescribed by statute, and the provision is express that 'preference shall not be given in the payment of a debt over other debts of the same class,' except judgments docketed against the decedent. (Code Civ. Proc. § 2719.) If the decedent dies intestate the title of the heir-at-law is subordinated to the lien of the creditors, which remains a burden for the period of three years after the issuing of the letters of administration. (Code Civ. Proc. § 2750.)" Aff'd *sub nomine*, *Matter of Richmond*, 168 N. Y. 385, 388. See *Lediger* v. *Canfield*, 78 App. Div. 596, as to will charging "all debts of my mother" on testatrix's estate.

§ 813. **Debts contracted by the executor or administrator.**—We note first a protective provision in § 113 of Decedent Estate Law:

> No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate, out of his own estate, unless the agreement for that purpose, or some memorandum, or note thereof, be in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

Where a creditor presents a claim to be paid out of the estate of a decedent and it appears that the liability to pay the claim was one not existent or not complete at the time of the decedent's death, but is one which has been assumed by the executor or administrator in his representative capacity, it will be important to determine whether or not the liability must be discharged by the executor *de bonis propriis* or *de bonis testatoris*.

Thus in an early case (*Chouteau* v. *Suydam*, 21 N. Y. 179), executors were sued upon a contract in writing, signed by them as such, in a matter concerning the estate and were held liable in their representative capacity as for money paid for the use of the estate. The question principally considered was as to the form of the execution of the contract, and whether the contract was the contract of the executors as such, or whether it was in form the personal contract of the defendants. The series of cases in this State decided before and since that case, are uniformly to the effect that a contract made by an executor upon a new consideration or for services *to be* rendered, although for the benefit of the estate will not bind the estate. *Parker* v. *Day*, 155 N. Y. 383, 387. See *Austin* v. *Munroe*, 47 N. Y. 360. See also *Wetmore* v. *Porter*, 92 N. Y. 76, 83; *Seaman* v. *Whitehead* 78 N. Y. 306, 309. And this rule has not been changed by the Code. *Parker* v. *Day*, *supra*, citing *Thompson* v. *Whitemarsh*, 100 N. Y. 35; *Buckland* v. *Gallup*, 105 N. Y. 453.

If the subject-matter of the contract be, in fact, a contract liability of the testator, incurred during his life (as was the case in *Pugsley* v. *Aiken*, 1 Kern. 494, where the action was upon the contract and leases of the testator, to which the defendant, as executor, had succeeded), then the liability of the estate, as laid down in *Chouteau* v. *Suydam*, is a clear one.

Judge Allen observed in *Austin* v. *Monroe*, *supra* (at p. 366): "The rule must be regarded as well settled, that the contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold and delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors, and do not bind the estate, notwithstanding the services rendered, or goods or property furnished, or other consideration moving from the promisee, are such that executors could properly have paid for the same from the assets, and been allowed for the expenditure in the settlement of their accounts. The principle is, that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator. *Barry* v. *Lambert*, 98 N. Y. 309; *Ferrin* v. *Myrick*, 41 N. Y. 315; *Reynolds* v. *Reynolds*, 3 Wend. 244; *Demott* v. *Field*, 7 Cow. 58; *Myer* v. *Cole*, 12 Johns. 349. The rule is too well established in this State to be questioned or disregarded; and departure from it would be mischievous. Consequently, where the executors are sued *as* executors upon a contract of the nature just described, and it is clear that they are not sued individually and the words are mere words *descriptio personæ* (in which case a judgment could be authorized against them individually, see *Merritt* v. *Seaman*, 2 Shedl. 168) a demurrer will lie to the complaint. *Austin* v. *Munroe*, *supra*.

Neither the executor not administrator whether acting separately or jointly, have authority to create an original liability on the part of the estate or enter into an executory contract binding upon or enforceable against it. *Barry* v. *Lambert*, 98 N. Y. 300, 309, citing *McLaren* v. *McMartin*, 36 N. Y. 88, and other cases; *Schmittler* v. *Simon*, 101 N. Y. 554, 557. They take the personal property as owners and have no principal behind them for whom they can contract. The title vests in them for the purposes of administration, and they must account as owners to the persons ultimately entitled to distribution. So they cannot bind the estate by indorsing a note. *Packard* v. *Dunfee*, 119 App. Div. 599.

In actions upon contracts made by them, however they may describe themselves therein, they are personally liable, and in actions thereon, the judgment must be *de bonis propriis*. Not so, however, upon contracts made by their testator or intestate; in such case the judgment is always *de bonis testatoris*. See *Schmittler* v. *Simon*, *supra*; *Gillet* v. *Hutchinson's Adm.*, 24 Wend. 184. And so it must be borne clearly in mind that a Surrogate has no power to direct payment of claims arising out of contracts

made by the executor or administrator as distinguished from claims against the deceased. *Buckley* v. *Staats*, 4 Redf. 524.

§ 817. **Leave to issue execution to a judgment creditor.**—The Surrogate is given power to protect estates, when judgment has been entered against the representative, against the unrestricted issuance of execution by the creditor, to prevent undue or improper priorities. One who has a judgment for a sum of money against an executor or administrator in his representative capacity must obtain leave from the Surrogate from whose court the representative's letters were issued before he can issue execution under his judgment. Code Civ. Proc. § 1825. The application to the Surrogate should result in an order specifying the sum to be collected and the execution must be indorsed with a direction to collect that sum. It has already been noted under § 2552 (in discussing Decrees and Orders) that a decree or order directing payment by the personal representative to a creditor of or a person interested in the estate or fund or an order permitting a judgment creditor to issue an execution against an executor or administrator is, except upon appeal therefrom, *conclusive evidence that there are sufficient assets* in his hands to satisfy the sum, which he is directed to pay, or for which the order permits the execution to issue. See *Matter of Warren*, 105 App. Div. 582. It is imperative, therefore, in view of the effect to be given to such an order that the Surrogate do not grant the same unless he is satisfied that the representative has assets applicable to the payment of the claim. Executions authorized by § 1825 are such only as can be issued against personal assets in the possession or under the control of the representative. *Matter of Hathaway*, 24 N. Y. Supp. 468, 472. Therefore, when a judgment creditor applies to the Surrogate for leave to issue execution, he should allege the possession of assets applicable to the judgment. *Hauselt* v. *Gano*, 1 Dem. 36; *Matter of Clark*, 2 Abb. N. C. 208.

It appears that this procedure under §§ 1825–26 is exclusive after judgment against the executor of an estate. So held in *Jones* v. *Arkenburgh*, 112 App. Div. 483, refusing the judgment creditor relief by way of receivership in supplementary proceedings.

Section 1824 provides that an executor or administrator is not to plead want of assets in the action and that a judgment against an executor or administrator in his representative capacity is not evidence of assets in his hands. If the Surrogate, therefore, is applied to for an order directing execution to issue, the practice must follow § 1826, which is as follows:

> At least six days' notice of the application for an order specified in the last section, must be personally served upon the executor or administrator, unless it appears that service cannot be so made with due diligence; in which case, notice must be given to such persons, and in such manner, as the surrogate directs, by an order to show cause why the application should not be granted. Where it appears that the assets, after payment of all sums chargeable against them for expenses, and for claims entitled to priority as against the plaintiff, are not, or will not be, sufficient to pay all the debts, legacies, or other claims

of the class to which the plaintiff's claim belongs, the sum, directed to be collected by the execution, shall not exceed the plaintiff's just proportion of the assets. In that case, one or more orders may be afterwards made in like manner, and one or more executions may be afterwards issued, whenever it appears that the sum, directed to be collected by the first execution, is less than the plaintiff's just proportion. **§ 1826, Code Civil Proc.**

It would seem to be incumbent upon the petitioner to show either that the representative has funds of the estate on hand applicable to the payment of the judgment which he refuses to so apply, or that funds of the estate have been misapplied which ought to have been devoted to the payment of the judgment. *Matter of Gall*, 40 App. Div. 114, 116; *Matter of Cong. Unit. Society*, 34 App. Div. 387.

In *Matter of Warren*, 105 App. Div. 582, the case turned on the question whether the funds sought to be reached were really assets of the estate.

If the Surrogate so desires in order to ascertain whether there are assets applicable, he may direct the representative to account. *Matter of Cong. Unit. Society, supra; Melcher* v. *Fisk*, 4 Redf. 22; *Peters* v. *Carr*, 2 Dem. 22. And in the *Warren* case above cited, the reference was ordered to take proofs from which the Surrogate might determine whether the assets were estate assets.

§ 815. **Same subject.**—For the purposes of the inquiry by the Surrogate a judgment is deemed a conclusively liquidated claim. The Surrogate cannot adjudicate upon the validity thereof. *Glacius* v. *Fogel*, 88 N. Y. 434. So he cannot receive evidence on the part of the executor that the creditor obtained such judgment by fraud. *Freeman* v. *Nelson*, 4 Redf. 374. In the case of *Glacius* v. *Fogel, supra*, the executor was without funds to pay the judgment creditor because he had paid the legacies before he knew the extent of the claims against the estate. This fact having developed, it was held that he had paid the legacies at his peril and that he must be charged with the sum so paid and pay the creditor his *pro rata* share upon his debt, for it is manifest from § 1826 that no preference is given the judgment creditor applying for leave to issue execution. *Schmitz* v. *Langhaar*, 88 N. Y. 503.

But where the assignee of a distributive share reduced his claim to judgment and prayed leave to issue execution thereunder, it would be competent for the respondent to show he was barred by a decree in accounting already entered. See *Matter of Weil*, 110 App. Div. 67. It has been held that this leave to issue execution once obtained marks the extent of the creditor's rights. There is no provision of the Code for supplementary proceedings or for proceeding in the way of sequestering or appropriating the property of the estate to the payment of the judgment, nor for obtaining an order for the examination of a third party. *Collins* v. *Beebe*, 54 Hun, 318.

The Court of Appeals has held, *Mount* v. *Mitchell*, 31 N. Y. 356, that no appeal will lie from an order granting leave to issue execution until the representative gives security for the amount for which execution issues under the Surrogate's permission.

CHAPTER IV

PROCEEDINGS TO COMPEL PAYMENT OF DEBTS

§ 816. **How payment of debts may be compelled.**—The Code provides a means by which the Surrogate at the instance of a creditor may compel the payment of a just debt by an executor or administrator. The remedy being a statutory one, must be pursued in compliance with the statutory requirements. *Matter of Lyon*, 1 Misc. 447.

The proceeding is a special proceeding based on petition and citation, and cannot be begun by affidavit and order to show cause. *Matter of Moran*, 58 Misc. 488.

The provision of the Code is as follows:

> In either of the following cases a petition may be presented to the surrogate's court, praying for a decree, directing an executor or administrator to pay the petitioner's claim, and that he be cited to show cause why such a decree should not be made:
>
> 1. By a creditor, for the payment of a debt, or of its just proportional part, at any time after six months have expired since letters were granted. **§ 2722, Code Civil Proc.**, in part.
>
> Subd. 2 relates to compulsory payment of legacies.

The word "creditor" in the section above quoted, includes the assignee of a claim equally with the original creditor. *Matter of Moderno*, 63 Hun, 261. In this case the application was made by the widow of the decedent claiming to be a creditor of his estate, for a decree directing the temporary administrator to pay certain claims set forth in her petition which were made up partly of expenditures made by her for services rendered by third parties to the decedent in his lifetime, such as hotel charges, nursing, etc., which were paid by her and of which she became the assignee, and the balance relating to receiving-vault and funeral expenses expended by her, also disbursements made upon the probate proceedings. The General Term of the First Department held that she was a creditor within the meaning of the Code and could maintain a proceeding under this section. And it has also been held that an original creditor, or an assignee of an original creditor, had a right to invoke this remedy where the public administrator after accounting for his administration of the decedent's estate, paid in to the city treasury the balance of moneys in his hands belonging to such estate, by virtue of that provision of the Consolidation Act (§ 244) which gave any person entitled to receive such moneys as creditor, etc., the same remedies against the corporation for the same as

they would have against any executor. *Matter of Conway*, 5 Dem. 290. But a Surrogate's Court has no jurisdiction of an independent proceeding by an executor, to compel payment of his claim against the estate, as the remedy of such executor is provided by a different section of the Code (§ 2731) which permits the executor to prove his claim on the judicial settlement of his account. *Meyer* v. *Weil*, 1 Dem. 71. This section does not contemplate as creditors persons to whom the deceased was not indebted during his lifetime. So where a person recovered a judgment for costs in an action brought against him by executors, it was held that this remedy was not open to him to enforce the payment of his claim. *Hall* v. *Dusenbury*, 38 Hun, 125. And so if the claim is for funeral expenses the claimant is held unentitled to pursue this remedy. *Matter of Flint*, 15 Misc. 598. The proceeding to compel their payment is now regulated by § 2729, subd. 3, quoted and discussed above at p. 823. The claim must be a *liquidated*, undisputed claim. This is manifest from § 2722; see below. *Matter of Walker*, 70 App. Div. 263, 266. In *Matter of De Forest*, 119 App. Div. 782, petitioner based her petition on a written agreement by decedent to pay her an annuity. This was confirmed by the language of the will already probated. Payment was directed.

But where a creditor, holding decedent's promissory note, presented it to the administratrix and slept on his rights, it was held, on his petitioning under § 2722, more than seven years and six months after maturity of note, that he had not a valid claim enforceable in this way. *Matter of Van Voorhees*, 55 Misc. 185.

§ 817. **The petition.**—The proceeding is begun by petition, duly verified. In an application begun on affidavit and notice of motion, the court treated the affidavit as a petition and disregarded the notice of motion. *Matter of Dunscombe*, 10 N. Y. Supp. 247. But this case is a dangerous precedent. The proper rule is stated in *Matter of Moran*, 58 Misc. 488.

What allegations should be incorporated in the petition will appear more fully from the further language of § 2722, which is as follows:

> On the presentation of such a petition, the surrogate must issue a citation accordingly; and on the return thereof, he must make such a decree in the premises as justice requires. But in either of the following cases the decree must dismiss the petition without prejudice to an action or an accounting, in behalf of the petitioner:
>
> 1. Where the executor or administrator files a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality, absolutely, or on information and belief.
>
> 2. Where it is not proved, to the satisfaction of the surrogate, that there is money or other personal property of the estate, applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied, without injuriously affecting the rights of others, entitled to priority or equality of payment or satisfaction. **§ 2722, Code Civil Proc.**, in part.

Not only then must it be alleged and appear that the creditor has a

claim, and that it is valid and legal, *Matter of Van Voorhees*, 55 Misc. 185, and that six months have expired since letters were granted, but the petition must contain allegations sufficient to admit of proof to the satisfaction of the Surrogate under subd. 2 of the second half of the section "that there is money or other personal property of the estate applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied, without injuriously affecting the rights of others, entitled to priority or equality of payment or satisfaction."

The form of petition used in Erie County is here suggested:

Surrogate's Court,
Erie County,
State of New York.
In the Matter of the Estate }
of Deceased. }

To the Surrogate's Court of the said County of Erie:

The petition of of the of in the County of Erie, and State of New York, respectfully shows:

That heretofore and on the day of 19 letters of the of late of the of were duly issued by this Court to

Your petitioner, upon information and belief, alleges and says, that said has not rendered an account of proceeding as such to this Court.

That your petitioner is interested in the estate of said deceased as a (*here state character of creditor's claim, or facts out of which it arose*).

Wherefore your petitioner prays [for a judicial settlement of the account of said executor, and that said be cited to show cause why (*note*) should not render and settle h account, and] for a decree or order directing said to pay the claim of your petitioner, and for such other and further relief in the premises as this Court may deem proper.

Dated this day of 19

.....

Petitioner to sign here.

(Verification.)

Note. The accounting is in Surrogates' discretion, and is only ordered if necessary to show adequate assets.

§ 818. **Effect of answer by executor or administrator.**—The Surrogate is bound upon the presentation of a petition under this section to issue a citation according to its prayer (§ 2722), upon the return of which he will have to inquire into the petitioner's claim to satisfy himself, under subd. 2, *supra*, as to the facts which authorize him to grant the relief prayed for, unless the executor or administrator files a written answer under subd. 1, "setting forth facts which show that it is doubtful whether the petitioner's claim is valid or legal, and denying its validity or legality, absolutely, or on information and belief."

If the claim be thus disputed, the Surrogate has no jurisdiction to determine its validity and decree its payment; *Matter of Callahan*, 152 N. Y.

320; *Holly* v. *Gibbons*, 176 N. Y. 520, 528; except under other circumstances upon the accounting (*q. v.*).

This answer should be verified (see subd. 1). But if the creditor fails to object that the answer is not verified by timely objection, he will be held to have waived the defect. *Matter of Corbett*, 90 Hun, 182, 183. A judgment creditor may of course resort to this proceeding, although customarily he will resort to the proceedings provided by §§ 1380, 1381 of the Code, and obtain leave to levy execution against the estate. But where the creditor is not a judgment creditor the executor or administrator can in a proper case effectually block these proceedings and secure their dismissal by putting in issue the validity or legality of his claim. *Matter of Lyman*, 11 N. Y. Supp. 530. The good faith of the executor is secured by the provision that he must verify the written answer and set forth facts which show the invalidity or illegality asserted. If he simply asserts conclusions, but no facts on which to predicate them, the Surrogate may disregard the answer as "evasive and technical." *Matter of De Forest*, 119 App. Div. 782. Where a judgment creditor presented a petition alleging the recovery of certain judgments against the administratrix's decedent, his claim on which had been duly presented to the administratrix and not disputed, that there had come into the hands of the administratrix moneys sufficient to pay his judgments; that there were no claims against the decedent's estate entitled to equality of payment with, or priority of payment over, petitioner's claims; and that there was sufficient money in her hands to pay his claim without injuriously affecting the rights of other persons entitled, it was held (*Matter of Application of Miller*, 70 Hun, 61, 63) that a verified answer by the administratrix alleging irregularities in the docketing of the judgments, was not a sufficient answer upon which to dismiss the proceedings; for conceding the judgments were irregular, their subsequent correction which was shown made them valid judgments; and (*White* v. *Bogart*, 73 N. Y. 256) they could not be attacked collaterally, and *prima facie* stated the claimant's claim against the estate. *McNulty* v. *Hurd*, 72 N. Y. 521. While the interposition of a verified answer ousts the Surrogate of jurisdiction to pass on the merits of the petitioner's claim, yet even where the answer is interposed he has the right, in considering that answer, to determine whether the claim has been already admitted and allowed by the representative. *Matter of Miles*, 170 N. Y. 75, 81. Where the petition alleged a judgment claimed to have been kept alive by a payment, and the answer denied such payment and set up the Statute of Limitations, the proceeding was dismissed. *Matter of Depuy*, 8 N. Y. 229. And where an answer to a judgment claim showed that the judge who rendered the judgment was related to one of the parties and so disqualified to act, the Surrogate dismissed the petition. *Matter of Depuy*, 9 N. Y. Supp. 121. The Surrogate has no power to try and determine questions regarding the validity of judgment claims and accordingly the General Term held (*Matter of Miller*, *supra*), that in order to have justified a dismissal of the petition the answer "should not only

have denied the validity or legality of the plaintiff's claim, but it should have set forth facts which showed that it was doubtful whether the petitioner's claim was valid and legal. *Hurlburt* v. *Durant*, 88 N. Y. 121; *Matter of Macaulay*, 94 N. Y. 574, 578; *Budlong* v. *Clemens*, 3 Den. 145, 146. But if a proceeding is initiated under this section, and to the allegation in the petition that the claim has been presented and admitted by the executor, the executor answers, denying that the claim was so admitted, this has been held to raise a dispute as to its validity and legality, and the petition must in such case be dismissed. *Matter of Cowdrey*, 5 Dem. 453, Rollins, Surr., citing *Hurlburt* v. *Durant*, *supra*. It was, however, in this case held that the fact that the petitioner's claim was in dispute justified a dismissal of the petition so far as it asked for payment of the claim but was no ground for denying that part of the application which asked for an accounting by the executor, citing *Schmidt* v. *Heusner*, 4 Dem. 275. In this case it was held that a mere appearance of an interest on the part of an applicant was sufficient to authorize the order for the filing of the account in spite of a contest of the claim of interest by the executor or administrator, citing Code Civ. Proc. § 2514, see cases cited at p. 276.

An oral dispute of the claim is not sufficient; the Code expressly requires a written answer. *Estate of McKiernan*, 4 Civ. Proc. Rep. 218.

It seems that if the petition does not allege the petitioner's claim with sufficient particularity to enable the executor or administrator to put its legality or validity in dispute, as required by § 2722, the Surrogate has power to direct the petitioner to set forth the nature of his claim with greater particularity. *Budlong* v. *Clemens*, 3 Dem. 145, 146, Rollins, Surr.

The requirements of the Code as to the character of the executor's answer are substantial rather than formal. Consequently where an executor does not in so many words doubt whether the petitioner's claim is valid and legal, and deny its validity absolutely, but his answer contains allegations of fact which show that it is doubtful whether the petitioner's claim is valid and legal, the answer will be sustained and the petition dismissed. *Cuthbert* v. *Jacobson*, 2 Dem. 134, 136.

So where an answer by an executor alleges that the claim presented is excessive the Surrogate must treat the claim as a disputed one, and dismiss the proceedings. *Koch* v. *Alker*, 3 Dem. 148. So also where the executor sets up in his answer that the claim has been released and denies its validity. *Matter of Hammond*, 92 Hun, 478.

So where the answer of the executor shows that the claim of the petitioner is for damages arising out of the alleged fraud of the decedent, and denies on information and belief the validity and legality of the claim, it will be deemed a sufficient answer to oust the Surrogate's jurisdiction. *Matter of Fargo's Estate*, 18 N. Y. Supp. 670.

Where the petitioner was a Young Men's Christian Association, and the executor's answer denied the incorporation of the petitioner alleging its nonincorporation and therefore denying the validity of the petitioner's

claim, it was held that this was a sufficient dispute of the claim to require the dismissal of the proceedings. *Matter of Young Men's Christian Association*, 22 App. Div. 325, 327, citing *Matter of Callahan*, 152 N. Y. 320; *Fiester* v. *Shepard*, 92 N. Y. 251, 255; *Matter of Hammond*, 92 Hun, 478. But where an answer merely denied the petitioner's incorporation and omitted to deny the validity of its claim the dismissal of the proceeding was held error. *Matter of Alexander*, 83 Hun, 147.

§ 819. **Right to payment.**—While it is within the power of the executor or administrator by the verified answer above discussed to secure a dismissal of the proceeding contemplated by § 2722, and put the claimant to his proof in another court (*Lambert* v. *Craft*, 98 N. Y. 342), and while he is not deprived of his right to dispute the claim in this proceeding by reason of his having previously made an oral admission of its validity (*Ruthven* v. *Patten*, 1 Robert, 416), yet if the executor does not interpose this objection and divest the court of jurisdiction, the Surrogate must inquire into the merit of the claim with a view to his being satisfied of the necessary facts under § 2722. The creditor sustains the burden of proof as to all the circumstances, for, if it be not proved to the satisfaction of the Surrogate first, that there is money or other personal property of the estate applicable to the payment or satisfaction of the petitioner's claim, and which may, in the second place, be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction he must by decree dismiss the petition although without prejudice to an action or an accounting in behalf of the petitioner. Code Civ. Proc. § 2722; *Lynch* v. *Patchen*, 3 Dem. 58, 60.

Of course an inventory is in the nature of such proof as showing assets although the inventory unsupported by other proof will be held insufficient to prove sufficiency of property to pay all debts. *Matter of Corbett*, 90 Hun, 182, 186. But if the amount of personal property returned upon the inventory is insufficient to pay the creditor's claim and he relies upon other property in the executor's hands, § 2722 requires affirmative proof of the existence of such assets. Moreover, the wording of the section above quoted contemplates that the power of the Surrogate is to be exercised in conformity with, and not in hostility to, the general principle of equality among creditors. This is a distinguishing feature of the New York system for the administration of the estates of decedents. *Thompson* v. *Taylor*, 71 N. Y. 217, 219, citing *Fitzpatrick* v. *Brady*, 6 Hill, 581. The object of the provision is to provide a way whereby creditors and others having claims against the estate of a decedent, or entitled to share therein may obtain payment thereof in whole or in part in advance of the final accounting and distribution, in cases where such contemplated payment may be made consistently with the rights of all parties interested in the estate. In the case last cited (71 N. Y. 219), Judge Andrews says:

"When application is made by a creditor for the payment of his debt under this section, the Surrogate, before making a decree therefor, must necessarily inquire into the condition of the estate; the amount of the

assets and of the debts. If it appears from the proof presented, that the relief asked may be granted without prejudice to other creditors, the Surrogate may make the decree, and the executor or administrator acting in good faith will be protected in paying the debt in full, pursuant to the decree, although it may finally turn out that by reason of losses, depreciation of values, or other causes, the remaining assets are insufficient to fully pay the other creditors. It is quite possible that this result may happen, and it often will happen, unless great care is taken by the Surrogate in exercising this jurisdiction. The application under § 18 may be made before the executor or administrator has been able to ascertain, by advertisement, the amount of the debts owing by the decedent, and many contingencies may happen to impair the value of the estate between the decree and the final accounting and distribution."

In *Matter of Weil*, 110 App. Div. 67, the Surrogate refused an order to pay a judgment against the administrator for a distributive share. He had previously granted leave to issue execution under the judgment, which, under § 2552, was conclusive evidence of assets. The administrator set up the decree in accounting which fixed the share at less than the judgment. But it did not appear the petitioner was made a party to the accounting. The Surrogate was reversed.

If the estate be insolvent, a creditor who desires to obtain payment must compel a judicial settlement of the account in order that all parties interested may be brought before the court. *M'Keown* v. *Fagan*, 4 Redf. 320.

But in *Matter of Miner*, 39 Misc. 605, the notice to present claims had been duly published. The administrators had collected in over $60,000. Their inventory showed about $100,000 of assets. The claims presented were $239,000, all of which were allowed as just and proper. Sixty-eight creditors petitioned under § 2722 for a *pro rata* payment on account. No accounting could be made, as a year had not expired. The Surrogate held he had power to act, citing *Thompson* v. *Taylor*, 71 N. Y. 217, decided under the Revised Statutes for which § 2722 is a substitute. He distinguished the case of *M'Keown* v. *Fagan* (see p. 614 of opinion).

Where the executors set up that by the will they are bound to continue the business of the testator, they cannot thus defeat the right of the creditor to payment of his claim. The creditors are not bound by any such direction in the will; they have a right to have the estate applied to the payment of their debts which have a preference over debts incurred by the executors in carrying on the business under the will. See *Willis* v. *Sharp*, 115 N. Y. 396.

In view of what has been above stated, it will be manifest that the decree which the Surrogate makes under this section is made in contemplation of sufficiency of assets. Therefore, if it remains unexecuted when the general order for distribution of the estate among all creditors comes to be made, it seems that the decree will have to give way to the paramount authority of the statute providing for equality among creditors

and a refusal of preference among debts of the same class except among judgments under subd. 3 of § 2719. It is a wise precaution, therefore, to include in the decree *on behalf of the executor* a provision, that he may apply for a modification of the decree in case it subsequently appear that the assets of the estate are insufficient to pay the debts in full. See *Thompson* v. *Taylor*, 71 N. Y. 217, 221.

In the case of *Lambert* v. *Craft*, 98 N. Y. 342, it was held upon a proceeding to compel payment where the executors appeared and did not put in issue the justice or validity of the claim, that their silence was a strong admission by conduct of the justice of the demand, and as conclusive as if it were proven by witnesses. The view of the court was that this failure to answer not only permitted the hearing to be had by the Surrogate as upon an undisputed claim, but was an admission of the justice of the claim. And from this case it might appear if no objection is interposed by the executor, the Surrogate need not inquire into the character or extent of the claim or require any proof thereon; but it must be borne in mind that the proceedings cannot progress at all if the executor puts in issue the validity of the claim, and it would seem, particularly under the decision of the Court of Appeals in the later case of *Schutz* v. *Morette*, 146 N. Y. 137, that mere silence on the part of the executor as to the claim does not relieve the claimant from establishing it by evidence, that the executor is not to be deemed to have waived any rights of the estate by permitting this proceeding to go on, and that it is the duty of the Surrogate to require of the claimant affirmative proof of his claim. See *Matter of Clauss*, 16 App. Div. 34.

The last case cited was one involving the power of the Surrogate to direct payment of claims upon the judicial settlement of an executor's accounts, but the cases are therein discussed as to the effect of an executor's silence. The Surrogate would be warranted in giving to the debt the character of an undisputed claim, if it appeared that it had been previously presented and acknowledged by the executor. It was accordingly held by the Appellate Division in *Matter of Clauss*, *supra*, that the doctrine of an account stated, whether in proceedings under this section or under § 2727, cannot in justice to estates of deceased persons be effectual as against their personal representatives. See also *Matter of Doran*, 73 N. Y. St. Rep. 593.

The Surrogate may exercise his discretion to dismiss the proceeding whenever it appears that the validity of the petitioner's claim has not been conceded or established. *Matter of Stevenson*, 77 Hun, 203, 207.

§ 820. **The decree.**—The decree may be substantially as follows:

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Decree for payment of debts under section 2722.

Title.

A petition, duly verified, having on the day of been presented by a creditor of late deceased, to the Surrogate of this county, whereby appears that he has a valid claim against said deceased, for dollars, with interest thereon from the day of and that six months have expired since letters testamentary of the last will and testament of said deceased, were issued to the executor therein named, and praying for a decree directing the said executor to pay the petitioner's said claim and that he be cited to show cause why such a decree should not be made;

And the Surrogate having issued a citation accordingly on the presentation of said petition, and on the return thereof said executor not having filed any written answer duly verified under section 2722 of the Code of Civil Procedure. (*Note.*)

Note. If the petition prayed for the filing of an account by the executor, recite the production and filing of the account in the decree.

And it appearing to the satisfaction of the Surrogate from the facts from which it arose, that the petitioner has a valid claim against said decedent; and it being proved to the satisfaction of the Surrogate that there is money or other personal property of the estate applicable to the payment or satisfaction of the petitioner's claim which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction. (*Note.*)

Now on motion of attorney for said creditor, it is

Ordered, Adjudged and Decreed, that the said the executor of the last will and testament of deceased, pay to the said creditor of said deceased his said claim of dollars and cents, with interest from the day of 19 ; and it is

Further Ordered (*here insert provision as to the payment of costs*); and it is

Further Ordered (*here insert provision, if deemed necessary, permitting executor to apply for modification of the decree in the event that the assets shall not prove to be sufficient to pay claims in full*).

Note. The practice is preferred by some, instead of using the language of the Code, to specify that there are assets in the hands of the executors to a specified amount; and specify also the amount of the debts and outstanding liabilities; this is only necessary where the assets are insufficient to pay all claims in full, and it is necessary to make a *pro rata* payment, and where all creditors are before the court.

Where the Surrogate is compelled to dismiss the proceeding, either because the validity of the claim is put in issue, or it does not appear that there are sufficient assets applicable to the payment of the claim, the decree is merely a decree dismissing the petition. But the decree, in that case,

should provide, in the language of § 2722, that the petition is dismissed "without prejudice to an action or an accounting in behalf of the petitioner." If the original petition, as is not an unusual practice, prays not only for the payment of the claim, but that the executor account, the decree dismissing the petition as has already been seen above does not prejudice the Surrogate's proceeding with the account already prayed for. *Matter of Cowdrey*, 5 Dem. 453. The effect of a decree of this character directing payment is defined by § 2552 of the Code, which is as follows:

> A decree, directing payment by an executor, administrator, or testamentary trustee, to a creditor of, or a person interested in, the estate or fund, or an order, permitting a judgment creditor to issue an execution against an executor or administrator, is, except upon an appeal therefrom, *conclusive evidence* that there are sufficient assets in his hands, to satisfy the sum which the decree directs him to pay, or for which the order permits the execution to issue. **§ 2552, Code Civil Proc.**

But, where it appears from the decree itself, on its face, as well as from examination of the proceedings on which it is based, that the representative had no assets in his hands with which to make the payment, § 2552 does not apply. *Matter of Monell*, 28 Misc. 308.

Section 2606 provides that in the case of an executor or administrator of a *deceased* executor, etc., § 2552 has no application. A decree against such representative of a deceased representative is not, therefore, conclusive evidence of the possession of assets. *Matter of Seaman*, 63 App. Div. 49, 52.

If it is attempted to punish an executor for contempt for nonpayment of the money required to be paid by such a decree it is nevertheless competent if such be the fact, for the executor to show in the proceeding to punish for contempt, that he has no funds of the estate available. *Matter of Battle*, 5 Dem. 447, Rollins, Surr., and cases discussed. As to proceedings to enforce a decree by execution, see § 823 below.

§ 821. **Docketing the decree.**—All the effect of a judgment in the Supreme Court may be given to such a decree as this by docketing it in pursuance of the provisions of § 2553, which are as follows:

> Where a decree directs the payment of a sum of money into court, or to one or more persons therein designated, the surrogate, or the clerk of the surrogate's court, must, upon payment of his fees, furnish to any person applying therefor, one or more transcripts, duly attested, stating all the particulars, with respect to the decree, which are required by law to be entered in the clerk's docket-book, where a judgment for a sum of money is rendered in the supreme court, so far as the provisions of law, directing such entries, are applicable to such a decree. Each county clerk, to whom such a transcript is presented, must, upon payment of his fees, immediately file it, and docket the decree in the appropriate docket-book, kept in his office, as prescribed by law for docketing a judgment of the supreme court. The docketing of such a decree has the same force and effect, the lien thereof may be suspended or discharged, and the decree may be assigned or satisfied as if it was such a judgment. **§ 2553, Code Civil Proc.**

Such a decree will not be made by a Surrogate, on a judgment creditor's claim where it appears that an appeal is pending on the judgment under which he claims. *Estate of Clark*, 12 Civ. Proc. Rep. 383. But where a judgment creditor resorts to this proceeding to compel payment of his judgment claim, the Surrogate may, upon application for such a decree, inquire into and pass upon alleged payments made upon this judgment, for the purpose of determining the amount due thereon; and he may also determine whether the applicant is the owner of the judgment and entitled to its payment; but he has no jurisdiction to determine whether there has been an accord or satisfaction, or whether the estate is entitled in equity to a release or discharge in whole or in part. See *McNulty* v. *Hurd*, 72 N. Y. 518; *Hurlburt* v. *Durant*, 88 N. Y. 121; *Matter of Miller*, 70 Hun, 61, 65; *Matter of Macaulay*, 94 N. Y. 574. And the executor is not prejudiced by the possession of this power by the Surrogate, for if he deems it necessary to have a judicial determination of the claim he may always compel the creditor to resort to the proper judicial tribunal by putting the validity of the claim in issue.

§ 822. **The accounting.**—It has been held that upon an application under this section the Surrogate before decreeing absolute payment of a debt not resting in judgment, should require the filing of an account in order that it may be ascertained whether or not the executor or administrator holds money or property applicable to the payment of the claim. See *Matter of Macaulay*, 94 N. Y. 574; *Bainbridge* v. *McCullough*, 1 Hun, 488. See *Ruthven* v. *Patten*, 1 Robert. 416. And it is perfectly competent for the petitioner to pray for the accounting in his petition to compel the payment of the debt. *Matter of Macaulay*, *supra*. See ch. VII, *post*, Payment of Legacies.

§ 823. **Enforcing the decree.**—When the decree requiring the payment of creditor's claim has been made and entered, it should be served personally upon the executor in order to its being enforced by an execution against the property of the executor directed to make the payment. The proceedings to enforce the decree in this manner will be those provided under § 2554. See part II, ch. IV, on "Enforcement of Decrees." Should the decree be one docketed under § 2553, as above indicated, it is not thereby merged in the judgment, but the creditor by docketing it merely *acquires an additional remedy* to enforce payment of his money; he retains his original remedy by attachment against the executor or administrator in a Surrogate's Court, and acquires a second remedy by execution based upon the docket. *Townsend* v. *Whitney*, 75 N. Y. 425, 428. These two remedies are not inconsistent, but concurrent or cumulative; and they may both be pursued until the decree has been complied with. *Ibid.*

Section 2554, however, by its reference to §§ 1365 and 1369 of the Code impliedly requires that the decree shall have been docketed in the clerk's office of the county, because an execution against property can be issued only to a county in the clerk's office of which the decree is docketed. See *Dissoway* v. *Hayward*, 1 Dem. 175. It is unnecessary for the person, to

whom money is directed to be paid by such a decree, to obtain leave of the Surrogate before asserting his right to issue execution. Section 1825 of the Code is inapplicable to such a case. Under § 2554 execution issues as of course. *Joel* v. *Ritterman*, 2 Dem. 242.

The remedy by attachment is a remedy within the power of the Surrogate, and is limited to the ordinary execution against the body in the nature of a *capias ad satisfaciendum*. *Matter of Watson*, 5 Lansing, 466. See also discussion of § 2555 in part II, ch. IV.

§ 824. **How payment should be made.**—In the previous chapter the primary rule as to the order in which the assets should be applied to the payment of debts was referred to. Where the executor is served with a decree, with notice of its entry, requiring him to pay to the creditor a specified sum, he should satisfy the same out of money or other personal property of the estate applicable to the payment or satisfaction of the claim. See § 2722, Code Civ. Proc. The making of the decree presumptively establishes that there is money or other personal property of the estate so applicable. For it is expressly provided by § 2722, that this fact must be proved to the satisfaction of the Surrogate, or in default thereof, the petition under that section will be dismissed. Where the assets are in the exclusive possession of one of several executors, it will be necessary to serve the executor having possession of the assets, personally, with the decree. So executors of a resident decedent who have sold lands in another State [under a direction in his will for sale to satisfy legacies] hold the proceeds subject to the debts, and though they sold under foreign letters taken out for the purpose of making the sale the New York creditors may compel an accounting. *Matter of Newell*, 38 Misc. 563.

§ 825. **Effect of equitable conversion.**—Although there may have been an equitable conversion of real estate, the proceeds thereof will not be deemed applicable to the payment of debts, so long as there is other personal property to which recourse can be had. See *Matter of Mansfield*, 10 Misc. 296. If the power to sell is general, either for the general purposes of the estate, or for payment of legacies if personalty is inadequate, the proceeds of a sale actually made are assets for the payment of debts. *Matter of Newell, supra*, citing *Matter of Bolton*, 146 N. Y. 257; *Cahill* v. *Russell*, 140 N. Y. 402.

As to *equitable conversion*, how worked, see *Garvey* v. *U. S. Fid., etc., Co.*, 77 App. Div. 391. The rules as to equitable conversion effected by wills have been summarized by Mr. Justice Patterson in *Phœnix* v. *Trustees of Columbia*, 87 App. Div. 438, aff'd 179 N. Y. 592:

(*a*) Intention must be plain, distinct, unequivocal.

(*b*) Intention may appear:

(1) From positive direction,

(2) From necessity, in order to carry out testamentary scheme,

(3) From necessity, in order to prevent failure of testamentary scheme.

See *Hayden* v. *Sugden*, 48 Misc. 109. But a creditor is entitled as against the beneficiaries under the will to have his claim paid out of the proceeds

of insurance on the real estate, when there is no other personalty. See *Matter of O'Connell's Estate*, 1 Misc. 50. Where executors have a discretionary power of sale under a will to be exercised for the benefit of devisees therein named, the Surrogate, where they have exercised this power, has no right to direct an application of any of the proceeds to the payment of debts where there is other real estate which can be reached in the proceedings contemplated by the Code for the payment of the decedent's debts. Such a fund is a trust fund to which the doctrine of equitable conversion is not applicable, and never becomes legal assets so as to be available for any purpose foreign to the will. *Matter of McComb*, 117 N. Y. 378, 383, distinguishing *Glacius* v. *Fogel*, 88 N. Y. 444; *Hood* v. *Hood*, 85 N. Y. 561; *Erwin* v. *Loper*, 43 N. Y. 521; *Kinnier* v. *Rogers*, 42 N. Y. 531, where the power of sale was general and not for the sole benefit of devisees.

But where all the decedent's real estate has been sold and the personal property is not sufficient to meet the claims of creditors, the proceeds of the real estate may be treated as personalty to the extent of enabling the court to direct the payment of the debts therefrom. See *Young* v. *Young*, 2 Misc. 381. The provisions of the Code as to the sale and disposition of decedent's real estate for the payment of his debts must be strictly followed (see ch. VII, *post*), and the real estate cannot be resorted to for the purpose of paying debts or legacies except in the manner prescribed by the statute. Therefore, where a legatee brought an action to have her legacy declared a charge upon the testator's real estate, the Court of Appeals held that the judgment in such action providing for the sale of land for the payment, first of testator's debts, and then of the legacies, was irregular, and modified it by providing for a sale of the real estate for the payment of legacies subject to the rights of creditors of the deceased and of persons who equitably represented creditors, but stayed such sale and execution of the judgment, until such proceedings could be had in the Surrogate's Court as would authorize a disposition of such real estate for the payment of the debts of the testator. *Hogan* v. *Kavanaugh*, 138 N. Y. 417, 424. Where, however, the heirs and next of kin are the same persons, it is immaterial whether the debts are paid out of the proceeds of real estate or out of the personal property, so long as the persons interested have received their distributive shares of the estate. *Matter of Braunsdorf*, 13 Misc. 666, 674, Tompkins, Surr., modified in other respects, 2 App. Div. 73.

CHAPTER V

THE TRANSFER TAX PROCEDURE

§ 826. **Jurisdiction conferred on Surrogates.**—By §§ 220–245 of the Tax Law, being ch. 60 of Consolidated Laws, art. 10, entitled Taxable Transfers, the subject of this tax on succession to property by reason of death of another is covered, and ample power is vested in the Surrogates' Courts (§ 228) "to hear and determine all questions arising under the provisions of this article." While the work of the Surrogates, in some counties particularly, has been very greatly added to in consequence, no increment of salary was provided; although additional assistants are provided for. The procedure, which it is the main object of this chapter to discuss, is simple and businesslike. But some treatment of the substantive law is preliminarily essential, in order to guide the practitioner in the conduct of the proceeding, especially in defending an estate against the State's avowed purpose of "taxing everything in sight."

§ 827. **Nature of the tax.**—In view of this frank purpose it was early seen that if the tax be deemed a tax on property, some property might get away, since it was not taxable for any purpose as such. This was the case with Federal and State bonds. The act read, "property . . . . over which this State has any jurisdiction for purposes of taxation." But the law being promptly amended, the Court of Appeals, whose attitude was foreshadowed in *Matter of Swift*, 137 N. Y. 77, came out clearly in *Matter of Sherman*, 153 N. Y. 1, to the effect that the tax was a succession tax on the "right of devolution of property of decedents." As this right is statutory, so it can be regulated, limited or even destroyed by law. This case involved United States bonds. See also *Matter of Hoffman*, 143 N. Y. 327; *Matter of Seaman*, 147 N. Y. 69; *Matter of Sloane*, 154 N. Y. 109; *Matter of Pell*, 171 N. Y. 48.

The weakness of the theory appears when applied to property of a nonresident; but if that property is within the dominion and grasp of the State, it is taxed, irrespective of the theory in that regard.

The *Hoffman* case, *supra*, summarizes it thus: The tax is imposed as a burden on each person or corporation claiming succession, measured by the value of the interest claimed, and collectible out of such interest only.

A better summary can be taken from the *Matter of Westurn*, 152 N. Y. 93, 99. The transfer tax is a tax imposed by the State of New York upon the right to succession to real and personal property, imposed upon and collectible out of each specific share or interest given by will, or derived under the statutes of descent or distribution, and limited as to each share or interest to its value. See also *Matter of Wolfe*, 89 App. Div. 349,

aff'd 179 N. Y. 599; *Matter of Cook*, 114 App. Div. 718, rev'd on another point, 187 N. Y. 253; *Morgan* v. *Cowie*, 49 App. Div. 612.

See § 227 of Tax Law as to prohibition to safe deposit and other corporations, under penalty, to deliver over decedent's assets to a representative without notice to or consent of the comptroller. The custom is to fix a time to examine the securities, etc.; the comptroller takes a list, and in the case of a foreign representative may exact a bond to pay the tax, in order to prevent getting the property out of the jurisdiction. The necessity of such examination is often due to the fact that such boxes are often the place where a will has been deposited.

§ 828. **Conditions of taxation.**—The act defines the transfers that are to be taxed as follows:

> § 220. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom in trust, or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:
>
> 1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the State.
>
> 2. When the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death.
>
> 3. When the transfer is of property made by a resident or by a non-resident when such non-resident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.
>
> 4. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this chapter.
>
> 5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will;
>
> (*b*) And whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this chapter shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure. [Declared from (*b*) on to be invalid in *Matter of Lansing*, 182 N. Y. 238, "no transfer, no tax."]
>
> 6. The tax imposed thereby shall be at the rate of five per centum upon

the clear market value of such property, except as otherwise prescribed in the next section.

§ 829. **The law in the courts.**—The constitutionality of this tax generally considered has been settled. Detail provisions have been lopped off as invading constitutional rights.

It hardly seems important in a work of this character to trace the development of the law or to indicate the character of the successive amendments. But it is proper to observe preliminarily that it has been distinctly held:

(*a*) That neither the act nor its successive amendments have any retroactive effect. See *Matter of Van Kleeck*, 121 N. Y. 701; *Matter of Travis*, 19 Misc. 393, citing *Matter of Miller*, 110 N. Y. 216; *Matter of Cager*, 111 N. Y. 343; *Matter of Seaman*, 147 N. Y. 69.

(*b*) And consequently do not affect estates or interests vesting prior to the time when the act or any particular amendment thereof went into effect. See *Matter of Coggswell*, 4 Dem. 248; *Matter of Travis*, 19 Misc. 393; *Matter of Pell*, 171 N. Y. 48.

(*c*) Nor can retroactive operation be given to the exemption provided for by any of these successive amendments. *In re Wolff's Estate*, 15 N. Y. Supp. 539, 546, citing *Sherrill* v. *Christ Church*, 121 N. Y. 701; *Matter of Minturn*, 15 N. Y. Supp. 547*n*. See *Matter of Wolfe, supra*, note, p. 547. *Matter of Graves*, 171 N. Y. 41.

In *Matter of Keeney*, 194 N. Y. 251, it was held constitutional against the attack of arbitrary inequality in the rate of tax.

§ 830. **Taxable transfers.**—Recurring to the language of § 220, and passing over for the time all exceptions by the act or by law, attempt will be made to summarize, with brief discussion, the rule as to what will condition taxability.

(*a*) *Succession to a resident's property.* If a resident of this State die, testate or intestate, here or elsewhere, the theory that the tax is on the succession enables the State to appraise his whole estate, *except* realty not in this State. The cases where any other description of a resident's property was not taxed turned on extraneous conditions; such as the time the act became operative, or the parting by decedent with ownership or title while living. Such cases are the following:

When they vested before the act went into effect. *Matter of Travis*, 19 Misc. 393; *Matter of Backhouse*, 110 App. Div. 737. Or when the grantee *causa mortis* became beneficially entitled prior to the act's going into effect. *Matter of Forsyth*, 10 Misc. 477, 480.

When the remainder was vested, although defeasible, before the act took effect. *Matter of Seaman*, 147 N. Y. 69, 77. Or where the decedent died before the passage of the act. *Matter of Moore*, 90 Hun, 162. Insurance policy assigned by decedent. *Matter of Parsons*, 117 App. Div. 321.

It is important to note that as to realty situated without the State it is altogether out of the operation of the tax. *Matter of Swift*, 137 N. Y. 77, 88; *Matter of Lorillard*, 6 Dem. 268. This is so even though its form be

changed by operation of a will, so that the proceeds come into the State, after equitable conversion and sale. *Matter of Sutton*, 149 N. Y. 618, aff'g 3 App. Div. 208, and 15 Misc. 659.

If it is within the State in its real form it is taxable. *Matter of Sherwell*, 125 N. Y. 376. The question of its equitable conversion may condition the question of the quantum of the realty and of the personalty, or of interests therein, under the $500 clause or the $10,000 clause. But it will not affect the present question. It is sufficient to state that the status of the property must be fixed as of the decedent's death. *Matter of Mills*, 86 App. Div. 555; *Matter of Offerman*, 25 App. Div. 94.

(*b*) *Succession to a nonresident's property.* But, whatever the theory as to the nature of the tax to be levied as to a nonresident's estate, the power to collect depends on the State's dominion over the property that passes. Is it here as a matter of fact, is not the only question. It must be here as a matter of law, as well.

If it be real property, located here, there is no difficulty. The tax must be paid. *Matter of Romaine*, 127 N. Y. 80; *Matter of Vinot*, 7 N. Y. Supp. 517. So if it be real property located without the State, which is not taxable as to a resident's estate, much less is it taxable against the nonresident's. *Estate of Wolfe*, 6 Dem. 268; *Matter of Swift*, 137 N. Y. 77, 88. But questions do arise as to the personal estate. Physically here, yet it may escape if here by accident or *in transitu*. To illustrate: When tangibly here, and kept here by decedent it is taxable. *Matter of Phipps*, 77 Hun, 325, aff'd 143 N. Y. 641. But if here transiently or by accident it is not. *Id.*, and *Matter of Romaine, supra.*

Invested here, e. g., on bond and mortgage, or in a savings bank account, it may be reached. *Matter of Romaine, supra; Matter of Burr*, 16 Misc. 89; *Matter of Clark*, 9 N. Y. Supp. 444. But if the security representing the investment is not here it cannot. *Matter of Preston*, 75 App. Div. 250.

Again, the character of the thing called property may determine its taxability on the "dominion" theory. Stock of a domestic corporation will be taxed, *Matter of Bronson*, 150 N. Y. 1; but the bonds of the same corporation, not physically here, will not. *Ibid.* Stock of a United States bank doing business here will be taxed. *Matter of Cushing*, 40 Misc. 505; while stock of other foreign corporations escapes. *Matter of Whiting*, 150 N. Y. 27; *Matter of James*, 144 N. Y. 6, 12; *Matter of Euston*, 113 N. Y. 174. If the bonds are here in safe deposit, they will be taxed, *Matter of Whiting, supra*, whether "coupon," or "registered." *Matter of Morgan*, 150 N. Y. 35. But securities here, pledged to secure a debt of decedent, are, to the extent of the debt, not taxable. *Matter of Pullman*, 46 App. Div. 574; *Matter of Havemeyer*, 32 Misc. 416. Though the theory of distinction appear to be the law of the situs of a debt, *Matter of Abbett*, 29 Misc. 567; *Matter of Phipps*, 77 Hun, 325; 143 N. Y. 641; *Matter of Bronson, supra*, yet it is held that money in a bank account here is taxable, *Matter of Houdayer*, 150 N. Y. 37; *Matter of Blackstone*, 171 N. Y. 682; 188 U. S. 187, unless the deposit is shown to be purely tempo-

rary, see *Matter of Phipps, supra,* and *Matter of Leopold,* 35 Misc. 369; *Matter of Euston, supra,* or unless it be a loan to the nonresident by another nonresident. *Matter of Bentley,* 31 Misc. 656.

Money here on open account, or in decedent's attorney's hands is taxable. *Matter of Burr,* 16 Misc. 89; and see *Matter of Anthony,* 40 Misc. 497. But see *Matter of Horn,* 39 Misc. 133, as to when such open account is treated as in the same category with debts and promissory notes. A partnership interest, in a firm here, is taxable. *Matter of Probst,* 40 Misc. 431.

As to a legacy to decedent, the matter is very fully discussed in *Matter of Clinch,* 180 N. Y. 300.

As to leasehold interest, see *Matter of Althause,* 63 App. Div. 252; *Matter of Embury,* 154 N. Y. 746. As to insurance policies, see *Matter of Gibbs,* 60 Misc. 645, opinion by Beckett, Surr. (foreign and domestic conpanies).

§ 831. **Exceptions and limitations.**—Section 221 of the Tax Law provides for certain exceptions and limitations, and is as follows:

Page 866: A correction should be made in the quotation of § 221 of the Tax Law, which was sent to the printer on the basis of the report of the Board of Statutory Consolidation which reads as found in the text; but in adopting the report the Legislature amended the Act, so that the first paragraph of § 221, on page 866, should be changed as follows: Line 3 omit "stepchild" and on line 10 after the words "Provided also that" insert "except in the case of a stepchild."

[redacted] acknowledged relation of a parent, *provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter,* and provided also that the parents of such child shall have been deceased when such relationship commenced, or to any *lineal descendant* of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this article; if real or personal property, or any beneficial interest therein, so transferred is of the *value of ten thousand dollars or more,* it shall be taxable under this article at the rate of one per centum upon the clear market value of such property.

But any property devised or bequeathed to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital, or infirmary corporation, including corporations organized exclusively for Bible or tract purposes, shall be exempted from and not subject to the provisions of this article. There shall also be exempted from and not subject to the provisions of this article personal property other than money or securities bequeathed to a corporation or association organized exclusively for the moral or mental improvement of men or women, or for scientific, literary, library, patriotic, cemetery or historical purposes, or for the enforcement of laws relating to children or animals, or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member, or employee thereof shall receive or may be lawfully entitled to receive, any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization

thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association, or for any of its members or employees, or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

§ 832. **Exemptions summarized.**—Discussing § 221, as it now reads, the practitioner is concerned to know whether, in the proceedings which may be brought, the person or interest he represents comes within the exception of the article.

The first element is the *quantum*. Does the pecuniary limitation apply to the property passing *from* the decedent? Or does it extend to the interest passing *to* the particular one who succeeds, by devolution or by the will?

Mr. Carter, in his admirably concise book on the subject, traces the development of the law from its first scheme as a tax only on property passing to collaterals which gave it its name. (See his chs. I and IV.)

At the outset, and until the amendment provided for by ch. 399 of the Laws of 1892 took effect, it was held that no tax could be levied against an amount passing to either of the persons mentioned in § 221, unless such amount in each case was personal property and exceeded in value $10,000 (*Matter of Hoffman*, 143 N. Y. 327), but by that amendment it was the valuation of the whole estate and not of the particular legacies which was contemplated, so that if the aggregate transfers to taxable persons exceeded $10,000, then the interest of each recipient of such transfer became taxable, no matter how small his proportion was. This interpretation of the effect of the amendment, the *Hoffman* case shows, turned on the definition in the amending act of the word "estate" and the word "property" as meaning that which passes *from* decedent, and not that which *passes* to one in a particular class entitled to exemption in whole or in part. Thus it was held, in *Matter of Corbett*, 171 N. Y. 516, where decedent died intestate, leaving an estate of $11,880.69 in personal property, of which amount a brother and sister each took one-third and two nieces divided the remaining third, that each of these interests was subject to tax. To the same effect, see *Matter of Curtis*, 31 Misc. 83, and *Matter of DeGraaf*, 24 Misc. 147; *Matter of Fisher*, 96 App. Div. 133. See § 846 below.

In the *Corbett* case is considered also the effect on taxability of reading into § 221 the language of § 243 (formerly § 242) entitled "Definitions." This section begins:

> The words "estate" and "property" as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor, or vendor, passing or transferred to those *not herein specifically exempted*. . . .

The words "not herein specifically exempted" refer to absolute exemption, and not to taxability at a lower rate. *Matter of Bliss*, 6 App. Div. 192, is not authority, since the *Corbett* case. The latter illustrates

the rule by supposing a $15,000 estate of which $6,000 goes to a "bishop" (and so exempt) and $9,000 to persons whose interests are not taxable unless the "property" exceeds $10,000. But if only $5,000 went to the "bishop" then the $10,000 passing to the others, justifies a tax, on each component share.

The *Matter of Bliss* has been followed by the Surrogates of Suffolk County, *Matter of Conklin*, 39 Misc. 771, and of Monroe County, *Matter of Garland*, 40 Misc. 579, in cases where the total estate was less than $10,000. In such case a "sister's" share is not taxable. Deducting her share left less than $250 to collaterals. Under this combination of estimate and deduction it was held there was a "specific exemption."

But Thomas, Surr., in *Matter of Rosendahl*, 40 Misc. 542 takes the view above stated, that the *Corbett* case overrules the *Bliss* case and fixes the interpretation of "exempt" to cases of absolute exemption as contrasted to an exemption or reduced taxability conditioned by the quantum of the estate, or by kinship or other legal relation. See *Matter of Costello*, 117 App. Div. 807, modified 189 N. Y. 288.

§ 833. **Figuring for an exemption.**—The respondents have to show affirmatively that the "property" is less than $10,000 as a unit in value passing, under the act, from a decedent or a grantor, donor or vendor, in contemplation of his death, etc.

First, we note then that the whole estate is first to be marshalled, *real and personal* property; *Matter of Hallock*, 42 Misc. 473; all the decedent owned *or was entitled* to at death. It must be what *he* owned. Hence if his ownership was *joint*, it becomes at his death that of the survivor, and of course does not become taxable as part of the decedent's estate, *Matter of Graves*, 52 Misc. 433, *Matter of Stebbins*, 52 Misc. 438, see "gifts *inter vivos*" below. But when marshalled and showing, e. g., a clear market value of over $10,000 there is still (for discussion, see below) a deduction possible, for the theory is, What is the *net* value of what *passes*, and to which the various persons *succeed?* Thus in *Matter of Page*, 39 Misc. 220, the gross estate was over $10,000 but articles or their pecuniary equivalent being set apart under § 2713 for the widow and children, the net estate was less than $10,000, and was declared free of tax.

The *Libolt* case, 102 App. Div. 29, is not to the contrary. It merely holds that to figure such a net result it is not permissible, where specific articles do not in fact exist, to deduct a pecuniary equivalent *in order to effect an exemption.*

Again, to arrive at the *net* result, debts of the decedent are to be deducted on the principles and in the cases more fully discussed below.

§ 834. **The exemption, as conditioned by the nature of the successor, or his relationship.**—We pass, therefore, to the various classes of persons, etc., who may succeed to "property" and either pay no tax or a one per cent reduced tax. As to some of those specified in § 221 there is no room for doubt; but as to others there has been much and very interesting litigation.

But, primarily, we note that it is the relationship of the person, on whom

the *succession* falls, to the decedent that controls. This cannot be created by transaction after his death. That seems an unnecessary proposition, but it has been tried, by assigning a legacy or share from one whose succession is taxable at five per cent to one whose interest would only have to pay one per cent, to secure a reduction of the tax. This was held ineffectual in *Matter of Cook*, 187 N. Y. 253. But in *Matter of Wolfe*, 179 N. Y. 599, the five per cent legatees all *renounced* absolutely. This threw their legacies into the residuary estate which went to one per cent legatees. Held, the result was to reduce the tax collectible to one per cent. If the object of the *Cook* case is to prevent collusive adjustments as against the State, it would seem that renunciation can nevertheless accomplish what assignment cannot. Yet a renunciation can be based on a valuable consideration, payable *in futuro*, as well as can an assignment!

§ 835. **Mutually acknowledged relation of parent.**—We pass now to the various specific classes of "exceptions." And first, in point of litigated interest, is that of this section heading. This relationship must, of course, be established by proof before the appraiser, and it has been held that the mere fact that in his will, testator describes the beneficiary as his "niece and adopted daughter," will not, *of itself*, be sufficient to warrant the exemption. *Matter of Fisch*, 34 Misc. 146. See discussion by Cullen, Ch. J., in *Matter of Davis*, 184 N. Y. 299. The exemption as it originally read was in favor of "any person" to whom the decedent for not less than ten years prior to the taxable transfer stood in the mutually acknowledged relation of a parent. This elicited different constructions by the various general terms. In the First Department (*Matter of Hunt*, 86 Hun, 232) Van Brunt, P. J., held that the provision covered only the case where an illegitimate child had been recognized by its parent and such recognition had been mutual and had continued for ten years or more, and consequently excluded from the benefits of the exemption the niece of the testator on whose behalf it was claimed that the testator stood to her in the mutually acknowledged relation of parent at the time of his death. In the Third Department (*Matter of Nichols*, 91 Hun, 140), and in the Second Department (*Matter of Butler*, 58 Hun, 400), it was held that the words "any person" were words too general to be capable of such limitation. The *Matter of Hunt* was not appealed. The *Matter of Butler* was affirmed without opinion by the Court of Appeals, 136 N. Y. 649.

But in *Matter of Beach*, 19 App. Div. 630, the same question as in *Matter of Hunt* came up and the same decision was made as had been made in that case. Upon appeal to the Court of Appeals (154 N. Y. 242), Judge Andrews discussed the question at length and held that it was not the intention of the legislature by the provision to cover the case of illegitimate children only. He says:

"The language imports no such limitation. The words 'any person' seem inconsistent with so narrow a construction. There can be no doubt that illegitimate children may come within the description. . . . The clause was intended to have a broader scope; to include among others,

those cases, not infrequent, where a person without offspring, needing the care and affection of some one willing to assume the position of a child, takes without formal adoption, a friend or relative into his household, standing to such person *in loco parentis*, or as a parent, and receives in return filial attention and service. The fixing of a period of ten years, during which the relation must continue in order to entitle such person to the benefit of the exemption, is a safeguard against imposition, and when for that period this relation has been mutually acknowledged" (which at p. 248 it is said is equivalent to "mutually recognized") "the case is fairly brought within the policy upon which children are exempted from the imposition of a tax upon property derived under the will of their parents."

The learned justice further observed:

"If it had been the intention of the legislature to benefit the innocent child of meretricious commerce, there would seem to be no reason why any period of time should be interposed, during which the relation should be acknowledged, as a condition of the child's enjoying the benefit conferred. The death of the parent before the child reached the age of ten years, or an acknowledgment of the relation deferred to a period within ten years of the death of the parent, would deprive the child of the benefit of the exemption, *a result which would seem to be most unjust if the legislature enacted the statute in the interest of illegitimates*. The legislature, at the time of the enactment in question, had in mind the question of legitimacy, for it excluded illegitimate descendants of a decedent from the benefit of the exemption by the words 'or any lineal descendant of such decedent, etc., *born in lawful wedlock*.' In other words, illegitimate descendants are not entitled *as such* to the exemption in any case, or under any circumstances. They only become so entitled under the alternative clause when the conditions of the statute are met, and then not because they are illegitimate, but because they are embraced within the words 'any person.'"

The case involved the further point that, at the time of the inception of the relationship the claimant was an adult. It was held that this did not take the case out of the statute; but that the words "any person" included both minors and adults.

Shortly after this decision was made the legislature amended the act (by ch. 88, of the Laws of 1898) by making the exception read: "Or to any *child* to whom any such decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of parent;" and by adding the proviso, "that such relation began at or before *the child's* fifteenth birthday and was continuous for said ten years thereafter."

In *Matter of Davis*, 184 N. Y. 299, the *Beach* case is said to be in full force except as modified by the amendment, which "was intended to exclude persons from the benefit of the section, unless the relationship was formed in the tender years of the legatee."

The Appellate Division, 98 App. Div. 546, had held that the words "mutually acknowledged" meant reciprocal conduct, and as the girl had never

called her uncle "father," or her aunt "mother" there was no mutuality. Cullen, Ch. J., says: "This is but of slight importance," that mere appellations, being the result of habit or custom, could not override proof of conduct and acts.

The relationship is to be established by *prima facie* evidence. *Matter of Lane*, 39 Misc. 522. The State can rebut. The appraisers must require proof. *Matter of Sweetland*, 47 N. Y. St. Rep. 285. The one claiming the relationship may testify. *Matter of Brundage*, 31 App. Div. 348.

This amendment, like those which have preceded it, will not be held to be *retroactive* and therefore will not affect exemptions, the right to which accrued before it went into operation. See *Matter of Cager*, 111 N. Y. 343; *Matter of Kemeys*, 56 Hun, 518; *Matter of Thomas*, 3 Misc. 388, 390. At first the exemption did not apply to the children of an adopted child. *Matter of Moore*, 90 Hun, 162; *Matter of Fisch*, 34 Misc. 146. See next section.

§ 836. **Child—Stepchild—Adopted child.**—*A stepchild* now comes within

Page 871: In § 836 at end of first paragraph insert: The amendment by L. 1909, Chap. 62 to § 221 omitting "stepchild," but inserting the words: [See page 866, *ante*] "provided that, except in the case of a stepchild, the parents of such child shall have been deceased when such relationship commenced," makes the *Matter of Wheeler*, 115 App. Div. 616, authority for including a stepchild, if the facts warrant, among those "to whom the decedent, etc., for not less than ten years prior to such transfer stood in the mutually acknowledged relationship of a parent."

187 N. Y. 253. A legal relationship arises from natural kinship or from operation of a statute. In the case of adoption it is from such latter origin. Since, therefore, the Domestic Relations Law (see chapter on Adoption, *supra*) gives rights of inheritance to the child adopted and to his heirs and next of kin, or, as stated in the *Cook* case, the artificial relation is given the same effect as the actual relation, it follows that the child of an adopted child must enjoy the same exemptive rights under the transfer tax law as its parents, and can claim such exemption *per stirpes* as to succession from the grand-adopted-parent. *Ibid.* So, reasoning back, the parents' succession to the adopted child's property must be equally exempt. And a legacy to an adopted son's widow is exempt as would be that of the "widow of a son." *Matter of Duryea*, 128 App. Div. 205.

§ 837. **Exemption of certain corporations.**—Keeping in mind the distinction in § 832 between liability to a reduced rate of tax and "property" "herein specifically exempted" we find that absolute exemption from all taxation is given by § 4 of the Tax Law, to certain corporations or associations specified in subd. 7 of that section in language similar to that in § 221.

But this subd. 7 of § 4 is limited to *real* property. Section 221, it will be seen, differentiates

(*a*) *Any property, devised* or *bequeathed*, to any person who is a bishop.

Corporations specifically characterized.

These are exempted, totally, regardless of amount of estate or of legacy.

(*b*) *Personal* property, other than money or securities, to corporations or associations, additionally specified.

The corporations in (*a*) and those under (*b*) together comprise all corporations mentioned in § 4, subd. 7. But the absolute exemption is limited to

Religious, including "bishop"	In contrast with	Scientific
Educational		Moral or mental improvement
Charitable		Library
Missionary		Patriotic
Benevolent		Historical
Hospital		Protection of children or animals
Infirmary		Cemetery
Bible, Tract		Literary

We next note that § 244 reads that the exemptions enumerated in § 4 shall not be construed as being applicable in any manner to art. 10, which includes § 221. This provision added in 1900 (ch. 382) and reenacted in 1905 (ch. 368), makes it unnecessary to quote the cases which naturally grew out of the application of § 220 in the words "to persons or corporations not exempt by law from taxation on real or personal property." For a while the only complete exemption was of religious corporations, including bishops. But now the scheme of §§ 220–221, settled since 1905, is simple and clear. (See Carter on Transfer Tax, for discussion of the development, pp. 63 *et seq.*) It is sufficient here to say that the questions now to be dealt with are merely whether a particular beneficiary comes within the meaning of the descriptive terms.

§ 838. **What institutions exempt.**

(*a*) *Bishop,* includes any degree of bishop, as archbishop or cardinal. *Matter of Kelly*, 29 Misc. 169.

The word "bishop" would probably be limited to the meaning it has in Catholic or Episcopal church law. The "bishop" of a Presbyterian church or parish, however correct his claim may be to the title as a matter of church history, is, when compared to the bishop of a diocese, a "parish priest," and a legacy to a Catholic priest would not be exempt under the act. Thus a bequest to a priest "for masses to be said" is taxable. *Matter of McAvoy*, 112 App. Div. 377; approving *Matter of Black*, 1 Conn. 477. See latter case as to validity of such a bequest. It is not a bequest, the *McAvoy* case holds, for "funeral expenses." In the *Matter of Didion*, 54 Misc. 201, Hart, Surr., held that a bequest for masses, direct to a church, was not taxable. He distinguishes the *McAvoy* case, in that there the bequest was scheduled as an item of funeral expense, and not taxable as being deductible before the taxable assets could be determined.

(*b*) *Corporations.* Mr. Fallows in his work on Taxable Transfers gives the text of the succession acts (*q. v.*).

As it now reads, the section needs little comment on its explicit wording, save as to its general terms.

Thus, corporation is limited to mean *domestic* corporation. *Matter of Prime*, 136 N. Y. 347; *Matter of Balleis*, 144 N. Y. 132.

But it may include one still to be formed, and if, when formed, it falls under the exempting category, its legacy is not taxable. *Matter of Graves*, 171 N. Y. 40.

"Religious" corporation means one "organized for religious purposes." Relig. Corp. Law. But it means more. It contemplates an organization ecclesiastically governed and having as its primary purpose the public worship of God. See *Matter of Watson*, 171 N. Y. 253. So a missionary society, which may fall under the head separately given (*Matter of Saltus*, N. Y., Law J., February 4, 1902), or a Y. M. C. A., *Matter of Fay*, 37 Misc. 532, which is benevolent, while they may have religious purposes are not in the category of the exemption. In *Matter of Prall*, 78 App. Div. 301, the name "missionary" in the title of a society whose purposes were solely religious was deemed not to derogate from its real nature as a religious corporation. But the law itself now includes with religious corporations those organized exclusively for Bible or tract purposes.

(c) *Institutions* having missionary, charitable, philanthropic or benevolent aims, and organized under the Membership Corporations Law must find their exemption specifically in the law. They must be incorporated. See *Matter of Higgins*, 55 Misc. 175, where the following were exempted: General city hospital; Public library; Society for the Protection of Homeless and Dependent Children. And *Matter of Moses*, 60 Misc. 637, where the following were exempted: Young Men's Christian Association of Brooklyn, Brooklyn Society Prevention of Cruelty to Children and Young Men's Christian Association of Brooklyn. See opinion of Ketcham, Surr.

In *Matter of Mergentime*, 129 App. Div. 367, the Metropolitan Museum of Art is held exempt as an educational institution, though not *exclusively* such.

§ 839. **Charter exemptions.**—The principle which the legislature has always seemed to follow of making a clear distinction, where taxation is concerned, between a strictly religious corporation and a charitable corporation, or corporation organized for mission or other beneficent work, led that body in 1900 to pass an act which, by its express terms, removed the exemption contained in § 4 of the Tax Law so far as it applied to any transfer tax, and thus made gifts to charitable corporations subject to this tax. Laws of 1900, ch. 382, § 2. This law is now § 244 of the Tax Law and is as follows: "The exemption enumerated in § 4 of this chapter shall not be construed as being applicable in any manner to the provisions of this article."

In the proceedings brought since the passage of this amendment it was strenuously contended that, at least, the amendment did not affect legacies going to charitable corporations expressly exempt by their charter, and

it was so held in *Matter of Howell,* 34 Misc. 40, where gifts to the Young Men's Christian Association of Brooklyn and the Industrial School of the city of Brooklyn (these corporations being exempt from tax by their charters), were held not subject to transfer tax; but the question has recently been settled by the Court of Appeals, adversely to this view. *Matter of Huntington,* 168 N. Y. 399. In that case the testator, C. P. Huntington, bequeathed four separate legacies to the Roosevelt Hospital, Children's Aid Society, the New York Society for the Relief of the Ruptured and Crippled and the American Female Guardian Society and Home for Friendless, respectively. The two societies first named were expressly exempt from taxation by virtue of special legislative acts; the two last named had no such exemption. The Appellate Division held that the special exemptions of the property of the Roosevelt Hospital and Children's Aid Society relieved them from transfer tax, but that, in the case of the other two societies, their legacies were taxable under the amendment of 1900. The Court of Appeals, however, while following the Appellate Division so far as the legacies to the two corporations not specially exempt were concerned, held that the legacies to the Roosevelt Hospital and Children's Aid Society were also taxable and that the General Tax Law of 1896 operated as a repeal by implication of all former statutes, general and special, upon the subject of exemption from taxation.

§ 840. **Tax on every devolution.**—A rather original application for exemption was made to Surrogate Fitzgerald of New York County in *Matter of the Estate of Anna H. Preston,* reported in the New York Law Journal of May 28, 1901. The decedent died intestate without descendants and her estate consisted wholly of personalty. The husband claimed that he took the assets by virtue of his marital rights, and that it was, therefore, not subject to tax. The Surrogate held, however, that the tax was not limited to transfers of property effected by the statute of distribution or descents, but operates upon any transfer of property effected by operation of law upon the death of a person omitting to make a valid disposition thereof, and that the estate was, therefore, taxable.

§ 841. **Gifts inter vivos and causa mortis.**—It will be noted that the language of the act makes taxable all transfers by deed, grant, bargain, sale or gift made *in contemplation of the death* of the grantor, vendor or donor or *intended to take effect* in possession or enjoyment *at or after such death.* Section 220, subd. 3.

The essential elements to constitute such a gift are that it must have been made in contemplation of the donor's impending death, by a clearly expressed intention to give *in præsenti;* the subject-matter of the gift must have been delivered and the donor must have died from the existing ailment or peril without revocation of the gift. *O'Brien* v. *E. S. Bank,* 99 App. Div. 77, 79, citing *Champney* v. *Blanchard,* 39 N. Y. 111; *Grymes* v. *Hone,* 49 *id.* 17; *Ridden* v. *Thrall,* 125 *id.* 572. See also *Matter of Palma,* 117 App. Div. 366; *Matter of Kidd,* 188 N. Y. 274; *Matter of Baker,* 83 App. Div. 530.

The question of interest to the State, therefore, is the time at which the transfer is complete and effectual. See Schouler on Pers. Prop., vol. II, § 86, as to effect of postponement of delivery. See also *Augsburg* v. *Shurtliff*, 180 N. Y. 138, as to effect of mutual order to savings bank to pay to "survivor" of two depositors. If securities are conveyed to a trustee by an irrevocable conveyance and the transfer is complete upon the execution and delivery of the deed, the transfer is in the nature of a gift *inter vivos* and would not be taxable; but where the conveyance is revocable by consent of the grantor and trustee, and the actual interest or right of enjoyment is postponed until the death of the grantor, it is clear that, within the intent of the act, the transfer is subject to the tax. *Matter of Bostwick*, 160 N. Y. 489; *Matter of Cruger*, 54 App. Div. 405 (aff'd 166 N. Y. 602); *Matter of Green*, 153 N. Y. 217, 223, citing *In re Seaman*, 147 N. Y. 77. See also *Matter of Skinner*, 45 Misc. 559; *Matter of Brandreth*, 169 N. Y. 437; *Matter of Cornell*, 170 N. Y. 423. So, where a trust company receives property to administer during the life of the grantor for his benefit, and to turn over the same, after his death, to persons indicated in his will, the transfer is peculiarly within the intent of the act and subject to the tax. *Matter of Ogsbury*, 7 App. Div. 71 (see opinion of Williams, J.). In *Matter of Edgerton*, however (35 App. Div. 125), a transfer of the greater portion of his property was made by a man seventy-two years old, four years before his death. On the transfer he took back, from the different transferees, bonds conditioned for the payment to him of a certain sum of money per annum until his death. The obligors further agreed to deposit with a trust company, as collateral security for the performance of the condition of the bonds, the securities so transferred to them, the same to remain so on deposit until the death of the transferor, the trust company being authorized to collect the dividends on the securities in case of failure of the obligors to make payment of the income to the life beneficiary until a sufficient amount should have been collected by it to pay the amount due, or upon reasonable notice to both parties to sell so much of the securities on deposit with them as might be necessary to realize the sum due. It was here held that the transfers were intended to take effect in possession and enjoyment at the time that they were made, and were, therefore, not within the statute. To the same effect see *Matter of Cary*, 31 Misc. 72; *Matter of Thorne*, 44 App. Div. 8, rev'g 27 Misc. 624; *Matter of Spaulding*, 49 App. Div. 541; *Matter of Mahlstedt*, 67 App. Div. 176; *Matter of Cornell*, 66 App. Div. 162; *Matter of Bullard*, 37 Misc. 663, aff'd 76 App. Div. 207. And on the general question as to what is a gift *inter vivos*, see opinion in *Matter of Swade*, 65 App. Div. 592. See, also, *Matter of Reichert*, 38 Misc. 228.

Surrogate Marcus in *Matter of Spaulding*, 22 Misc. 420 (aff'd 49 App. Div. 541), discusses at length the difference between gifts *causa mortis* and gifts *inter vivos*. And he observes (at p. 424): "Gifts apparently *inter vivos* may nevertheless have attached to them such conditions and circumstances that clearly bring them within the statute," and, he intimates,

"gifts *inter vivos* where the grantor is *in extremis*, would doubtless come within the purview of the statute."

But in a very recent case (*Matter of Mahlstedt*, 67 App. Div. 176) the Appellate Division of the Second Department held that where the president of a corporation being ill, transferred to his wife all of his stock in the corporation with the exception of one share, which transfer was absolute upon its face, and at the same time made a will by which he made his wife the sole beneficiary, the fact that the testator died within three weeks after the transfer, and that he died of the same illness with which he was afflicted at the time of the transfer, had no bearing upon the question. The court says (p. 179):

"The only point to be determined is whether the transfer was made in the then belief that he was not going to get well; that it was made in contemplation of his impending death and for the purpose of defrauding the State of the transfer tax, for that is the essence of the matter, and there is no presumption that a man intends to commit a fraud of any kind. The rule is also well settled that where two inferences may be drawn from a given state of facts, one of which is lawful and the other unlawful, the result which is consistent with innocence is to prevail. Looking at the facts in this case in the light of these rules, we are led irresistibly to the conclusion that they do not warrant holding that the transfer of the 559 shares of stock was made in contemplation of death, in the sense in which that phrase is used in the statute."

But where a father transferred his stock in a corporation to his daughters without consideration and upon condition that he should receive the dividends and have a right to vote upon the stock until his death, it was held that such a transfer was subject to tax within the provision of the statute. *Matter of Brandreth*, 28 Misc. 468. To the same effect see *Matter of Sharer*, 36 Misc. 502. In this case, after the death of Sharer, there were found in a box of his at his bank, on the outside of which box there was pasted a paper bearing his name and also the name of Margaret Caldwell, some unrecorded deeds purporting to convey to Margaret Caldwell and to Julia Caldwell certain property of Sharer's, and also an executed assignment of some shares of stock, a mortgage to Julia Caldwell and two certificates of deposit with indorsements on the back thereof to pay to the order of Julia Caldwell. These instruments were in envelopes on which the doctor had written "the property of" the different transferees (naming them). The deeds were all executed before a notary. The court, in holding all this property subject to a transfer tax, says: "It is true that he signed certain papers which if delivered in good faith and followed by a change of possession and acts of ownership on the part of the transferee would be good and effectual to carry an absolute title away from him; but to all the world after the date of the alleged delivery he continued to be and remain the owner of the property as before; the property was not within the reach of either Margaret or Julia Caldwell when it went to Sharer's private box at the bank; he received the income from it and so far as can be determined

treated it as his own; he still exercised dominion over it and did not permit the transfer to take effect so far as the use or control of the property was concerned during his life.

"Whatever may be alleged as to the legality of the execution of the papers and the alleged subsequent delivery thereof, yet the property was so managed and such management acquiesced in by the parties that the transfer if any took effect after Sharer's death.

"If a gift were claimed, then it can be surely asserted that the supposed donor retained the property under his control and it was within his power to such an extent as to invalidate the gift theory; if a grant or transfer, then the property was retained and controlled by the grantor during his life and never actually took potential effect until after his death." See also *Matter of Miller*, 37 Misc. 449.

In *Matter of Masury*, 28 App. Div. 580, the Appellate Division in the Second Department held that the law relating to taxable transfers did not apply in the following case: John W. Masury "acting in good faith and with the single purpose of providing for his adopted sons," executed and delivered certain deeds of trust under which the adopted sons who were the beneficiaries were to receive the avails of the trusts thereafter and during the lifetime of the grantor; but a clause was inserted in each deed reserving the right of the grantor to revoke and annul the same during his lifetime. The point before the court was whether these transfers were in the nature of "gifts among the living or whether they were in some manner contingent upon the death" of the grantor. And the court held the test to be, whether first the beneficiaries were in the enjoyment of the property or the income from the property prior to the death of the grantor; and, second, whether their relations to the property were not changed by the fact of such death. It was held distinctly that these deeds were not intended to take effect in possession or enjoyment "at or after the grantor's death" within the meaning of § 220 of the Tax Law. *Id.*, at p. 548. The court held that the reservation of the right to revoke and annul the deed was a mere prudent precaution, and the fact that the grantor had not made use of it up to the time of his death, precluded the presumption that he would have done so at any time. And *Matter of Ogsbury*, *supra*, was distinguished. But in the same case the grantor made a separate trust deed transferring securities valued at over $100,000, by which it was provided that the avails should go to the grantor or his order during his lifetime, and after his death the avails were to go to one of his grandsons during his life, and after to those who might be designated in his will or to his children. Subsequently to the execution of this last deed, a direction was given to the trustee by the grantor to pay to the grandson, the beneficiary, "all the net income arising from the trust fund transferred to said company under said deed by trust until this authority is revoked by me in writing." Under this deed it was clear that the rights of the grandson did not accrue until the death of the grantor, and this brought it within the rule laid down in *Matter of Seaman*, 147 N. Y. 69,

and therefore the securities and property transferred by the last deed were held liable to the tax. *Matter of Masury, supra,* at p. 588.

A transfer tax will also be laid on the amount of savings bank accounts in decedent's name "in trust for" others, where, while "an absolute trust was created, the death of the depositor was the culminating event in the creation of the trust." *Matter of Pierce,* 60 Misc. 25; *Matter of Edwards,* 32 N. Y. Supp. 901. As to the rule in regard to such deposits see *Matter of Totten,* 179 N. Y. 125, opinion of Vann, J.

§ 842. **Effect of foreign law and of decedent's contracts.**—Two questions arising out of the community law of other States have come before an appraiser in New York County recently and are of sufficient interest to be spoken of here. In the first case (*Matter of Van Benthuysen,* report filed June, 1902) a resident of Louisiana died leaving, among other assets, bank deposits in New York State. It was contended by his executors that because of the fact that the laws of Louisiana provided for a community interest on the part of the wife in one-half of the decedent's property, one-half of the amount of these deposits should be exempt from tax, as they passed to the wife under the community laws of Louisiana and not by will or intestacy.

The other case was *Matter of Steinbrugge,* report filed July, 1902. Mr. Steinbrugge, at the time of his marriage, was a resident of Hawaii, where the Code Napoleon, which recognizes the community law, prevails. He entered into an antenuptial agreement by which his future wife was to take, upon his death, absolutely one-half of the interest in his estate. Some years after marriage Mr. and Mrs. Steinbrugge came to this State to live, and he died a resident of the State. It was contended that this antenuptial agreement operated to transfer one-half of the husband's property to the wife absolutely on the death of Mr. Steinbrugge, and that this half was not subject to tax. In both cases the appraiser found for the State.

In the latter case it would appear to be clear that the parties to the antenuptial agreement, by becoming residents of New York State, had made themselves amenable to the New York law, and that no contract made between them, while residents of another State or country, could operate to defeat the right of this State to a tax on the estate. Some doubt, however, is thrown on this proposition because of a decision just made (May, 1902) in *Matter of Baker,* 38 Misc. 151. Here the Surrogate of Monroe County has declared that an interest passing to the wife of a resident decedent under an antenuptial agreement was not subject to tax. This case was affirmed, 83 App. Div. 530, on the ground that the contract created a debt of the decedent obligor, which while enforceable only from and after his death, was no more taxable than any other debt. It is to be noted this agreement was in lieu of dower. (See next section.)

In the *Van Benthuysen* case a different proposition enters, i. e., that as to whether comity of States would require the recognition of a law of

the State of the domicile, a recognition which would result in substantial money loss to the State whose comity is invoked.

§ 843. **When antenuptial agreement may obviate tax.**—But, it must be reiterated, as in § 841, the question for the State is, when did the transfer become complete? In the *Matter of Miller*, 77 App. Div. 473, the transfer by virtue of such a contract became complete *inter vivos*, and subsequent relations, acts and decease, were held not to alter the effect of such complete delivery. See for the opposite situation *Matter of Brandreth*, 169 N. Y. 437; *Matter of Green*, 153 N. Y. 223. So where the antenuptial agreement is to make a will—and the contractors do so, the transfer is by the will and is subject to the tax. *Matter of Kidd*, 188 N. Y. 274. If the contractor does not perform the contract, but his devisee, or heir, or executor-trustee is compelled to do so by judgment of a competent court, the effect, as to taxability, is the same. *Ibid.*, citing *Phalen* v. *U. S. Trust Co.*, 186 N. Y. 178.

§ 844. **Powers.**—Subdivision 5 of § 220 as to powers and their exercise gave rise at first to considerable discussion and a variety of decisions, but that law has now been pretty thoroughly construed by the highest courts. See *Matter of Delano*, 176 N. Y. 486, rev'g 82 App. Div. 147. In this case the power, exercised by will, was derived from a deed executed *before* the act was passed. This subdivision is an amendment passed by the legislature of 1897 (ch. 284 of the Laws of that year), and was designed to meet the ruling of the Court of Appeals in *Matter of Harbeck*, 161 N. Y. 211, that the appointees of a power take under the will *creating the power* and not under the instrument *by which the power is exercised.* The constitutionality of that amendment was vigorously assailed. The questions involved, however, were largely disposed of in *Matter of Vanderbilt*, 50 App. Div. 246, affirmed without opinion, 163 N. Y. 597. (A later decision in the matter of the same estate was affirmed by the same court on the decision in this case in 58 App. Div. 619, and this last decision was affirmed without opinion by the Court of Appeals in 166 N. Y. 640.) By the will of William H. Vanderbilt, who died in 1885, a trust fund was established in favor of his son, Cornelius Vanderbilt, for life, the testator directing that upon the death of Cornelius, the fund should be paid to his lawful issue in such shares or proportions as Cornelius might, *by his will*, direct or appoint, and in default of such appointment the gift was made directly to the issue of Cornelius with an alternative disposition upon failure of such issue. Cornelius Vanderbilt died in 1899, leaving a will by the terms of which he exercised the power in question in favor of his issue. At the time of the death of William H. Vanderbilt there was no tax to lineal descendants, and it was contended that, as the rights under the will were fixed at the time of his death, no later law could affect those rights; that a law which attempted to tax the beneficiaries of the power exercised by Cornelius Vanderbilt was unconstitutional; that the execution by Cornelius of the power of appointment related back to the will of the father, and that the interests affected by the exercise of the power were to be re-

garded as coming under the administration of William H. Vanderbilt's estate and should be controlled by the law existing at the time of his death. It was held, however, that, although the execution of a power made for certain purposes relates back to the instrument conferring the power, there was no complete vesting of the estate in the donees of the power until that power was exercised, citing *Matter of Stewart*, 131 N. Y. 274, and that the law in force at the time of the exercise of the power, and not of the creation of the power, controlled. To the same effect see *Matter of Potter*, 51 App. Div. 212; *Matter of Tucker*, 27 Misc. 616, and *Matter of Dows*, 167 N. Y. 227, aff'd as *Orr* v. *Gilman*, 183 U. S. 278. This last case also held that although the property devised by the testator who created the power was at that time real estate, as it consisted of personal property when the power was exercised, it was subject to tax. But where an original testatrix by her will gave her property to her husband for life with power of disposition during his life, and by will, and directed that the residue or so much thereof as should remain at the death of the life tenant undisposed of should then pass to two certain legatees or the survivor, and the first testator died before the Collateral Inheritance Tax of 1885 was passed, but the life tenant died in 1894 having exercised his power of disposition, or attempted to do so by directing the transfer of the property coming to him from his wife, the original testator, to the executors of her will to be distributed according to the provisions of her will, the Court of Appeals held (*Matter of Langdon*, 153 N. Y. 6) that his direction was not an exercise of the power of disposition but the relinquishment of his right of disposition and that the transfer or succession referred back to the time of the death of the original testator and that such remainder was not therefore taxable, citing *In re Seaman*, 147 N. Y. 69; *In re Stewart*, 131 N. Y. 274; *In re Curtiss*, 142 N. Y. 219. The donee of a power, in contemplation of law, has a disposing power as broad as could attach to complete ownership. It is *his* disposition. *Isham* v. *N. Y. Assn.*, 177 N. Y. 218, 223. See also *Matter of Cooksey*, 182 N. Y. 92. And see *Matter of Lord*, 111 App. Div. 152. This case deals with the effect of *situs* of property as to which power is exercised, and also the effect, on the exercise of power, of the state of the property disposed of, when the power is exercised. But see *Matter of Hull*, 111 App. Div. 322. And in *Matter of Thomas*, 39 Misc. 137, it was held that the exercise of a power by domestic will was not taxable when it was created by foreign will, disposed of foreign property, and was governed by foreign law. See *Matter of Lowndes*, 60 Misc. 506. In determining whether the tax should be a five per cent or a one per cent tax, the degree of relationship *to the appointee* and not to *the appointor* of the power controls. *Matter of Walworth*, 66 App. Div. 171; *Matter of Rogers*, 71 App. Div. 461. In *Matter of Rogers*, *supra*, it was also held, where testator gave property to his wife with power of appointment and in exercising the power she directed that a loan obtained by her during her lifetime and secured by her bond be repaid out of the property covered by the power, that such a payment constituted a transfer upon which the creditor would have to pay tax.

§ 845. **Failure to exercise power.**—In *Matter of Warren*, 62 Misc. 446, Heaton, Surr., says: "The surrogate has no jurisdiction to assess a tax upon property which does not pass by the will of the deceased. If the power of appointment has not, in fact, been exercised, or if, in fact, no property has been transferred by it, the surrogate was without jurisdiction to assess a tax by reason of any succession; and he may modify his order which has held that a transfer or succession did take place which did not in fact take place. *Matter of Backhouse*, 110 App. Div. 737, aff'd 185 N. Y. 544." Section 220, subd. 5, last half, provides that if the one having the power shall fail or omit to exercise it, yet the tax is to be laid as if he had acted. This was held invalid in *Matter of Lansing*, 182 N. Y. 238, on the principle, "no transfer, no tax." The revisers or "consolidators," nevertheless, in reporting the consolidated laws, report this provision unchanged, and it has been re-enacted. It should be eliminated by amendment. Since the *Lansing* case it is inoperative as being void.

§ 846. **The pecuniary boundaries of taxability.**—In § 832 is discussed the effect of "is of the value of $10,000, or more." The rule there reached is that if the aggregate transfers to taxable persons exceed $10,000 then each share, however small, is taxable. What is the rule under the $500 limitation in § 220? Suppose an estate of less than $10,000, of which all but $400 goes to persons whose relationship to decedent exempts their succession shares by virtue of § 221, but the $400 passes to taxable persons. Is the $500 limit exceeded because the aggregate amount passing exceeds $500? Or is the limit dependent on the aggregate amount *passing to taxable persons?* The latter is the rule asserted in *Matter of Mock*, 49 Misc. 283, following *Matter of Bliss*, 6 App. Div. 192. The reasoning in the latter case is that if the estate passed, except as to the $400, to a bishop, it is reasoned, then it is specifically exempt by law from tax. Equally is the same amount so exempt when passing to a son or wife also specifically exempt if the estate is less than $10,000. This leaves the total passing from testator, less than $500 for purposes of this tax. Hence the shares are not taxable. But in *Matter of Costello*, 189 N. Y. 286, the contrary is held. There the distributable estate is $654.90 (i. e., over $500). One-half went to a sister, and was not taxable. The balance, $327.45 (i. e., less than $500), went to nieces, who are not exempted by § 221. Held, whether or not the shares of nieces are subject to the tax is determined by the aggregate amount of the decedent's personal property. If the aggregate is more than $500 the shares are taxable.

§ 847. **From what fund tax is paid.**—The tax is a lien on the "property transferred," § 224. The executor may deduct it from the legacy, or from the appraised value of the property. *Ibid.* It remains a lien on real property until paid. The executor is personally liable for it. *Ibid.*

So it may be said the law now directs the payment of the tax *out of the property transferred.* Under the act of 1896, ch. 908, it was held the tax on life estates was payable out of income and that no tax could be imposed on contingent remainders. *Matter of Johnson*, 6 Dem. 146; *Matter*

of Roosevelt, 143 N. Y. 120. But since then it has been amended by ch. 76, Laws of 1894, and ch. 658, Laws of 1900. Hence "whenever a transfer of property is made, upon which there is, or by any contingency there may be, a tax imposed, the property is to be properly appraised at its clear market value, and the transfer tax is due and payable forthwith *out of the property transferred.*" *Matter of Tracy*, 179 N. Y. 501, 509, rev'g 87 App. Div. 215. See also *Matter of Hoyt*, 44 Misc. 76. Hence the tax upon a trust, whether on the life estates or on the remainders, is payable out of principal. *Ibid.*

Of course, the will may specifically control this subject. *Clarke* v. *Clarke*, 145 N. Y. 476. So where A disposed by will of $500,000 under appointment in her father's will and of $1,000,000 of her own, all in bequests, and directed her executors to pay transfer tax from residuary estate, held, in *Isham* v. *N. Y. Asso. for the Poor*, 78 App. Div. 396, that this direction applied to *all* bequests (aff'd 177 N. Y. 218) including those made under power.

Where an annuity is charged on a fund, the fund not the income pays the tax. *Matter of Tracy, supra.* See opinion as to how tax must be computed. But an annuity is not charged on a fund by merely hortatory words. *Post* v. *Moore*, 181 N. Y. 15.

If the transfer tax on realty is paid out of personalty which afterwards proves insufficient to pay the creditors they are entitled to reach the personalty, and in a proper case the administrator may be subrogated to their claim for their benefit and directed to pay them out of funds paid him on partition. *Hughes* v. *Golden*, 44 Misc. 128.

But when the property in question was New Jersey realty left by will of nonresident of New York to her son for life and a power of appointment to him as to the remainder, it was held no tax could be imposed though he resided here and left a will proved here. *Matter of Hurd*, 47 Misc. 567.

§ 848. **The procedure; jurisdiction of the Surrogate.**—We pass now to the practice.

Jurisdiction of the court

of one or more Surrogates.

§ 228. *Jurisdiction of the Surrogate.*—The Surrogate's Court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction *to hear and determine* all questions arising under the provisions of this article, and *to do any act in relation* thereto authorized by law to be done by a Surrogate in other matters or proceedings coming within his jurisdiction; and if two or more Surrogates' Courts shall be entitled to exercise any such jurisdiction, the Surrogate *first acquiring jurisdiction* hereunder shall retain the same to the exclusion of every other Surrogate.

Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the

provisions of article seven, title three, chapter eighteen, of the Code of Civil Procedure shall set forth the name of the state comptroller as a person to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state and the value thereof; and upon the presentation thereof the Surrogate shall issue a citation directed to the state comptroller; and upon the return of the citation the Surrogate shall determine the amount of the tax which may be or become due under the provisions of this article and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such Surrogate if the state comptroller were a creditor of the decedent.

Notice of proceedings for ancillary letters must be given to State Comptroller.

Considerable question at first arose as to the jurisdiction of the Surrogate's Court in the case of an estate of a nonresident decedent dying leaving stock in New York corporations where certificates were not within the State. Such stock was declared to be subject to a transfer tax by the Court of Appeals in *Matter of Bronson*, 150 N. Y. 1, but in that case the jurisdiction of the Surrogate's Court was not expressly challenged. The question, however, was clearly settled by the same court in *Matter of Fitch*, 160 N. Y. 87. It was contended in that case that while the decedent's interest in the stock of a New York corporation was property within the State within the meaning of the Taxable Transfer Act, it was still not property within the contemplation of § 2476 of the Code which regulates the jurisdiction of the Surrogate's Court over decedents' estates. Chief Justice Parker, in giving his opinion (p. 93), says: "While much may be said in support of that contention, and, indeed, has been said by the learned counsel for the appellant, it is our view, after an examination of the provisions of § 10 of the act of 1892 (*supra*), that the Taxable Transfer Act and the sections of the Code providing for the granting of letters testamentary and administration, or of ancillary letters, should be read together as if constituting one enactment. Thus reading them, the taxing provisions of the act and the provisions providing the machinery for collection of the tax are in perfect harmony, and that which is held to be property within the meaning of that portion of the statute which provides that a tax shall be imposed upon its transfer is also property for the purpose of conferring upon the Surrogate's Court jurisdiction to impose the tax."

Where a nonresident leaves property in two counties the Surrogate, who first issues ancillary letters, acquires exclusive jurisdiction to appoint an appraiser. *Matter of Hathaway*, 27 Misc. 474. See *Matter of Arnold*, 114 App. Div. 244, construing § 228 (then § 229) carefully as to this *exclusive* jurisdiction. This was a case of a nonresident leaving personal property in one county only. The fact that property of a nonresident who died prior to the Transfer Tax Act was left in New York State until after the passage of that act will not give jurisdiction to the Surrogate's Court, and such property was held not taxable in *Matter of Pettit*, 65 App.

Div. 30. It was held in *Weston* v. *Goodrich*, 86 Hun, 194, that the Surrogate's Court alone had original jurisdiction to determine the tax, and that a proceeding brought in the Supreme Court for that purpose was improperly brought, the jurisdiction of that court, so far as the transfer act is concerned, being limited to review on appeal.

The jurisdiction of the Surrogate is not divested by the fact that executors of a non-resident decedent, some of whose property was within the State at the time of his death and subjected to this tax, have accounted, made distribution, and been discharged in the State of the decedent's domicile. So far as the State of New York is concerned, and the collection of its tax, the duty of foreign executors has been stated to be to cause the tax to be ascertained and to pay the same before removing the property from this State. *Matter of Embury*, 19 App. Div. 214, 217, affirmed 154 N. Y. 746; *Matter of Crerar*, 31 Misc. 481. They cannot, by evading this duty, divest the jurisdiction of the Surrogate's Court on behalf of the State to collect the tax. But where foreign executors have actually removed the property, the order which will be entered need not in terms run against the executors; but, as was held in *Matter of Hubbard*, 21 Misc. 556, "It will specify the names of the legatees taking taxable interests, the value of such interests respectively, and the tax due upon the transfer thereof. Consequently proceedings may then be taken against the beneficiaries or against the corporations in which the decedent held the stock, as well as against the personal representatives."

§ 849. **The Surrogate's jurisdiction conditioned by the remedial provisions of the statute—Notice to persons interested.**—The jurisdiction of the Surrogate depends upon the provisions of the statute providing a mode for ascertaining and collecting the tax. The original statute of 1885, even as amended by the act of 1887, declared certain property belonging to nonresident intestates at the time of their death to be liable for taxation within the State but provided no means of assessing and collecting the tax.

The Court of Appeals (*Matter of Stewart*, 131 N. Y. 284) held that it was not sufficient for the legislature merely to declare that such interests were taxable; and in the absence of provisions as to collection of the tax the law was imperfect and incapable of execution. See *Matter of Embury*, 19 App. Div. 214, 217, aff'd 154 N. Y. 746. A tax cannot be legally imposed unless the statute in addition to creating the tax, provide for an officer or tribunal who shall appraise and assess the property on notice to the persons interested. *Matter of Embury, supra*, citing *Stuart* v. *Palmer*, 74 N. Y. 188; *Matter of McPherson*, 104 N. Y. 321; *Remsen* v. *Wheeler*, 105 N. Y. 575.

The procedure in transfer tax proceedings includes the giving of a notice to persons interested as to the imposition of the tax, a hearing or an opportunity to be heard in reference to the value of the property and the amount of the tax, and a judicial determination of the value of the property and the amount of the tax preliminary to the liability of the taxpayer becoming finally fixed. Such are the proceedings, the ab-

sence of any of which the Court of Appeals said, in *Matter of McPherson*, invaded the constitutional right to due process of law. It will be seen from the following discussion of the procedure in transfer tax proceedings, that the legislature has safeguarded the rights and remedies of the State in almost every conceivable way as to property of residents and nonresidents intended to be subjected to the tax. It must be borne in mind that the *procedure* is controlled by the statute existing in force at the time the proceeding is instituted. See *Matter of Davis*, 149 N. Y. 539. This is so, although the *rights* of the parties depend upon the law in operation at the time of the decedent's death. *Ibid.*, and cases heretofore cited. The jurisdiction of the Surrogate to hear and determine all questions in relation to the tax arising under the provisions of this act, is a special grant of power, but in broad and comprehensive language; and under this grant it has been held that the Surrogate's Court has power to decide every question that may arise in the proceeding before him which may be necessary in order to fully discharge the duties imposed upon him by the act. See *Matter of Ullman*, 137 N. Y. 403, 407. In that case it was held, in consequence of this view of his power, that he had jurisdiction to hold that the property sought to be subject to the tax did not as a matter of law pass to the legatees or devisees under the will in question but to the heirs-at-law or next of kin. See cases cited in Judge Russell's brief for appellants, *id.*, p. 404.

§ 850. **Double nature of Surrogate's function.**—The jurisdiction given to the Surrogate, moreover, is a double one. He is in the first instance made a taxing officer fixing the amount of the tax upon the report of the appraiser. From this formal determination, which is made "as of course," appeal may be had to the Surrogate as a judicial officer for his judicial examination into the questions of law arising upon such appeal. See *Matter of Costello*, 189 N. Y. 288. If the Surrogate is appealed to to hold that no proceeding is necessary by reason of complete exemption he must act on notice to all parties interested. This means, primarily, the State. If he acts without such notice his order may be set aside. *Matter of Collins*, 104 App. Div. 184. It is not improper to secure an order, on due notice, that the estate is below the statutory limit. *Matter of Schmidt*, 39 Misc. 77.

§ 851. **Appointment of appraisers.**—Section 229 of the Tax Law in so far as it treats of the appointments of appraisers provides as follows:

"The state comptroller shall appoint and may at pleasure remove, not to exceed six persons in the county of New York; two persons in the county of Kings, and one person in the counties of Albany, Dutchess, Erie, Monroe, Oneida, Onondaga, Orange, Queens, Rensselaer, Richmond, Suffolk and Westchester, to act as appraisers therein. . . ." The rest of this provision is administrative. The question of the Surrogate's independent power to appoint appraisers not nominated by the Comptroller is no longer an open one. He has no such power. See *Matter of Sondheim*, 32 Misc. 296, aff'd 69 App. Div. 5; *Matter of Fuller*, 62 App. Div. 428; *Matter of Wallace*, 71 App. Div. 284; *Matter of Duell* v. *Glynn*, 56 Misc. 41.

§ 852. **The petition.**—The petition under this section may be made either by the executor on behalf of the estate or by the state comptroller on behalf of the State. *Matter of O'Donohue*, 28 Misc. 607, aff'd, 44 App. Div. 186. The proceedings, if begun by the executor, should be begun as soon as conveniently may be, because of the right of the estate to a discount of five per cent, if the tax is paid within six months from the accruing thereof. See § 223.

The following form for the petition for the appointment of appraiser is suggested:

Petition for the appointment of an appraiser under section 229.

Surrogate's Court,
County of

In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the property which was of Deceased.

To the Surrogate's Court of the County of

The petition of respectfully shows to this court and alleges:

I. That your petitioner is (one of) the executors named in the last will and testament of the decedent above named, and as such is a person interested in his estate.

II. That on or about the day of 19 the said then residing within the county of (*or, if decedent be a nonresident*, without the State of New York) was seized and possessed of property within the State of New York, all or some part of which your petitioner is informed and believes is claimed to be subject to the payment of the tax imposed by the act in relation to taxable transfers of property; and that on the said day of 19 the said deceased departed this life.

III. That the said decedent made a last will and testament which was duly admitted to probate by the Surrogate's Court of the county of and letters testamentary thereon were duly issued on that day to your petitioner.

Note. See paragraph IV below. (*Note.*)

[*In case the decedent die intestate, paragraphs I and III should be modified in the following manner:*

I. That your petitioner is the administrator of the goods, chattels and credits of the decedent, and as such is a person interested in the estate of the above named decedent.

III. That the decedent died intestate, on the day of 19 and on the day of letters of administration on his estate were duly issued to your petitioner by the Surrogate's Court of the county of and that under the Laws of Intestacy of the State of the

decedent's property passed at his death to the following named persons:

(*Here insert names of heirs and distributees.*)]

IV. That the names and post-office addresses, and the nature of their respective interests, of all the persons interested in the estate of the said decedent, and who are entitled to notice of all proceedings herein, including the Comptroller of the State of New York are as follows, *e. g.:*

NAME.	ADDRESS.	NATURE OF INTEREST.
John Smith.	London, England	Sole Residuary Legatee.

Wherefore, your petitioner prays for an order appointing some competent person as appraiser according to the law in such case made and provided, and directing him to give to all persons entitled to notice of the time and place of such appraisal such notice thereof as to the court may seem sufficient.

Petitioner.

(Verification.)

§ 853. **Designation of appraisers.**—Upon the filing of this petition the Surrogate will make the order appointing the appraiser. In the counties where the office is salaried he must select the Comptroller's appointee or one of them. In other counties he designates the county treasurer. But he *must* designate. The direction is mandatory. *Matter of Kelsey* v. *Church*, 112 App. Div. 408. The appraiser should then serve notice by mail on all parties who are, by law, interested in the whole estate and by law entitled to notice of all proceedings affecting the same, § 230. See *Matter of Astor*, 6 Dem. 402, 410. The length of the notice is fixed by the Surrogate in each case, there being no provision in the statute as to the length of notice to be given.

The order is on a form provided now by all Surrogate's offices:

It is not essential under the law as it now exists that the order should recite the names and addresses of the parties to be served with the notice, and it is quite customary to omit such recital from the order appointing the appraiser. It is enough that the appraiser actually mail the notice to all parties entitled thereto. (See below.)

It should be noted that § 230 formerly read that the duty of the appraiser was "to fix the fair market value *at the time of the transfer thereof* of property of persons whose estates shall be subject to the payment of any tax imposed by the articles." These words in italics were misleading when taken in connection with the other sections of the law, which accounts for their omission from the section as it now exists.

§ 854. **When to appoint the appraiser.**—The appointment of an appraiser by the Surrogate is not limited by the language of the act to any particular time. For some years after the passage of the act it was not customary to bring a proceeding for such appointment until after the ad-

vertising for claims had been completed and the inventory made by the two appraisers appointed by the Surrogate. Indeed it was intimated in *Matter of Westurn*, heretofore cited, that "it would seem to be prudent and reasonable for the Surrogate to take notice of the statutory system for the settlement of estates and to defer the appointment of an appraiser for the period necessary to enable the executor or administrator to advertise for claims and ascertain whether there are any creditors." But it was held in *Matter of Vassar*, 127 N. Y. 1, that the Surrogate was not bound to await a final accounting before proceeding under the statute, and the general practice now is to bring the proceeding at as early a date as possible after the qualification of the executors, so that the estate may take advantage of the five per cent rebate provided for in case of payment within six months after the date of death.

§ 855. **The appraiser, his duty and power.**—Prior to the act of 1892, ch. 399, the appraiser had no power to administer oaths or take testimony or to compel the attendance of witnesses. Attention having been called to this omission (see *Matter of Astor*, 6 Dem. 413), the act was amended and the present law in regard to the duty and power of the appraiser reads as follows:

Duty of appraiser.

§ 230 (in part). *Proceedings by appraisers.*—Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall, at such time and place, appraise the same at its fair market value, as herein prescribed, and for that purpose the said appraiser is authorized *to issue subpœnas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath* concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said Surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to the said matter as said Surrogate may order or require.

The power now given includes taking testimony by commission. Of course the commission must be directed by the Surrogate. *Matter of Wallace*, 71 App. Div. 284. The Surrogate first acquiring jurisdiction controls the proceeding exclusively. *Matter of Hathaway*, 27 Misc. 474.

The powers of an appraiser in conducting the inquiry are threshed out in the *Matter of Bishop*, 82 App. Div. 112. See opinion by Patterson, P. J. The Webb case, N. Y. Law Journal, May 18, 1901, holds the appraiser can compel by *subpœna duces tecum* the production of material papers.

Upon his appointment the appraiser, under the law as it formerly existed, first took an oath that he would truly, honestly and impartially appraise and fix the value of the decedent's property subject to the tax, under the

act relating to taxable transfers; and that he would make a true report thereon to the best of his understanding. Under the law, as it now exists (§ 229), each of the official appraisers, upon taking office, files with the state comptroller his oath of office and his official bond of not less than one thousand dollars in the discretion of the state comptroller, conditioned for the faithful performance of his duties as such appraiser, which bond must be approved by the attorney general and the state comptroller.

The form of the notice to be given to the persons indicated in the order must be substantially as follows (the form in use in the New York County Surrogate's Court being indicated):

Surrogate's Court,
County of

In the matter of the Appraisal under the Act in relation to Taxable Transfers of Property of the property of Deceased.

You will please take notice that, by virtue of an order of Hon. one of the Surrogates of the County of New York, made and dated the day of 19 and pursuant to provisions of chapter 908 of the Laws of 1896, entitled "An Act in Relation to Taxable Transfers of Property," and the acts amendatory thereof, I shall, on the day of 19 at o'clock in the noon of that day, at Room No. Building, No. in this City of New York, proceed to appraise at its fair market value, all the property of said deceased, passing by h last Will and Testament, or by the Intestate Laws of the State of New York, which is subject to the payment of the tax imposed by the said act and the acts amendatory thereof.

Note. This notice to infants is required in New York County and might well be required everywhere.

And such of you (*note*) as are hereby notified as are under the age of twenty-one years, are required to appear by your guardian, if you have one, or if you have none, to appear and apply for one to be appointed, or in the event of your neglect or failure to do so, a guardian will be appointed by the Surrogate to represent and act for you in the proceeding.

New York, 190

.....

To Appraiser.

This notice was, by the original act, required to be given to such persons as the Surrogate might by order designate.

The Court of Appeals held (*Matter of McPherson*, 104 N. Y. 306, 422), that the statute contemplated that the Surrogate should designate in his order *all the persons entitled to notice*, in spite of the indefiniteness of the language. And it held also, that if he should omit to do so, it would be an error upon which any tax imposed upon the persons not notified would be invalid, as having been imposed without jurisdiction. See opinion of

Earl, J. The provisions as to notice, in the law as it then existed, were that the appraiser should give notice of the appraisal "to such persons as the Surrogate may by order direct." The present law provides that the appraiser shall give notice "to all persons known to have a claim or interest in the property to be appraised, including the state comptroller and to such persons as the Surrogate may by order direct." The better practice would appear to be to set out in the order appointing the appraiser the names and addresses of the parties to be served, although this is not essential so long as notice is given by the appraiser to the parties interested.

In *Matter of Winter*, 21 Misc. 525, Surrogate Marcus held that a proceeding to assess the tax, in which notice is not given to a person interested, in that case the sole heir-at-law, was fatally defective and should be set aside, citing *Matter of McPherson, supra.*

§ 856. **Special guardian.**—The notification in the appraiser's notice to persons under the age of 21 years, with reference to their appearance by guardian, should be carefully noted. Where the application is made for the appointment of the special guardian in such proceedings, the provisions of the Code with regard to the appointment must be carefully followed. See Part II, ch. II, under "Parties." And where a person other than the infant applies for the appointment under §§ 2530 and 2531, care must be taken to comply with the provisions of the Code (*id.*), in regard to giving eight days' notice of the application (see *Pinckney* v. *Smith*, 26 Hun, 524), and in regard to *personal* service of the notice upon the infant. The actual appointment of the guardian does not validate the proceedings where the infant was not properly served with notice of the application (see *Hogle* v. *Hogle*, 49 Hun, 313; *Davis* v. *Crandall*, 101 N. Y. 311), unless the infant personally appears in court so as to give the Surrogate jurisdiction of his person. See *Buck's Estate*, 15 Abb. 12; *Matter of Seabra*, 38 Hun. 218. Where the application is made by the parent of the infant in these proceedings, and the infant is of tender years, observance of this requirement of the Code would seem to serve no useful end, but the statute is explicit and must be observed. The writer was informed by one of the Surrogates of New York that in a case of this sort, the affidavit of service of citation recited the personal delivery of the notice to the infant "who was about the age of fourteen months, *and who then and there swallowed the same.*" The service was held to be complete.

The requirement that the infant should be represented in the proceedings in the Surrogate's Court by special guardian, is a general one, and it is customary that they be appointed where there are infants. But it has been held where there is no necessity for the appointment of a guardian, by reason of the fact that the infant's interest is not presently involved, and there is no provision in the will under which the infant's interest in remainder or otherwise could be affected, the appointment of a special guardian and the burdening of the estate with charges for his services, should not be authorized by the court. *Matter of Post*, 5 App. Div. 113.

And it is not the custom now, in transfer tax proceedings, to appoint a special guardian for an infant whose taxable interests are very small. And see *Matter of Jones*, 54 Misc. 202.

But it is now, and since ch. 368, L. 1905, provided:

"If, however, it appear at any stage of the proceedings that any of such persons known to be interested in the estate is an infant or incompetent, the Surrogate may, if the interest of such infant or incompetent is presently involved *and is adverse to that of any of the other persons interested therein*, appoint a special guardian of such infant; but nothing in this provision shall affect the right of an infant over fourteen years of age, or of any one on behalf of an infant under fourteen years of age, to nominate and apply for the appointment of a special guardian for such infant *at any stage of the proceedings*." This provision originally read *shall* for *may*, and related to the time when appeal was taken from the taxing Surrogate to the judicial Surrogate (see ch. 672, L. 1899, amending § 232, now, in part, § 231).

§ 857. **Fair market value of property; how and when ascertained.**— It is the duty of the appraiser to fix "the fair market value of property" subjected to the payment of the tax. In this connection therefore § 242 is of importance defining as it does what is meant by "estate" and "property" as used in the act. This section is as follows:

> The words "estate" and "property" as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article, and not as the property or interest therein passing or transfered to individual legatees, devisees, heirs, next of kin, grantees, donees, or vendees, and shall include all property or interest therein, whether situated within or without this state. The word "transfer" as used in this article, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed.

Section 120 of Decedent Estate Law provides for the method to be pursued by appraisers generally in ascertaining the value of taxable securities.

> "Whenever by reason of the provisions of any law of this State it shall become necessary to appraise in whole or in part the estate of any deceased person, . . . the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time."
>
> See *People* v. *Coleman*, 107 N. Y. 541.

Under this provision it was held in *Matter of Crary*, 31 Misc. 72, that, in the absence of any facts tending to show that the appraiser did not reach a fair conclusion, a valuation of stocks based on the average of quoted prices on the day on which the will took effect and for three months preceding, should be sustained. It is customary, however, in reaching the valuation of listed stocks or bonds in transfer tax proceedings, to take the average quotations on the date of the death of the decedent. *Matter of Ramsdill*, 190 N. Y. 492; *Matter of Westurn*, 152 N. Y. 93, 102.

In valuing shares in a foreign corporation, held by a nonresident, he must apportion its assets within and without the State. That is, assuming a railway company to have its property half in New York and half in Pennsylvania, and its stock to be selling at par, the nonresident's stock on succession to which the New York tax is laid must be appraised at 50. See *Matter of Cooley*, 186 N. Y. 220. And see opinion of Beckett, Surr., in *Matter of Thayer*, 58 Misc. 117, as to appraisal of stock in an interstate railroad corporation. Aff'd 126 App. Div. 951, 193 N. Y. 430. In the court of appeals decision it is pointed out that the method "suggested" in the Cooley case is not controlling or exclusive, merely a "convenient" way of determining a "question of fact."

In *Matter of Gould*, 19 App. Div. 352, aff'd 156 N. Y. 423, the rather novel proposition was advanced by the estate that, in determining the value of large blocks of stock, only the purchase and sale in markets of correspondingly large blocks should be considered, on the theory that throwing large blocks upon the market would result in a break in values. The court did not adopt that construction of the act of 1891.

A more difficult question arises where the securities are not listed and in such case the practice is to take testimony as to the full market value from parties who would be in position to testify with knowledge of that fact. See *Matter of Curtice*, 111 App. Div. 230, the stock was in a "close corporation," not listed, no record sales. *Held*, the statutory direction did not control, citing *Matter of Judson*, 73 App. Div. 620. See also *Matter of Proctor*, 41 Misc. 79, experts testifying to value from infrequent quotations and private sales. As to the nature of this testimony see opinion of Surrogate Silkman, in *Matter of Brandreth*, 28 Misc. 468, 473. In *Matter of Smith*, 71 App. Div. 602, the appraiser valued the stock of a corporation at par basing the valuation on the fact that a dividend of eight per cent had been declared on that stock for some time prior to the death of decedent, and this, despite the fact that an officer of the company in which the stock was held testified that he sold such stock at the rate of $50 a share at about the time of the death of the decedent. The Appellate Court held that in the absence of any evidence going to show that the sales testified to by this officer were not made at the fair market value, and in the absence of evidence tending to show that a stock earning eight per cent dividend was worth more than the price at which it had been sold, or of any special fact showing any greater value of the stock than that at which it had been sold, the appraiser should fix the value at the

selling price. Dividends paid are not conclusive proof of value. *People, etc.*, v. *Barker*, 81 Hun, 22. So, in *Matter of Morgan* v. *Warner*, 45 App. Div. 424, affirmed without opinion, 162 N. Y. 612, it was held that notes belonging to the estate which the executors were directed to cancel, should be valued at their actual and not their face value. See also *Matter of Bartlett*, 4 Misc. 380; *Matter of Wood*, 40 Misc. 155.

As to valuation of good will of decedent's business see *Matter of Keahon*, 60 Misc. 508.

§ 858. **Same subject.**—The power of the appraiser to subpœna witnesses and examine them upon oath, makes it immaterial where the property is situated that he has to appraise. He, in the ordinary course, accepts affidavits as to the facts. But in contested cases, e. g., as to residence, or locus of property, or as to value, witnesses are called, sworn and examined. The appraiser appointed is to appraise the *whole estate* of the decedent. If the property is situated in several counties and the appraiser deems it necessary to inspect the same for its appraisal, § 230 contains ample provision for the payment of his expenses, and so far as the property in various counties is concerned, the receipts of the county treasurer to whom the tax is paid may, under § 236 of the Tax Law, be recorded in the clerk's office of any county in which taxable property is situated. Such clerks are required to keep a book for the purpose, known as the Transfer Tax Book.

Section 36 of the Tax Law (now § 37) is inapplicable to this appraisal. *Matter of Kennedy*, 113 App. Div. 4. Hence the appraiser cannot make a tentative assessment and put the executor to the burden of swearing it off or down.

§ 859. **The appraiser's report.**—Sections 230 and 231 proceed further to define the practice as follows:

> § 230. The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the state comptroller.
>
> § 231. From such report of appraisal and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser.
>
> The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest therein limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct.
>
> The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article, and of the tax to which it is liable to all persons known to be interested therein, and shall immediately forward a copy of such taxing order to the state comptroller.

The surrogate shall also forward to the state comptroller copies of all orders entered by him in relation to or affecting in any way the transfer tax on any estate, including orders of exemption.

It is the appraiser's duty to report the taxable property and the value at which he appraises it. It is customary for the appraiser to submit with his report a schedule containing facts relative to the property transferred, reported "for the information of the Surrogate."

§ 860. **Deducting the debts, taxes, etc.**—Since the "property" is to be taxed as coming *from* the decedent, the *quantum* to be reported must logically be the net amount. Hence it is proper for the appraisers to take evidence as to decedent's debts and to report them, as well as the taxable property, to the Surrogate. The rule is well stated in *Matter of Thomas*, 39 Misc. 222, 226.

This practice has been sanctioned in New York County (*Matter of Wormser*, 36 Misc. 434), and has been tacitly approved by the courts, numerous decisions reciting the practice and not disapproving thereof. In Westchester County, however, in *Estate of Ludlow*, 4 Misc. 594, and *Estate of Millard*, 6 Misc. 425, the practice was declared to be improper. A later decision in that county, however, *Matter of Purdy*, 24 Misc. 301, would seem to indicate that there, too, this practice is now approved. The question of these deductions has become a very practical and important one in reaching the amount of the taxable property. We have noted one phase of this in connection with fixing the value of stock in interstate companies. On the other hand, suppose a nonresident dies, and there is property, taxable, in this State, but the claims of domestic creditors exceed its value. There is nothing, manifestly, left on which to lay the tax. *Matter of Grosvenor*, 124 App. Div. 331. See *Matter of Burden*, 47 Misc. 329, as to representative's right to apply taxable and nontaxable securities to discharge of nonresident's debt to New York creditor.

There was considerable difference of opinion in the lower courts on this whole question of what is and what is not to be deducted in ascertaining the amount of taxable property. Thus, for example, in Orange County, *Matter of Curtis*, 31 Misc. 83, it was held that the United States war revenue tax could not properly be deducted while, at the same time, in Cattaraugus County, *Matter of Irish*, 28 Misc. 648, and Erie County, *Matter of Becker*, 26 Misc. 633, it was held that this tax should be deducted. The Appellate Division, First Department, sustained this last contention in *Matter of Gihon*, 64 App. Div. 504, and *Matter of Vanderbilt*, 68 App. Div. 27, but the Court of Appeals finally disposed of the question in *Matter of Gihon*, 169 N. Y. 443, holding that the Federal tax is not to be deducted because it is not a tax upon the property transferred but upon the legatee, for the privilege of succeeding to the property, and is therefore payable out of his particular legacy and not out of the estate. See *Matter of Daly*, 100 App. Div. 373.

The *Gihon* case held that the commissions and disbursements of a temporary administrator appointed pending the result of a will contest, as

well as the commissions of trustees paying over the income of a trust to a life beneficiary, are proper subjects of deduction. But § 226 provides that commissions are to be excluded and nontaxable, only to the extent of the amount allowed by law to executors or trustees, in that it makes taxable legacies or devises in lieu of commissions as to any excess in value in such bequests or devise over that of the legal commissions.

A sum paid by proponents to contestants in settlement is not deductible. *Matter of Marks*, 40 Misc. 507. And, if commissions were not deducted, the proceeding, in a proper case, may be reopened for the purposes. *Matter of Silliman*, 79 App. Div. 98.

A legacy tax paid to another State cannot be deducted (*Matter of Kennedy*, 20 Misc. 531), and the fact that property of a nonresident decedent is taxed in the State of his domicile does not affect the question of its taxation here. *Matter of Burr*, 16 Misc. 89.

A gift to a foreign cemetery association for keeping the burial lot in order forever is not "funeral expenses," and is taxable as a gift by will. *Matter of Beaver*, 62 Misc. 155.

Another question which has involved considerable discussion is whether the expenses entailed by a will contest may properly be deducted from the assets of the estate before the tax is fixed. As to this point Chief Justice Andrews says in *Matter of Westurn*, 152 N. Y. 93 (p. 102):

"The appellants further insist that the Surrogate erred in refusing to deduct from the valuation of the estate the sum expended by them in the litigation over the will. We think the Surrogate properly disallowed this item. It was not a claim existing against the decedent or his property. The tax imposed by the statute is upon the interests transferred by will or under the intestate law of the State. The devolution of the property and the right of the State have their origin at the same moment of time. The ascertainment of the value of the taxable interest and the fixing of the tax necessarily takes place subsequent to the death. But the guide is the value at the time of the death, when the interests were acquired. The fact that the appellants were put to expense in asserting their rights and were embroiled in expensive litigation to obtain them, was their misfortune.

"It did not diminish the value of the interests which devolved upon them on Westurn's death. It was a loss, but a loss to their general estate. It did not prevent them receiving the whole interest transmitted to them. The fact that the court charged certain costs and allowances in their favor upon the estate did not change the situation. It was practically a charge upon their own property for the benefit of their attorneys."

The only way in which this decision and the decision in the *Gihon* case, *supra*, can be reconciled is by the statement last quoted, that the expenses of a will litigation are practically a charge upon the separate properties of the beneficiaries. That this is the view taken by the Surrogates of New York County, see decision of Surrogate Thomas in *Estate of Mary*

Francis Baker, in the New York Law Journal of May 28, 1902. He there says:

"The practical effect of the decision of the Court of Appeals in *Matter of Westurn* is to determine that litigation between rival claimants to an estate cannot be prosecuted at the expense of the State of New York. This decision has not been modified or distinguished by *Matter of Gihon*, but on the contrary the existence of an analogy between the two is expressly affirmed, not only in the latter opinion but also in the opinion of the learned Surrogate." Attention should be called, however, to the fact that, in *Matter of Westurn, supra*, the deductions asked for were for the expenses directed to be paid out of the estate incurred by the next of kin in a successful will contest. The courts have not applied the same rule where the expenses either in a will contest or in a proceeding for the construction of a will have been made *by the legal representatives* of the estate, and the disposition of the courts now appears to be to hold that, where such expenses were necessary and reasonable, they are the proper subjects of deduction. *Matter of Maresi*, 74 App. Div. 76; *Estate of Peter Thomas*, N. Y. Law Journal, November 8, 1902.

The mere fact that a claim against an estate is outstanding is not sufficient to warrant a deduction of the amount of the claim in computing the tax in the absence of any proof as to its legality. *Matter of Wormser*, 51 App. Div. 441. It has been the custom in making deductions in the matter of the taxation of nonresident estates to allow only such proportion of the debts as is represented by the ratio of New York assets to the entire assets of the estate. The Appellate Division in a very recent decision, *Matter of King*, 71 App. Div. 581, has, however, held that, where a nonresident decedent had an undivided interest in a firm, having a branch in New York State, and where the claims of New York creditors of the concern exhausted the value of the property here, no tax could be imposed, basing such decision on the broad ground that a tax on personal property of a nonresident is founded upon the State's dominion over the property situated within its territory, and as the debts exhausted the assets, there was no property here to form a basis of taxation. On the other hand, it was held in *Matter of Pullman*, 46 App. Div. 574, where domestic creditors of a nonresident decedent have in their hand, as pledgees, securities not taxable under our transfer tax law, that the indebtedness due such creditors is not to be offset against taxable assets.

A different question arises where the testator provides in his will for the payment of moneys out of his estate in return for services rendered him in his lifetime. *Matter of Gould*, 156 N. Y. 423. The case involved peculiar circumstances. Jay Gould, by a codicil to his will, acknowledged an indebtedness to his son George J. Gould for services rendered amounting to $5,000,000, and provided in what way and with what property or securities the debt should be discharged. The Appellate Division in the First Department held the legacy to be not a gift but the payment of a legal obligation of the estate, and, therefore, not taxable. But the Court of

Appeals held, that, granting the testator did owe the sum bequeathed, and did intend by the codicil to provide for its payment, nevertheless the method of payment selected by him and its acceptance by his son was one which brought the transaction within the taxing provisions of the statute. The court (Parker, Ch. J.), says (p. 428): "It matters not what the motive of a transfer by will may be, whether to pay a debt, discharge some moral obligation, or to benefit a relative for whom the testator entertains a strong affection, if the devise or bequest be accepted by the beneficiary, the transfer is made by will and the State by the statute in question makes a tax to impinge upon that performance." The court also says, *obiter*, "It can easily be imagined that the legislature aimed to prevent parties from avoiding payment of the tax by changing intended beneficiaries into testamentary creditors." But it can hardly be imagined that the legislature intended to tax the payment of just debts in full, as might be the result if the debt provided for in a will was equal to or greater than the estate. Creditors are entitled to the payment of their just claims, irrespective of the accident of death to their debtors, and the remedy would appear to be in a case like the one mentioned for the claimant or creditor to renounce the provision under the will and rely on recovering the amount of his claim against the estate in the usual way. See also *Matter of Rogers*, 71 App. Div. 461. See *Matter of Huber*, 86 App. Div. 458, where tax was laid on legacy to executor over and above his legal commissions for services *to be* rendered.

§ 861. **Same—Taxes.**—Taxes assessed against decedent in his lifetime, though not levied until after his death, may be deducted. *Matter of Brundage*, 31 App. Div. 348. *Matter of Liss*, 39 Misc. 123. This case also deducted cost of a burial plot and expense of fencing and sodding same. See, also, opinion by Thomas, Surr., in *Matter of Hoffman*, 42 Misc. 90, where executors had actually paid real and personal taxes which had become debts of decedent. The amount was deducted. But taxes *accruing after* his death cannot be deducted. *Matter of Maresi*, 74 App. Div. 76.

§ 862. **Appraiser's duty when in doubt.**—Doubtful questions may be reserved. This is often necessary as to future or contingent interests. But it may be proper in this very matter of deductions demanded. In *Matter of Dimon*, 82 App. Div. 107, an equitable method is outlined. When the appraiser is in doubt as to allowing deduction of payments made or estimated by the representative, he should not disallow them. He taxes the residue, and in the report (and of course in the subsequent order) reserves the taxation on this doubtful amount until it has been adjudicated upon on the accounting. The court cites the *Gihon* case, 169 N. Y. 443; *Matter of Rice*, 56 App. Div. 253; *Matter of Gould*, 19 App. Div. 352.

§ 863. **Are mortgage incumbrances to be deducted.**—Two cases can be supposed with regard to real estate so far as mortgages thereon are concerned. The one where the real estate passes directly under the will or by the law of descent, the other where the will works an equitable con-

version. In such a case as the latter, *Matter of Sutton*, 3 App. Div. 208 (aff'd 149 N. Y. 618), it was held (Brown, P. J., writing the opinion) by the Appellate Division, reviewing the cases, that the fiction of equitable conversion could not be applied for the purpose of subjecting *domestic* real estate to taxation which would otherwise be exempt.

In *Matter of Livingston*, 1 App. Div. 568, First Department, the court held that where the real property and personal property descended into the same hands and mortgages on the real estate are satisfied by the executors by virtue of a power in the will, the payment of the mortgages out of the personalty could have no effect in reducing the amount of the tax on the personal estate. *Matter of Offerman*, 25 App. Div. 94, is authority for the general principle that mortgages upon decedent's real property are not to be deducted from the personal property in reaching the amount of the tax. To that effect see *Matter of Sutton*, 3 App. Div. 208; *Matter of DeGraaf*, 24 Misc. 147; *Matter of Berry*, 23 Misc. 330. Where a mortgage is, however, secured by the testator's personal bond, and there is a judgment against him for a deficiency, the judgment is a deductible debt.

In *Matter of Swift*, 137 N. Y. 77, the Court of Appeals has held that the doctrine of equitable conversion was not applicable to subject *foreign* real estate, the proceeds of which had been brought within the State, to taxation. See Dos Passos on Inheritance Tax Law (2d ed.), pp. 152, 155, and notes. Where real property passes to a devisee or descends to an heir, such heir or devisee must satisfy and discharge all mortgages out of the property so passing or descending without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of the testator that such mortgages should be otherwise paid. 2 R. S., ch. 1, title 5, § 4.

§ 864. **Debts of nonresident.**—The *Matter of Grosvenor*, and the *Matter of Burden*, cited in § 860, show the extent and the limit of offsetting local debts against taxable property of a nonresident reachable by the State.

There are several theories. Assume A dies in New Jersey. His estate is in all $100,000, of which $10,000 is in New York City. His total debts are $20,000 and $10,000 of that is due to New York creditors. Shall the property here be exempt because the local debts equal it? Or shall it be proportionately offset in the ratio that the assets here bear to the total assets? In the latter case, as the assets here are one-tenth, then the debts can only be offset to the extent of one-tenth. Or again, suppose the debts here are not general debts, but debts to a banker or broker secured by collateral—and part of that is nontaxable?

The correct answer to all these questions is reached by keeping in mind the theory on which the State taxes the nonresident estate, to wit, its dominion over the property.

Hence the local debts may be paid out of the local taxable assets. *Matter of Doane*, N. Y. Law Journal, March 12, 1903; *Matter of King*, 172 N. Y. 616, 71 App. Div. 581, 30 Misc. 575. Then the taxable value of those

assets is reckoned, after such deduction. *Matter of Westurn*, 152 N. Y. 93; *Matter of Burden*, 47 Misc. 329. But, if nontaxable assets have been specially pledged for the local debt, the debt is deemed paid thereby, and the taxable assets are not to be diminished thereby. *Ibid.*

In the *Pullman* case, 46 App. Div. 574, the rule is clearly stated: "Where domestic creditors have in their hands the legal title and the right to resort for the payment of their debts to securities (of a nonresident) . . . . not taxable . . . . the indebtedness due to *such creditors* is not to be offset against the value of property . . . . otherwise taxable."

It is further clarified in the *Grosvenor* case, 124 App. Div. 331, where Ingraham, J., points out "what is taxable is the property of the (decedent) within this State, which was in excess of the amount of the debts . . . to residents . . . . with the payment of which this property was primarily chargeable."

He continues: "The principle applicable to this taxation is different from that applicable to the taxation of personal property of residents of the State, for here the tax is not against the individual or against the particular property, but is a tax upon the transfer of that property, and it is only by reason of the transfer of the specific personal property in this State from the testator to his legatees that the State undertakes to tax, *and when nothing actually passes by virtue of that transfer no tax is imposed.* The Code having made this property within the State applicable to the payments of the debts of the decedent to resident creditors, the fact that, to release them, the executor brought money of the decedent from out of the State and paid the debts so that the securities in this State could be transmitted to be administered at the residence of the decedent cannot make any difference as to what actually was transferred upon which a tax was imposed. If the securities had been sold and the proceeds used to pay the debts to resident creditors there could be no question. The executors have procured the money, paid the debts, and released these securities from the liability for his indebtedness, in substance purchased the securities for the estate. This result is within *Matter of King*, 71 App. Div. 581, aff'd on opinion below, 172 N. Y. 616, and *Matter of Westurn*, 152 *id.* 93. There it was held that what was transferred and what was, therefore, taxable was the amount of the property of the testator less his debts."

§ 865. **Appraisal by Surrogate.**—Section 231 provides that the Surrogate may determine the cash value of all the estates and amount of tax to which the same are liable without appointing an appraiser. And where the legacies are mere cash legacies the appointment of an appraiser is wholly unnecessary. See *Matter of Astor*, 20 Abb. N. C. 405; *Matter of Jones*, 10 N. Y. St. Rep. 163. This method of establishing the value of the inheritance and fixing the tax, is a distinct proceeding complete in itself and, if adopted, precludes any resort to the other. *Matter of Davis*, 91 Hun, 53, 60. The words at the end of § 231, paragraph third, "including orders of exemption" recognize the practice of application, in proper

cases, to the Surrogate, for an order that the estate is not liable to the tax. Where real property is involved, the entry of such an order may be requisite to avoid the question of a "lien" in later transactions.

§ 866. **Report of the appraiser.**—To summarize, the appraiser, having ascertained the estate by means of the power of inquiry given him as above noted, must proceed to ascertain the *quantum* of the estate and its fair market value. He must report every estate passing, define its character and estimate its value. It has been held that the appraiser in case of doubt, should report the property as liable to a tax, leaving the doubt to be resolved by the Surrogate who is the assessing officer. *Matter of Astor*, 17 N. Y. St. Rep. 737.

§ 867. **Proceedings on the coming in of the report.**—When the appraisers' report has been made and one of the duplicates filed in the office of the Surrogate, the Surrogate proceeds to exercise his assessing power and fixes the tax. See § 232. In so acting he represents the State; and, therefore, it was at first held (see *Matter of Wolfe*, 137 N. Y. 205, 213), that a failure to notify the comptroller or the county treasurer of his act was not error or an irregularity, although it was held proper that he should cause the comptroller or county treasurer to be notified of the proceedings. But there was nothing in the law which made notice to him a prerequisite to a complete determination by the Surrogate of the questions presented in the proceedings. And the court held that the doctrine of notice was one which finds application when it is sought to take the property of the citizen, and that a failure to give notice to the person whose interest was being taxed deprived such person of an inherent right. But the law as it now stands, by § 231, provides that the Surrogate shall immediately give notice upon the determination by him as to the value of any estate which is taxable and of the tax to which it is liable, to all persons known to be interested therein, and *the state comptroller.* This direction is explicit and must be followed. *Matter of Bolton*, 35 Misc. 688. Service of such notice upon the attorney who has represented the comptroller upon the hearing before the appraiser will, of course, be sufficient. The Surrogate's notice is furnished in that office.

§ 868. **Computations by State Superintendent.**—Where there are future or later estates, income or annuities dependent upon any life or lives in being, it is provided by § 231, that their value "shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum." Consequently, the Surrogate is given power by § 231 to apply to the superintendent of insurance by a requisition or notice, and the superintendent of insurance is required upon such application to determine the value "of any such future, or contingent estate, income, or interest therein limited, contingent, dependent, or determinable upon the life or lives of persons in being, upon the facts con-

tained in the appraiser's report." This computation the superintendent of insurance must certify to the Surrogate, and it is provided that his "certificate shall be conclusive evidence that the method of computation adopted therein is correct." This determination of value is binding on the Surrogate as well as on the parties, and the Surrogate therefore cannot without reversing the whole proceeding make an appraisal himself, nor can he reverse the whole proceeding except in the manner provided by law. See *Matter of Davis*, 91 Hun, 53, aff'd 149 N. Y. 539. The practitioner is not required to prepare the notice to the superintendent, and it is now the custom in many counties for the appraiser to make the application on behalf of the Surrogate, and to include the superintendent's certificate in his report, upon which the Surrogate acts in fixing the tax. The superintendent of insurance is given a summary of the facts upon which his computation is to be based, to wit: The amount of the principal estate on which the future or contingent estate or an income or interest therein is limited, the name of the remainderman, the name and age of the person or persons upon whose life or lives such estates or interests are contingent, dependent, or determinable and the date of death of decedent, the value being fixed as of that day. The superintendent's certificate returns the money value of life estate and remainder, and the Surrogate then on the filing of the appraiser's report determines the cash value of all estates passing and the amount of tax to which they are severally liable. An order is thereupon entered assessing the tax, which should be substantially in the following form:

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Order fixing tax under section 232.

Title.

On reading and filing the report of Esq., the appraiser heretofore appointed herein, and on all the papers and proceedings herein; and on motion of Esq., attorney for it is

Ordered that the cash values of the interests of the beneficiaries in the estate of the above named decedent, the transfer of which is subject to the payment of the tax imposed by the act relating to taxable transfers of property is as follows:

Beneficiaries.	Relationship.	Cash Value.

and it is

Further ordered that the tax to which the transfer of said property is liable is as follows:

On the interest of				widow	$
"	"	"	"	sister	$
"	"	"	"	orphan	$
"	"	"	"	no relation	$

Notice of such taxation is thereupon sent by the Surrogate to every person known to be interested therein, that is, the persons to whom notice of the appraisal has already been given, as well as to the comptroller as above noted.

§ 869. **Appeal from Surrogate's decision.**—The Surrogate having acted as assessor and fixed the tax on the facts reported to him by the appraiser, and upon such other proof relating to the estate which may be before him (see § 232), and the notice having been given to all parties known to have an interest in the property to be taxed, provision is made for a determination by the Surrogate in his judicial capacity upon an appeal from the order made by him as assessor. (See also § 874, below.) Upon this appeal a review of the whole proceeding may be had upon any ground of error specified in the notice of appeal, but the Surrogate is not limited on such appeal, to a review of his former determination in assessing the tax. He may admit new testimony (*Matter of Thompson*, 57 App. Div. 317), and the executor is a party in interest and so can appeal. *Matter of Cornell*, 66 App. Div. 162. The appeal to the Surrogate given by § 232 must be taken within sixty days from the fixing, assessing and determination of the tax by the Surrogate. Although in *Matter of Daly*, 34 Misc. 148, where a corporation exempt from taxation, having notice of the bringing of the proceeding, but no notice of the fixing of the tax as provided for by § 232, neglected to appear within sixty days, the Surrogate of Suffolk County, on application of the corporation, made after the sixty days, and as soon as it ascertained that a tax had been fixed on its legacy, modified the decree so as to exempt the corporation from the tax.

§ 870. **Reopening or vacating.**—Contrasted with this right of appeal, which contemplates a judicial act, embodied in a final order, from which appeal may further be had, there are other methods of review, or reconsideration, or reappraisal.

(*a*) *Reappraisal under* § 232. This is limited to two years from the entry of the order or decree. The party entitled thereto is the State Comptroller. The grounds are fraud, collusion, or error. The application is to a justice of the Supreme Court. The appraiser is "some competent person," appointed by him. When he reports to such justice, the practice follows the original method, except that for "Surrogate" you read "Justice," and the determination thus made supersedes that formerly made by the Surrogate.

§ 871. **Same subject.**—But (*b*) *vacating* or (*c*) *reopening*, are remedies the Surrogate may grant because of his general powers, *Matter of Henderson*, 157 N. Y. 423, and not lessened by the Tax Law. Thus, in *Matter of Earle*, 71 N. Y. Supp. 1038, aff'd 74 App. Div. 458, after the time to appeal had expired, the Surrogate granted an application made by the estate to va-

cate the order fixing tax and remit the report to the appraiser on the ground that the appraiser had omitted a material fact in his report. The same Surrogate in a later decision in speaking of his earlier decision and the decision in *Matter of Crerar*, 56 App. Div. 479, hereafter cited, says in the *Estate of Jane S. Van Post*, reported in Law Journal of June 20, 1901: "I expressed the opinion that under this provision of law and under the general power inherent in every court, I could correct an error in an order fixing a tax caused by my own inadvertent error and oversight of a jurisdictional defect on mere motion and without an appeal. The subsequently reported opinion of the Appellate Division in *Matter of Crerar* would limit this power, and I must hold myself bound by the views of that court."

A rather different question arose in *Morgan* v. *Cowie*, 49 App. Div. 612. Here an appraisal was made in 1896. In 1898, when the judicial settlement of the accounts of the executors was had, it appeared that several legacies in the will of the testator had lapsed by reason of the death of the legatees prior to that of the testator. There being no residuary clause in the will, the Surrogate's Court directed that the lapsed portion of the estate pass under the Statute of Distributions to the widow. The tax had been imposed on these legacies at the rate of five per cent, as the legacies were given to collaterals, but under this ruling the transfers, so far as these legacies were concerned, proved to be subject to a one per cent tax only as they went to the widow. In 1899, the executors applied to the Surrogate's Court for a modification of the order of 1896, fixing the tax. The application was resisted by the comptroller on the ground that the power of the Surrogate's Court to modify the order had expired with the time to appeal. The court held, however, that, under § 2481, subd. 6 of the Code, which provides that the Surrogate has the power "to open, vacate, modify, or set aside, or to enter as of a former time, a decree or order of his court, or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause," the order should be modified and the tax reduced accordingly. For a general discussion of the whole subject, see *Matter of Lansing*, 31 Misc. 148.

§ 872. **Same subject.**—The cases warrant the following summary statement: The Surrogate's power under § 2481 is governed by the general provisions of §§ 1282–1292, as to *errors of substance*, not arising on the trial. *Matter of Tilden*, 98 N. Y. 434; *Matter of Barnum*, 129 App. Div. 418.

Cases of fraud or collusion, newly discovered evidence, or total lack of jurisdiction to make the original order, are not limited by the two-year restriction. *Ibid. Matter of Hawley*, 100 N. Y. 206. Errors of law are reviewable only by appeal. Same, and *Matter of Douglas*, 52 App. Div. 303; *Matter of Walrath*, 37 Misc. 696; *Matter of Niven*, 29 Misc. 550. And the appeal is limited as to time.

The contrast is between a remedy to make a record conform to the facts, and a remedy to review what, on litigated questions, was erro-

neously decided. To correct the latter appeal is the only remedy. Lack of jurisdiction warrants vacation. *Matter of Scrimgeour*, 175 N. Y. 507. Fraud or collusion or newly discovered evidence may warrant a new trial.

These cases will illustrate the contrast:

Matter of Lowry, 89 App. Div. 226 (1903). Reopening of transfer tax decree refused, to revalue realty, sold for less than appraised value.

Matter of Wallace, 28 Misc. 603. Application to vacate denied.

Matter of Rice, 29 Misc. 404; 56 App. Div. 253. State's application to reopen and rectify improper deductions denied.

Matter of Niven, 29 Misc. 550. Appraiser exempted a legacy. Law as fixed by a later decision would have taxed it. Application to Supreme Court under § 232 denied. Remedy by appeal exclusive.

Matter of Connelly, 38 Misc. 466. Application to reopen denied, as error was in a determination in respect to matters of fact upon evidence as to which the court had exercised judgment.

For cases when Surrogate has vacated transfer tax orders see *Matter of Scrimgeour*, 80 App. Div. 388, aff'd 175 N. Y. 507. Vacated on its being later (*Matter of Pell*, 171 N. Y. 48) found that the act was unconstitutional under which the tax was laid.

Matter of Coogan, 27 Misc. 563, aff'd 45 App. Div. 628, 162 N. Y. 613. Here mandamus was granted to compel refund of tax collected under order set aside as void as made without jurisdiction.

Matter of Silliman, 79 App. Div. 98, aff'd 175 N. Y. 513. Order reopened and modified.

Matter of Mather, 90 App. Div. 382, aff'd 179 N. Y. 526. See Surrogate's opinion, 41 Misc. 414.

Matter of Cameron, 97 App. Div. 434, aff'd 181 N. Y. 560, where an order made in 1898 was opened in 1904 on newly discovered evidence, and modified by reducing the tax.

Matter of Willets, 119 App. Div. 119, aff'd 190 N. Y. 527. Order opened and modified on proof property taxed did not belong to decedent.

See *Matter of O'Berry*, 179 N. Y. 285, and opinion below in 91 App. Div. 6.

Matter of Eaton, 55 Misc. 472. Order set aside, although moving party had also appealed.

§ 873. **Same subject.**—But there is another differentiation. This depends on who the moving party is. If it be the estate, or a person interested, the foregoing discussion applies. But if it be the State Comptroller it would seem he is limited:

(*a*) To the reappraisal under § 232. *Matter of Crerar*, 56 App. Div. 479.

(*b*) To an appeal. *Ibid.*, and *Matter of Earle*, 74 App. Div. 458.

(*c*) To open to rectify a clerical error. *Ibid.*

§ 874. **The first appeal.**—The appeal to the judicial Surrogate is taken by filing in the office of the Surrogate a written notice of appeal stating the grounds upon which the appeal is taken. Rule 25 of the Surrogate's Court in New York County provides:

1. Upon the filing of the appraiser's report in a transfer tax proceeding, the surrogate will immediately enter the order determining the value of the property and the amount of the tax. The matter will not appear on the calendar at this stage, nor will the court then consider objections to the report.

2. A party having objections to the report, or the order entered thereupon, may, within sixty days, file a notice of appeal. This notice to be served upon all parties appearing before the appraiser, and proof of service to be filed with the clerk, with the notice of appeal. Thereupon the proceeding will be placed upon the calendar for the next regular motion day. This notice must specify the grounds of objection.

If it fail to specify such grounds, it may be dismissed. *Matter of Stone*, 56 Misc. 247, citing *Matter of Davis*, 149 N. Y. 539. Moreover, the grounds specified in *this* appeal limit the area of judicial re-examination in the Appellate Courts. *Matter of Manning*, 169 N. Y. 449.

Notice of appeal to the Surrogate from the order fixing the tax.

Surrogate's Court,
County of

Title. }

Sirs:

Please take notice that A. B., executor of the last Will and Testament (*or* administrator of the goods, chattels and credits) of C. D., deceased, (*note*) hereby appeals to the Surrogate of the county of from the order and determination by said Surrogate heretofore entered herein on the day of 19 upon the report of the appraiser in the above entitled matter, fixing the tax upon the estate of said decedent, and that grounds of such appeal are as follows: (*Here state specific grounds.*)

Note. Or any person aggrieved, or having objections.

Dated the day of 19

Yours, etc.,

Attorney for A. B.

(*As executor of the last Will and Testament, or administrator of the goods, etc.*)

To Esq.,

The Clerk of the Surrogate's Court.

Hon.

Comptroller of the State of New York (*or* Hon. County Treasurer of the County of).

Any questions raised and decided, upon which error could be assigned or any irregularity in the proceedings entitling the parties interested to an appeal, may be raised before the Surrogate upon this appeal, and the appeal is in the nature of an application for a rehearing, upon which new evidence may be taken bearing upon the questions involved. *Matter of Thompson*, 57 App. Div. 317.

He can direct a reference and stay the proceedings pending the report. *Matter of Bishop*, 111 App. Div. 545. The Surrogate has jurisdiction of the appeal by the notice actually given, if given within the sixty days.

And the Court of Appeals has held that it would be an unwise construction of the act to limit the hearing so as to exclude the consideration of a new question subsequently arising on the ground that it was not specified in the notice of appeal. *Matter of Westurn*, 152 N. Y. 93, 104. But as to other questions the Surrogate is limited, as just shown upon this appeal to the grounds specified in the notice of appeal. *Matter of Wormser*, 51 App. Div. 441. And so is the Appellate Court. *Matter of Manning*, 169 N. Y. 449; *Matter of Kennedy*, 93 App. Div. 27. Thus, where a party interested appeals to the Surrogate from that portion of the decree which directs the treasurer to collect the penalty, but not from the appraisal or valuation of the estate or from the assessment of the tax, the Surrogate may only review that part of the decree relating to the penalty (see *Matter of Davis*, 149 N. Y. 539, 548), for as to all other matters the decree is conclusive, and the Surrogate will not order a rehearing before the appraiser on the ground that the valuations of the appraiser are incorrect unless some proof is adduced before him going to show such incorrectness. *Matter of Johnson*, 37 Misc. 542. The jurisdiction of the Surrogate sitting as a judicial officer, and the inquiry into the questions resting upon the appeal, extends to all matters necessary to enable him to perform the duties imposed upon him. Thus in *Matter of Ullman*, 137 N. Y. 403, 407, it was held that he had necessarily the power to determine in such a proceeding whether any property of a deceased person did or did not pass to another under a will or under the laws of intestacy, and that consequently he could hold a provision of the will invalid. This decision would operate both where the property purported to pass by the invalid provision to a person who would take it exempt from the tax, or where the result of his determination is to exempt an otherwise taxable transfer. His determination of the validity or invalidity of the will for the purposes of this proceeding can always be reviewed upon appeal; but the right to exercise this power is undeniable. But the jurisdiction of the Surrogate must be limited with reference to the object of the proceeding, which is to subject certain property to taxation. The jurisdiction, therefore, in construing the will is merely that, for the purpose of taxation under the law of taxable transfers, a certain amount of property passes to certain specific persons. The jurisdiction of the Surrogate, therefore, is binding only upon the question of taxation and a failure to appeal from his decree fixing the tax will not bind parties interested, and is not *res adjudicata* and conclusive upon the rights of parties arising from matters outside of the will. See *Amherst College* v. *Ritch*, 151 N. Y. 282, 343.

When the Surrogate makes his decree after this appeal has been heard, an appeal may be taken as from any other decree to the Appellate Division. But from his order as taxing officer no such appeal lies. *Matter of Costello*, 189 N. Y. 288. See *Matter of Davis*, 91 Hun, 53, opinion of Judge, and 149 N. Y. 539, statement of facts, for instructive record of practice. But the appeal to the Appellate Courts is not to be taken piece-

meal. Every ground relied on should have been raised in the first appeal to the Surrogate. Otherwise the final determination of the Appellate Court is conclusive as to all matters raised or *which might have been raised. Matter of Cook*, 194 N. Y. 400.

In *Matter of Hull*, 109 App. Div. 248, motion was made to dismiss the Comptroller's appeal, on the ground that the fixing of the tax was a ministerial duty. Held, the Surrogate acts judicially in determining the *quantum* of the estate, the exemptions claimed and the amount of the tax, citing *Morgan* v. *Warner*, 162 N. Y. 612, aff'g 45 App. Div. 424.

§ 875. **Reappraisal at the instance of the state comptroller.**—Section 232 contains provisions for a reappraisal at the instance of the comptroller of the State, if he believes that the appraisal, assessment or determination already had was fraudulently, collusively or erroneously made. These provisions give the right only to the state comptroller, who is not required to give notice of the application (*Matter of Smith*, 40 App. Div. 480) and are as follows:

> Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the state comptroller may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively or erroneously made, make application to a justice of the Supreme Court of the judicial district in which the former owner of such estate resided, for a reappraisal thereof.
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> The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. . . . The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice *shall supersede the determination and assessment of the surrogate*, and shall be filed by such justice in the office of the state comptroller and a certified copy thereof transmitted to the surrogate's court of the proper county.

It is said, in *Matter of Crerar*, 56 App. Div. 479, that in transfer tax proceedings the courts have no general power or jurisdiction. That what they do they must find authority for in the act itself, citing *Matter of Smith, supra*. At any rate, § 232 gives the state comptroller in paragraph one the right to appeal in 60 days from the taxing Surrogate to the judicial Surrogate, and in paragraph two this special right to a reappraisal. This does not mean that, once the judicial Surrogate has made his final order, the comptroller cannot appeal therefrom. The right is not exclusive so as to prevent an appeal from the decree by the state comptroller under § 2570 of the Code. *Morgan* v. *Warner*, 45 App. Div. 424. But a reappraisal will not be ordered at the instance of the state comptroller on the ground that the property was afterwards sold for a larger sum than that at which it was appraised (*Matter of Bruce*, 59 N. Y. Supp. 1083; *Matter of Rice*, 56 App. Div. 253), nor to show that deductions for debts were excessive. *Ibid.* And the errors for which a reappraisal may be

ordered are errors of fact only, not errors of law. *Matter of Niven*, 29 Misc. 550; *Matter of Silliman*, 38 Misc. 226.

If, in the meantime, the executors, acting upon the appraisal already had, have parted with the control of the property, they cannot be held liable for the tax, provided they have acted in good faith, that is to say, provided the collusion or fraud alleged by the comptroller is not shown to have been participated in by them. If they have acted in good faith the State's remedy is against the property in the hands of the transferees who are by the act made liable, by § 222, which provides that every such tax shall be and remain a lien on the property transferred *until paid*, and the person to whom the property is so transferred and the executor, administrator and trustees of every estate so transferred should be personally liable for such taxation until its payment.

§ 876. **Appraisals "whenever occasion may require."**—In the former act, § 230 contained the vague phrase of this section heading, under which second appraisals were repeatedly sought, and no estate could deem itself secure from further expense and trouble. *Matter of Lansing*, 31 Misc. 148, explains the reason of the rule as being to cover all cases in which, for any reason, all the property could not be appraised and the tax fixed in one proceeding. But very properly this was held in *Matter of Crerar*, 56 App. Div. 479, not to cover cases where there was erroneous omission from appraisal of known assets. It was held to cover cases of property not known on first appraisal, or not then readily appraisable. These words are omitted from § 230 now, and the review or reappraisals above discussed are now exclusive.

§ 877. **Correction of tax erroneously assessed—Time limit.**—Full remedy is afforded, by way of appeal, where a Surrogate has, in such proceedings, decided certain questions of fact or law erroneously. Any attempt to review such a decision upon the merits must be made within the periods limited by the provisions of the Code or statutes governing appeals. But, under the guise of "modifying," or "correcting clerical errors" proceedings are sought to be revived.

It was held in *Matter of Crerar*, 56 App. Div. 479, that the Surrogate has no power to amend an order, *six years after its entry*, so as to change the recital, "the only property belonging to John Crerar within the State of New York is the premises known as 91 John Street" to make the order conform to the report of the appraiser as follows: "being all the property of decedent known to be in the State of New York and which is subject to tax," nor has he the power to grant an order directing a second appraisal of personal property which was in the hands of the executors at the time the first appraisal was made, where it was held on the previous appraisal that this precise property was not subject to tax.

In the *Estate of Thomas S. Van Post*, reported in N. Y. Law Journal of June 20, 1901, an application was made for an order amending an order theretofore made fixing tax, by deducting from the taxable interest of the life tenant the interest in certain United States bonds, on the ground

that as the law then stood (1896) transfers of such bonds were exempt. Surrogate Thomas, however, on the application, said, "Assuming that I have precisely the same power to correct the order in question that the Supreme Court has over one of its orders, such power should not be exercised after the lapse of *more than five years* and after a voluntary payment has been made under it, and on the mere ground that with full knowledge of the facts without inadvertence and deliberately, but on a mistake of law, an order was made, which mistake was only discovered by a subsequent decision of the Court of Appeals."

See *Matter of Lowrie*, 89 App. Div. 226, application to modify appraisal of land at $200,000, on proof that it actually brought about half that amount. Held, "error of fact arising upon a trial," denied. Also *Matter of Hamilton*, 41 Misc. 268.

But, if original order void for lack of jurisdiction, it is a different case. See *Matter of Silliman*, 79 App. Div. 98, rev'g 38 Misc. 226, granted. *Matter of Scrimgeour*, 80 App. Div. 388; *Matter of Coogan*, 27 Misc. 563; 162 N. Y. 613; *Matter of Connelly*, 38 Misc. 466, denied.

Where debts have neither been urged before the appraiser in the first instance nor reserved for future action and the time to appeal has expired, the Surrogate cannot grant relief (*Matter of Annie Taylor Morgan*, 36 Misc. 753), but an omission to tax the life interest of an infant, on the ground that the value of that interest could not at the time be ascertained and that the ultimate legatees were indefinite and could not then be known, is an adjudication that the interests of the infant *are not then* taxable and an express reservation of the matter. *Matter of Irwin*, 36 Misc. 177. The Surrogate has no power to make an order declaring that an appraisal theretofore made was erroneous as to certain securities, a former order having remained unreversed and in full effect (*Matter of Schermerhorn*, 38 App. Div. 350; *Matter of Connelly*, 38 Misc. 466), but, at any time before an appraiser's report is acted upon by the Surrogate, he may remit the same to the appraiser for the purpose of taking additional testimony. *Matter of Kelly*, 29 Misc. 169.

§ 878. **The liability of the executor, administrator or trustee.**—The liability for payment of the transfer tax is twofold. The tax is declared to be a lien upon the property transferred in the first place, § 224, and the executor, administrator or trustee of the estate transferred is held to be liable personally for the tax until its payment. *Ibid.*

Hence, the executor must see to it that the tax is fixed and paid, and that the proper duplicate receipts in the form specified in § 236 are issued to him: "No executor, administrator, or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this act, unless he shall produce a receipt so sealed and countersigned or a certified copy thereof."

§ 879. **When tax due and payable.**—Section 222 provides: "All taxes imposed by this article shall be due and payable *at the time of the transfer*, except as hereinafter provided. Taxes upon the transfer of any estate,

property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof."

The law thus makes it the duty of the representative to have the tax assessed and paid. The only way that the representative can avoid liability, is by proceeding to have timely disposition of the matter made in the Surrogate's Court. Where an administratrix never took such proceedings, and the district attorney made no motion to compel the assessment and payment of the tax until after the accounting and distribution of the estate, it was held nevertheless, that the liability of the administrator and the lien of the tax continued, and that the administratrix should pay. *Matter of Hacket*, 14 Misc. 282. The statute, as it now reads, forbids the judicial settlement of the accounts of an estate, unless the representative shall produce his duplicate of the receipt of the state comptroller. No statute of limitation runs against the State. *Matter of Strang*, 117 App. Div. 796.

§ 880. **Discount for prompt payment; penalty for delay.**—Where it is possible to do so it is the duty of the executor to avail himself of the discount granted by § 223 of the law, which is as follows:

§ 223. *Discount, interest and penalty.*—If such tax is paid *within six months* from the accrual thereof, a discount of five per centum shall be allowed and deducted therefrom.

Five per cent discount.

If such tax is not paid *within eighteen months* from the accrual thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined and paid as herein provided, in which case interest at the rate of *six per centum* per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged.

Ten per cent penalty.

The law as it first existed (ch. 713 of the Laws of 1887) provided for the payment of the six per cent penalty, only from the time of the expiration of the eighteen months, but by the present law, which has been in effect since 1892, the additional interest is charged from the date of decedent's death. See *Matter of Fayerweather*, 143 N. Y. 114.

The distribution of the estate, by executors, without any proceedings having been had to assess the tax, affords no legal excuse for its nonpayment (*Matter of Hacket*, 14 Misc. 282), even though they are executors of a nonresident who had property in the State of New York subject to the tax. See *Matter of Hubbard*, 21 Misc. 566, 567. See also *Matter of Embury*, 154 N. Y. 746, aff'g 19 App. Div. 24. If the penalty, however,

has been incurred, an application may be made to the court upon motion to remit it (*Matter of DeGraaf*, 24 Misc. 147, 150), but the basis of such application must be some sufficient cause arising out of claims made against the estate, necessary litigation, or other *unavoidable* cause of delay. *Matter of Wormser*, 51 App. Div. 441; *Matter of Prout*, 53 Hun, 541; *Matter of Bolton*, 35 Misc. 688. The appraiser has no power to remit the tax. He may report the request, but the application must be to the Surrogate, in the exercise of the judicial power given him by § 228 to "hear and determine all questions arising."

When "by reason of claims made upon the estate, necessary litigation, or other unavoidable cause of delay" the payment of the tax has been delayed so that the penalty of ten per cent under § 223 has been incurred, it is the duty of the executor to apply for an order remitting the penalty and reducing the interest to six per cent.

Petition for remission of ten per cent penalty.

Surrogate's Court,
County of

Title.

To the Surrogate's Court of

The petition of A. B. respectfully shows to this court:

I. That he is the executor of the last Will and Testament (*or* the administrator of the goods, chattels and credits) of the above named decedent, who died on the day of in the year domiciled at in the State of

II. That by reason of litigation involving the entire estate of the said decedent it was impossible until the day of 19 to fix and determine the shares in the estate of the said decedent to which the parties interested were entitled (*or* that it has been impossible until the day of in the year of 19 to definitely ascertain, liquidate and adjust the claims made against the estate of the decedent and the values of his property; *or set forth any other just cause for delay in settling the affairs of the decedent, which may have prevented the fixing of the tax*).

III. That such proceedings have been had herein that an appraiser has heretofore been appointed, who has made his report and filed the same in the office of the Surrogate of said county, on the day of in the year 19 and an order duly made thereon, whereby the said Surrogate fixed and determined the value of the shares of persons interested in the estate of said decedent and the tax due upon the same under the act relating to Taxable Transfers.

IV. That your petitioner is desirous of paying such tax; that in order to obtain the proper receipt therefor and to settle his accounts it is necessary to present with such accounts proper vouchers for the payment of the tax due the State of New York upon the estate of said decedent, and to obtain

the same your petitioner makes this application pursuant to the provisions of said act for a remission of the penalty incurred by reason of the non-payment of such tax within eighteen months from death of said decedent from ten per cent to six per cent.

Wherefore your petitioner prays that an order be made remitting the penalty upon the tax heretofore fixed herein from ten per cent to six per cent to be charged upon such tax from the accrual thereof, to wit: from the date of the death of said decedent, provided such payment be made within five days from the date of the entry of the order of the Surrogate on this application; and that your petitioner have such other or further relief as to the Court may seem just.

Petitioner.

(Verification.)

Notice of motion to remit penalty of ten per cent.

Surrogate's Court,
County of

Title. }
}

Please take notice that on all the papers and proceedings herein and on the affidavit herewith served of A. B. (executor *or* administrator of deceased) verified on the day of (*note*) I will apply to the Surrogate of the county of at a Surrogate's Court (*or* at Chambers of the Surrogate) to be held in said county in on the day of at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order remitting the penalty of ten per cent upon the tax heretofore fixed upon the estate of the above named decedent, by order of the Surrogate of said county made and entered on the day of to interest at the rate of six per cent per annum from the date of the accrual of the said tax, to wit: the date of the death of the said decedent, which occurred on the day of until the date of the payment of said tax, provided said payment be made within days after the entry of the order of the said Surrogate to be made upon this application.

Note. The petition serves for an affidavit.

Dated the day of 19

To Hon.

Comptroller of the State of N. Y.

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Order for remission of ten per cent penalty.

Title. }

On reading and filing the petition of A. B., executor of the last Will and Testament (*or* administrator of the goods, chattels and credits) of C. D., the decedent above named, and on all the papers and proceedings herein; and after hearing Esq., attorney for said petitioner, and Esq., attorney for the Comptroller of the State of New York and on motion of A. B., Esq., attorney for said petitioner, it is

Ordered that the penalty upon the tax heretofore fixed herein be remitted from ten per cent to six per cent per annum to be charged from the date of the accrual of said tax, to wit: the date of the death of said decedent, which occurred on the day of 19 until the date of the payment of such tax, provided the said tax be paid within days from the date of this order. *Note.*

Note. *Or* until the day of 19 when the cause of the delay in fixing said tax was removed, and from said last date to the date of payment to be charged at the rate of ten per cent per annum. See section 223.

§ 881. **Reducing tax on nonresidents' estates.**—The representative *and* the Surrogate are charged with the duty of protecting decedents' estates. As against the State, it is notable that the Surrogate is paid nothing for the increasing labor this law imposes on him. The courts uphold representatives, in cases of nonresidents, in any legitimate application of local assets calculated to lessen the tax burden. Suppose A, of New Jersey, leaves an estate of which less than $10,000 in value is in this State. The legacies run partly to persons in the exempt class, and partly to those who are liable to five per cent tax. The executor may pay exempt legacies out of the New York assets. *Matter of James*, 144 N. Y. 6; *Matter of McEwan*, 51 Misc. 455.

The *James* case authorized the payment of taxable legacies out of foreign assets, and the application of local assets to a trust for exempt beneficiaries. But in *Matter of Ramsdill*, 190 N. Y. 492, reviewing both courts below, the Court of Appeals somewhat limited this theory. *Here there was intestacy.* Held, that mere methods of bookkeeping could not avoid the operation of the law *eo eodemque instante* of the time of death and consequent devolution of the interests. That is, the interest of a distributee vests by law. He has, in this State, an undivided interest in the New York property by virtue of our law. A legatee can require payment in the foreign jurisdiction of his specific legacy.

§ 882. **Compounding payment on future estates.**—When the tax has been fixed, provision is made whereby the tax on certain remainders or expectant estates may be compounded by an immediate payment. This is by virtue of the provision of § 233.

§ 233. *Composition of transfer tax upon certain estates.* The state comptroller, by and with the consent of the attorney general expressed in writing, is hereby empowered and authorized in a county in which they receive payments on account of transfer tax, to enter into an agreement with the trustees of any estate in which remainders or expectant estates have been of such a nature, or so disposed and circumstanced that the taxes thereon were held not presently payable, or where the interests of the legatees or devisees were not ascertainable under the provisions of chapter four hundred and eighty-three of the laws of eighteen hundred and eighty-five; chapter three hundred and ninety-nine of the laws of eighteen hundred and ninety-two, or chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, and the several acts amendatory thereof and supplemental thereto; *and to compound such taxes upon such terms as may be deemed equitable and expedient;* and to grant discharge to said trustees upon the payment of the taxes provided for in such composition.

Provided, however, that no such composition shall be conclusive in favor of said trustees as against the interests of such *cestuis que trust,* as may possess either present rights of enjoyment, or fixed, absolute or indefeasible rights of future enjoyment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto, either personally, when competent, or by guardian or committee. Composition or settlement made or effected under the provisions of this section shall be executed in triplicate, and one copy shall be filed in the office of the state comptroller, one copy in the office of the surrogate of the county in which the tax was paid, and one copy to be delivered to the executors, administrators or trustees who shall be parties thereto.

This is a special power; not extending generally as authority to the comptroller to settle all disputed transfer tax cases, it relates to clearing up the tax on future interests, *as against the State.* As to the ultimate beneficiaries, their right to question the propriety of it remains unless foreclosed by proper consent.

As a matter of practical interest the compromise consists in the State getting all it wants, subject to discount for cash. The State can afford to be patient. The lien is there. On the other hand, the estate may want to give title to realty, and the lien must be first cleared off.

The composition binds the estate. *Matter of Kidd,* 115 App. Div. 205. Reversal, 188 N. Y. 274, involved construction of effect of antenuptial agreement.

§ 883. **Collection of the tax.**—The tax law provides two methods of paying this tax: The first through the voluntary medium of the executor, administrator or trustee, and the second by compulsory proceedings. See § 235. The first provisions are contained in § 224, which is as follows, in part:

§ 224. *Collection of tax by executors, administrators and trustees.*—Every executor, administrator or trustee, shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor or trustee, having in charge

or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasury or state comptroller, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

Questions under this section regarding the duty of executors of the wills of nonresidents in regard to this tax, are discussed in *Matter of Embury*, 19 App. Div. 214, aff'd 154 N. Y. 746, where it was held that where executors took personal property of a nonresident out of the State for distribution in the jurisdiction of domicile at a time prior to the imposition of a tax upon such property of a nonresident, or, more strictly speaking, at a time when the mode for assessing and collecting the tax was so imperfect as not to be capable of execution as to the interest of nonresidents, the executors could not be held liable, but that it was in fact their duty to remove such property, citing *Matter of Bronson*, 150 N. Y. 1. The court, in this case, were inclined to the view that had the property still remained in the State, it would be taxable under an act afterwards passed. In *Matter of Pettit*, 65 App. Div. 30, however, where, before the passage of the act of 1892 taxing interests going to lineals, a nonresident died leaving assets in New York County which were not removed from the county until after the passage of the act, the court refused to follow the *dictum* in *Matter of Embury*, saying (p. 32): "It is difficult to conceive how the fact of nonremoval by the executors of a nonresident decedent of property belonging to the decedent from this State, could make such property the subject of an inheritance tax which was imposed long after the transfer of the property had occurred."

Another interesting question arose in regard to the estates of nonresidents in *Matter of James*, 144 N. Y. 6. In that case a citizen of the Kingdom of Great Britain died in Africa, and by his last will disposed of a large estate. He left property in Great Britain and an estate of over two millions in this country. By his will legacies were given to collateral relatives and charity, which in the aggregate amounted to about one-half of

the property left by him in Great Britain. The residuary estate was given to his executors in trust for the benefit of his brothers.

The General Term and the Court of Appeals (reversing the Surrogate of New York County who had imposed a tax upon the collateral legacies and directed the payment thereof out of the assets here) held that the foreign executors had a right to apply the property in England to the payment of the collateral legacies, thereby constituting the American assets a part of the residuary estate disposed of in the will in favor of the testator's brothers, thus saving the estate from the payment of the succession tax imposed by our laws. The Court of Appeals held (*id.*, p. 11): "If the executor determines to pay the legacies from the English estate, the American estate is, thereby, freed from the burden of the special tax, the imposition of which depends upon the fact of a succession by the legatee to some property which is within the State. If the American estate is appropriated to persons, who are within the excepted degrees of relationship to the testator, the right to claim the tax from the executor is gone. It does not lie with the officers of the State to say, in such a case, which part of the testator's property shall be appropriated to the payment of the legacies." And it was distinctly intimated that the court would incline always to avoid the result of double taxation of decedents' estates. And see *Matter of Ramsdill,* discussed above.

But with these equitable limitations the executors of nonresidents will be held strictly to the liability imposed by the act, nor will they be held excusable either by reason of the distribution of the estate (*Matter of Hacket,* 14 Misc. 282), nor on the ground of ignorance of the law (*Matter of Platt,* 8 Misc. 144), nor of hardship to the legatee. *Ibid.*

§ 884. **Collection by district attorney.**—This is covered by § 235, *q. v.*, which it is unnecessary to quote. He may not act

(*a*) Until the expiry of eighteen months of the accrual of the tax.

(*b*) The neglect or refusal of the persons liable therefor to pay.

(*c*) After notification of that fact from the comptroller.

(*d*) Upon application to Surrogate for a citation.

§ 885. **Refunding tax.**—It quite frequently happens that after the payment of the tax has been made, through a reversal of the order fixing tax, or otherwise, the parties making payment become entitled to some rebate. See *Matter of Campbell,* 50 Misc. 485; *Matter of Willets,* 51 Misc. 176; 119 App. Div. 119. But Surrogate may refuse to order the refund of a tax voluntarily paid, i. e., not under mistake, etc. *Matter of Mather,* 41 Misc. 414. It often occurs, too, that through a desire on the part of the representatives of the estate to take advantage of the five per cent rebate clause a payment is made to the comptroller before a proceeding is brought, which payment is afterward found to have been too large. For such cases as these § 225 provides as follows:

> If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax

has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comptroller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the state comptroller or county treasurer, or if such tax has been paid to such state comptroller or county treasurer such officer shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this article.

If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed *within two years* from and after the date of entry of the order fixing the tax, on due notice to the state comptroller, the state comptroller shall refund or direct the refund of the excess tax, but without interest.

However, in *Matter of O'Berry*, 179 N. Y. 285, the Court of Appeals (see opinion) held that if the order was reversed because the law was unconstitutional, and this would extend to any order made without jurisdiction, the estate is entitled to recover the tax paid, *with interest.* See *Matter of Hoople*, 179 N. Y. 308, where Werner reviews this statute and holds the right to a refund to be a privilege and not a vested right. Hence the limitation of time will be strictly applied. It is further provided, "no application for such refund shall be made after one year from such reversal or modification." The act is self-operative. The comptroller is directed by the section to refund. He need not await an order from Surrogate. *Matter of Cameron*, 97 App. Div. 436.

It was held in *Matter of Sherar*, 25 Misc. 138, that, under the section in question, the Surrogate had the right to direct that a portion of the tax, which, in that case, had been paid, be refunded because of the fact that certain notes held by the decedent at the time of his death and valued at par for the purpose of fixing the tax, proved to be worthless, and this, even though the application were not made within two years after the entry of the order fixing the tax, the Surrogate holding that the two years' provision did not cover the precise case in question.

In *Matter of Coogan*, 27 Misc. 563; 162 N. Y. 613, certain United States bonds had been taxed in a transfer tax proceeding and the tax thereon paid. Four years thereafter, the courts having, in the meanwhile, declared that under the law as it then existed, United States bonds were not properly taxable, an application was made to the comptroller under the section in question for a refund of the tax on these bonds. No appeal had been taken from the original order fixing tax and it was contended by the comptroller that, the time to appeal having expired, there was no remedy for the parties who had paid the tax. The court held, however, that the order fixing the tax in question was absolutely void for lack of jurisdiction and granted a mandamus against the comptroller directing him to refund the tax. Where the tax still remains in the hands of the county

treasurer, the Surrogate has the power to direct him to refund it and it is only in a case of payment into the state treasury that the state comptroller is given that authority. *Matter of Park*, 8 Misc. 550. See also discussion in previous section as to modifying or vacating appraisal, and see *Matter of Backhouse*, 110 App. Div. 737; *Matter of Scrimgeour*, 175 N. Y. 507.

§ 886. **Surrogate's power to tax amount of debts erroneously deducted.** —There is, at the end of § 225 an additional reserved right of review or reappraisal, which reads as follows:

> Where it shall be proved to the satisfaction of the surrogate who has assessed the tax upon the transfer of property under this article, that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted.

The proof of this state of facts will probably only be available after the accounting.

§ 887. **Postponement of payment.**—The liability to pay the tax is a liability that continues until the tax has been paid; and the tax remains a lien upon the property transferred until payment. See § 222 and *Matter of Winters*, 21 Misc. 552. But no person can be compelled to pay the tax until notice has been given him as provided for by the law and he has had the opportunity contemplated by the statute to be heard, upon which hearing he may allege any reason whatever which shows that he ought not to pay it. *Matter of McPherson*, 104 N. Y. 306.

§ 888. **Reaching the property.**—In the early history of the Transfer Tax Law it was not foreseen how far-reaching the decisions would be, nor that the estates of nonresidents would be so largely concerned in the law. A goodly portion of the transfer taxes, by reason of the decisions of our courts, are now being collected from estates of nonresident decedents. While the law creates a lien of the tax on the property itself, it also, as has been seen, makes both the beneficiary and the executor or administrator liable for its payment. In cases, however, where the only assets of a nonresident decedent, which are subject to tax, are stocks in New York corporations, and where the executors and beneficiaries of the estate are not within the jurisdiction of the State, it can be seen that in the absence of any further provision, the payment of the tax could readily be evaded.

To meet this situation § 227 now provides with much detail:

> If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this State standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the state comptroller or the treasurer of the proper county on the transfer thereof.
>
> No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits or other assets belonging to or standing in the name of a decedent

who was a resident or non-resident, or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons or upon their order or request, unless notice of the time and place of such intended delivery or transfer be served upon the state comptroller at least ten days prior to said delivery or transfer; nor shall any such safe deposit company, trust company, corporation, bank or other institution, person or persons deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent, or belonging to, or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution, making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax and interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits, or other assets including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, under the provisions of this article, unless the state comptroller consents thereto in writing.

And it shall be lawful for the said state comptroller, personally, or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer.

Failure to serve such notice or failure to allow such examination, or failure to retain a sufficient portion or amount to pay such tax and interest as herein provided, shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution, making the delivery or transfer, and in addition thereto, a penalty of one thousand dollars; and the payment of such tax and interest thereon, or of the penalty above prescribed or both, may be enforced in an action brought by the state comptroller in any court of competent jurisdiction.

§ 889. **Form of affidavit by executor as to amount of decedent's estate.**—It will be recalled that upon offering a will for probate an affidavit as to the decedent's property is required to be filed. That which must be submitted to the appraiser must be more in detail. It may be substantially as follows:

Affidavit of executor or administrator of decedent or their agent as to assets, and liabilities of the deceased to persons entitled to his estate.

Surrogate's Court,
County of

Title.

State of New York,
Borough of Manhattan,
City and County of New York. } ss.:

being duly sworn says:

I. That he is one of the executors of the last will and testament (*or* administrator of the goods, chattels and credits) of deceased.

II. That the said decedent died at State of on the day of 19 and was at the time of his death a resident of the State of New York.

III. That the will of said decedent was thereafter and on the day of 19 duly proved before the Surrogate of County and letters testamentary were thereupon duly issued to deponent and

IV. That the decedent died seized and possessed of the following property, real and personal. (Then follows itemized list of assets as follows:)

Real Property.			
Locality.	Street No.	Assessed Value.	Actual Value.

Personal Property.		
Nature.	Par Value.	Actual Value.

V. Said decedent at the time of his death, to the best of deponent's knowledge, died seized and possessed of no other property, real or personal, nor did he, prior to his death, make any transfer of property by deed, grant, bargain, sale or gift, in contemplation of death or intended to take effect at or after such death. [If known to have done so, recite it; for if afterwards discovered, the executor is liable.]

VI. The following is a list of all debts and estimated expenses of administration:

Sworn to before me this
day of 19

(But if the decedent be a non-resident of the State of New York, after paragraph II which should, of course, give the place of residence of the decedent at the time of his death, use the following paragraphs:)

III. That the only property within the State of New York owned by decedent at the time of his death and the only stock in New York corporations were as follows:

IV. That at the time of his death the decedent was not engaged in any business in the State of New York, had no capital invested therein, had no bonds of the United States, or of any corporations or individuals on deposit in the State of New York, nor bank or trust company deposit within said State, nor was he at that time possessed of any other personal property in said State, nor of any stock in New York corporations, than as above set forth, nor did decedent die seized of any real estate other than that above mentioned.

V. To the best of deponent's knowledge, said decedent made no transfer of property in this State by deed, grant, bargain, sale or gift, in contemplation of his death, or intended to take effect in possession or enjoyment at or after such death.

VI. That a copy of the last will and testament of said decedent (together with the copy of the inventory of his estate, *if any made*) is hereto annexed and marked and made a part hereof.

VII. That the ages of the beneficiaries under the last will and testament of said decedent who are entitled to estates for life in all or in a part of the estate of said decedent, are as follows: (Here insert details.)

Note. Use if conditions admit. See *Matter of James*, 144 N. Y. 6.

(*Note.*) VIII. That the executor of said decedent availing himself of the privilege allowed by law has appropriated the property of said decedent within the State of New York to form a part of the residuary estate of said decedent which passed under the will to the following names persons: (Here insert list of residuary legatees with their post-office addresses.)

(Jurat.)

(*This should be made before an officer duly authorized, whose signature is to be certified in such manner as to entitle the affidavit to be read in evidence in the courts of the State of New York.*)

IX. That the entire estate of said decedent amounted, at the time of his death, to $ and that the following is a list of all debts and expenses of administration:

§ 890. **The receipt.**—Section 236 of the Tax Law provides for the procuring from the state comptroller, by any person of a copy of the receipt given to the executor for the payment of the tax. And of course the one paying the tax is entitled to duplicate receipts. It also provides that: "any person shall upon the payment of fifty cents be entitled to a certificate of the State Comptroller that the tax upon the transfer of any real estate of which any decedent died seized has been paid." The section also provides that such certificate shall designate the real property upon which such tax is paid, the name of the person so paying the same and whether the payment is "in full of such tax." Then it is provided that the certificate may be recorded in the office of the county clerk or

register of the county where such real property is situate, in a book to be kept by him for that purpose, which shall be labeled "Transfer Tax."

According, if the title to property of a decedent is being searched on a proposed sale thereof the lien of the tax, imposed upon the property under § 224 of the Tax Law, which would be revealed by the fact of the owner's death and by title being tendered by his heirs or executors, is met and obviated by the record of the certificate identifying the property and showing the amount of the tax paid, and which certificate can be searched for in a book exclusively devoted to Transfer Tax matters.

§ 891. **Expectant interests.**—Section 230 is discussed in the text-books on the Transfer Tax Law. We do not quote it in full. The general scheme of the article is to facilitate the immediate clearing up of the tax, while safeguarding the rights of remainder interests when, by reason of conditions or contingencies, the *fair* market value is not presently ascertainable, or where the rate of tax may vary.

The rule is the tax accrues "at the time of the transfer." The exception is as to transfers limited, conditional, dependent or determinable upon the happening of any contingency or future events" by reason of which the *fair* market value is not determinable as of such "time of the transfer." In such cases it accrues when the beneficiary gets possession or enjoyment (§ 222.)

But both State and estate may be equally interested in having the tax fixed and paid. If they are, there is no difficulty as to immediate interests being appraised. That is, a life estate will be computed by the Superintendent of Insurance (§ 230). The future estate *may* be compounded under § 233.

If the life estate, at the time of appraisal, has actually ended, as where a widow having an expectancy of x years has already deceased, that estate may properly be appraised and computed on the actual duration and not the theoretical expectancy. See *Matter of Hall*, 36 Misc. 618, Thomas, Surr., disapproving *Matter of Jones*, 28 Misc. 356, when the mortality tables were held to govern. The rule cuts both ways: the shorter the intermediate estate, the less is the diminution of the remainder. If the life tenant is exempt and the remainder taxable at five per cent the comptroller's representative may have views not suggested to his mind where the life estate would have to pay five per cent and the remainder be exempt.

§ 892. **Same—Full value taxed.**—Section 230 further, in effect, provides that the possible abridgment, defeasance or diminution of any estate or interest, when there are persons . . . . *presently* entitled to the beneficial enjoyment of possession, shall not work any diminution of the "fair market value." But, if the incumbrance or other contingent diminution in value actually occurs then a return of the tax, *pro tanto*, can be had under § 225.

Section 230 also provides:

> When property is transferred in trust or otherwise, and the rights, interest

> or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, with legal interest thereon from the time of payment. Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this article.

This is clear and explicit. Then follows a provision, which was enacted substantially in 1897, ch. 284, omitted in ch. 76, Laws of 1899, and restored in 1901, ch. 493. As now amended, ch. 368, Laws of 1905, and re-enacted in the Consolidated Laws, it reads as follows:

> Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation upon which said estates in expectancy may have been limited. Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

Prior to the amendment of 1899, therefore, contingent future estates were not taxable until they vested in possession. *Matter of Hoffman*, 143 N. Y. 327; *Matter of Curtis*, 142 N. Y. 219. The object of the amendment stated was clearly to secure a payment of tax in the cases of such contingent estates, immediately upon the death of the decedent, by whose will these estates were created. The courts, at first, did not give this construction to the law as amended. Thus, where property was given to a brother for life with privilege to use as much of the principal as might be necessary, then over, the court held that, as it could not be determined how much of the principal the life tenant would use until his death, the clear market value of the property to be transferred to the remaindermen could not be ascertained until then, and such remainder was not presently taxable. The same interpretation of the amended law was given in *Matter of Plum*, 37 Misc. 466, and *Matter of Howell*, 34 Misc. 432; and in *Matter of Vanderbilt*, 68 App. Div. 27. The case last cited was reversed by a divided court, see 172 N. Y. 69, but in the *Matter of Brez*, 172 N. Y. 15, the court discusses the *Vanderbilt* case, and the provision for payment of

the tax at the *highest* rate, subject to a refund later for cause shown, and suggests further legislation looking at a first assessment at the *lowest* rate subject to increase later for cause shown.

In *Estate of Ogden Goelet*, reported in the New York Law Journal of July 19, 1901, the question of the construction of this clause was involved.

In this case testator died in August, 1897, leaving a will by which he gave one-half of his residuary estate to a trustee for his son, directing such trustee to pay to the son upon his reaching twenty-one years of age, the sum of $500,000 on account of his share in the residuary estate. A proceeding was brought soon after decedent's death to fix the tax on the estate and the appraiser in that proceeding fixed and taxed the value of the $500,000 legacy for the period intervening between the death of the testator and the son's majority, but reported that the remainder was not then taxable. Upon the son's reaching twenty-one years of age the executors asked the court to make an order fixing the tax upon the remainder interest in the sum in question at the value theretofore fixed by the appraiser, the executor contending that the Laws of 1899 and not the Laws of 1897 prevailed. The court, however, fixed the tax as provided for by the Laws of 1897, holding that the estate transferred to the son must be assessed at the full value of the trust fund undiminished by the value of the estate during the minority of the legatee.

A slightly different question involving the construction of this act arose in *Estate of James Connolly*, New York Law Journal, July 26, 1902. Here the decedent died in 1892, before the existence of any act taxing remainders at their full undiminished value. The estate went to the wife for life and upon her death to the testator's children then surviving. A proceeding was brought in 1895 to determine the tax, and the interests of the remaindermen were declared to be not then ascertainable. The widow died in 1901, and an application was then made to fix the tax on the remainders. While conceding that if the tax on the remainders had been fixed in 1895, the value of the life estate would first have to be deducted, and while expressing some doubt as to the constitutionality of the amended law so far as it attempted to affect an estate created prior to the passage of such amendments (see *Matter of Pell*, 171 N. Y. 48), the Surrogate asserted the rule to be a wholesome one that a law should not be declared unconstitutional by a court of first instance and taxed the remainders at their full undiminished value. See also *Matter of Hosack*, N. Y. Law Journal, October 30, 1902.

§ 893. **Inequality of the law—The burden of the tax.**—It is competent for a testator to direct his executors to pay all succession taxes out of his estate. *Jackson* v. *Tailer*, 41 Misc. 36, is not to the contrary. There the will provided that legacies be paid "without any rebate or reduction whatever." It was held that as there was no such tax law then, testator did not contemplate this tax on the several shares; implying if the law had been in force the direction was valid. *Matter of Gihon*, 169

N. Y. 443, points out that the only effect is to increase each legacy by the amount of the tax.

But when the will is silent, the question, so far as these intermediate and future estates is concerned, is whether the tax, which is payable forthwith by the trustees or executors, is to be charged to principal or income. Section 230 says ". . . . 'payable forthwith' . . . . out of the property transferred."

See *Matter of Vanderbilt*, 172 N. Y. 69; *Matter of Tracy*, 179 N. Y. 501; *Matter of Bass*, 57 Misc. 531. Legacy of income of a trust fund. Tax paid out of principal. But so is the tax on the remainder, which has to be paid "at the highest rate." The life tenant, say an annuitant, has his income docked each year by a proportionate share of the tax, as per his expectation of life, *Matter of Tracy, supra,* and his income is also diminished by the principal being diminished by the five per cent tax. The refund is made after the life tenant is dead, and the injustice of the scheme is pointed out in *Matter of Vanderbilt, supra.*

CHAPTER VI

PAYMENT OF LEGACIES

§ 894. **Carrying out the will.**—The Statute of Distribution divides an intestate's estate. But, in cases of testacy, the executor has an instrument which governs distribution. Having ascertained the *quantum* of the estate, and liquidated all claims against it, the provisions of the will as to legacies being operative, both the executor and the beneficiaries become interested in the questions that arise as to payment, in full or in part, of these bequests.

§ 895. **Payment of legacies.**—The general provisions of the Code as to payment of legacies are contained in § 2721, which is as follows:

> No legacy shall be paid by any executor or administrator *until after the expiration of one year* from the time of granting letters testamentary or of administration, unless directed by the will to be sooner paid.
>
> If directed to be sooner paid, the executor or administrator *may require a bond*, with two sufficient sureties, conditioned, that if debts against the deceased duly appear, and there are not other assets to pay the same, and no other assets sufficient to pay other legacies, then the legatees will refund the legacy so paid, or such ratable portion thereof with the other legatees, as may be necessary for the payment of such debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee, and that if the probate of the will, under which such legacy is paid, be revoked, or the will declared void, that *such legatee will refund* the whole of such legacy, with interest, to the executor or administrator entitled thereto.
>
> *After* the expiration of *one year*, the executors or administrators *must* discharge the specific legacies bequeathed by the will and pay the general legacies, if there be assets. If there are not sufficient assets, then an *abatement* of the general legacies must be made in equal proportions. Such payment shall be enforced by the surrogate in the same manner as the return of an inventory, and by a suit on the bond of such executor or administrator whenever directed by the surrogate. **§ 2721, Code Civil Proc.**
>
> [Italics for purposes of emphasis merely.]

§ 896. **What is a legacy?**—A legacy is a disposition of personal property by will. The property may be testator's or he may have a right to dispose of it. In either case his testamentary disposition of it, directly or under a power, creates a legacy. See *Isham* v. *N. Y. Assn., etc.*, 177 N. Y. 218.

§ 897. **The legatee.**—The legatee is the person whom the testator specifies as the recipient of his testamentary bounty. It is not "the per-

son entitled to the legacy." An assignee might be that. Or a receiver, or trustee in bankruptcy. The distinction is not always material under this chapter. Of course the representative must, at his peril, pay the person entitled to receive it. He must therefore recognize a proper power of attorney. *Anderson* v. *Fry*, 116 App. Div. 740; see cases on p. 742; *Lahn* v. *Sullivan*, 116 App. Div. 609. The question of *identity* is the one of practical moment. It arises where there is a misnomer, as frequently happens, of some charitable institution.

§ 898. **Specific and general legacies.**—Section 2721 gives a preference to specific legacies bequeathed by the will over general legacies. Specific legacies must first be paid. That means that, if there be a deficiency of assets, the general legacies will first be subject to abatement. *Matter of Matthews*, 122 App. Div. 605. Specific legacies were originally of two kinds, the first being where a certain chattel was particularly described and distinguished from all others of the same species, as, "I give the diamond ring presented to me by A." Such a legacy can be satisfied only by the delivery of the identical ring. The second was where a chattel of a certain kind was bequeathed without any distinction of it as an individual chattel, as, "I give a diamond ring." Such a legacy could be fulfilled by the delivery of anything of the same kind. The only specific legacy now recognized is that first above mentioned. A bequest of a sum of money or of a sum in government securities, must be taken as a legacy of quantity and is therefore a general legacy notwithstanding the testator may have a greater or an exact quantity of the specific security at the date of his will. See *Matter of Hadden*, 1 Connoly, 306; *Spencer* v. *Hay Library Assn.*, 36 Misc. 393, 395, citing *Tifft* v. *Porter*, below; *Holt* v. *Jex*, 48 Hun, 528; *Newton* v. *Stanley*, 28 N. Y. 61; *Brundage* v. *Brundage*, 60 N. Y. 544; *Matter of Van Vliet*, 5 Misc. 169.

A *general* legacy is a gift of personal property, by a last will and testament, not amounting to a bequest of a particular thing or money, or of a particular fund designated from all others of the same kind. *Crawford* v. *McCarthy*, 159 N. Y. 514, 519. A *specific* legacy is a bequest of a specified part of a testator's personal estate, distinguished from all others of the same kind. *Ibid.* Thus a legacy of $1,500 is general, while a legacy of the proceeds of a bond and mortgage for $1,500, identified by description, is specific. *Matter of Robinson*, 37 Misc. 336; *Walton* v. *Walton*, 7 Johns. Ch. 258; *Fenton* v. *Fenton*, 35 Misc. 479; *Matter of Reynolds*, 124 N. Y. 388; *Ball* v. *Dixon*, 83 Hun, 344. Whether a legacy shall be considered specific depends upon testator's intent as expressed in the will, construed in the light thrown upon it in the rest of the will. *Cramer* v. *Cramer*, 35 Misc. 17, 19; *Davis* v. *Crandall*, 101 N. Y. 319; *Matter of Mitchell*, 61 Hun, 372; *Matter of Hastings*, 6 Dem. 307.

The word "my" preceding the words "government security, stock or annuity," has been held, however, to render the legacy a specific legacy. See *Walton* v. *Walton*, 7 Johns. Ch. 258. See opinion of Kent, Chan. On the other hand, a legacy is general when it is so given as not to amount

to a bequest of a particular thing or money of the testator distinguished from all others of the same kind. See *Tifft* v. *Porter*, 8 N. Y. 516, citing Wms. on Ex. 838. To make a legacy specific, therefore, its terms must clearly require such a construction. The reason for this is that the presumption is stronger, that a testator intends some benefit to a legatee, than, that he intends to benefit only upon the collateral condition, that he should remain till death the owner of the property bequeathed. *Newton* v. *Stanley*, 28 N. Y. 61, 66.

§ 899. **Importance of distinction.**—This appears from the different status as to rights and remedies of the two kinds of legatee. A is legatee of "my diamond stud." That gives him no general or undivided interest in the estate. Thus he cannot compel an accounting, if his legacy is withheld. His remedy is replevin. *Matter of Egan*, 89 App. Div. 565. The importance of the distinction between specific and general legacies lies in the further fact, that an executor as such takes the unqualified legal title of all personalty not specifically bequeathed, and he holds such personalty not in his own right but as a trustee for the benefit, first, of the creditors of the testator, second, of those entitled to distribution under the will, or third, if all the property is not bequeathed of those entitled to distribution under the statute of distributions. See *Blood* v. *Kane*, 130 N. Y. 514, 517. On the other hand, as to chattels and choses in action specifically bequeathed, an executor has but a qualified title, to wit: the right to apply them in discharge of debts after and only after first exhausting all other property applicable to that purpose. *Ibid.* When certain things are mentioned or enumerated in a bequest, followed in the same clause by a more general description, that description is taken to cover only things of a like kind with those mentioned or enumerated. *Ludwig* v. *Bungart*, 33 Misc. 177 (rev'l 48 App. Div. not affecting point), citing Jarm. on Wills, 709, note. When articles of personal property are specifically bequeathed they are not to be resorted to for the payment of debts, unless the property not specifically devised or bequeathed is insufficient for that purpose. If the testator bequeaths a picture, a particular bond, and a sum of money deposited in a bank, to three legatees, these items are not to be taken for the payment of debts unless the remainder of the estate be found insufficient. *Toch* v. *Toch*, 81 Hun, 410, 414. If the specific article is *in esse* when the will takes effect it is immaterial that testator did not own it when the will was made. *Waldo* v. *Hayes*, 96 App. Div. 454. Annuities to be paid out of a trust fund created out of testator's personal estate are general and not specific legacies. *Turner* v. *Mather*, 86 App. Div. 172.

§ 900. **Specific and demonstrative legacies.**—A *demonstrative* legacy is a bequest of a certain sum of money, stock, or the like, payable out of a particular fund or security. *Crawford* v. *McCarthy*, 159 N. Y. 514, 518. The fund on which they are charged must first be applied to their extinguishment, and the balance, if any, of such a legacy, not satisfied by such fund, goes in with general legacies. As to such balance, if the residuary

estate be insufficient, the abatement is *pro rata* with that of the general legacies. *Florence* v. *Sands*, 4 Redf. 210, followed in *Matter of Warner*, 39 Misc. 432. The advantage which a specific legacy has over a general legacy in regard to the feature above indicated, is in some cases more than outweighed by the fact that a specific legacy is lost in case the subject of it is disposed of by the testator or is extinguished by payment or otherwise in his lifetime. And the courts, therefore, will incline to consider legacies as general rather than specific in order to effect the general intention of the testator that a real benefit should pass to the legatee by his will. Thus where a testator gave and bequeathed "the sum of $1,200 and interest on the same contained in a bond and mortgage," it was held to be the bequest of a certain sum of money and not of the bond and mortgage itself. See *Giddings* v. *Seward*, 16 N. Y. 365, 367. Judge Selden observed, that such a legacy was general in the sense that it would not have been regarded as adeemed by the assignment of the bond and mortgage, or its extinction in the lifetime of the testatrix. And he observed: "It belongs to a peculiar class of legacies, usually termed demonstrative, which partake so far of the nature of specific legacies, that the security referred to in the bequest, if in existence, and belonging to the testator at the time of his death, is set apart as a primary fund for the payment of the legacy." So also a legacy "I give to my wife the sum of $50,000 which may be invested in bank stock, Fort Edward and Wyoming, Iowa, and in bonds." The Court of Appeals held that this legacy was of a sum of money but not specific. *Matter of Hodgman*, 140 N. Y. 421, 428. See also *Booth* v. *Bapt. Church*, 126 N. Y. 215. Judge Finch observed: "It is merely demonstrative. . . . It points out the source from which payment was expected to be made, but is to be regarded as a general and not a specific legacy. Citing *Giddings* v. *Seward*, and *Newton* v. *Stanley*, *supra*." So, where a will directed executors to set apart sufficient real estate to produce $25,000 a year and to pay yearly to his widow in lieu of dower, the net income up to $25,000 for her life it was held to be a demonstrative legacy. It was also held the trustee could not retain the surplus of any one year to safeguard there being full income in some future year. *Spencer* v. *Spencer*, 38 App. Div. 403, 409, 411.

A bequest of half a certain promissory note owned by testator is specific. *Davis* v. *Crandall*, 101 N. Y. 311. A bequest of $1,000 is general. *Matter of Matthews*, 122 App. Div. 605. But a direction to sell the note or any other specifically identified property and pay A $1,000 of the proceeds is specific. *Ibid.* If the balance of such proceeds is insufficient, the general legacies abate *pro tanto* if charged on the land. If not charged and there be no other assets, the general legacies fail. *Ibid.*

The interest in any specific thing bequeathed vests in the legatee upon the assent of the executor. And the assent of the executor once given to a specific legacy vests the interest irrevocably. See *Onondaga Trust, etc., Co.* v. *Price*, 87 N. Y. 542, 548; *Linthicum* v. *Caswell*, 19 App. Div. 541, 543. This assent may be expressed or implied, and the rule applies al-

though the legatee is himself executor. *Blood* v. *Kane*, 130 N. Y. 514. When the executor assents to a specific legacy, the legacy ceases to be part of the testator's assets. *Matter of Pye, No. 1*, 18 App. Div. 306, 308, citing 2 Wms. Exs. (5th Am. ed.), m. p. 1242; *Hudson* v. *Reeve*, 1 Barb. 89. In case of deficiency of assets to pay the debts the executor cannot prudently or properly give such assent, for the specific legacy is subject to application thereon in behalf of creditors after all other available property has been applied, but as a general rule a specific legacy vests on the death of the testator so that the legatee is entitled to the income and profits that proceed from it. *Matter of Pye, supra*, citing 3 Pom. Eq. Juris. § 1130.

Where a testator bequeathed a specific amount of bonds and mortgages, made to him by his daughter who was one of his devisees, to his wife, and charged the payment of such bonds and mortgages upon the devises and bequests made to his daughter in the will, it was held that the legacy was not a specific legacy but a pecuniary one charged upon land. *Dunning* v. *Dunning*, 82 Hun, 462, 466. The mere fact, however, that a legacy is given for a specific purpose does not necessarily give it a preference as a specific legacy over all others. The mere statement of the purpose for which a legacy is given in no manner alters its character. *Wetmore* v. *St. Luke's Hospital*, 56 Hun, 313, 322. See *Matter of Whiting*, 33 Misc. 274.

§ 901. **Legacy based on consideration.**—On proof of such a characteristic, a legacy so given has priority over general legacies. The latter are "mere bounty" of the testator. The former are based on an existing, enforceable right. Examples of this kind are legacies in lieu of dower, or to a creditor in payment of a debt. Such legatees are "purchasers." *Matter of Woodbury*, 40 Misc. 143, and cases at p. 148; *Wilmot* v. *Robinson*, 42 Misc. 244. The ratio of value between the right and the legacy is immaterial. Hence, except as against debts, a legacy in lieu of dower, e. g., will be scrupulously guarded. Its existence in a will may be a consideration turning the scale in a doubtful case of "equitable conversion." *Ibid.*

§ 902. **Legacy by implication.**—To uphold a legacy by implication the inference from the will must be such as to leave no hesitation in the mind of the court, and permit of no other reasonable inference. *Brown* v. *Quintard*, 177 N. Y. 75, 84. *Bradhurst* v. *Field*, 135 N. Y. 564, applies this to devises: "To devise an estate by implication there must be so strong a probability of such an intention that *the contrary cannot be supposed.*" *Post* v. *Hover*, 33 N. Y. 594. Since an heir is not to be disinherited lightly, no implication so operating will be drawn unless by such plain and cogent inference as to be irresistible. *Scott* v. *Guernsey*, 48 N. Y. 106; *Quinn* v. *Hardenbrook*, 54 N. Y. 83; *Lynes* v. *Townsend*, 33 N. Y. 558; *Matter of L. I. L. & T. Co.*, 92 App. Div. 5, 14.

§ 903. **Legacy to a class.**—A gift to a class is a gift of an aggregate sum to a body of persons, uncertain in number, at the time of the gift, to be

ascertained at a future time, who are all to take in equal, or in some other definite, proportions, the share of each being dependent for its amount upon the ultimate number. *Herzog* v. *Title Co.*, 177 N. Y. 86, 97, citing *Matter of Kimberley*, 150 N. Y. 90, 93; *Matter of Russell*, 168 N. Y. 169.

If the number of donees is certain and their several shares certain the legacy is not to a class. *Ibid.*

The importance of determining this question is due to (2 R. S. 66) § 52 as to lapsed legacies in case of gifts to a child or descendant dying before testator leaving issue who survives testator. If the bequest is to a class issue of one of the class who predecease testator will not take under the statute, but only where will clearly so provides. *Pimel* v. *Betjemann*, 183 N. Y. 194. Who belongs to the class is reckoned as of the time of distribution. *Gilliam* v. *Guaranty Trust Co.*, 186 N. Y. 127, and cases cited at p. 133.

§ 904. **Legacies—How paid.**—The primary fund for the payment of debts and legacies is the personal estate; and the land of the testator cannot be resorted to for that purpose, until the personal estate is exhausted in the ordinary course of administration and under the authority of the statute. *Kingsland* v. *Murray*, 133 N. Y. 170; *Smith* v. *Atherton*, 54 Hun, 172. A testator may by his will charge a legacy upon his real estate. See for cases where a legacy is held to be charged upon land, *Wellbrook* v. *Otten*, 35 Misc. 459, 463, reviewing *Kalbfleisch* v. *Kalbfleisch*, 67 N. Y. 354; *Bevan* v. *Cooper*, 72 N. Y. 317; *Hoyt* v. *Hoyt*, 85 N. Y. 142; *Scott* v. *Stebbins*, 91 N. Y. 605; *McCorn* v. *McCorn*, 100 N. Y. 511; *Briggs* v. *Carroll*, 117 N. Y. 288; *Morris* v. *Sickly*, 133 N. Y. 456; *Dunham* v. *Deraismes*, 165 N. Y. 65. Whether this is the effect of the will or not is always a question of the testator's intention as manifested in its terms. *Hogan* v. *Kavanaugh*, 138 N. Y. 417, 421; *Matter of McKay*, 33 Misc. 520; *McCorn* v. *McCorn, supra; Matter of Grotrian*, 30 Misc. 23. The very use of the legacy may negative an intent to charge it. *Matter of Paddock*, 81 App. Div. 267. Or, it may be made to appear by satisfactory proof of extrinsic facts, such as the condition of the estate at time will was made. *McManus* v. *McManus*, 179 N. Y. 338; *Dunham* v. *Deraismes, supra.* And see opinion and cases cited in *Lediger* v. *Canfield*, 78 App. Div. 596. Or from there being a power of sale, for which there appears no other cause or occasion in the will. *Taylor* v. *Dodd*, 58 N. Y. 335; *Kalbfleisch* v. *Kalbfleisch, supra; Matter of Plummer*, 38 Misc. 536. But if when will was made the personalty was adequate, a *mere* power of sale alone will not charge the realty. *Schmidt* v. *Limmer*, 91 App. Div. 359. But it must always be borne in mind that the claims of creditors of a deceased person are preferred to those of his legatees or devisees, for the only interest in the testator's property which he can transmit to them, is that which remains after the payment of his just debts. *Platt* v. *Platt*, 105 N. Y. 488; *Rosseau* v. *Bleau*, 131 N. Y. 182; *Matter of Swart*, 2 Silv. 585. See *Conkling* v. *Weatherwax*, 173 N. Y. 43. Here A gave farm or its proceeds to B, after payment of $1,000 therefrom to C. B mortgaged the farm, thus accepting

the devise, and becoming liable to C. Held that the lien of the legacy was prior to that of the mortgage. Residuary legatees are entitled to nothing until the debts and legacies have been paid (*Wetmore* v. *St. Luke's Hospital*, 56 Hun, 313), and if legacies have not been charged, and real estate of the testator and the personal estate is insufficient, the legacies must be abated *pro rata*. If testator, after making a will, invests his whole estate in real property, that alone will not charge the legacies on such realty. *Harvey* v. *Kennedy*, 81 App. Div. 261; *Schmidt* v. *Limmer*, *supra*; *Morris* v. *Sickley*, 133 N. Y. 456. A bequest of personal property constitutes a legacy regardless of the fact whether the bequest is made to a wife in lieu of dower or to a debtor in satisfaction of an indebtedness. *Orton* v. *Orton*, 3 Keyes, 486.

One claiming his legacy is charged on realty must not only prove intent to charge realty but also an intent so to charge it *as to exonerate the personalty*. *Turner* v. *Mather*, 86 App. Div. 172. Once charged on realty it applies to it all, unless charged specifically. Hence it may be paid out of proceeds of a suit against elevated railroads for damages to easements appurtenant to such realty. *Matter of Levy*, 41 Misc. 68. So, recurring to legacies in lieu of dower, the legatee is really a creditor, and if the personalty be insufficient may require satisfaction out of realty or its proceeds, as, e. g., upon its sale in partition. *Wilmot* v. *Robinson*, 42 Misc. 244. See *Orth* v. *Haggerty*, 126 App. Div. 118, for typical case of widow being "put to her election." It is to be remembered that the land to be charged is that testator owns *at death*, not when will was made. *Irwin* v. *Teller*, 188 N. Y. 25.

§ 905. **Petition for payment.**—Section 2722 of the Code, provides, that a petition may be presented to the Surrogate's Court, praying for a decree directing an executor or administrator to pay petitioner's claim, and that he be cited to show cause why such a decree should not be made:

> 2. By a person entitled to a legacy, or any other pecuniary provision under the will, or a distributive share, for the payment or satisfaction thereof, or of its just proportional part, at any time after one year has expired since letters were granted.

There seems to be no valid reason why an afterborn child, not named in the will, might not have recourse, in a proper case, to this summary remedy and not be remitted to an action.

§ 906. **Legatee's remedies.**—A legatee may, if he so desire, sue for his legacy in an action against the executor in his representative capacity. If he is a residuary legatee he must join as defendants all persons interested in the residue (*Tonnelle* v. *Hall*, 2 Abb. 205); if not, he need not join the other legatees. *Cromer* v. *Pinkney*, 3 Barb. Ch. 466. A specific legatee may sue in replevin. *Matter of Egan*, 89 App. Div. 565. The Supreme Court has concurrent jurisdiction with the Surrogate's Court to enforce the payment of legacies, and if an action is pending under § 1819 of the Code, it will be a bar to proceedings before the Surrogate

by the same plaintiff to require the defendants to render their account and pay the legacy. *Lewis* v. *Maloney*, 12 Hun, 207; *Pittman* v. *Johnson*, 35 Hun, 41, aff'd 102 N. Y. 742, and cases cited. If, when a suit is begun under § 1819, proceedings have already been instituted in the Surrogate's Court for an account, and to compel the defendant to pay the legacy to the plaintiff, and payment of the amount of the legacy has been made into the Surrogate's Court, such facts would constitute a bar to the action, but it would be in the nature of an affirmative defense and would have to be pleaded as such. *Wall* v. *Bulger*, 46 Hun, 346, 348, citing *Hendricks* v. *Decker*, 35 Barb. 298; *Henderson* v. *Scott*, 32 Hun, 413. The provisions of § 1819 are as follows:

> If, after the expiration of one year from the granting of letters testamentary or letters of administration, an executor refuses, upon demand, to pay a legacy, or distributive share, the person entitled thereto may maintain such an action against him, as the case requires.

As to the nature of the action to be brought, and various principles regulating the proceedings and recovery, see *Lewis* v. *Maloney*, 12 Hun, 207; *Nichols* v. *Nichols*, 12 Hun, 428; *Porter* v. *Kingsbury*, 77 N. Y. 164; *Brown* v. *Knapp*, 17 Hun, 160; *Hoyt* v. *Hoyt*, 17 Hun, 192; *Kerr* v. *Dougherty*, 17 Hun, 341; *Eberhardt* v. *Schuster*, 6 Abb. N. C. 141, and *Roundle* v. *Allison*, 34 N. Y. 180. When such an action is brought the executor or administrator cannot set up want of assets (see § 1824, Code Civ. Proc.); nor is the plaintiff's right to recovery affected by want of assets except with respect to the costs to be awarded as prescribed by law. *Ibid.* And it is expressly provided that a judgment in such action is not evidence of assets in the defendant's hands. *Ibid.*

The control of the Surrogate over the estate affected by proceedings of this character, although he has no jurisdiction over the action itself, is safeguarded by requiring leave to issue execution upon the judgment obtained against the executor or administrator in his representative capacity to be obtained by order from the Surrogate from whose court the letters issued. See §§ 1825 and 1826, Code Civ. Proc. (already discussed in detail).

> Where a judgment has been rendered against an executor or administrator, for a legacy or distributive share, the surrogate, before granting an order, permitting an execution to be issued thereupon, may, and, in a proper case, must, require the applicant to file in his office, an undertaking to the defendant, in such a sum, and with such sureties, as the surrogate directs, to the effect, that if, after collection of any sum of money by virtue of the execution, the remaining assets are not sufficient to pay all the sums, for which the defendant is chargeable, for expenses, claims entitled to priority as against the applicant, and the other legacies or distributive shares, of the class to which the applicant's claim belongs, the plaintiff will refund to the defendant, the sum so collected, or such ratable part thereof, with the other legatees or representatives of the same class, as is necessary to make up the deficiency. **§ 1827, Code Civil Proc.**

§ 907. **Same—Proceedings under § 2722.**—This is a special proceeding, and cannot be brought on by motion, or by order to show cause. *Matter of Moran*, 58 Misc. 488; *Matter of Lyon*, 1 Misc. 447; *Matter of Hitchler*, 21 Misc. 417. Where a person entitled to a legacy or any other pecuniary provision under a will or a distributive share of the estate, presents a petition under § 2722, the Surrogate must issue a citation to the executor or administrator to show cause why a decree should not be made directing him to pay the petitioner's claim.

On the return of the citation he must make "such a decree in the premises as justice requires." But in either of the following cases the decree must dismiss the petition without prejudice to an action or an accounting, in behalf of the petitioner:

1. When an executor or administrator files a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality, absolutely, or on information and belief.

2. Where it is not proved, to the satisfaction of the surrogate, that there is money or other personal property of the estate, applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied, without injuriously affecting the rights of others, entitled to priority or equality of payment or satisfaction.

§ 908. **Form of the petition.**

Petition under § 2722.

Surrogate's Court,
County of

Title. }

To the Surrogate's Court of the county of

The petition of respectfully shows to this court and alleges:

I. That your petitioner resides at in

II. That late of deceased, departed this life leaving his last will and testament duly admitted to probate by the Surrogate's Court of the county of by decree duly made and entered on the day of 19 that letters testamentary were issued thereupon on the day of to the executor therein named.

III. That by said will a legacy of dollars was bequeathed to your petitioner and that more than one year has elapsed since letters were granted, but that payment of said legacy has not been made to your petitioner by said executor although payment of the same has been duly demanded.

IV. Your petitioner is informed and verily believes from the inventory of the personal property of said decedent filed by said executor on the day of (*or state other source of information*, e. g., testimony before transfer tax appraiser); that said executor has money or other personal prop-

Note. The legatee, if not a specific legatee, may combine in his petition with his application to obtain the payment of his legacy, an application to compel the settlement of the account of an execu-

tor. In such case an additional allegation should be inserted stating that he has not accounted. And the prayer for relief should be enlarged by asking that he be directed to account. *Matter of Macaulay*, 94 N. Y. 574, aff'g 27 Hun, 577.

erty of the estate applicable to the payment or satisfaction of the petitioner's claim sufficient to pay the same and which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction with your petitioner.

Wherefore your petitioner prays for a decree of this court directing said executor to pay the petitioner's claim and that he be cited to show cause why such a decree should not be made. (*Note.*)

(Signature.)

(Verification.)

This proceeding is a special proceeding and *must* begin by petition and citation, not by affidavit and order to show cause. *Matter of Moran*, 58 Misc. 488.

In *Matter of Tisdale*, 110 App. Div. 857, is presented a case where a legatee (widow—in lieu of dower) was held entitled to an accounting under §§ 2722 and 2725, subd. 3.

§ 909. **Who may petition.**—The language of § 2722 in subd. 2, "A person entitled . . . . under the will," has been held to confine the benefit of the section to the legatees themselves, and that it cannot be extended to assignees of legatees. *Peyser* v. *Wendt*, 2 Dem. 221, 223, 224; *Matter of Wood*, 38 Misc. 64, and cases cited. But if a legatee who has temporarily divested himself of his right under § 2722 by assigning his legacy, secures a reassignment of the legacy to himself, he will be deemed entitled to make the petition to compel payment of his legacy under this section. *Id.*, p. 226. See also *Matter of Brewster*, 1 Connoly, 172, 173. Where A assigned to B "all my legacy or legacies of every name and nature," it was held not to include an estate in expectancy vested in A on the death of another remainderman. *People's Trust Co.* v. *Harman*, 43 App. Div. 348. The petition must show that there is money or other personal property applicable to the satisfaction of the petitioner's claim, and which may be so applied without injuriously affecting the rights of others entitled to priority of payment or satisfaction. In the absence of such an allegation the facts required under the section could not be said to be proved to the satisfaction of the Surrogate, even in the absence of any answer by the executor or administrator. See *Baylis* v. *Swartwout*, 5 Redf. 395. If there are several claimants to the legacy, one claiming under an attachment against the legatee, and another by assignment from such legatee, the Surrogate cannot try their dispute. *Matter of Arkenburgh*, 38 App. Div. 473; *Matter of Grant*, 37 Misc. 151. He may, however, determine whether the legacy was in fact assigned. *In re Geis*, 27 Misc. 490. The Surrogate may in declining to pass on the dispute, and having found that the assignment was made, make a decree directing payment to the assignee, unless the legatee commence an action against him within a reasonable time. *Matter of Grant, supra.*

§ 910. **The executor's answer.**—If the executor or administrator file

a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality, absolutely or on information and belief, the Surrogate must dismiss the proceedings without prejudice to an action or an accounting. § 2722, Code Civ. Proc.; *Matter of McClouth*, 9 Misc. 385, 386, citing *Fiester* v. *Shepard*, 92 N. Y. 251; *Matter of Stevens*, 20 Misc. 159, 160. The answer of the executor must set forth facts which show that it is doubtful. If the Statute of Limitations has run he should set it up. *Matter of Cooper*, 51 Misc. 381. If an executor allege that the legatee is indebted to the estate in a sum larger than the legacy, this will be deemed a sufficient and conclusive answer under the section. *Charlick's Estate*, 11 Abb. N. C. 56; *Smith* v. *Murray*, 1 Dem. 34. So where an executor alleges payment of the legacy, it will be held a sufficient denial. *Mumford* v. *Coddington*, 1 Dem. 27. So where residuary legatees apply to compel a trustee under the will to pay the balance of their legacies alleged to have been retained by him in the form of commissions, and the answer denies the validity and legality of the claim, it was held that the petition was properly dismissed. *Hurlburt* v. *Durant*, 88 N. Y. 121. So where the petitioner was a religious corporation and the executor filed a verified answer showing that it was uncertain that the petitioner was the corporation to which the legacy had been given, and on the further ground that the amount of the legacy was in doubt, it was held that the petition was properly dismissed on the ground that the Surrogate had no power to take proof as to the facts put in issue. *Matter of Hedding Meth. Epis. Church*, 35 Hun, 315.

It is manifest that the object of these provisions of the Code is to establish a mode of procedure whereby a beneficiary under a will may obtain prompt relief *whenever it is plain that the rights of other persons cannot thereby be prejudiced;* but it does not extend to where the rights of third parties are involved or it is not shown to the satisfaction of the Surrogate that they will not be prejudiced. The proceeding for the judicial settlement of the executor's account in which all these matters can be administered and adjusted, is a preferable one. See *Beekman* v. *Vanderveer*, 3 Dem. 221, 225; *Riggs* v. *Cragg*, 89 N. Y. 479.

In this summary proceeding a legatee may not collaterally attack some prior adjudication defeating, or passing adversely upon, his claim, and which was not appealed from. Hence, the executor may set up such former adjudication in the answer, as in bar. *Matter of Stevens*, 40 Misc. 377.

While proceedings for the judicial settlement of an executor's account are pending a Surrogate will not as a rule decree payment of legacies unless it appears to his satisfaction that some very good and controlling reason or necessity therefor exists. *Matter of Harris*, 1 Civ. Proc. Rep. 162.

Where the executors interpose an answer denying the incorporation of the petitioner and allege its nonincorporation and deny the validity of its claim, the answer is sufficient under § 2722 to require the dismissal of the proceeding. *Matter of Young Men's Christian Association*, 22 App. Div.

325, 327, citing *Matter of Callahan*, 152 N. Y. 320; *Fiester* v. *Shepard*, 92 N. Y. 251; *Matter of Hammond*, 92 Hun, 478.

§ 911. **The order or decree.**—The form for the decree dismissing the petition can be adapted from the similar decree from the chapter on "The Payment of Debts," as may also the decree in case the executor interposes no defense and the petitioner is successful in his application.

§ 912. **Payment of legacy while proceedings are pending to revoke probate.**—When citations have been issued and served in a proceeding to revoke the probate of a will it is provided by § 2650 of the Code, that the executor or administrator with the will annexed must suspend until a decree is made upon the petition, "all proceedings relating to the estate except for the recovery or preservation of property and for the collection and payment of debts and such other acts as he is expressly allowed to perform by an order of the Surrogate made upon notice to the petitioner." The effect of this section has been held merely to restrict the powers of the executor, but not to restrict or enlarge the powers of the Surrogate. *Matter of McGowan*, 28 Hun, 246. If the executor desire or is requested to perform any act other than those in preservation of property or in collecting and paying debts which he could have lawfully performed, had the proceedings to revoke probate not been begun, he can do so only upon application to the Surrogate with notice to the petitioner in the proceedings to revoke probate. Consequently the Surrogate is not by means of this section deprived of power to direct payment of a legacy in a proceeding brought for that purpose, provided the notice is given to the petitioner in the proceedings to revoke probate, and it appears to his satisfaction that the money or other personal property of the estate may be applied to the payment of the petitioner's claim without injuriously affecting the rights of others. If the petitioner in the proceedings to revoke probate can show the Surrogate that his right would be injuriously affected, the Surrogate will dismiss the petition. But if it appears that the legatee is entitled to the payment of his legacy and that such payment will be without prejudice, the Surrogate may direct the payment, but would doubtless in such case require security from the legatee under the provisions of § 2721. See *Matter of Hoyt*, 31 Hun, 176, 179. The petitioner for revocation may himself petition for payment of an interest in the estate when he can show that in any outcome of the litigation he will be entitled thereto. *Matter of Hughes*, 41 Misc. 75. In this case Thomas, Surr., points out that he would have the same power under § 2672 if a temporary administrator had been appointed pending a will contest. See *Rank* v. *Camp*, 3 Dem. 278. But he has no power to direct payment of a legacy except in the very contingencies expressly provided for by statute. *Estate of Riegelmann*, 2 Civ. Proc. Rep. 98, and see *Riegelman* v. *Riegelman*, 4 Redf. 492, and *La Bau* v. *Vanderbilt*, 3 Redf. 384, 415, decided before the amendment of § 2672 in 1881. This order comes within the contemplation of § 2650 and its entry relieves the executors *pro tanto* from the suspension of their powers imposed by that section. *Ibid.*

§ 913. **Payment of legacies by temporary administrator.**—The Surrogate has power by order to direct a temporary administrator to pay a legacy or other pecuniary provision under a will or a distributive share or just proportionate part thereof according to § 2723 (formerly § 2719) as though he were an executor or administrator. § 2672, Code Civ. Proc. This power the Surrogate has both in cases of testacy and intestacy, and as a temporary administrator is appointed usually because of a contest causing delay in the probate of a will, it is clear, collating these sections, that the Surrogate may direct payment of a legacy where the probate of the will is delayed by a contest necessitating the appointment of a temporary administrator, or where the powers of the executor or administrator with the will annexed are suspended by virtue of proceedings to revoke probate. See *Matter of Hoyt*, 31 Hun, 176, 181; *Matter of Hughes*, 41 Misc. 75. But the power of the Surrogate is always subject to the limitation that the title of the applicant for the legacy or distributive share is undisputed and free from doubt. *Keteltas* v. *Green*, 9 Hun, 599. Consequently, when during the pendency of a contest of a will one of the contestants named as a legatee, and who was also one of the next of kin, made application for an order directing the payment of a sum of money to be charged against such legacy in case the will was upheld or against such distributive share in case the will was refused probate, the petition was dismissed upon its being made to appear that the will propounded contained a clause providing that any legatee or devisee who should contest its validity "shall forfeit thereby the bequest or devise in his favor." *Estate of Grout*, 2 How. N. S. 140. The provision in the will being one the testator had a right to make, and the party being a contestant, it was clear that the validity of the claim was doubtful in the event of the will being probated.

§ 914. **Payment on account of legacy for support of indigent legatee.**—Where the payment of the legacy is necessary for the support or education of the petitioner, provision is made by § 2723 for the making of an application for such payment although a year has not expired. The section is as follows:

> In a case specified in subdivision second of the last section, the surrogate may in his discretion, entertain the petition, at any time after letters are granted, although a year has not expired. In such a case, if it appears, on the return of the citation, that a decree for payment may be made, as prescribed in the last section; and that the amount of money and the value of other property in the hands of the executor or administrator applicable for the payment of debts, legacies and expenses, exceed, by at least one-third, the amount of all known debts and claims against the estate, of all legacies which are entitled to priority over the petitioner's claim and of all legacies or distributive shares of the same class; and that the payment or satisfaction of the legacy, pecuniary provision or distributive share, or some part thereof, is necessary for the support or education of the petitioner, the surrogate may, in his discretion, make a decree directing payment or satisfaction accordingly, on the filing of a bond, approved by the surrogate, conditioned as prescribed by law, with re-

spect to a bond which an executor or administrator with the will annexed may require from a legatee, on payment or satisfaction of a legacy, before the expiration of one year from the time when letters were issued, pursuant to a direction to that effect contained in the will. **§ 2723, Code Civil Proc.**

Of course this section does not apply to the case of a legacy which is directed by the will to be paid wholly or in part within the year. Section 2723 (formerly § 2719) has no reference to cases where the will has made explicit provision. The sole object of that section is to provide that, under certain specified circumstances, an executor may be required to pay a legacy in whole or in part, even before the expiration of a year, and even though the testator had given no direction for early payment provided that such payment is necessary for the support and education of the legatee. See *Matter of Selling*, 5 Dem. 225.

The security required by this section is by way of precaution, and emphasizes the legislative intent that the discretionary power given by this section to the Surrogate should be exercised with great care and caution. See *Matter of Austin*, 50 Hun, 604.

§ 915. **Same subject—Estimating the estate.**—The provision in § 2723 requiring it to be shown that the amount of money and the value of the other property in the hands of the executor or administrator applicable to the payment of debts, legacies, and expenses exceed *by at least one-third* the amount of all known debts and claims against the estate of all legacies which are entitled to priority over the petitioner's claim and of all legacies or distributive shares in the same class, means simply this:

"That the Surrogate must see to it that no payment shall be required of a representative of an estate within the year which shall leave in his hands less than one-third in excess of the claims upon the fund exclusive of that of the petitioner." See *Tuttle* v. *Heiderman*, 5 Redf. 199, second opinion, 205. And where the petitioner is entitled only to the interest of a specified sum, the residuary legacies should also be excluded in estimating the estate. *Lockwood* v. *Lockwood*, 3 Redf. 330, 333.

§ 916. **Support or education of the petitioner.**—These words are a distinct limitation on the power of the Surrogate. See *Hoyt* v. *Jackson*, 1 Dem. 553. But in determining whether the money applied for is necessary for the support or education of the petitioner or how much is necessary, the court will construe the provisions of the Code liberally. *Ibid.* It will take into consideration the station in life of the petitioner and of the testator, and, particularly where the petitioners are ultimately entitled substantially to the whole estate of the whole residuary estate, the court will not be astute to deny to the petitioners the present benefit of that which they are ultimately to enjoy.

It is perfectly competent in such a case for the Surrogate to refer the matter to a referee to determine the exact condition of the estate, the interest of the petitioner, and such other questions as may suggest themselves, provided the validity of the petitioner's claim is not put in issue. For it is especially provided by § 2723 that he may make the decree "if it

appears on the return day of the citation that a decree for payment may be made *as prescribed in the last section.*"

Of course the amount must not exceed the amount to which the petitioners will be ultimately entitled. And where the interest of the petitioner is the income of a trust fund, the Surrogate must be guided by the amount which the fund is earning at the time the application is made. *Hoyt* v. *Jackson, supra.* And the Surrogate should not direct the payment of interest not yet accrued. *Lockwood* v. *Lockwood,* 3 Redf. 330.

The petitioner in such an application must state facts going to show that the advance is necessary. The word "necessary" in the statute means, necessary with reference to the station in society, the former mode of life and surroundings, and the estate or income to which the applicant has been accustomed, and that to which she will ultimately be entitled. See *Lockwood* v. *Lockwood,* 3 Redf. 330, 332; *Williamson* v. *Williamson,* 6 Paige, 298. See also *Seymour* v. *Butler,* 3 Bradf. 193.

§ 917. **The form of petition.**—The petition should be substantially in the following form:

Petition under § 2723.

Surrogate's Court,
County of

Title. }

To the Surrogate's Court of the county of

The petition of respectfully shows to this Court and alleges:

I. That your petitioner resides at in

II. That late of deceased, departed this life leaving his last will and testament duly admitted to probate by the Surrogate's Court of the county of by decree duly made and entered on the day of 19 that letters testamentary were issued thereupon on the day of to the executor therein named.

III. That your petitioner's interest under said will consists of a legacy of dollars (*or state character of disposition in the will in favor of petitioner, such as for example, life interest in whole estate or whatever it may be*).

IV. Your petitioner further shows that the payment hereinafter prayed for is necessary for the support (*or* for the education) of your petitioner, in that your petitioner is without other income or means of support (*or* without adequate income to maintain petitioner in the station of life to which she has been habituated) (*or, state facts showing that such advance is necessary to the petitioner's support*). *Note.*

Note. See *Lockwood* v. *Lockwood,* 3 Redf. 330.

V. Your petitioner is informed and verily believes from the inventory of the personal property of the said decedent filed by said executor on the day of (*or state other source of information*); that the said executor has money or other personal property of the estate applicable to the payment or satisfaction of the petitioner's claim sufficient to

Note. It is customary for the petitioner in such case to present the bond

duly executed with the application. The bond must conform to the statute. Its condition must be for the refunding of the money *whenever required* and not simply for the payment of debts and legacies. See *Barnes* v. *Barnes*, 13 Hun, 233.

pay the same within the provisions of Section 2723 of the Code of Civil Procedure, and which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction with your petitioner.

Wherefore, your petitioner prays for a decree of the Surrogate under said section 2732 of the Code of Civil Procedure directing the said executor to pay to the petitioner the sum of dollars forthwith upon the filing of the bond (*note*) required by said section, to be approved by the Surrogate and conditioned as therein prescribed, and that said executor be cited to show cause why such a decree should not be made.

§ 918. **The bond under § 2723.**—The bond under this section must be a bond "conditioned as prescribed by law with respect to a bond which an executor or administrator with the will annexed may require from the legatee on payment or satisfaction of the legacy before the expiration of one year from the time when letters were issued pursuant to a direction to that effect contained in the will." In this connection it has been held that a bond conditioned for the refunding of the money "in case it is needed to pay debts and legacies" is defective. See *Barnes* v. *Barnes*, 13 Hun, 233, 235. The bond should be conditioned for the return of the money whenever required, which condition may be substantially in the following form:

Note. The words "whenever required" are intended to protect the executors in any contingency, as, for instance, in case the will should be set aside, and they be called to account to the heirs. *Barnes* v. *Barnes*, 13 Hun, 233, 235.

Now the condition of this obligation is such (*see text below*) that if the said the legatee above named, shall refund the said sum of dollars so to be paid as aforesaid with interest thereon whenever required (*Note*), then this obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered, etc.

(Signatures.)

(Acknowledgment, etc.)

If desired, the exact language of § 2721, Code Civ. Proc., may be put into the condition of the bond, that is to say, the bond may be conditioned "that if debts against the deceased duly appear and there are not other assets to pay the same, and no other assets sufficient to pay other legacies, then" (if the legatee above named), etc., "the legatees will refund the legacy so paid, or such ratable portion thereof, with the other legatees, as may be necessary for the payment of such debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee," and further conditioned, "that if the probate of the will, under which such legacy is paid, be revoked or the will declared void, that such legatee will refund the whole of such legacy, with interest, to the executor or administrator entitled thereto." See § 2721, Code Civ. Proc.

§ 919. **Interest on legacies.**—Under § 2721 no legacy is payable, unless directed by the will to be sooner paid, until after the expiration of one year from the time of granting letters testamentary or of administration. *Matter of Martens*, 106 App. Div. 50, 54; *Thorn* v. *Garner*, 113 N. Y. 202. This was for a time held not to be in conflict with the common-law rule that, though the time of payment was changed, general legacies were due one year after the death of the testator, and that from and after the expiration of one year interest accrued upon the legacy in favor of the legatee. See *Matter of Gibson*, 24 Abb. N. S. 45; *Matter of Seymour*, 27 N. Y. St. Rep. 762; *Dustan* v. *Carter*, 3 Dem. 149; *Campbell* v. *Cowdrey*, 31 How. Pr. 172; *Lawrence* v. *Embree*, 3 Bradf. 364.

If the administration is ancillary the rule of the decedent's domicile will govern this question of interest. *Matter of Kucielski*, 49 Misc. 404, citing § 2694, Code Civ. Proc.; *N. Y. Life, etc.*, v. *Viele*, 161 N. Y. 11. But the general rule is that no interest accrues upon a legacy until it becomes by law the duty of the executor to pay the legacy. See *Bradner* v. *Faulkner*, 12 N. Y. 472; *Goodwin* v. *Crooks*, 58 App. Div. 464, 467. And as it is not the duty of the executor to pay until one year has expired after granting letters testamentary, interest can only be computed from the expiration of such year and not the year running from the death of the testator. See *Matter of Accounting of McGowan*, 124 N. Y. 526, 530, citing *Kerr* v. *Dougherty*, 79 N. Y. 327; *Bradner* v. *Faulkner, supra; Cooke* v. *Meeker*, 36 N. Y. 15, 23; *Thorn* v. *Garner*, 113 N. Y. 198, 202; *Van Rensselaer* v. *Van Rensselaer*, 113 N. Y. 207, 215; *Matter of Bostwick*, 49 Misc. 186; *Matter of Oakes*, 19 App. Div. 192. See *Matter of Erving*, 103 App. Div. 500, when the situation was complicated by partial payments, and by assets inadequate to pay in full, pending sale of realty.

The court also held, in the case last cited, that "a year from the granting of letters testamentary or of administration" in the statute included the granting of letters of temporary administration. *Id.*, at p. 531. But the rule laid down in *Matter of McGowan* is limited to general legacies payable out of the corpus of decedent's estate. See *Matter of Stanfield*, 135 N. Y. 292, 294. In respect to other legacies the authorities sustain the doctrine that the legatee is entitled to interest on the legacy from the date of the testator's death. See *Cooke* v. *Meeker*, 36 N. Y. 15, 22; *Matter of Stanfield, supra*, at p. 298. In this case it was claimed that *Cooke* v. *Meeker, supra*, did not enunciate a general rule. Held that the chief justice had expressly done so, to the effect that

(*a*) Payment of annuities or income date from testator's death.

(*b*) Where a sum is left in trust to apply interest or income to a person's use, that carries interest from testator's death.

See also *Matter of McKay*, 5 Misc. 123, 128. Where there is a specific direction in the will that the legacy be paid immediately or before the expiration of a year, interest commences to run from the date fixed by the testator for payment thereof. *Stevens* v. *Melcher*, 80 Hun, 514, 548, aff'd 152 N. Y. 551. The other exceptions to the rule above stated have

grown out of facts from which the courts have presumed an intention to have interest paid from the death of the testator. For example, a legacy to a minor child for support and maintenance. See *King* v. *Talbot*, 40 N. Y. 76; *Brown* v. *Knapp*, 79 N. Y. 136; *Matter of Travis*, 85 Hun, 420; *Lyon* v. *I. S. Association*, 127 N. Y. 402; *Matter of Vedder*, 2 Connoly, 548. This is on the theory that the child will not be provided for unless interest is given (*Lyon* v. *I. S. Association, supra*). Or where the gift to a particular legatee is the income of a fund (*Matter of Stanfield*, 135 N. Y. 292); or a legacy to a creditor in satisfaction of a debt (*Matter of McKay, supra*, citing *Lynch* v. *Maloney*, 2 Redf. 434).

Or the legacy may be based on a consideration, acknowledged in the will, e. g., as in performance of an antenuptial agreement. *Matter of Bostwick*, 119 App. Div. 455.

§ 920. **Interest on legacies in lieu of dower.**—But, while a legacy in lieu of dower imports a consideration and there were numerous cases in which such legacies were held or supposed to be held to draw interest from the date of death, it would now seem to be settled by *Matter of Barnes*, 1st Dept., 7 App. Div. 13, aff'd 154 N. Y. 737; and *Matter of Martens*, 2d Dept., 106 App. Div. 50, that in the absence of plainly expressed intention to that effect in the will, legacies in lieu of dower draw interest from and after one year from the issuance of letters. It is necessary to contrast the two classes of legacies making such provision. The one may be a sum put in trust to produce an income, in lieu of dower. *All* this income must go to the widow *ab initio*, unless a contrary intent appear in the will. *Williamson* v. *Williamson*, 6 Paige, 298; *Bullard* v. *Benson*, 1 Dem. 486; *Seymour* v. *Seymour*, 5 Bradf. 193; *Hepburn* v. *Hepburn*, 2 Bradf. 74; *Parkinson* v. *Parkinson*, 2 Bradf. 77. See, however, *Matter of Hodgman*, 69 Hun, 484, holding, *obiter*, that a legacy in lieu of dower does not draw interest until the widow shall have elected to accept it. This was affirmed in 140 N. Y. 421, but at p. 428, Judge Finch expressly stated that the widow was not entitled to the interest for the reason that she had accepted a given sum in full of the legacy without making a claim for the interest. And he adds, as that was not given by the will and was charged, if at all, only for damages for delay, her acceptance of the principal excludes the right more than ten years later (i. e., on the judicial settlement of the account) to demand the interest, citing *Cutter* v. *Mayor*, 92 N. Y. 166. See further opinion of Parker, J., in *Stevens* v. *Melcher*, 80 Hun, at p. 549, distinguishing *Duclos* v. *Benner*, 136 N. Y. 560.

But where a legacy given to a widow is of a specific sum absolutely "in lieu of all other interest, dower, or distributive share in testator's estate" the legacy does not draw interest until the expiration of one year from the issuance of letters. *Matter of Barnes, supra*, and *Matter of Martens, supra*. The court there pointed out that it did not appear that the testator had left any real estate so that the widow parted with nothing in accepting the legacy. The case is different where a testator gives to his wife the income of a fund to be held in trust, or a life estate in property,

the income only in either case being received by the wife. Such cases are entirely distinct from a case where the gross sum is given to the wife in lieu of dower. In the one case the income is given for the purpose of her support, and, as the wife has no power to appropriate the principal during the year, if interest were not allowed from the death of the testator she would have no support, and the clear intention of the testator would be frustrated. On the other hand, where a gross sum is given to a wife in lieu of dower, over which she has the absolute right of disposition, such gross sum takes the place of the dower interest, and the wife has the right to appropriate it at once for her support. *Matter of Barnes, supra,* opinion of Ingraham, at p. 17. See history of case and of *Stevens* v. *Melcher,* 152 N. Y. 551, discussed in *Matter of Martens,* 106 App. Div. 50, 54. See also *Flynn* v. *McDermott,* 183 N. Y. 62. A died leaving his widow a legacy in lieu of dower. Under the Real Property Law, §§ 180, 181, she had a year in which to elect which she would take. She died within the year. Held the right of election, being personal, died with her. But also held that the legacy did not therefore abate, but vested in her representative. Held also that interest on the legacy ran from date of husband's death, because *will expressly so provided.*

§ 921. **Interest on income or annuity.**—Where the income of an estate or a designated portion is given to a legatee for life, he becomes entitled to it whenever it accrues. If the estate is productive of income from the death of the testator he can require the executor to account to him for such income from that time. If the estate is sufficient for the liquidation of debts and other charges, and is so invested as to be productive of income from the death of the testator, a bequest of income to a legatee for life must be construed to invest him with a title to such income from the date of the testator's demise, unless there is some provision in the will from which a contrary intent is to be inferred. *Matter of Stanfield,* 135 N. Y. 292; *Pierce* v. *Chamberlain,* 41 How. Pr. 501; *Matter of Lynch,* 52 How. Pr. 367; *Craig* v. *Craig,* 3 Barb. Ch. 76; *Powers* v. *Powers,* 16 N. Y. St. Rep. 770; *Barrow* v. *Barrow,* 29 N. Y. St. Rep. 240; *In re Fish,* 19 Abb. Pr. 209. Interest is a penalty, and presupposes a default. *Matter of Barnes, supra,* opinion of Van Brunt, P. J. The rule above stated, namely, that when a sum is left in trust with a direction that the interest and income should be applied to the use of a person, such person is entitled to the use thereof from the date of the testator's death (see *Cooke* v. *Meeker,* 36 N. Y. 15), has been held subject to this limitation, that where the condition of the estate is such as not to be productive of income in such a case the legacy will bear interest only from the expiration of one year from the granting of letters testamentary. *Matter of O'Hara,* 19 Misc. 254, 257. And so also interest does not run on a legacy payable out of rent or income, until sufficient rent or income accrues to pay the same. *Wells* v. *Disbrow,* 48 N. Y. St. Rep. 746.

§ 922. **Testator's intention.**—Where the intention of the testator is clear and explicit, it must govern in fixing the time from which interest

is to be computed. See *Flynn* v. *McDermott*, 183 N. Y. 62. Thus where it was the clear intent of the will that interest should be computed from the date of the will, it was held that testator's intention should govern. *Gilbert* v. *Morrison*, 53 Hun, 442, 447. It was there held (Van Brunt, P. J.), that the direction in the will that interest should be paid at the rate of five per cent per annum, ran to the expiration of one year after the death of the testatrix, and that subsequent to that date the legal interest of six per cent was payable and could be collected.

But where a will directs that a legacy be paid "as soon as possible," or as soon after testator's decease "as the circumstances of the estate may render such payment convenient," does this amount to a special direction that the payment be made earlier than the time prescribed by law? See *Matter of Gibson*, 2 Connoly, 125, 127, citing *Rogers* v. *Rogers*, 2 Redf. 24, holding it does not. And *Stevens* v. *Melcher*, 80 Hun, 514, seeming to hold that it does. *Semble*, so held in *Matter of Martens*, 106 App. Div. 50, 55.

Where a testator gives to his executor property with the direction to pay a legacy out of the rent and income thereof whenever said executor should deem it convenient, the executor has no power although made "the sole and arbitrary judge of when it may be convenient for him to pay," to postpone payment arbitrarily, for an indefinite period. *McKay* v. *McAdam*, 80 Hun, 260, 261, citing 2 Perry on Trusts, § 771.

Where testator directed payment as soon after his death as should be convenient to his executors, and payment was made within sixteen months of his death, a claim of interest made ten years later upon accounting was denied. *Matter of Hodgman*, 140 N. Y. 421, 428.

Where a will is revoked upon the admission to probate of a later will and both wills contain a similar legacy to the same legatee, the only legacy which the courts can consider in computing interest is the legacy contained in the later will. *Matter of Patterson*, 5 Misc. 178.

Where a legacy was given charged upon real estate, which was directed to be sold "whenever the legatee may wish to have the same paid to her" and where by the terms of the will resort must be had to a court of equity to authorize the sale of the real estate to pay the legacy, the legatee is not entitled to interest for the time during which she delayed instituting the necessary proceedings for the sale of such real estate (*Rocheron* v. *Jacques*, 2 Ed. Ch. 207); nor will interest be allowed to a legatee incapable of receiving the legacy at the time it is due and when the executor is ready to pay it (*Simpkins* v. *Scudder*, 3 Dem. 371, Rollins, Surr.), although the running of interest is not stopped by the mere fact that the condition of the estate is such that its payment is impossible at the time it becomes due by reason of the unproductiveness of the estate. See *Hoffman* v. *Pennsylvania Hospital*, 1 Dem. 118. But it is expressly provided (§§ 48 and 49 of title 3, ch. 6, part 2, of the Revised Statutes) that, in case a legatee is a minor and has no guardian, or the Surrogate does not direct the payment of the legacy to the guardian, the legacy must be invested in permanent securities in the name and for the benefit of such minor, and

interest thereon must be applied under the direction of the Surrogate to the minor's education and support. A legatee will not be entitled to interest upon so much of his legacy as the executor may tender at the time it becomes payable; if he refuses to accept the portion tendered unless he should be paid the whole amount of his share, which the executor is unable at the time to distribute, he forfeits the right to interest on the sum thus tendered. *Burtis* v. *Dodge*, 1 Barb. Ch. 77.

The interest chargeable as a penalty for delay is of course interest at the legal rate. See *Hoffman* v. *Pennsylvania Hospital*, 1 Dem. 118; *Clark* v. *Butler*, 4 Dem. 378.

Where the legatee is also executor, and having funds applicable to the payment of his legacy fails to pay it when it becomes due, he waives his right to collect interest thereon. *Matter of Gerard*, 1 Dem. 244.

Where testator bequeathed two mortgages as legacies, one already held by him and one to be bought by his executors, it was held that they were of the same character, and carried similar interest. *Cammann* v. *Whittlesey*, 70 App. Div. 598.

§ 923. **Payment of legacy cannot be enforced under § 2606 of the Code.** —When a proceeding is brought under § 2606 of the Code to compel an accounting by the executor of a deceased executor and the delivery over of the trust property, a legatee is not entitled to an order in such proceeding requiring the delivery of any of the property to such legatee. Section 2606 gives the Surrogate the same jurisdiction to compel the decedent's executor to account which he would have against decedent if his letters had been revoked by a Surrogate's decree. This jurisdiction is limited by § 2603 of the Code, which provides that in such a case the decree may, in the discretion of the Surrogate, require the executor to account for all the money or other property received by him and to pay it into the Surrogate's Court or to his successor in office, "or to such other person as is authorized by law to receive the same." Under the language quoted it was accordingly recently claimed (see *Matter of Moehring*, 154 N. Y. 423), that a legatee under a will taking absolute title to a certain residuary bequest was included by the words "such other person as is authorized by law to receive the same," and consequently entitled in a proceeding under § 2606 to a direction for the payment and delivery to such legatee of the money and property in the hands of the executrix constituting the residuary bequest. The Court of Appeals (*Id.*, at p. 429 *et seq.*) affirmed the decision of the Surrogate, declined to order such payment and delivery to the legatee, and held that the purpose of § 2606 was merely to call an executor of an executor to account for the money or property belonging to the first estate which comes into his hands, and to require him to pay and deliver it over to a legal representative of that estate. And Judge Martin says (at p. 430): "We do not think the phrase, 'such other person as is authorized by law to receive the same,' includes legatees or creditors to whom the property will ultimately belong, but that this provision will be construed as relating to such other

person as is authorized by law to receive it '*for the purpose of administration.*' . . . A legatee, devisee or creditor cannot be said to be authorized by law to receive such an estate in whole or in part until it is fully administered by a proper representative."

§ 924. **Ademption.**—There is one disadvantage inherent in a specific legacy. Where a legacy is specific the legatee can take nothing unless the legacy remain *in specie* at the death of the testator. If in the lifetime of the testator it has been destroyed, consumed, sold, exchanged or in any manner disposed of, so that nothing remains in the estate to which the dispositive words of the will can be deemed applicable, the legacy is of no avail to the person named as legatee. *Abernethy* v. *Catlin*, 2 Dem. 341, 343. A legacy so destroyed, consumed, sold or disposed of during the lifetime of the testator is said to have been adeemed. See discussion of cases in *Abernethy* v. *Catlin, supra*, and exceptions there noted at pp. 348 *et seq.* To prevent this doctrine of ademption from being applied in a given case, it is usually sought to be established that the legacy is not specific but at the most demonstrative, in which case the legacy is not adeemed and payment thereof may be secured. See *Giddings* v. *Seward*, 16 N. Y. 365; *Doughty* v. *Stillwell*, 1 Bradf. 300; *Enders* v. *Enders*, 2 Barb. 362. So if a testator bequeaths a certain bond and mortgage which he subsequently forecloses, he works an ademption of the legacy. See *Beck* v. *Gillis*, 9 Barb. 56. And while in *Doughty* v. *Stillwell, supra*, Surrogate Bradford held that the testator had avoided an ademption by exchanging the mortgage bequeathed for a new bond and mortgage, so that the fund or legacy "remained the same in substance with unimportant alteration," yet it is the safe rule that a testator who gives a specific legacy of this character and subsequently destroys or disposes of the very thing bequeathed, should maintain his testamentary provision by codicil or otherwise if he desires to give effect to his testamentary desire. See *Abernethy* v. *Catlin*, 2 Dem. 341, 350.

Where a parent bequeaths a legacy to a child, and afterwards, in his lifetime, gives a portion or makes a gift to, or a provision for, the same child, even without expressing it to be in lieu of the legacy, if the gift or provision be certain and not merely contingent, if no other object be pointed out, and if it be *ejusdem generis*, then it will be deemed an ademption of the legacy *in toto*, if greater than or equal to, and *pro tanto*, if less than, the provision of the will. *Benjamin* v. *Dimmick*, 4 Redf. 7, headnote. (See Advancements.)

Where testator gave a legacy of certain specified shares of stock to A, directing his executors to transfer them to A, "or the proceeds thereof when realized," and before he died sold the shares, and invested the money in bonds, it was held ademption had taken place. *Hosea* v. *Skinner*, 32 Misc. 653.

Where a legacy of $25,000 given to a church was expressly stated to be "for the purpose of paying off the mortgage on said church or chapel belonging thereto which was assumed for the purpose of building said

chapel," and at the time of testatrix's death the mortgage had been reduced by $11,000, part of which had been paid by the testatrix in her lifetime, it was held that in so far as the testatrix had contributed to the reduction of the mortgage in so far the principle of ademption applied to this legacy (*Matter of Gasten*, 16 Misc. 125, 127, citing Roper on Legacies, 380), but that it could not apply further *as there can be no ademption by strangers*. And the learned Surrogate accordingly directed a reference to ascertain the amount paid by the testatrix towards the reduction of the mortgage by which amount the legacy was to be held adeemed upon the entry of the final decree. So where after making a valid will testator becomes insane and *his committee* disposes of the subject of the legacy, *semble*, there is no ademption. *Brandreth* v. *Brandreth*, 54 Misc. 158.

But in respect of residuary legatees, this doctrine cannot be applied. *Hays* v. *Hibbard*, 3 Redf. 28. Nor can it be applied to devises of realty. *Burnham* v. *Comfort*, 108 N. Y. 535. And in any event the burden of proving ademption is upon the executor. *Piper* v. *Barse*, 2 Redf. 19. Gifts made to the legatee *prior to the execution* of a will or *in execution of a purpose declared* and begun to be carried out *prior* to the execution of a will, will not adeem a legacy contained in such a will. See *Matter of Townsend*, 5 Dem. 147; *Matter of Crawford*, 113 N. Y. 560. Where real property devised by a will is taken in condemnation proceedings *before testator's death*, the devise is revoked and the proceeds cannot be demanded by the devisee (*Ametrano* v. *Downs*, 33 Misc. 180, aff'd 170 N. Y. 388), precisely as if testator had himself sold the land. *M'Naughton* v. *M'Naughton*, 34 N. Y. 201; *Burnham* v. *Comfort*, 108 N. Y. 535; *Philson* v. *Moore*, 23 Hun, 152. The principle "there can be no ademption by strangers" it seems is not applicable. In the *Ametrano* case, the Court of Appeals says:

"We see no such difference between a voluntary and an involuntary sale of the devised land as justifies a distinction in principle in the application of the rule that where the testator has parted with the subject of the devise, all claim of the devisee is lost. While there is no authority on the point in this State (there is said to be none in the country), the question presented is not without analogy in the rule which determines in cases of intestacy the character of the proceeds of sales by operation of law, whether they are to be considered as real or personal property. It is settled by a number of authorities that if the sale be made by execution or judicial decree in the lifetime of the intestate the proceeds are personalty and go to the next of kin, while if made after his death they are real estate and go to the heirs-at-law (*Graham* v. *Dickinson*, 3 Barb. Ch. 169; *Denham* v. *Cornell*, 67 N. Y. 556), except where the property belongs to an infant or to an incompetent person, in which case the proceeds retain their original character of realty. (*Sweezy* v. *Thayer*, 1 Duer, 286; *Horton* v. *McCoy*, 47 N. Y. 21.)"

§ 925. **Refusal to pay legacy on account of condition against contest.** —Where a will, under which a legatee claims in a proceeding to procure

payment of his legacy, contains a condition against contest, and the legatee took part in a contest of the will, it is competent for the executor to dispute the validity of the legatee's claim on such ground.

A condition against disputing one's will is reasonable, and has been held to be in conformity to good policy in view of its purpose to prevent litigation, and will be held binding and valid. See *Matter of Stewart*, Ransom, Surr., 1 Connoly, 412, 429, and note at p. 430. Such provision, it seems, will *not defeat an infant's rights*, if the special guardian, in the discharge of his duty on probate, has interposed objections. *Bryant* v. *Thompson*, 59 Hun, 545.

It must be noted, however, in this connection, that there is a difference between proceedings intended to defeat the known and established intention of a testator, such as an ordinary "attempt to break a will" by contesting its probate on the ground of lack of testamentary capacity, or undue influence, or the like, and a proceeding instituted to obtain an adjudication by a court of competent jurisdiction as to what the intention of the testator really was. See *Woodward* v. *James*, 44 Hun, 95, 100, affirmed in other particulars, 115 N. Y. 346. See opinion of Rollins, Surr., *Rank* v. *Camp*, 3 Dem. 278, 288. A legatee also forfeits his legacy by taking a legal position inconsistent with his position under the will; such an inconsistent position, for example, is that of a legatee who brings an action against an executor alleging ownership of certain property bequeathed by the will to other legatees. See *Matter of Bratt*, 10 Misc. 491, 492, citing *Havens* v. *Sacket*, 15 N. Y. 365; *Caulfield* v. *Sullivan*, 85 N. Y. 153; *Matter of Noyes*, 5 Dem. 315; *Leonard* v. *Steele*, 4 Barb. 21. So also where a condition is attached to the legacy, a failure to comply with the condition operates to forfeit the legacy and the executor may set up such failure in opposition to proceedings for the payment of the legacy. See *Matter of Bratt, supra*. See *Matter of Hughes*, 41 Misc. 75.

§ 926. **Legacy to subscribing witness.**—Decedent Estate Law, § 27, provides that where a subscribing witness is a legatee under a will, and the will cannot be proved without his testimony, the legacy as to him is void. Where from the proceedings had upon the probate of the will, it appears that the legatee's testimony was indispensable to procure such probate, the executor is bound to set up this fact in dispute of the validity of the petitioner's claim. *Matter of Orser*, 4 Civ. Proc. Rep. 129. But, it is further provided that, "if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed, to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will; and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them.

§ 927. **Legacy for life.**—Where a will gives one or more life interests the duty of the executor may be discharged in one or two ways. He may turn over the property charged with the income given to the life legatee,

exacting security for its redelivery to the remainder interests. *Matter of Burr*, 48 Misc. 56, citing *Matter of McDougall*, 141 N. Y. 21, and other cases. See also *Putnam* v. *Lincoln Safe Dep. Co.*, 49 Misc. 578, and cases cited at p. 589. Or, if the property be not so delivered, it must be invested and the income paid to the tenant for life. *Ibid.*, citing *Calkins* v. *Calkins*, 1 Redf. 337. In which case his investments must be those approved in a long line of decisions such as *King* v. *Talbot*, 40 N. Y. 76, elsewhere noted; *Ormiston* v. *Olcott*, 84 N. Y. 339; *Denton* v. *Sanford*, 103 N. Y. 607. Whether he should turn over the corpus depends on the will. If it gives the life tenant power to use any or all such corpus, he certainly is entitled to *possession and use*. See *Matter of Trelease*, 49 Misc. 205. In such cases it seems security is not to be exacted. *Ibid.*, citing *Matter of McDougall, supra*, and other cases. Where the will directs the payment of income "or so much thereof as is needful," the discretion of the executor or trustee is subject to the Surrogate's control and on petition to the court an order may be made in a proper case directing the application of the full income. *Matter of Vandecar*, 49 Misc. 39.

§ 928. **Abatement of legacy.**—An executor cannot be required to pay a legacy in full where the circumstances are such as respects a deficiency of assets applicable thereto as to require an abatement thereof. An abatement of a legacy means such diminution thereof as may be necessary in order not to injuriously affect the rights of others entitled to priority or equality of payment or satisfaction. This rule of abatement emphasizes the advantage which specific and demonstrative legacies have over general legacies, for before specific legacies general legacies must abate, and before general legacies can be abated residuary bequests must abate. See 13 Am. & Eng. Ency. of Law (1st ed.), p. 130. See *Farmers' Loan & T. Co.* v. *McCarthy*, 128 App. Div. 621. In *Matter of Hinman*, 32 Misc. 536, the Surrogate observed:

"The general rule is that where the assets prove insufficient to pay the general legacies in full and all the general legatees are volunteers, the general legacies must abate proportionately *inter se*, in the absence of an intent on the part of the testator to prefer one general legacy to another. Under some circumstances the courts have found an intention to prefer without express words on the part of the testator. The leading case establishing this construction by the courts is *Lewin* v. *Lewin*, 2 Ves. 415. In that case the executor was directed to pay an annuity to the wife for the maintenance of a child. Lord Hardwicke declared that it was a strong case to show that the annuity was intended to be preferred, especially in view of the fact that it was a provision for a child otherwise unprovided for.

"In New York, the rule established in *Lewin* v. *Lewin* seems to have been followed. In this State it has been held that legacies for support and maintenance of wife and child, otherwise unprovided for, do not abate with general legacies. *Stewart* v. *Chambers*, 2 Sandf. Ch. 393.

"The principle has also been extended to the analogous case of a be-

quest by a wife for the support of her husband. *Scofield* v. *Adams*, 12 Hun, 366.

"The principle seems to have been further extended to bequests for the maintenance of minors who are near relatives of the decedent. *Petrie* v. *Petrie*, 7 Lans. 93.

"The principle referred to seems to have been approved in *Bliven* v. *Seymour*, 88 N. Y. 475, and in *Matter of Chauncey*, 119 N. Y. 84. But it would seem to be the prevailing opinion that the rule should not be further extended by mere construction. 3 Pom. Eq. Juris. 77; 2 Williams, Exec. (7th Am. ed.), 661; Roper, Legacies (2d Am. ed.), 422; Woerner, Adm. 988." [In *Matter of Brown*, 42 Misc. 444, it was extended to prevent abatement of legacy of amount due on a bond and mortgage made by an adopted child who borrowed the money to build a home to be, and which was, shared by testator. In *Matter of Wenner*, 125 App. Div. 358, held a legacy to a sister must abate *pro rata*, in the absence of proof that she was 'otherwise unprovided for.' Citing above cases.]

"A general legacy, given for a specific purpose, abates with other general legacies. *Wetmore* v. *N. Y. Institution for the Blind*, 9 N. Y. Supp. 753.

"In the case at bar, testator gives to his sister $4,000. He gives to his brother $4,000 in trust. From the will I cannot find any intention to prefer the brother over the sister. It does not appear in any way that the brother was dependent upon the testator during his lifetime for his support and maintenance; nor does it appear that the relations of the testator to the brother were any closer or nearer than his relations to the sister."

But legacy to *Cemetery* was directed to be paid in full, citing *Wood* v. *Vanderburgh*, 6 Paige, 285.

Where there are several legacies belonging to the same class they must abate ratably.

Certain legacies, however, are excepted from this rule of abatement. For example, a bequest in lieu of dower, which, if accepted by the widow, places her in the position of a purchaser for a consideration, must be paid without abatement in preference to other general legacies. *Brink* v. *Masterson*, 4 Dem. 524, 526, citing *Babcock* v. *Stoddard*, 3 T. & C. 207; *Isenhart* v. *Brown*, 1 Edw. Ch. 211. This right of the widow to exemption from abatement can be maintained as against other voluntary legatees but yields to the rights of creditors. *Beekman* v. *Vanderveer*, *No.* 2, Rollins, Surr., 3 Dem. 619, 622, and cases cited. See *Sandford* v. *Sandford*, 4 Hun, 753; *Pittman* v. *Johnson*, 35 Hun, 38. It seems that it makes no difference whether the legacy given in lieu of dower exceeds the value of the dower right. *Matter of Brooks*, 2 Connoly, 172; *Matter of Dolan*, 4 Redf. 511; *Orton* v. *Orton*, 3 Keyes, 486; *Matter of McKay*, 5 Misc. 123, 126. But if the will distinctly provides that in case of a deficiency of assets all legacies given should abate ratably, it seems to have been held that a legacy given in lieu of dower is covered by the provision of the will, and must so abate. *Orton* v. *Orton*, 3 Keyes, 486. But a legacy merely

given to a wife not in lieu of dower abates ratably with other pecuniary legacies. See *Matter of Williams*, 1 Redf. 208.

§ 929. **Refunding the legacies.**—Where a legacy is prematurely or improperly paid to a legatee, and it subsequently appears that creditors or legatees entitled to priority of payment have not been paid, there is a liability on the part of the legatee to refund in whole or in part the legacy paid to him. See as to liability of heirs and devisees § 101, Decedent Est. Law. Where the legacy has been paid upon the giving of a bond as hereinbefore indicated, of course the liability to refund is covered by the condition of the bond. The Code provides two cases in which an action may be brought against the legatee who has so received his legacy. The one by a creditor to recover against a surviving husband or wife of a decedent, the next of kin of an intestate, or the next of kin of legatees of a testator, to the extent of the assets paid or distributed to them, for a debt of the decedent upon which an action might have been maintained against the executor or administrator. See art. 2, title 3, ch. 15, Code Civ. Proc. §§ 1837 *et seq.* This right to pursue legatees for a debt of the testator existed independently of the statute. See *Colgan* v. *Dunne*, 50 Hun, 443. The action, however, must be brought in conformity to the statute, and all the prerequisites to recover it in an action against the legatee provided by § 1841 must be satisfactorily shown by the plaintiff.

The other provision is by virtue of art. 4 of the same title, § 1868 of the Code, which provides for an action against a legatee by a child born after the making of a will, who is entitled to succeed to a part of the real or personal property of the testator, or by a subscribing witness to a will who is entitled to succeed to a share of such property.

With regard to residuary legatees they are liable to refund in any case, where, having been paid from the estate, it is discovered that there is a deficiency of assets for distribution under the will caused by diminution of the estate through the premature payment. *Mills* v. *Smith*, 141 N. Y. 256. Where a residuary legatee receives moneys of the estate prematurely, that is, before the specific legatees have been paid, and before any judicial settlement of the executors' accounts, he takes it subject to a liability to refund, regardless of whether he takes it with knowledge that the specific legacies have not been paid or not. *Buffalo Trust Co.* v. *Leonard*, 154 N. Y. 141, 147.

The rule is different as to a specific legatee, if such a legatee has been successful in getting his legacy paid to him, and at the time of payment the assets in the executor's hands are sufficient to pay all legacies, a subsequent *devastavit* by the executor, through which there occurs a deficiency of assets wherewith to pay the other legatees, will not justify an action to compel a refund by the legatee who has received his legacy. *Ibid.*, at p. 146. That would be because the payment itself to the legatee was not a *devastavit*, and because the law would throw its protection around the more diligent legatee. *Ibid.*, citing Roper on Legacies, 460; *Lupton* v. *Lupton*, 2 Johns. Ch. 626, 627. This rule of course does not

apply to the right of a creditor. But, as to other legatees, the right to compel a refunding only exists in a case where the assets were not sufficient to pay all legacies at the time of the payment to the particular legatee. As between the residuary legatees and general legatees the liability of the residuary legatee to refund in case of a premature payment of moneys is clear. This rule will not apply where an executor has paid a residuary legatee in good faith and after paying or providing for all other legatees, in which case no subsequent insolvency of the executor resulting in the loss of a fund so set apart and held for a legatee, would create a liability to refund. *Buffalo Trust Co.* v. *Leonard, supra,* citing *Walcott* v. *Brown,* 2 Brown's Ch. 205. In this case the executor had set apart under the testamentary provisions a legacy given to an infant payable when he became of age and had then paid the surplus of the testator's estate to the residuary legatees. He became insolvent, before paying over the legacy, and it was held that the residuary legatees would not be compelled to refund; for they had only received what they were entitled to.

Where an estate has been distributed to the residuary legatees under a decree judicially settling the account of the executor and a testamentary trust fund is set apart and held by the executor as trustee under the will, the subsequent default, misconduct or *devastavit* of the trustee, creates a liability only on the part of the trustee and his estate, and no claim for contribution arises against the residuary legatees. *Mills* v. *Smith,* 141 N. Y. 256, 262.

Where a Surrogate has full jurisdiction of proceedings to settle an executor's account and make a decree of final distribution and the executor has made no claim for an abatement of legacies, nor is any necessity therefor shown in the account filed and passed, it will be too late after the entry of the decree for the executor thereafter to seek to recover an overpayment made to a legatee. If the amount was voluntarily paid and on an accounting he claimed credit for the amount as a just and proper charge against the estate, and has been credited with it in the final decree, he is bound thereby, as is the estate, and can have no further action for an abatement or refunding. *Matter of Hodgman,* 140 N. Y. 421, 431. This does not affect the rule that an executor may, in equity, recover an overpayment to a legatee under peculiar circumstances which excuse his mistake. *Ibid.; Lupton* v. *Lupton,* 2 Johns. Ch. 627. And a Surrogate has certainly no jurisdiction where an executor has overpaid one of the legatees to decree that the legatee should pay the excess to the executor, any more than he would have power to decree that an overpaid creditor should refund the excess so paid to him. *Matter of Underhill,* 117 N. Y. 471, 475, aff'g 1 Connoly, 113. See also *Matter of Randall,* 152 N. Y. 508, 515.

§ 930. **The procedure to secure refunding of legacy.**—Where a creditor or a child born after the making of a will or a subscribing witness brings an action against legatees, the procedure of course is that indicated by arts. 2 and 4 of title 3 of ch. 15 of the Code of Civil Procedure. Where, however, a proceeding is had in the Surrogate's Court to secure such re-

funding by reason of the condition in the bond given by the legatee when taking the legacy, the procedure must be by petition substantially as follows:

Petition to compel repayment of legacy.

Surrogate's Court,
County of
In the Matter of the Administration of the Estate of deceased.
In the Matter of the Application of as Executor of the last Will and Testament of deceased, to Compel the Refunding of a Legacy.

To the Surrogate's Court of the county of :

as executor of the last will and testament of late of deceased, for his petition in the above entitled proceeding respectfully shows to this court and alleges:

I. That your petitioner is (sole) executor of the last will and testament of late of deceased, by virtue of letters testamentary issued to him by the Surrogate of the county of on the day of

II. That residing in the respondent herein, was named in the will of the said decedent as a legatee, being given by the clause of said will a legacy of $5,000.

III. That heretofore and on the day of said legatee having applied to your petitioner for payment (on account) of his said legacy, and it appearing then to your petitioner that the estate was sufficient to pay all legacies and your petitioner being than in possession of assets applicable to the payment of said legacy (*or if the legacy was paid pursuant to an order of the Surrogate, recite the making and date of the order, and say:* and in pursuance of said order your petitioner) paid to said legatee the sum of $5,000 and said legatee made, executed and delivered to your petitioner his certain bond or obligation with two sureties conditioned for the refunding to your petitioner of said legacy whenever required (*or state actual condition of the bond*) a copy of which bond is hereto annexed.

IV. And your petitioner further shows: That thereafter a claim was presented against the estate of said decedent theretofore unknown to your petitioner and such proceedings were had by the creditor as established his claim as a valid claim against the said decedent, that the said claim amounts to thousand dollars and that there are no assets in your petitioner's hands sufficient to pay said claim; and that it is necessary that said legacy of $5,000 be refunded to your petitioner as executor as aforesaid. *Note.*

Note. If other legacies have been paid in full the ap-

V. Your petitioner has caused to be prepared and annexed

plication should be based upon a *pro rata* contribution by the legatees to meet the creditor's claim.

hereto a statement of the assets which have come into his hands, of the total amount of creditors' claims indicating thereon such as have been paid and such as still remain due and payable; also indicating the total amount of legacies given by the will and such as have been paid in whole or in part; from which statement to which reference is hereby had as fully as if it were incorporated at length herein and made a part hereof, it appears that there is a deficiency of assets in your petitioner's hands wherewith to pay the same of dollars:

Wherefore your petitioner prays for an order of this court directing said the legatee above named to refund to your petitioner dollars paid to him as aforesaid and that a citation issue to said requiring him to attend and show cause why such a decree should not be made.

(Signature.)

(Verification.)

§ 931. **Offsets, legacies to debtors.**—Where the legatee was a debtor of the testator, the executor has the right to offset against the legacy in favor of the estate, the amount due from the legatee to the testator. In such a case, the fact that the Statute of Limitations had run against the debt is immaterial. *Matter of Timerson*, 39 Misc. 675; *Matter of Dows*, 39 Misc. 621, 624. The Statute of Limitations only affects the legal remedy and in no case operates as a discharge or extinction of the debt. It does not even raise a presumption of payment, but is merely a bar to the remedy by action. That an executor has an equitable lien upon a right to obtain out of the legacy an amount due from the legatee to the testator, and that this right is unaffected by the fact that such debt is barred by the Statute of Limitations is well established. See *Matter of Foster*, 15 Misc. 175; *Rogers* v. *Murdock*, 45 Hun, 30, and cases cited. The legatee may not assert a mere expressed intention of decedent to forgive the debt, which was unaccompanied by surrender or cancellation of the note. *Matter of Timerson, supra.*

This right to offset such a debt against a legacy is called the "right of retainer;" it is an equitable doctrine founded upon the principle that the legatee should not be entitled to his legacy while he retains in his possession a part of the fund out of which his and other legacies should be paid. *Matter of Foster*, 38 Misc. 347, 348, citing *Smith* v. *Kearney*, 2 Barb. Ch. 533; *Rogers* v. *Murdock*, 45 Hun, 32.

A debt due to the testator from one to whom he has given a legacy is an asset of the estate in the hands of the legatee and is a satisfaction of the legacy to the extent of such asset. *Clarke* v. *Bogardus*, 12 Wend. 69; *Matter of Bogart*, 28 Hun, 468; *Rogers* v. *Murdock, supra; Smith* v. *Murray*, 1 Dem. 34; *In re Colwell*, 15 N. Y. St. Repr. 742. It is upon the same equitable principle that the Statute of Limitations has been held to be ineffective against the right of retainer.

In *Matter of Foster, supra*, Hoysradt, Surr., held that the principle

upon which the right of retainer depends is the same whether the legacy is general or is the income of a fund placed in trust. He accordingly held that while in that case the income of the trust fund was so small as that there could be no surplus beyond the sum necessary for the education and support of the beneficiary and could therefore not be reached by ordinary creditors, it was not proof against the equitable lien of the executors enforceable through this right of retainer. In *Matter of Warner*, 39 Misc. 432, the executor was a legatee and also indebted upon two bonds and mortgages to testator. Held, he *must* exercise the right of retainer and offset his legacies and commissions as a payment on account of the bond debt, citing *Matter of Foster, supra.* But, in *Matter of Bogert*, 41 Misc. 598, Church, Surr., permitted an executor to withhold the legacy to offset the debt but refused to allow him as trustee to retain the income of a fund, as to do so would give the estate as creditor a right to reach property of the debtor *which no other creditor could reach*, overruling *Matter of Foster.* The *Bogert* case was approved in *Matter of Knibbs*, 45 Misc. 83, which was affirmed 108 App. Div. 134.

A legacy is created by informal words in relation to a debt; such as "I forgive the debt owing me by A;" or "I direct my executor to withdraw my claim against B;" or "to forego collecting." This is so if the transfer tax is considered, *q. v.* See *Matter of Wood*, 40 Misc. 155, and cases cited.

Where a testator directs that any charge against his legatees on his books shall be deducted from their legacies, the books must be examined, but extrinsic evidence of the facts and circumstances may also be considered. *Matter of Burdsall*, 64 App. Div. 346. In this case it was sought to charge against a daughter's legacy of income a sum paid by her father for a house which proved to have been his wedding gift to her. It was held that it need not be deducted, particularly as testator's books showed the opening of a new account with her upon her marriage into which the sum so paid was not carried.

The Code expressly provides that where the executor is a debtor of the estate any just claim which the testator had against him must be included among the credits and effects of the decedent in the inventory, and the executor should be liable for the same as for so much money in his hands. See § 2714. That section provides:

> The discharge or bequest in a will of a debt or demand of the testator against an executor named therein, or against any other person is not valid as against the creditors of the deceased; but must be construed only as a specific bequest of such debt or demand; and the amount thereof must be included in the inventory and, if necessary, be applied in the payment of his debts; and if not necessary for that purpose, must be paid in the same manner and proportion as other specific legacies.

Where a creditor bequeaths a legacy to his debtor and either does not notice the debt, or mentions it in such a manner as to leave his intention doubtful, and after his death the security for the debt is found uncanceled

among the testator's property, the courts do not consider the legacy to the debtor as necessarily or even *prima facie*, a release, or extinguishment of the debt, but require evidence clearly expressive of the intention to release; such intention may be expressed or implied from the will or may be proved *aliunde*. *Matter of Foster, supra.*

In the case of *Smith* v. *Murray, supra,* Surrogate Rollins says: Nobody would contend that the mere gift of a legacy is, of itself and necessarily, a manifestation of an intent on the part of the testator to remit a debt due him from the legatee. Citing *Smith* v. *Kearney,* 2 Barb. Ch. 543, 547, 549; *Wright* v. *Austin,* 56 Barb. 17; *Close* v. *Van Husen,* 19 Barb. 509; *Rickets* v. *Livingston,* 2 Johns. Cas. 100. The intent of the testator clearly expressed, that the debt be extinguished, will govern. *Williams* v. *Crary,* 8 Cowen, 246; *Ex parte Leslie,* 3 Redf. 280. See *Ritch* v. *Hawxhurst,* 114 N. Y. 512.

Where a testator expressly discharges a legatee "from all claims of the testator against such legatee" this will operate to extinguish such claims, as they existed when the will becomes effective, that is to say, at the death of the testator. *Van Vechten* v. *Van Veghten,* 8 Paige, 104. But where the testator releases "all claims or demands which I may have at my death against any person or persons named in this will" the Court of Appeals held that a legatee named in a codicil to the will indebted to the testator was not entitled to an extinguishment of his debt. *Sloane* v. *Stevens,* 107 N. Y. 122. But an executor has no right to offset a contingent claim against the absolute right of a legatee to her legacy. The Surrogate's Court has no equitable powers which would enable it to enforce such contingent claims of the executors by means of an equitable set-off. *Matter of Peaslee,* 81 Hun, 597, 599.

§ 932. **Legacy to creditor.**—A legacy to a creditor, in value equal to or greater than decedent's debt will, as a general rule, be deemed to be in satisfaction of the debt. *Williams* v. *Crary,* 5 Cow. 368. The exceptions to this rule are discussed in *Matter of Arnton,* 106 App. Div. 326, 329.

§ 933. **Lapsed legacies.**—A legacy is said to lapse when the person named by testator dies before the bequest vests, and there is no one who by operation of law or in contemplation of the will is capable of taking as his substitute. The Decedent Estate Law provides by § 29:

"Whenever any estate, real or personal, shall be devised or bequeathed to *a child or other descendant* of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy *shall not lapse,* but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate."

This changed the common-law rule, which was, generally, if the legatee died before testator, the legacy lapsed (*Matter of Wells,* 113 N. Y. 393, 400), that is, fell into the residuary fund, if any. Hence it might pass to those who had no natural claim to testator's bounty, leaving his grand-

children penniless. This statute was passed to avoid this possibility where the testator provided for a child, or other descendant, who might die, leaving issue, not named in the will, and indeed possibly not in being when it was executed. *Tuttle* v. *Tuttle*, 2 Dem. 48, 51. See also report, in footnote of *Cook* v. *Munn*, 12 Abb. N. C. 344 *Downing* v. *Marshall*, 23 N. Y. 366. But, save in respect of this modification, the common-law rule still obtains. *Matter of Wells, supra.*

But the words "child or other descendant" are limited. They do not extend to collaterals. *Van Beuren* v. *Dash*, 30 N. Y. 393; *Roberts* v. *Bosworth*, 107 App. Div. 511. So where the devise was to a sister, it lapsed. *Gill* v. *Brouwer*, 37 N. Y. 549. So, if the provision is to a "class" and one of the class die before testator, issue cannot take. The statute does not apply. There are others of the class to prevent lapsing, which is the sole object of the statute. *Pimel* v. *Betjemann*, 183 N. Y. 194. See also *March* v. *March*, 186 N. Y. 99.

The common-law rule that lapsed bequests fall into the residue, but lapsed devises do not, but go to the heir as undisposed of by will has been done away with by statute. *Moffett* v. *Elmendorf*, 152 N. Y. 475, 485; *Cruikshank* v. *Home, etc.*, 113 N. Y. 337, 353; 2 R. S. 57, § 5.

Where there is a residuary clause, it will require explicit terms to exclude therefrom lapsed, specific gifts. See *Moffett* v. *Elmendorf, supra; Ricker* v. *Cornwell*, 113 N. Y. 115, 127.

The rule is that where the residuary bequest is not circumscribed by clear expression in the will, and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid disposition or other accident. *Newcomb* v. *Newcomb*, 33 Misc. 191, 197; *Morton* v. *Woodbury*, 153 N. Y. 243, 254; *Matter of Woolley*, 38 Misc. 353.

Where a legacy is to several persons, it is important to ascertain whether they share jointly or in common. If they are severally named, and not described as a class, and are given equal shares, they will be deemed to take as tenants in common, and share distributively and not collectively. *Moffett* v. *Elmendorf, supra.* So if one or more of those so named die, his or their share will fall into the residuum and not go to the survivors. See also *Matter of Kimberley*, 150 N. Y. 90; *Matter of Wells, supra.*

If the residuary bequest itself lapses the property passes as undisposed of by the will. *In re Benson*, 96 N. Y. 499.

§ 934. **Effect of void or lapsed legacies.**—A lapsed or void legacy increases the residuary estate *pro tanto.* If the will contains no residuary clause, the amount passes as in intestacy. So, in *Matter of Woolley*, 38 Misc. 353, mod. 78 App. Div. 224, there was a residuary clause, with ten provisions; the tenth was of the balance not covered by the other nine. One of the nine lapsed. Held it was not disposed of by the tenth clause. The rule as to "residue of a residue," applied in *Kerr* v. *Dougherty*, 79 N. Y. 346, and in *Beekman* v. *Bonsor*, 23 N. Y. 298, 312, was followed. Therefore held, decedent was intestate as to the lapsed ninth.

So, equally of void legacies. Except that if there be deficiency of property to pay general legacies, they are preferred to the residuary legatee in that the amount which would have been applied to the void legacy must first be used to make good the general legacies. *Matter of Botsford*, 37 App. Div. 73. But if the will itself provides the residuary fund as the destination of lapsed legacies, or of the principal of a fund, the income alone of which was bequeathed, then the fund for general legacies is not accreted by its lapse, avoidance, or the determination of the trust period. See *Wetmore* v. *St. Luke's Hospital*, 56 Hun, 313. *Per contra*, the will may itself divert lapsed legacies from the residue. See *Beekman* v. *Bonsor*, *supra*.

§ 935. **Status and rights of annuitants.**—There is a difference between the life beneficiary of a fund held in trust and an annuitant. The annuity is not a "measuring life" within the rule against perpetuities. This is well shown in *People's Trust Co.* v. *Flynn*, 188 N. Y. 385, where the court shows that on the falling in of the "measuring lives" the trust ended, but the charge of the annuity continued, that is, assuming the annuitant survived the "measuring lives." The corpus *vests* on the end of the trust, but still subject to the annuity.

It is intimated that such annuity may be compounded (as if often done by consent) by ascertaining its "present" value, which is based on the expectation of life under the mortality tables.

The annuitant is entitled to payments figured from the testator's decease. The rule of the common law was that annuities were not apportionable. *Kearney* v. *Cruikshank*, 117 N. Y. 95. Since 1875 (ch. 542) they are so by law. In the *Kearney* case, the annuitant died just before a yearly payment was due, and as the statute was not applicable, the entire annual sum fell back into the estate.

The annuity is a *charge* on the larger interests given by the will. Hence arrearages in "lean" years must be made good in the "fat." *Matter of Chauncey*, 119 N. Y. 77. But if the annuity is a gift solely of income from a particular fund, this will not be the case. Certainly, the principal cannot be resorted to. *Delaney* v. *Van Aulen*, 84 N. Y. 16. But if the primary object of testator is to provide a given annual sum to his annuitant, the principal may be used. *Pierrepont* v. *Edwards*, 25 N. Y. 128; *Bliven* v. *Seymour*, 88 N. Y. 469. This emphasizes the difference. Is the testator's intent to give so much a year, or what a given sum, or fund, or property will produce? The annuitant is entitled to be paid from the funds in the representative's hands, the stipulated annual sum. *Clark* v. *Clark*, 84 Hun, 362.

CHAPTER VII

DISPOSITION OF THE DECEDENT'S REAL PROPERTY FOR THE PAYMENTS OF DEBTS AND FUNERAL EXPENSES

§ 936. When decedent's real estate may be resorted to by creditors. —The remedy afforded creditors by title 5 of ch. 18 of the Code of Civil Procedure (completely revised in 1904) whereby the decedent's real property may be disposed of for the payment of debts and funeral expenses, or for the payment of judgment liens existing thereon at his death, gives a jurisdiction to the Surrogate to order a sale, mortgage, or lease of the real property of which a decedent died seized, or of an interest which the decedent had in real property under a contract for the purchase of the same. This jurisdiction he must exercise in the manner and according to the procedure prescribed in the statute. See *Duryea* v. *Mackay*, 151 N. Y. 204, 208; *Platt* v. *Platt*, 105 N. Y. 488, 497. As this jurisdiction is so given to the Surrogate the Supreme Court will not entertain such a proceeding. *Hogan* v. *Kavanaugh*, 138 N. Y. 417. This being so, it is improper to join such a cause of action with one for partition. *Letson* v. *Evans*, 33 Misc. 437.

The Code first provides what property may be subjected to this remedy and when it may be so subjected. The provision is as follows:

> Real property, of which a decedent died seized, and the interest of a decedent in real property, held by him under a contract for the purchase thereof, made either with him, or with a person from whom he derived his interest, may be disposed of, for the payment of his debts and funeral expenses, or for the payment of judgment liens existing thereon at his death, as prescribed in this title; *except* where it is *devised, expressly charged* with the payment of debts or funeral expenses, or is *exempted from levy and sale* by virtue of an execution, as prescribed in title second of chapter thirteen of this act. The expression "funeral expenses," as used in this title, includes a reasonable charge for a suitable headstone. **§ 2749, Code Civil Proc.**

The exceptions noted in this section are most important. That relating to property exempt from sale and levy does not include realty bought with pension moneys, as the pensioner's exemption ceases at his death. *Matter of Liddle*, 35 Misc. 173, appr. in *Smith* v. *Blood*, 106 App. Div. 317, 325; citing also *Beecher* v. *Barber*, 6 Dem. 129. Where exemption is claimed it must be set up at the first opportunity, for the Surrogate to determine. If not so set up by the heirs they *may* be held to have waived it. *Beecher*

v. *Barber, supra.* Where the testator's real estate is expressly charged by the will with the payment of debts or funeral expenses, the right to resort to the remedy provided by this title must be denied, and it will become important, therefore, in all such cases to note whether or not the case is clear of the exception in the statute. As early as 1786 (see Laws of 1786, ch. 27) there have been statutes in force in this State authorizing the sale of a decedent's real estate to pay debts. And by reason of the existence of this remedy it has been held on the one hand that an intent to charge debts upon real estate, must appear from express directions or be clearly gathered from the provisions of the will (see *Matter of Gantert,* 136 N. Y. 106, 112; *Holly* v. *Gibbons,* 176 N. Y. 520; *Matter of Van Vleck,* 32 Misc. 419. See also *Reynolds* v. *Reynolds,* 16 N. Y. 257; *Matter of City of Rochester,* 110 N. Y. 159, 167); and on the other hand that where the intent to charge debts upon the real estate is clear it excludes all resort to this remedy. *Ibid.* At common law a devise of real estate after a direction by the testator that his debts be first paid, was deemed equivalent to a charge of the debts upon the real property devised. But it is not sufficient that debts and legacies are directed "to be paid," that alone does not create the charge, but they must be directed to be *first* or *previously* paid, or the devise declared to be made *after* they are paid. *See Lupton* v. *Lupton,* 2 Johns. Ch. 614; *Matter of City of Rochester,* 110 N. Y. 159, 166. So a direction to pay "my just debts . . . . out of my property" does not create a charge upon the real estate. *Matter of Powers,* 124 N. Y. 361; *Clift* v. *Moses,* 116 N. Y. 144; *Matter of O'Brien,* 39 App. Div. 321.

A testator cannot by charging the payment of a specified debt upon his real property limit the rights of his general creditors by such attempted priority. The Surrogate may nevertheless order it sold under § 2749 after the personal estate is exhausted. *Matter of Richmond,* 168 N. Y. 385, aff'g 62 App. Div. 624. The word "debts" means *all* the debts of testator. *Ibid.*

The Real Property Law (being ch. 50 of the Consolidated Laws) defines an imperative trust power as follows (see § 157):

"A trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative and imposes a duty on the grantee the performance of which may be compelled for the benefit of the person interested."

Where a power or authority to sell is given without limitation, and is not in terms made discretionary, and its exercise is rendered necessary by the scope of the will and its declared purposes, the authority is to be deemed imperative, and a direction to sell will be implied, provided the design and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt, and his intention cannot otherwise be carried out. *Matter of Gantert, supra,* at p. 110, citing *Scholle* v. *Scholle,* 113 N. Y. 261; *Chamberlain* v. *Taylor,* 105 N. Y. 194; *Hobson* v. *Hale,* 95 N. Y. 598; *Clift* v. *Moses, supra.*

A power of sale is not available for the payment of debts where the

power is discretionary or limited to some other specific purpose, or where it cannot be exercised without breaking up and destroying the scheme of the will and frustrating the intention of the testator. Same, citing *Kinnier* v. *Rogers*, 42 N. Y. 531; *Scholle* v. *Scholle, supra; Matter of McComb*, 117 N. Y. 378; *Matter of Bingham*, 127 N. Y. 296.

But where the real and personal property is blended in one gift to the executors for a common trust, in which all the beneficiaries share equally, and the will gives a general and unlimited power to sell, such power is imperative, and may be compelled in favor of any party who is lawfully entitled under the provisions of the will to the proceeds of the real property when sold. See *Holly* v. *Gibbons*, 176 N. Y. 520. A creditor, whose debt is directed by the will to be paid, and for the satisfaction of which the personal estate proves insufficient, belongs to this class. He is beneficially interested in the exercise of the power, within the meaning of the Real Property Law, and, as to him, it becomes a power in trust enforceable under the statute. See *Matter of Gantert, supra*, at p. 111.

Nor does such a power interfere with the order in which the assets of a decedent's estate must be marshaled for the payment of debts. The personalty must first be exhausted, and if that fails, the execution of the power may be resorted to and compelled so far as necessary to meet the deficiency.

§ 937. **This remedy available unless will provides one as effectual.**— The testator can only deprive his creditor of this statutory remedy against the real estate by providing in his will "a remedy as efficient and as expeditious." *Matter of Gantert*, 136 N. Y. 106; *Parker* v. *Beer*, 65 App. Div. 598, aff'd 173 N. Y. 332.

Thus, the question as to which remedy the creditor must resort to hinges upon whether the power to sell is imperative or discretionary. "A power of sale to pay debts sufficient to defeat a creditor's application under the statute must be one the exercise of which is imperative, and not simply discretionary. *A creditor cannot be deprived of his statutory remedy, unless the debtor has by his testamentary act provided him with one which is equally prompt and effective in its operation.*" *In re Juch's Estate*, 63 Hun, 280, aff'd as *Matter of Gantert, supra; Matter of Powers*, 124 N. Y. 361.

It is important, therefore, in determining whether a power to sell is imperative or not, to note the distinction between whether the power in the will *can* be exercised for the payment of debts, or whether it *must* be exercised for the payment of debts. A power of sale may be general and unrestricted, and be in such terms as, if exercised, to render the proceeds of the real estate subject to be applied to the payment of debts, if an intention to that effect could be reasonably inferred from the will; but such a discretionary power of sale unexercised and in the absence of express directions in the will as to the payment of debts, or such general intent in the will to that end, from which it *must* be inferred that the real estate was to be sold for that purpose, will not be sufficient to prevent creditors from enforcing payment of their debts by compelling the sale

of the real estate where all the jurisdictional facts are shown. See *Matter of Hervy*, 67 Hun, 13, 18, 19.

In the case last cited Van Brunt, P. J., concurring in the result, held, that the language of § 2749 was, "except where it is devised *expressly* charged with the payment of debts, not charged by implication or by operation of law, but *expressly* charged." See opinion at p. 20. And he adds: "Unless it has been so expressly charged this section gives the creditor the right to maintain this proceeding."

If the power to sell is limited by such words as "for any purpose which the said executor may in his judgment think proper," the courts will construe such words as indicating the purpose of the testator, to leave the exercise of the power to the judgment of the executor. No such power can be compelled by a creditor and will therefore not stand in the way of the proceeding about to be discussed (see *Matter of Johnson*, 18 App. Div. 371, 373), or if the power to sell is postponed until the payment of testator's debts, it will not be such a power as to prevent initiation of these proceedings. *Matter of Duffy's Estate*, 18 N. Y. Supp. 924. See *Matter of Davids*, 5 Dem. 14; *Coogan* v. *Ockerhausen*, 18 N. Y. St. Rep. 366.

§ 938. **For what debts or expenses property may be sold.**—The statutory definition of debts will govern in these proceedings, to wit: "Every claim and demand upon which a judgment for a sum of money could be recovered in an action." See § 2514, subd. 3, Code Civ. Proc. This means the decedent's debts. *Matter of Dusenbury*, 106 App. Div. 235.

The words "funeral expenses" include all necessary and reasonable expenses connected with the interment of the deceased including, as expressly provided by § 2749, a "reasonable charge for a suitable headstone." *Matter of Laird*, 42 Hun, 136; *Matter of King*, 10 Civ. Proc. Rep. 175. See general discussion of "funeral expenses" above. The question of reasonableness of funeral expenses depends upon two considerations:

(*a*) The station in life of the decedent.

(*b*) The amount of the estate.

Where no express authority is given by the will for unusual expenses, such as a vault or tomb, disbursements made by the executor or administrator of a considerable sum will be closely scrutinized. Thus where the estate was only $17,000, a disbursement of $2,000 for a vault and tomb was held excessive and disallowed. *Matter of Shipman*, 82 Hun, 108. See for authorities as to what are reasonable funeral expenses including cost of a headstone, *In re Erlacher*, 3 Redf. 8; *In re Mount*, 3 Redf. 9, note; *In re Wood*, 3 Redf. 9, note; *In re Rooney*, 3 Redf. 15, and *Owens* v. *Bloomer*, 14 Hun, 296. But the statute does not contemplate by the words "debts and funeral expenses" the expenses incurred by the executor in defending actions concerning the estate (see *Matter of Wilcox*, 11 Civ. Proc. Rep. 115); nor for any other expenses of administration (*Matter of Quatlander*, 29 Misc. 566; *Fitch* v. *Witbeck*, 2 Barb. Ch. 161; *Cornwall's Estate*, 1 Tucker, 250; *Sandford* v. *Granger*, 12 Barb. 392); nor even costs in an action pending at the decedent's death so far as they accrued after his death (*Burn-*

ham v. *Harrison*, 3 Redf. 345; *Wood* v. *Byington*, 2 Barb. Ch. 387); nor for costs against an executor in an action begun by his decedent (*Matter of Foley*, 39 App. Div. 248 (see § 2757, *post Sandford* v. *Granger*, *supra; Matter of Stowell*, 15 Misc. 533); nor do they include costs and allowances granted upon a decree refusing probate to a decedent's will (*Smith* v. *Meakim*, 2 Dem. 129); nor are debts barred by the Statute of Limitations such as are contemplated as a basis for this proceeding (see *Gilchrist* v. *Rea*, 9 Paige, 66; *Carman* v. *Brown*, 4 Dem. 96), any more than they can be made the occasion of the exercise by an executor of a power to sell (see *Butler* v. *Johnson*, 111 N. Y. 204), nor can such proceedings be initiated for the purpose of reimbursing one who has paid the taxes and assessments on the property of a decedent. *Norsbury* v. *Bergh*, 16 How. Pr. 315. But, it has been held that where testator's widow, who was his executrix, herself advanced enough to pay his debts, not charged upon the realty, she could be treated as the equitable assignee of the claims, and institute this proceeding. *Matter of O'Brien*, 39 App. Div. 321, 326; *Ball* v. *Miller*, 17 How. Pr. 300; *Gilchrist* v. *Rea*, 9 Paige, 66, 73; *Pease* v. *Egan*, 131 N. Y. 262; *Kochler* v. *Hughes*, 148 N. Y. 507.

§ 939. **The petition.**—The proceeding is begun by a petition, the requirements as to which are set forth with great particularity in the Code. The time within which and the person by whom it may be presented are indicated by § 2750, which is as follows (italics and parentheses ours):

> At any time within three years after letters were first duly granted within the state, upon the estate of a decedent, an executor or administrator, whether sole or joined in the letters with another (other than a temporary administrator), or a person holding a judgment lien upon decedent's real property at the time of his death, or any other creditor of the decedent (other than a creditor by a mortgage, which is a lien upon the decedent's real property), or any person having a claim for the funeral expenses of the decedent * may present to the surrogate's court, *from which letters were issued*, a written petition, duly verified, praying for a *decree directing the disposition* of the decedent's real property, or interest in real property, specified in the last section, or so much thereof as is necessary for the payment of his debts or funeral expenses or, if so decreed as hereinafter provided, for the payment of any judgment liens existing upon such land, or some portion thereof, at decedent's death, *by the mortgage, lease or sale* at public or private sale thereof; and that the parties named in the petition and all other necessary parties as prescribed in the subsequent sections of this title, may be cited to show cause, why such a decree should not be made. **§ 2750, Code Civil Proc.**

The proceeding is deemed commenced when the petition is filed. Subsequent delay in issuing citation is not a jurisdictional defect. *Matter of Van Vleck*, 32 Misc. 419; *Matter of Bradley*, 70 Hun, 104, 109; *Matter of Phalen*, 51 Hun, 208. The amendment of the petition so as to bring in a new party is within the power of the Surrogate to allow, though the

* The claimant for funeral expenses is now allowed to petition by virtue of ch. 183, Laws 1909, in effect September 1, 1909.

Statute of Limitations has by that time run. *Matter of Ibert*, 48 App. Div. 510. See *Matter of Georgi*, 35 Misc. 685; *Stuyvesant* v. *Weil*, 167 N. Y. 421; *Matter of Wheeler*, 48 Misc. 323.

This section applies to the three years' limitation to creditors, as well as to executors and administrators, in harmony with § 1844, *ante*. It does not change the previous rulings that certain debts of the estate which are not debts of the decedent, cannot be collected by these proceedings. See *Ball* v. *Miller*, 17 How. 300; *Fitch* v. *Witbeck*, 2 Barb. Ch. 161; *Cornwall's Estate*, 1 Tuck. 250. By § 2514, subd. 3, these proceedings may be founded upon equitable as well as legal debts, and by subd. 5, of the same section, they may be taken by an administrator with the will annexed. A creditor may apply, under this section, without first applying for an order for the executor to show cause, etc., as provided by L. 1837, ch. 460, § 72.

§ 940. **Who may petition.**—The persons by whom the petition may be presented are, first, an executor or administrator, *other than a temporary administrator*. A temporary administrator has no authority to mortgage or sell the real estate of a decedent by virtue of his office. *Duryea* v. *Mackey*, 151 N. Y. 204, 207. And the Surrogate is without jurisdiction to make an order permitting him so to do. *Ibid.* And it has also been held that the holder of ancillary letters of administration cannot institute proceedings under this title of the Code. *Matter of Estate of Ladd*, 5 Civ. Proc. Rep. 50.

The creditors who may bring the proceedings are defined as: "Any person holding a judgment lien upon decedent's real property at the time of his death, or any other creditor of the decedent *other than a creditor by a mortgage which is a lien upon the decedent's real property*." See *Matter of Lowerre*, 48 Misc. 317.

The words "any other creditor," however, must be taken in connection with the definition of the word "creditor" by § 2514 of the Code, subd. 3, as including every person having a claim or demand upon which a judgment for a sum of money or directing the payment of money could be recovered in an action. This being the wording of the statute, and § 2750 limiting the word "creditor" by the additional words "of the decedent," it had been held that one holding a claim for funeral expenses is not a creditor of the decedent within the intent of this title, and therefore cannot initiate a proceeding for the disposition of his real estate for the payment of his claim. It is noticeable that the words "funeral expenses" are always explicitly mentioned in the Code distinctly from the expression "debts." Unlike ordinary debts a claimant for funeral expenses has a personal remedy for the claim against the executor or other person who contracted the obligation. See *Matter of Flint*, 15 Misc. 598. And it has accordingly been held that he has not the right to invoke this remedy as himself the petitioner. See *Matter of Corwin*, 10 Misc. 196, 197. See *Matter of King*, 10 Civ. Proc. Rep. 175. But the amendment of 1909 above noted, while recognizing the general differentiation, expressly permits such a claimant to petition.

Irrespective of this amendment, however, the provision in § 2749, that the real property of which a decedent died seized may be disposed of for the payment of his funeral expenses, is not without meaning, for, as the executor is given by § 2750 the right to initiate these proceedings and as he is also presumed to have paid or have become liable for the funeral expenses, there is no question that such funeral expenses may be paid or reimbursed to the claimant or to the executor or administrator in proceedings properly brought under this title.

§ 941. **When petition must be presented.**—Section 2750 provides that the petition may be presented at any time within three years after letters were first duly granted within the State upon the estate of a decedent. The date at which the petition is filed must determine whether or not the proceeding was begun within the three years limited by this section. The citation issues at the time the petition is filed, and although it may be returnable after the lapse of the three years this will not affect the jurisdiction of the court. See *Matter of Topping*, 9 N. Y. Supp. 447, 449, Ransom, Surr., citing *Matter of Gouraud*, 95 N. Y. 256, 262; *Matter of Phalen*, 4 N. Y. Supp. 408.

The statute commences to run from the date of the *original* granting of letters of administration or letters testamentary and not (in a case of a change of administration) from the time letters were granted to the administrator who seeks to make the sale. See *Slocum* v. *English*, 62 N. Y. 494, 496. See also *Matter of Kingsland*, 60 Hun, 116.

In the case of *Slocum* v. *English*, Church, Ch. J., observed, that "an administrator *de bonis non* takes the estate where his predecessor left it; and in respect to the time of limitation to sell real estate, as well as in most other respects, his administration is a mere continuation of that commenced by the latter. . . . The object of the statute was to fix a certain period after which *bona fide* purchasers would be protected, and actions might be maintained against the heirs and devisees."

That this is the correct interpretation is manifest from the terms of art. 2, title 3, ch. 15, of the Code of Civil Procedure, providing that the heirs of an intestate and the heirs and devisees of a testator (who are declared by § 101, Dec. Est. Law to be "respectively liable for the debts of the decedent, arising by simple contract, or by specialty, to the extent of the estate, interest, and right in the real property, which descended to them from, or was effectually devised to them by, the decedent"), cannot be sued to enforce this liability except where three years have elapsed since letters testamentary or letters of administration upon his estate were granted within the State. See § 1844, formerly 2 R. S. 109, § 53.

§ 942. **The Statute of Limitations and the three years' limitation.**—Where the Statute of Limitations has begun to run during the life of the debtor it does not cease running during the period which may elapse between the death and the granting of administration upon his estate, save, that eighteen months after the death is by statute deemed not to be a

part of the time limited. *Sandford* v. *Sandford*, 62 N. Y. 553. This is by virtue of § 403 of the Code of Civil Procedure, which provides:

> The term of eighteen months after the death, within this state, of a person against whom a cause of action exists, ... is not a part of the time limited for the commencement of an action against his executor or administrator. If letters testamentary or letters of administration upon his estate are not issued within this state at least six months before the expiration of the time to bring the action, as extended by the foregoing provisions of this section, the term of one year after such letters are issued is not a part of the time limited for the commencement of such an action. . . .

This last provision may prove confusing. It is in effect that, if letters are not issued at least six months before the expiration of the time to bring an action as extended by the eighteen months' provision, then the term of one year after letters are issued is not a part of the time limited (*Church* v. *Olendorf*, 49 Hun, 439, 443), provided the full period of limitation had not expired before such letters issued. *Chapman* v. *Fonda*, 24 Hun, 130; *Hall* v. *Brennan*, 64 Hun, 394, 396. This does not mean, that in case letters are not issued within six months before the expiration of eighteen months' extension of the six years' Statute of Limitations, then the term of one year after such letters are issued is not part of the time limited. *Ibid.* It is only in a case where the letters are not issued six months or more before the expiration of the time (including the eighteen months) within which the action may be brought that the additional year is given. *Ibid.*

The Code also provides that where the commencement of an action has been stayed by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action. Code Civ. Proc. § 406. See also *Mead* v. *Jenkins*, 95 N. Y. 31; *Brehm* v. *Mayor*, 104 N. Y. 186; *Hall* v. *Brennan*, 64 Hun, 394, 397; *Church* v. *Olendorf*, 49 Hun, 439, 444. For example, as the law stood prior to September 1, 1880, a proceeding for the sale of real estate to pay the debts could not have been commenced until after the executor or administrator had rendered his account. See *Mead* v. *Jenkins*, 95 N. Y. 31. And, consequently, in cases arising at or about that time, where an executor or administrator had not accounted up to September 1, 1880, the proceeding was held to be stayed by statutory prohibition, and the time during which it was so stayed was not reckoned as a part of the time of the running of the statute. See *Church* v. *Olendorf*, 49 Hun, 439, 443.

The present section contains no such limitation, but provides that "at any time within three years," etc., the proceeding may be begun and no previous accounting by the representative is required. *Ibid.*

But this provision of § 2750, that at any time within the three years after letters are first duly granted within the State upon the estate of a decedent, a creditor may institute such a proceeding, does not extend the Statute of Limitations so that the creditor may institute such a proceeding at any time within three years after the letters are issued, regardless of

the period of time that may have elapsed before such letters were issued. The purpose of the statute was to *restrict the right* of the creditor or representative to institute such a proceeding and not to *extend the period* of limitation. See *Church* v. *Olendorf*, *supra*, at p. 444, citing *Chapman* v. *Fonda*, 24 Hun, 130; *Sandford* v. *Sandford*, 62 N. Y. 553.

§ 943. **Same subject.**—Moreover, the Code contains explicit provisions extending the time of creditors in certain cases to commence this proceeding. This is by virtue of § 2751, which is as follows:

> The time, during which an action is pending in a court of record, between a creditor and an executor or administrator of the estate, is not a part of the time limited in the last section, for presenting a petition, *founded upon a debt, which was in controversy in the action;* if the creditor has, before the expiration of the time so limited, filed, in the clerk's office of the county where the real property is situated, a notice of the pendency of the action; specifying the names of the parties, the object of the action, and, if the creditor's debt is made the foundation of a counterclaim, the nature of the counterclaim; containing a description of the property in that county to be affected thereby; and stating that it will be held, as security for any judgment obtained in the action. A notice so filed must be recorded and indexed, and may be canceled, as prescribed, with respect to the notice of pendency of an action, in article ninth of title first of chapter fourteenth of this act. It may also be canceled in like manner, or a specified portion of the property affected thereby, may be discharged from the lien thereof, by the order of the court in which the action is pending, made upon the application of a person having an interest in the real property, upon notice to the creditor, and upon such terms as justice requires.
>
> Whenever an executor, administrator, or creditor of a deceased person shall have commenced, or shall hereafter commence, an action in any court of competent jurisdiction of this state, for the purpose of setting aside any fraudulent conveyance of, or encumbrance upon, any real estate of such deceased person, and such action shall have been decided in favor of such executor, administrator, or creditor, such executor, administrator, or creditor may, at any time within three years after the final determination of such action, have and maintain an action or proceeding against the proper parties, in any court of competent jurisdiction of this state, for a sale of such real estate, and for a distribution of the proceeds of such real estate among the creditors of such deceased person, and other persons entitled to the same, as may be directed by the judgment in such action. **§ 2751, Code Civil Proc.**

It must be noted under this section that the Court of Appeals has held that it is not necessary that the petition itself should allege that it is founded upon a debt which was in controversy in an action, the pendency of which is by § 2751 made operative to extend the creditor's time. While it is essential that the petition be founded upon such a debt to relieve the proceeding from the limiting provision of § 2750, the statute does not in terms require that this fact should appear in this petition, the contents of which are carefully prescribed by § 2752.

It is important, however, that such requirements be effectually supplied by proof. That the *lis pendens* be filed before the expiration of the time

so limited, and that it specify the facts required by § 2751, is the important prerequisite. See *Matter of Bingham*, 127 N. Y. 296, 305.

§ 944. **The form of the petition.**—The contents of the petition in this proceeding are prescribed by § 2752, which is as follows:

Contents of petition.

The petition must set forth the following matters, as nearly as the petitioner can, upon diligent inquiry, ascertain them:

1. *The amount of the unpaid debts and funeral expenses of the decedent and that the personal estate is inadequate for the payment thereof.*

2. A general description of all the decedent's real property, and interest in real property, within the state, which may be disposed of as prescribed in this title; a statement of the value of each distinct parcel; whether it is improved or not; whether it is occupied or not; and, if occupied, the name of each occupant; whether it is incumbered by a mortgage lien or liens together with a statement of the amount due or claimed to be due thereon. Where the petition describes an interest in real property, specified in section two thousand seven hundred and forty-nine of this act, the value of the interest must be stated, and also the value of, and the other particulars, specified in this section, relating to the real property to which the interest attaches.

3. The names of the husband or wife, and of all the heirs and devisees of the decedent, and also every other person claiming under them, or either of them, stating who, if any, are infants; the age of each infant, and the name of his general guardian, if any; and also, if the petition is presented by a creditor or judgment lienor, the name of each executor or administrator.

4. If the petition is presented by an executor or administrator, the amount of personal property which has come to his hands, and those of his coexecutors or coadministrators, if any; the application thereof, and the amount which may yet be realized therefrom. **§ 2752, Code Civil Proc.**

The provision in subd. 2 that the statement of the value of each distinct parcel must be given in the petition, must be reasonably interpreted. Thus in *Matter of McGee*, 5 App. Div. 527, it was held that where the estate consisted of several parcels but each parcel consisted of several lots of land and the description showed that the various lots lay together and formed one parcel and the valuation was given of the parcel as a whole, it was sufficient within the meaning of § 2752. *Matter of Georgi*, 35 Misc. 685. While where the running of the statute is suspended by the pendency of a suit, as covered by § 2751, it is essential that the petition should be founded "upon a debt which was in controversy in the action" in order to avoid the statute, § 2750, the statute does not in terms require that the fact must be set forth in the petition. If not so set forth, therefore, the Surrogate does not lose jurisdiction. The requirement is suppliable by proof. *Matter of Bingham*, 127 N. Y. 296, 305.

The detail schedule of debts, in judgment or otherwise, formerly required by subd. 1 before the amendment of 1904 (ch. 750) need not now be given. The amount in gross is to be alleged, and it must be stated that the personal estate is inadequate.

Under subd. 3 care must be taken to specify. A petition was rejected

as insufficient which alleged that the names and numbers of the heirs at law were unknown. *Matter of O'Neill*, 49 Misc. 285. If they are unknown, then there should be the proper allegation that diligent effort to discover them has been made. *Ibid.* In other words, to secure a citation to them as a class the rule as to such citation must be followed.

§ 945. **Same—Form of petition.**—A form of petition is suggested as a precedent:

Petition.

In Matter of Disposition of Real Estate.

To the Surrogate's Court of the County of

The petition of respectfully shows that your petitioner is of late of the town of in the county of deceased;

That the said died on or about the day of 19 leaving a Last Will and Testament, which was duly proved, and admitted to probate and record, by an order duly made by the Surrogate's Court of said County, on the day of 19 by which will the testator appointed your petitioner the executor thereof; (*or*)

That on the day of 19 the said died, intestate and your petitioner thereupon duly appointed administrat of the goods, chattels and credits of the said deceased, by the Surrogate's Court of the County of on the day of 19

That thereupon your petitioner duly qualified; and thereupon, by an order of the said Surrogate's Court, duly made on the day of 19 letters were duly issued to your petitioner who thereupon entered upon the discharge of duties as such which letters still remain in force, and were duly issued within three years prior to the presenting of this petition.

That the whole amount of the personal property of said decedent, which has come to the hands of your petitioner as such is dollars and cents.

That your petitioner has paid therefrom [preferred debts? funeral expenses? etc.] in due course of administration $ [see subd. 4].

That the amount of the unpaid debts (and funeral expenses *if still unpaid*) is $ and that the personal estate in petitioner's hands is inadequate for the payment thereof, by the sum of $ [Add in a proper case] and that no more than $ may yet be realized from the personal estate yet unsold, and still in the petitioner's possession or control.

That none of said debts or claims are secured by mortgage, or otherwise a lien or charge upon the real property of said decedent:

That the following described real property is, as your petitioner informed and believe all the real prop-

erty within the State of New York of which the decedent died seized, and in which he had any interest, or which in any wise belonged to him, at the time of his death, valued at the sums respectively affixed to each lot, piece or parcel, and occupied or not occupied, as stated in respect to each of said several lots, pieces or parcels, that is to say:

Note. In stating value, improvements occupation and title of decedent specify *each* parcel, as required by subd. 2.

(*Note*) That the value of the above described real estate is as follows:

That the said lands are improved as follows:

That the same are occupied by

That the interest of decedent therein is as follows:

That it is (not) encumbered by (any) (a) mortgage on which the amount due to the owner of said mortgage is the sum of $ with interest from the day of 19 at per cent.

That the value of the interest of the decedent is as follows:

That names of the husband (or wife) and of all the heirs and devisees of the said decedent, and of every other person, claiming under them, or either of them, and their residences, are as follows, viz.:

That the said
are infants under the age of twenty-one years, to wit:

The said is of the age of years,
The said is of the age of years,
The said is of the age of years,
is the general guardian of
and is the general guardian of
; *or*,

That none of the above-named infants has any general guardian;

That no previous application has been made for a decree authorizing the disposition of the real property of the said decedent for the payment of his debts or funeral expenses;

Wherefore, your petitioner prays that a decree be made directing the disposition of the said real property of said decedent [*or* the interest of said decedent therein] or so much thereof as may be necessary, for the payment of his debts (and funeral expenses)
and that and the heirs-at-law, occupants, creditors and persons interested in said estate above mentioned
may be severally cited to show cause why such decree should not be made, and that such other process and proceedings may be had in the premises as may be just and proper.

(Dated.)

(Verification.)

§ 946. **Same subject, and the citation.**—If the petition fails to disclose such facts as are required by the statute to be shown the Surrogate acquires no jurisdiction. *Matter of Williams's Estate,* 1 Misc. 35, 36, citing *Matter of German Bank,* 39 Hun, 181.

If any of the facts required to be stated in the citation are unknown or cannot be ascertained by the petitioner upon diligent inquiry, the Code provides for a further inquiry by the Surrogate. The provision is as follows:

> If, *upon diligent inquiry,* any of the matters required to be set forth as prescribed in the last section, cannot be ascertained by the petitioner, that fact must be shown to the surrogate's satisfaction, and the surrogate must, thereupon, inquire into the matter, as prescribed in article first of title second of this chapter. If the petition is presented by a creditor or judgment-lienor the surrogate may, by order, require the executor or administrator to render such an account or other statement, as he deems necessary for the purpose of the inquiry. **§ 2753, Code Civil Proc.**

So where the names of heirs are unknown, and the petition does not state that "diligent inquiry" was made the Surrogate may refuse a citation. *Matter of O'Neill,* 49 Misc. 285.

The citation which issues in this proceeding is one dependent upon an inquiry and determination by the Surrogate and cannot therefore be issued as of course by the clerk. That the act is judicial, appears from the language of the section providing for the issuance of the citation.

> Where the surrogate is satisfied that all the facts, specified in the last section but one, have been ascertained, as far as they can be upon diligent inquiry, and it appears to him that the debts, judgment liens and funeral expenses, or either, cannot be paid, without resorting to the real property, or interest in real property, he must issue a citation according to the prayer of the petition.
>
> If, upon the inquiry, it appears to the surrogate, that any heir or devisee, or person claiming an interest in the property under an heir or devisee, is not named in the petition the citation must also be directed to him.
>
> Unless the executor or administrator has caused to be published, as prescribed by law, a notice requiring creditors to present their claims, and the time for the presentation thereof, pursuant to the notice, has elapsed, the citation must be directed generally to all other creditors of the decedent, as well as the creditors named. **§ 2754, Code Civil Proc.**

The defect of a necessary party may be cured by amending the petition, or by supplemental citation based on affidavits, or resulting from the inquiry made by the Surrogate. See *Matter of Wheeler,* 48 Misc. 323, citing *Matter of Ibert,* 48 App. Div. 510. For the purpose of this inquiry the Surrogate may appoint a referee to *hear and report* the facts and he may direct him to submit his opinion thereon. *Matter of Walker,* 43 Misc. 475.

The issuance of a citation by the Surrogate amounts to a determination by him that the jurisdictional facts exist. It is therefore necessary that

all the facts essential to give the Surrogate jurisdiction, both of the subject-matter and of all necessary parties, should be shown affirmatively in order to give validity to the proceeding. *Lawrence* v. *Brown*, 5 N. Y. 394.

If from the petition, or such other inquiry as the Surrogate may make under the section already quoted, it appears to him that the debts or judgment liens or funeral expenses *can* be paid without resorting to these proceedings, he must refuse to issue the citation. *Matter of Davids*, 5 Dem. 14. This of course will prove to be the case where the will, which the Surrogate should examine in the course of his inquiry, contains an imperative power to sell. *Ibid.*

§ 947. **The citation further considered.**—The provisions of § 2754, already quoted above, as to the persons to whom the citation must be directed, must be interpreted in connection with § 2752 to mean that the citation must be served upon every person to whom it is directed. *Kammerrer* v. *Ziegler*, 1 Dem. 177.

Where the executor or administrator has not caused the usual notice to creditors to present claims to be published; or where, having so published a notice, the time has not yet elapsed (*Matter of Slater*, 17 Misc. 474, 479) for the presentation of claims the citation *must* be directed generally not only to the creditors named in the citation but "to all other creditors of the decedent." *Kammerrer* v. *Ziegler*, 1 Dem. 177, 180; *Matter of Georgi*, 44 App. Div. 180. The mere fact that the petitioner claims to be the only creditor does not excuse noncompliance with this provision of § 2754. See *Ibid.* And if they have been omitted in the petition and not designated in the original citation, the Surrogate will hold the proceeding, while a supplemental citation issues to bring them into court. Same, citing § 2514, Code Civ. Proc., subd. 10, and § 2755. See *Matter of Wheeler*, 48 Misc. 323. If citation is not published, therefore, it is a defect which will excuse purchaser from completing. *Matter of Georgi, supra.* Inaccuracies in the citation, such as omission of Christian names, or individual names of partners in a firm, are curable by amendment. *S. C.*, 35 Misc. 685. If petition is filed in time to give jurisdiction, the time to issue or complete service of citation can be extended by the Surrogate. *Matter of Van Vleck*, 32 Misc. 419, where Surrogate held delay of four years did not invalidate proceeding! *Matter of Bradley*, 70 Hun, 104, 109; *Matter of Phalen*, 51 Hun, 208.

§ 948. **Effect of §§ 1837–1849.**—Article second of ch. 15, title 3 of the Code, provides for action by a creditor against his debtor's next of kin, legatee, heir, or devisee by §§ 1837 to 1860, and contemplates an action jointly against the surviving husband or wife or all the legatees or all the next of kin to recover to the extent of the assets paid or distributed to them for a debt of the decedent upon which an action might have been maintained against an executor or administrator.

It is, however, important in this connection only to point out the effect upon such an action of proceedings to sell decedent's real property. The following provision covers the case:

> Where it appears that, at the time of the commencement of such an action, a petition, seasonably presented as prescribed by law, praying for a decree to dispose of real property of the decedent, for the payment of his debts, was pending in a surrogate's court having jurisdiction, the proceedings in the action, subsequent to the complaint, must be stayed by the court, until the petition is disposed of, unless the plaintiff elects to discontinue. If a decree to dispose of real property, pursuant to the prayer of the petition, is granted, the action must be dismissed, unless the plaintiff has alleged in his complaint, or alleges in a supplemental complaint, that real property, other than that included in the decree, descended or was devised to the defendants. If the plaintiff elects to proceed under such an allegation, he is entitled to a preference in payment, out of the real property, with respect to which the allegation is made; but he cannot share, as a creditor, in the distribution of the money, arising from the disposal of the real property, described in the decree; and the judgment in the action does not charge, or in any way affect, that property, **§ 1845, Code Civil Proc.**

It has been held, in view of the provisions of § 1844 (that the action cannot be maintained until either three years have elapsed since decedent's death and no letters, either testamentary or of administration have been issued in this State, or where three years have elapsed since such letters have been granted), that a creditor of the original testator elects whether he will proceed to procure his decedent debtor's real property to be sold to pay his debts or rely upon the statutory liability of the devisee of his decedent debtor to pay the obligation. *Matter of Fielding*, 30 Misc. 700, 703. The devisee of a testator is made by § 1843 now § 101 Dec. Est. Law "liable for the debts of the decedent arising by simple contract . . . to the extent of the assets . . . . so effectually devised to him."

After assignment of her dower, a widow is not entitled to notice of proceedings for the sale of her husband's real estate for the payment of his debts. She does not claim under the heirs and devisees, and therefore cannot litigate the proceedings; and as she cannot litigate and is not entitled to notice, it necessarily follows that she cannot be bound by the decree of the Surrogate directing a sale of the land assigned for her dower. See *Lawrence* v. *Brown*, 5 N. Y. 394, 399; *Lawrence* v. *Miller*, 2 N. Y. 245. And, moreover, she is protected by § 2793 upon the distribution. See below.

§ 949. **Technicality of the proceeding.**—The statutory proceeding having for its purpose and effect the divesting of title to real estate, it is essential that the statute be strictly pursued, for any substantial departures from its requirements render the whole proceeding void. *Havens* v. *Sherman*, 42 Barb. 636. See also *Elwood* v. *Northrop*, 106 N. Y. 172, 185; *Atkins* v. *Kinnan*, 20 Wend. 241; *Battel* v. *Torrey*, 65 N. Y. 294, 296; *Matter of Valentine*, 72 N. Y. 184, 186; *Stillwell* v. *Swarthout*, 81 N. Y. 109, 113. Thus, for example, the insertion in the petition of the names of the heirs-at-law and their ages is jurisdictional. See *Matter of Slater*, 17 Misc. 474, 478, citing *Dennis* v. *Jones*, 1 Dem. 80; *Mead* v. *Sherwood*, 4 Redf. 352; *Ackley* v. *Dygert*, 33 Barb. 176; *Estate of Evan John*, 21 Civ. Proc.

Rep. 326; *Kelley's Estate*, 1 Abb. N. C. 102; *Stillwell* v. *Swarthout*, 81 N. Y. 109; *Jenkins* v. *Young*, 35 Hun, 569.

A purchaser at a sale made in such proceedings may be relieved from completing the purchase and may recover his purchase money and auctioneer's fees where the petition is shown to have omitted to set forth the names of the heirs-at-law, and it appears that they were not in fact cited in the proceeding. *Estate of John*, 18 N. Y. Supp. 172; *Matter of Slater*, 17 Misc. 474. Although where it appears that two or three legatees whose legacies were charged upon the real property sold in such proceedings were not served with a copy of the order to show cause, but the proceeds of the sale if completed were shown to be more than sufficient to pay all debts as well as the legacies of such legatees the Court of Appeals held that no injury would be wrought by a completion of the sale and the purchasers should not be relieved. *Matter of Dolan*, 88 N. Y. 309. But if, at the time of filing the petition, names of necessary parties were not known, and the defect is subsequently supplied and the party is subsequently cited and appears, the defect is cured. *Matter of Bingham*, 127 N. Y. 296. For the Surrogate's Court has power upon the hearing, if it appears that the jurisdictional facts actually existed, to allow the defect in the petition to be supplied by amendment by virtue of § 2474, Code Civ. Proc. See *Matter of Miller*, 2 App. Div. 615, mem. opinion. See also *Matter of Wheeler*, 48 Misc. 323. So also, although the petition merely stated the facts upon information and belief, and omitted to say that diligent inquiry had been made, the Surrogate retains jurisdiction if on the hearing it appears that the facts actually existed. *Merchant* v. *Merchant*, 25 N. Y. St. Rep. 268.

But, under the provisions of the former statute for which § 2754 was substituted (2 R. S. 100, § 5), the procedure required was, that the Surrogate should make an order directing all persons interested to appear at a time and place to be specified, not less than six nor more than ten weeks from the time of making the same, to show cause why authority should not be given to sell, etc. It was held that an order to show cause made in proceedings brought under the statute and returnable in nearly a week less than the time provided for, was not in accordance with the statute. That defect went to the foundation of the entire proceeding, and showed a want of jurisdiction on its face, which was fatal to its validity. *Stillwell* v. *Swarthout*, 81 N. Y. 109, 113.

But where the defect, which was asserted for the purpose of invalidating proceedings under the statute, was that the order to show cause why a sale should not be had was made returnable one day later than the time limited by statute, the Court of Appeals (*O'Connor* v. *Huggins*, 113 N. Y. 511, 519), held that the lengthening of the time for appearance by one day could not work any possible prejudice to any party interested, and was not a substantial departure from the requirements of the statute.

It was also held in *Stillwell* v. *Swarthout*, *supra*, that it was a fatal defect that no report of sale was made to the Surrogate by the administra-

tor, and no order entered confirming the report prior to the conveyance. *Ibid.*, citing *Rea* v. *McEachron*, 13 Wend. 565.

It was held to be a further defect in the proceeding that there was no proof that a guardian alleged to have been appointed for infant parties either consented to act, or did act or receive notice of his appointment as such. But a petition stating that certain persons therein named are the heirs of the decedent has been held equivalent to the statement that such persons were all the heirs of the decedent. *Greenblatt* v. *Hermann*, 144 N. Y. 13. But where the petition stated neither the ages of the heirs nor the value of the land nor the occupants of the specific parcels, it was held fatally defective. *Mead* v. *Sherwood*, 4 Redf. 352. See also *Matter of German Bank*, 39 Hun, 181; *Matter of Laird*, 42 Hun, 136.

§ 950. **Rights of infant parties.**—Where a party who must be cited in this proceeding is an infant, the Surrogate must appoint a special guardian, otherwise he obtains no jurisdiction (*Havens* v. *Sherman*, 42 Barb. 636; *Ackley* v. *Dygert*, 33 Barb. 176), and a sale had in such a case would be void. *Schneider* v. *McFarland*, 2 N. Y. 459; *Matter of Mahoney*, 34 Hun, 501. But see *Jenkins* v. *Young*, 43 Hun, 194, where infant over fourteen for whom no guardian was appointed, was nevertheless personally served with the order to show cause.

If during the life of the proceeding it appears that there was irregularity in the appointing of a special guardian, as, for example, that the person appointed was ineligible, the Surrogate may correct the irregularity by removing him and appointing a person in his place. *Matter of Luce*, 17 Weekly Dig. 35.

But if the irregularity in appointment or the failure to appoint be discovered after the sale has taken place, the defect cannot be cured by an order to show cause, although served upon the infants personally, and an attempted appointment of a guardian *nunc pro tunc*. *Matter of Mahoney*, 34 Hun, 501. But if the irregularity is merely the omission of the date in the order appointing the guardian and the true date appears from other parts of the record, the omission will be disregarded. *Sheldon* v. *Wright*, 5 N. Y. 497.

If process was duly served, the failure to appoint the special guardian makes the decree voidable, not void. *Smith* v. *Blood*, 106 App. Div. 317; citing *McMurray* v. *McMurray*, 66 N. Y. 175; *Fox* v. *Fee*, 24 App. Div. 314.

Where, upon the appointment of a special guardian for an infant, notice of the application for the appointment was not personally served upon the infant, as required by § 2531, Surrogate Rollins held that the omission was not such an irregularity as to vitiate the proceedings, or to so impair the title as to relieve the purchasers at the sale from fulfilling their contract (*Price* v. *Fenn*, 3 Dem. 341, 346), but was an "omission" of the character contemplated by § 2763, old number 2784, of the Code, which declares that the title of a purchaser in good faith, at a sale pursuant to a decree made in proceedings under title 5 of ch. 18, is not affected by any omission, error, defect or irregularity, occurring between the return

of the citation and the making of the decree, or the order directing the execution of the decree, in any case where "a petition was presented and the proper persons were duly cited, and a decree for a sale and an order directing execution thereof was made as prescribed in this title, and the decree and order if any were duly recorded," etc. See § 2784 of the Code, subd. 1. This decision was doubtless correct, for the Surrogate has power to disregard errors or defects within the limits laid down in § 2784 that go merely to the *form* of the proceeding and not to the *substance*, but he may not dispense with any absolute prerequisite. *Matter of Mahoney*, 34 Hun, 501.

A special guardian for an infant cannot be appointed, however, until after the citation shall have been duly and personally served upon such infant. See *Pinckney* v. *Smith*, 26 Hun, 524.

§ 951. **Hearing and determination.**

> Upon the return of the citation the surrogate must proceed to hear the allegations and proofs of the parties. A creditor of the decedent, *including one whose claim is not yet due*, or a person having a claim for unpaid funeral expenses, although not named in the citation, may *appear* and thus make himself a party to the special proceeding. An heir or devisee, or a person claiming under an heir or devisee, of the property in question, although not named in the citation, may contest the necessity of applying the property to the payment of debts, judgment liens or funeral expenses, or the validity of a debt, due or unpaid, represented as existing against the decedent, or the reasonableness of the funeral expenses; may interpose any defense to the whole or any part thereof; and, for that purpose, may make himself a party to the special proceeding. The admission or allowance by the executor or administrator of a claim or debt of any creditor against the decedent shall, for the purpose of such proceeding, be deemed an establishment thereof, unless objection be made thereto by a party to the special proceeding. Where such a defense arises under the statute of limitation, an act or admission by the executor or administrator does not prevent the running of the statute, or revive the debt, so as to affect, in any manner, the real property, or interest in real property in question, *or to permit the creditor to participate in the fund arising therefrom.*
> **§ 2755, Code Civil Proc.**

The practitioner must not overlook the fact that hidden away in another title, 2, in § 2547, is a provision whereunder the Surrogate has discretionary power to make an order directing a trial by jury, at Supreme Court trial term in his county (or in the county court), of any controverted question of fact. It is the same power given to all Surrogates which in probate cases in New York County is given to the Surrogates of that county, and which is elsewhere discussed in detail. The order frames the issues "and is the only authority needed for the trial." See p. 141 *et seq.*

It is apparent from the language of § 2755 that the Surrogate must determine judicially upon the allegations and proofs of the parties the jurisdictional facts entitling the petitioner to the decree prayed for.

It appears further from the language of the section that the proceeding is one upon which the Surrogate has power to determine the validity and

amount of a disputed claim against the decedent. *Matter of Haxtun*, 102 N. Y. 157, 159. This was when the section read that the creditor might "present and prove" his debt or lien. This is now stricken out. The heir or devisee may dispute the validity of debts due, unpaid, or represented as existing. But as even a creditor whose claim is *not yet due*, and any other creditor, may *appear*, and become a party, and the Surrogate is given express power to hear the "allegations and *proofs of the parties*," the rule will be unchanged.

Moreover, it is now essential that the quantum of debts and of each of them be determined at this stage. They ought to be scheduled in the decree, [so that after the sale the executor may know how to deal with the proceeds.] There is no longer a second chance to litigate the amount of the claims, as formerly. He must be satisfied of the existence of debts and that the personal estate is insufficient for their payment in order to make a decree. He must of course, under § 2750, have determined this preliminarily and prior to issuing the citation, but he determines it for the purpose of the decree only upon proof of the statutory facts, and this proof must be made, whether proceedings for the sale of the real estate of a decedent to pay debts are instituted by a creditor or by an executor or administrator, or whether parties cited oppose or fail to contest the application. See *Matter of Lichtenstein*, 16 Misc. 667, 669.

The dispute of the validity of a creditor's claim, which as has been noted in a proceeding to compel payment of debts operates to require a dismissal of that proceeding *ipso facto*, has no effect upon proceedings of this character. *Kammerrer* v. *Ziegler*, 1 Dem. 177. The fact that the claim presented by a creditor in this proceeding has already been presented to and rejected by representatives of the estate does not affect the Surrogate's jurisdiction. See *Matter of Haxtun*, 102 N. Y. 157, 159; *Merchant* v. *Merchant*, 25 N. Y. St. Rep. 268. Nor, by the language of the section, is the allowance by the executor made conclusive if any party objects.

"The rule, that a Surrogate may not adjudicate upon a disputed claim as between executor and creditor, does not reach the case of a proceeding to mortgage, lease or sell the real estate of a deceased, and in such proceeding the Surrogate has jurisdiction to determine the validity of all claims upon the estate." *Matter of Haxtun*, 102 N. Y. 157, 158. This overruled *Matter of Glann*, 2 Redf. 75, 76, holding that claims disputed or rejected by the administrator must be established, if at all, by a suit or by a reference pursuant to the statute; and that a Surrogate in such a proceeding as this is limited to pass upon such claims as are contested by the heir or devisee, and does not extend to deciding claims disputed or rejected by the administrator. 2 R. S. 102, § 10; *Magee* v. *Vedder*, 6 Barb. 352; *Barnett* v. *Kincaid*, 2 Lansing, 320. See *People ex rel. Adams* v. *Westbrook*, 61 How. 138; *Matter of Strickland*, 1 Connoly, 435, 437.

But that a claim has been admitted by the representative merely establishes the claim *prima facie* for the purposes of this proceeding, so that any person specified in § 2755 who may contest its validity, must sustain the

burden in such case of proving its invalidity. *Jones* v. *Le Baron*, 3 Dem. 37, 39, citing *Matter of Frazer*, 92 N. Y. 239. And the provision of § 829 of the Code of Civil Procedure which declares, that a party or a person interested in the event, shall not be examined in his own behalf or interest against the executor, administrator or survivor of a deceased person, concerning a personal transaction or communication between the witness and the deceased person, etc., is not applicable in this proceeding so as to prevent the inquiry contemplated as to the validity of the claim. *Ibid.* The Surrogate has jurisdiction in this proceeding to determine the validity of a debt of the decedent due to the representative. *Matter of Williams*, 1 Misc. 35, 38, citing *Matter of Haxtun, supra; People* v. *Westbrook, supra; Kammerrer* v. *Ziegler, supra; Hopkins* v. *Van Valkenburgh*, 16 Hun, 3. The Surrogate, of course, has no jurisdiction to entertain a proceeding solely for the purpose of proving such persons' claim. See *Matter of Rieder*, 129 N. Y. 640. But the mere fact that the only indebtedness of the decedent is the personal claim of the representative, who is the petitioner, does not take the question out of the rule established by the cases just cited; nor is it affected by the fact that the Code makes provision that any debt owing to the executor or administrator by the decedent, may be proved upon the judicial settlement of his accounts. *Matter of Williams, supra.*

Where improper evidence is admitted in support of a creditor's claim in proceedings of this character, the proceedings will not be set aside if the decree made is sustained by sufficient competent evidence. *Matter of McGee*, 5 App. Div. 527, 528.

The provisions of § 2755, as to the hearing, contemplates an opportunity being given to the persons therein specified of litigating any particular claim. Therefore, if the Surrogate reopens the hearing upon application of any claimant for the purpose of taking further testimony, due notice must be given to the devisees or heirs or to the attorney who appeared for them of such rehearing; a failure to give such notice is error (*Matter of Hearman*, 34 N. Y. St. Rep. 231), for they would otherwise be deprived of their right to contest given by this section. The rights of creditors are confined, after becoming parties to such proceedings, to presenting their claims, or objecting to those of other creditors. They cannot contest the necessity of the proceeding itself, nor interpose defenses to its prosecution. *Matter of Campbell*, 66 App. Div. 478. These defenses are expressly limited to heirs and devisees, or "persons claiming under them." And it has been held that a judgment creditor of a devisee is a person entitled to appear and oppose the application if the devisee does not appear. *Raynor* v. *Gordon*, 23 Hun, 264.

It follows from the fact that the Surrogate has jurisdiction in these proceedings to adjudicate upon all claims upon the estate, that any valid defense to or ground of contest of such claims may be interposed in the proceeding. The Statute of Limitations is a defense which the executor or administrator ought to set up, and which, if he does not set it up, any

heir or devisee, or persons claiming under such heir or devisee, may insist upon, even though the executor or administrator have acknowledged or admitted the claim. *Mooers* v. *White*, 6 Johns. Ch. 360; *Renwick* v. *Renwick*, 1 Bradf. 234; *Gilchrist* v. *Rea*, 9 Paige, 66.

§ 952. **Judgment debts.**—The revision of 1904 eliminated numerous sections, among them the sections, then numbered 2756 and 2757, which gave a special status to judgment creditors, while limiting them in their claim on the real property to the judgment claim "exclusive of costs." It also permitted any heir or devisee to offset in reduction of such judgments "any payment or counterclaim which might be allowed to him, or to the person under whom he claims, in an action founded upon the debt." The presumption of validity of the judgment claim is now left to the operation of the general rule of law, and the rights of the heirs are covered by the general terms of § 2755.

The discussion, in former editions, is still applicable, therefore, to the following extent:

The first point to emphasize is that in order to give a judgment or decree the force of presumptive evidence of the debt, it must have been rendered in a trial *upon the merits*. See *Colson* v. *Brainard*, 1 Redf. 324, 328, and cases cited. At common law neither the omission of an executor or administrator nor a judgment against him could in any way bind the heir or devisee or affect the real estate derived from his testator or intestate. See *Osgood* v. *Manhattan Company*, 3 Cowen, 612; *Spraker* v. *Davis*, 8 Cowen, 132; *Baker* v. *Kingsland*, 10 Paige, 366, 368; *Mooers* v. *White*, 6 Johns. Ch. 360, 373.

By the statute prior to 1904 a judgment obtained after a hearing on the merits was made *prima facie* evidence of the debt in such a proceeding as this, that is to say, the judgment is divested of the character and force of a judgment, but it is made in the first instance evidence of the extent of the claim which, like any other *prima facie* evidence, is liable to be controverted, impeached, reduced or entirely disproved by any competent evidence. *Colson* v. *Brainard*, *supra*. By force of the amendment it seems that it retains the character and force of a judgment; but is subject, in respect of its *payment from the fund realized*, to the interposition of "any defense to the whole or any part thereof" by any heir, or devisee, or person claiming under either, which is legally available to him, *upon his becoming a party*. (See § 2755.)

Under the original title, the following decisions were made:

Where a judgment was entered upon a debt due from a decedent upon an offer of the executors, against whom the action was revived, it is not such a judgment as that contemplated by (former) § 2756 and cannot have the effect thereby given. *Kavanagh* v. *Wilson*, 5 Redf. 43. But a judgment rendered upon the taking of an inquest by the plaintiff comes within the meaning of (former) § 2756. *Estate of Rosenfield*, 5 Dem. 251.

The purpose of this provision is to give the Surrogate full power of determination of the claims of creditors, whether disputed or not, against

the real estate which it is sought to sell. *People* v. *Westbrook*, 61 How. 138.

The provision in (former) § 2757 that the debt for which the judgment was rendered cannot be allowed as against property in question at any greater sum than the amount recovered *exclusive of costs* (*Matter of Foley*, 39 App. Div. 248; *Matter of Summers*, 37 Misc. 575, 578) seems eliminated by the amendment. The judgment creditor specified in § 2750 is one holding a "judgment lien upon decedent's real property at the time of his death." This certainly includes the face of the total judgment as a lien. So, while as the Code formerly stood, the costs recovered against an executor could not be paid as part of the debt out of the moneys realized by a sale of the real property in proceedings under this title of the Code (see *In the Matter of Estate of Fox*, 92 N. Y. 93, 97; *Matter of Woodard*, 13 N. Y. St. Rep. 161) they would seem now to be similarly excluded under the words "any other creditor *of the decedent*." Where the claim in a proceeding to dispose of a decedent's real property to pay debts consisted of a certain deficiency judgment, entered upon the foreclosure of a certain purchase money mortgage made by the deceased, Surrogate Coffin held, that the deficiency would be deemed to be the balance of the debt existing against the decedent in her lifetime remaining due after paying the costs and expenses of the foreclosure and applying the balance of the purchase money to the payment of the debt, and that such a deficiency judgment could not be held to include costs within the then prohibition of the statute. *East River National Bank* v. *M'Caffrey*, 3 Redf. 97, 100. This decision was approved and followed in *Hurd* v. *Callahan*, 5 Redf. 393, 396. See also *Matter of Stowell*, 15 Misc. 533, 535, holding that costs in an action brought against the surviving partner could not be regarded as a debt of the decedent within the meaning of the statute, citing *Wood* v. *Byington*, 2 Barb. Ch. 387; *Sandford* v. *Granger*, 12 Barb. 392; *Ball* v. *Miller*, 17 How. Pr. 300, and *Matter of Peck*, 3 Redf. 345.

§ 953. **What proof necessary for a decree.**—The Code, as amended, now provides:

> A decree directing the disposition of real property or of an interest in real property can be made only where after due examination the following facts have been established to the satisfaction of the surrogate.
>
> 1. That the proceedings have been in conformity to this title.
>
> 2. That the personal estate of the decedent is insufficient for the payment of his debts and funeral expenses. **§ 2756, Code Civil Proc.**

See next section for discussion.

The form and content of the decree are prescribed in § 2757:

> If it shall appear to the satisfaction of the surrogate that the personal estate of the decedent is insufficient for the payment of his debts and funeral expenses, the surrogate shall make a decree empowering the executor or administrator to mortgage, lease or sell the whole or such part of the real property or interest of the decedent in real property as the surrogate shall deem necessary for the payment thereof.

The surrogate may limit the amount to be sold and afterward extend the power to other parcels and direct the order of the sale of parcels and may direct whether the same be mortgaged, leased, or sold, for the purpose of preserving all the rights and equities of the parties and preventing any unnecessary disposition of such real property; and may limit the amount to be raised thereby.

The decree must describe the property to be sold with common certainty.

If it appears that one or more distinct parcels of which the decedent died seized has been devised by him or sold by his heirs the decree must provide that the several distinct parcels be sold in the following order:

1. Property which descended to the decedent's heirs and which has not been sold by them.

2. Property so descended which has been sold by them.

3. Property which has been devised which has not been sold by the devisee.

4. Property so devised which has been sold by the devisee. **§ 2757, Code Civil Proc.**

§ 954. **The decree discussed.**—All the prerequisites to the making of the decree are summarized in the last sections quoted, which contemplate that the decree shall be a determination by the Surrogate of the jurisdictional regularity of the proceedings, of the existence of the debts as just debts of the decedent, or of the funeral expenses as just and reasonable, of the validity of the judgment liens, of the character of the debts, to wit: that they are within the description of the statute and not within the class of claims excepted by the statute; that the property sought to be disposed of was not property excepted; and finally that the necessity for resorting to this proceeding exists by reason of a deficiency of personal property which could have been applied for the purpose. See *Matter of Meagley*, 39 App. Div. 83.

In spite of the strict interpretation which can be put on § 2756, it seems advisable, to avoid the delay or expense of a rejection of title by a purchaser, to insert in the decree, explicit findings of fact established, and to insert as conclusions of law, in the language of subds. 1 and 2:

1. That the proceedings have been in conformity with Title V of Chapter 18 of the Code of Civil Procedure.

2. That the personal estate of the decedent is insufficient for the payment of his debts and funeral expenses.

Formerly § 2759 provided in detail the facts which should have been established. There were five subdivisions of which 1 was identical with 1 in present § 2756. Present subd. 1 is certainly general and inclusive, and is defined as one of the "following *facts*" by the preceding language. But it is really a conclusion, and good practice would at least justify inserting explicit findings that would on the face of the decree justify the use of subd. 1 as a "conclusion of law." And the reason is obvious.

Substantial compliance with all these jurisdictional requirements is necessary to sustain the decree; and they must be treated as of equal importance, in the sense, that the failure to *establish* the facts specified in §§ 2749 or 2750 would affect the validity of the decree. Sections 2749 and

2750 must be read with § 2752, which specifies the necessary allegations of the petition and thus together show what are jurisdictional facts to be "established." Thus, where the facts required by the fifth subdivision of former § 2759 were not affirmatively established before the Surrogate the decree was reversed. See *Kingsland* v. *Murray*, 133 N. Y. 170; *Matter of Georgi*, 21 Misc. 419; *Matter of Lichtenstein*, 16 Misc. 667. This required a finding as to insufficiency of personalty and so under subd. 2 of present § 2756. So these cases are applicable. And the reason has already been suggested, namely, that the right of a creditor to resort to the real estate of his decedent debtor did not exist at common law, nor was the collection of debts from real estate ever regarded as a part of the jurisdiction of courts of equity. *MacLaury* v. *Hart*, 121 N. Y. 636. And the right to take real estate for the payment of debts existed only by virtue of statute. *Kingsland* v. *Murray*, 133 N. Y. 170, 174. The right must be asserted and proved in the manner that the statute prescribed. *Hogan* v. *Kavanaugh*, 138 N. Y. 417, 422; *Long* v. *Long*, 142 N. Y. 545; *Moser* v. *Cochrane*, 107 N. Y. 35, 39. There can be no hardship in requiring creditors or their assignees to proceed in the usual way to appropriate real estate to the payment of debts.

There is a possible case of hardship indicated by the Court of Appeals in *Kingsland* v. *Murray*, 133 N. Y. 170, 174. If the decedent at the time of his death left sufficient personal property which could have been applied to the payment of his debts and funeral expenses in the exercise of reasonable diligence on the part of his executors or administrators, then resort cannot be had to the statute for the sale of the real estate for the payment of his debts, for in that event, personal property is the fund for the payment of his debts and the creditors must resort to that through the executors or administrators. Consequently, if the latter waste or squander the personal property so that it becomes insufficient for the payment of debts, the only resort of the creditors is against them to enforce their personal responsibility and they cannot in that case cause the real estate to be sold under the statutes referred to. *Kingsland* v. *Murray*, *supra*. See *Matter of Meagley*, 39 App. Div. 83; *Matter of Georgi*, 21 Misc. 419, 423. It is clear, therefore, that there may be cases, although rare, where the creditors may not be able to compel the sale of the real estate of the decedent for the payment of their debts under the provisions of the Code referred to. But, as Earl, Ch. J., observes in the case just cited (at p. 176):

"Creditors are not confined to such a proceeding in their efforts to compel payment of their debts. *During three years after the granting of letters* testamentary, or of administration, they have their remedy against the personal property of the decedent, and against the executors or administrators, for any waste or misappropriation of the same. During that period they may resort to the real estate, and by showing a compliance with the provisions of the law, they may compel a sale of it for the payment of their debts. But if they fail to get payment, within the three

years, out of the real or personal estate left by the decedent, then after that time further remedies are given to them by provisions of law found in the Code. (§§ 1837 to 1860.) They may sue the surviving husband or wife or next of kin of the decedent, who have received any of his personal property. If they fail to recover their debts in full from them, then they may sue any legatee who has received any of the property or assets of the decedent. If they fail to recover from any of the persons who have received the personal property of the decedent, then they may sue and recover from the heirs, who have received any of the real estate or its proceeds. If they fail to recover the full amount of their debts from the heirs, then they may resort to the devisees who have received any of the real estate or its proceeds. Therefore, taking all the provisions of the law, the cases must be very rare where a creditor, proceeding with proper diligence, would be unable to recover payment of his debt, if the decedent, at the time of his death, left ample property for that purpose."

In determining whether the personal estate is insufficient to pay debts the Surrogate may consider the inventory on file. *Merchant* v. *Merchant*, 25 N. Y. St. Rep. 268. Although the inventory alone will not be sufficient proof of the fact that the decedent left property enough to pay his debts. *Matter of Corbett*, 90 Hun, 182, 186. But the contestant may impeach the accuracy of the inventory and show that there were other assets which could have been applied for the payment of debts. *Matter of Topping*, 29 N. Y. St. Rep. 211. But it is not necessary that a judicial settlement of the executor's account be first had. *Merchant* v. *Merchant, supra; Matter of Plopper*, 15 Misc. 202. Although, if there has not been a judicial settlement of the account, the burden is on the petitioner to show the insufficiency of the personal property. *Matter of Howard*, 11 Misc. 224. Under the former statutes it was required that a judicial settlement should precede the commencement of proceedings for disposition of real estate to pay debts. *Ibid.*, p. 229. But if, when such a proceeding is initiated the proceeding for the judicial settlement of the executor's account is pending, the granting of the application shall be delayed until the determination of the accounting proceeding, as there can be no better or more expeditious way under the circumstances of ascertaining whether all personal property which could have been applied to the payment of debts has been so applied or not, than by carrying to a close the proceedings for the accounting. *Estate of Rosenfield*, 10 Civ. Proc. Rep. 201.

§ 955. **Same subject.**—So again, under subd. 4 of old § 2759, which comes under the general terms of subd. 1 of present § 2756, the Surrogate should not make the decree if it has not been established to his satisfaction that the property sought to be disposed of was not effectually devised, expressly charged with the payment of debts or funeral expenses, or was not subject to a valid power of sale for the payment thereof. See *Smith* v. *Coup*, 6 Dem. 45, 47. But, in *Matter of Richmond*, 168 N. Y. 385, 389, it was held that if the power of sale is void, or payment as directed is impracticable, this proceeding may still be resorted to. So also where the

creditor effectually relinquishes the enforcement of such a power, resort may be had to the proceeding. *Matter of Wood*, 70 App. Div. 321. If the debts be a charge upon the real estate of the testator, the Surrogate's Court has no jurisdiction to order a sale for their payment. The general rule as to the order in which a decedent's personal estate is to be applied for the payment of his debts, will not be disturbed except by express words in the will, or the clear intent of the testator to be derived from its language. See *Livingston* v. *Newkirk*, 3 Johns. Ch. 312; *Livingston* v. *Livingston*, *Ibid.* 148. The order above referred to is:

First. The general personal estate.

Second. Estates specifically devised for the payment of debts.

Third. Estates descended.

Fourth. Estates specifically devised though charged generally with the payments of debts. But the personal estate must be first resorted to even where the real estate is so charged; and even where the testator gives his personal estate, he is supposed to give it subject to the payment of his debts, that being the first fund applicable for the purpose; and when he charges his real estate with the payment of his debts, he is supposed so to charge it with the payment of such debts as remain after his personal estate is exhausted.

§ 956. **Same subject—Directions.**—Title fifth of the Code now under discussion is entitled "*Disposition* of decedent's real property for the payment of debts and funeral expenses." This does not necessarily, therefore, contemplate a sale of the property. If there be a mortgage or lease authorized, the decree will simply so provide. Its execution is safeguarded by the security required by § 2758 and by the right to accounting given in § 2761 (below).

The former section is as follows:

> It shall be the duty of the executor or administrator to execute the power conferred upon him by a decree directing that property be mortgaged, leased or sold; but he must first execute and file with the surrogate his bond, with two or more sureties, to the people of the state in a penalty fixed by the surrogate not less than twice the sum to be raised, or the value of the real property, or interest in real property, directed to be sold. The bond must be conditioned for the faithful performance of the duties imposed upon the principal by the decree and for the accounting by the principal for all moneys received by him whenever he is required so to do by a court of competent jurisdiction. **§ 2758, Code Civil Proc.**

The former Code provision (§ 2766) made a condition of the bond that the proceeds realized be paid into the Surrogate's Court, which is now omitted, and he is held only to the liability of his accounting, protected by the credit of the surety. (See § 959 below.)

The Surrogate must of course take the amount of the debts which have been allowed into consideration as well as their character, in making this preliminary inquiry whether a mortgage or lease can be decreed to the

advantage of the persons interested. See *Barnett* v. *Kincaid*, 2 Lansing, 320.

It was expressly provided by former § 2760 that a lease should not be made for a longer time than "until the youngest person, interested in the property leased, attains full age." There is no such limitation, however, with regard to leasing or mortgaging in the present statute, and if the property is in such form as not to be capable of sale in parcels and the amount of the debts is not too great, a decree directing a lease or mortgage may properly be made.

But a decree permitting a lease or mortgage of a decedent's real estate can be made only upon the same facts and with as strict compliance with the statutory requirements as a decree permitting a sale. *Duryea* v. *Mackey*, 151 N. Y. 204, 208. The Surrogate is not given general jurisdiction to grant leave to lease or mortgage real estate in his discretion, but only in a case contemplated by statute. Thus, in the case cited, a Surrogate who had appointed a temporary administrator pending contest having refused probate to the will of the decedent, allowed costs to the contestants to be paid out of the estate; and the temporary administrator having no moneys in his hands out of which to pay such costs, the Surrogate made an order upon consent of the attorneys in the case, authorizing the temporary administrator to borrow in his representative capacity the sum of $2,000 and to execute a proper bond and mortgage upon the real estate of which the decedent died seized, to secure the payment of the same. This the court held he was wholly without jurisdiction to do.

§ 957. **Same subject.**—The discretion given to the Surrogate as to whether all or part of the property is to be sold, must of course be taken in connection with the obvious general intent of the statute, namely, the payment of the ascertained debts, funeral expenses and judgment liens. Where a Surrogate has ordered a sale of all the real property upon the ground that a sale of part only would work prejudice to persons interested, the parties in interest alone can complain of his act, for if he errs in the exercise of his discretion only the heirs and devisees can complain and try to reverse his act by appeal. The purchaser at the sale has nothing to do with this question, nor can he refuse to complete the purchase upon the ground that the sale made was in excess of the debts established in the proceeding. See *Matter of Application of Dolan*, 88 N. Y. 309, 320. Section 2757 is explicit enough to require no extended discussion.

It will be noted that § 2757 (which consolidates and amends former §§ 2760–63) provides that the Surrogate shall have discretion as to the order of sale where there are two or more distinct parcels of real property in the proceeding, except in case one or more distinct parcels of which the decedent died seized appear to have been devised by him or sold by the heirs, in which case an equitable order of sale is prescribed by which the Surrogate must be governed. See *Matter of Clarke*, 5 Redf. 225, 228, under former statute (2 R. S. 103, part of § 20).

The third subdivision, which requires that property which has been

devised and has not been sold by the devisee must be sold, is a substitute for the previous statute which provides that the order should specify the lands to be sold, and the Surrogate might direct the order in which the several parts should be sold and should order that the part descending to heirs be sold before that devised. And then it read, "if it appear that any lands devised or descended have been sold by the heirs or devisees, than the land remaining in their hands unsold shall be ordered to be first sold." The intent, however, was that (former) § 2763 of the Code should in its purpose and effect be substantially the same as the former statute (2 R. S. 103, § 20), and it has been held that the fair and equitable construction of the Code is that which was given to the statute, to wit: that the property referred to as "devised and not sold" is that remaining unsold of the particular devisee who may have conveyed a portion only of the estate devised to him, and not of the other devisees who have not conveyed the property devised to them. *Matter of Lawrence*, 79 Hun, 176, 181, citing *Matter of Clarke*, *supra*. It will be clear from the discussion below as to dealing with the proceeds, that as the Surrogate, in order to determine how much money is to be raised, or how much property sold, must have ascertained how much the debts amount to, it will be advisable to insert a schedule of the claims to be paid out of the proceeds, at the amounts at which they are severally allowed. The creditors are interested in securing such findings, as otherwise complication may be introduced into the distribution stage of the proceeding, owing to the manner in which this statute was amended.

§ 958. **Execution of decree.**—The proceedings upon failure to execute decree or file bond as required by § 2758 are governed by § 2759:

> Where there are two or more executors or administrators, if either of them fails, within such time as the surrogate deems reasonable, to give, or to join with the coexecutors or coadministrators in giving, a bond as prescribed in the last section, the surrogate may direct those who have given the bond to proceed to execute the decree. But if a sole executor or administrator, or all the executors or administrators, so fail, such failure shall be deemed ground for the revocation of his or their letters and the surrogate shall, upon the application of any person interested, revoke such letters and grant administration to such person entitled as will execute such decree. He may revoke letters so granted from time to time, as the case requires, to obtain the proper execution of the decree. A person to whom letters are so granted shall have all the powers under the decree which were given to the executor or administrator at the time it was made; and must give the bond required by such decree, as well as the bond required to be given upon issuing letters to him. **§ 2759, Code Civil Proc.**

And the following provision covers the case of death:

> The death, removal, or disqualification, before the complete execution of a decree, of all the executors or administrators does not suspend or affect the execution thereof; but the successor of the person who has died, been removed, or become disqualified, must proceed to complete all unfinished matters, as

his predecessors might have completed the same; and he must give such security for the due performance of his duties as the surrogate prescribes. **§ 2760, Code Civil Proc.**

§ 959. **The representative in relation to the decree.**—Section 2758 prescribes the bond. The amount is fixed by the Surrogate. If mortgage or lease is authorized, it must be not less than "twice the sum to be raised." If sale is decided, the value of the property is to be taken as the basis.

The Surrogate may determine for himself the value of the real property for the purpose of fixing the penalty of the bond. The allegations in the petition are not conclusive upon him and it may be shown before the Surrogate that the real value is less, as well as more, than the value as stated in the petition. *Jackson* v. *Holladay*, 3 Redf. 379. The mere fact that the administrator is insolvent, does not affect the question of his being directed to execute the decree. Whether solvent or insolvent he must give the bond described in that section. His solvency or insolvency is wholly immaterial (*Matter of Georgi*, 21 Misc. 419, 423) except as it may affect his ability to procure the necessary bond. In case of his failure to give the bond prescribed by law for whatever reason, then § 2759, above quoted, governs. That is, if there are several representatives and one fails to obey, those who gave security may act. But if all fail to give bond, or a sole representative does so, then it is additional ground for revocation of letters, and a "grant of administration to *such person entitled*, as will execute such decree." The section contemplates a sort of "progressive euchre party" as it preserves the statutory priority in granting letters, but preserves a successive right of revocation if the newly appointed one still refuses to give the bond. This situation could be avoided by amending the section to read "grant administration to such person entitled as will execute and file the requisite bond upon his application for letters." And the Surrogate might be given better control of the situation by inserting after the provision that the Surrogate may "upon the application of any person interested, revoke such letters" the words "and upon like application *or upon* his own motion, and on proper notice, he may" grant administration, etc.

The effect of the decree, manner of executing same, applying proceeds of sale and accounting for same are further prescribed in § 2761:

The executor or administrator must proceed to execute the decree in the same manner, and the execution thereof shall have the same effect, as if he were acting as executor of the decedent under a like power contained in a will of said decedent duly executed and proved. He shall apply the proceeds of the real property mortgaged, leased or sold in the manner as if he had acted under such a power of sale contained in a will and all persons interested in the execution of the decree shall have the same remedies for the enforcement of the decree and the application of the proceeds that they would have had if the executor or administrator were acting under such a power. The executor or administrator may account for such proceeds and may be compelled to account therefor and for his acts under such decree and shall be entitled to com-

missions upon the settlement of his accounts as if he had acted under such a power. **§ 2761, Code Civil Proc.**

The wording of § 2761, which is substituted for former §§ 2772–2776, must be noted. The former statute made applicable to the sale §§ 1384, 1385, 1386, 1434, 1435 and 1436, reading "executor or administrator" for "sheriff."

Now the executor sells as if executing a power in the will. "A like power" means a power limited and defined as the decree limits and defines. But the repeal of all these provisions regulating the sale seems to enlarge the scope of the decree which the Surrogate may make. The repeal of the provision requiring the proceeds to be paid into court, leaves the executor free (subject to the conditions of the bond) to apply the proceeds "in the same manner as if he had acted under such a power of sale."

If the decree liquidated the claims by appropriate findings, and the proceeds are ample, the executor makes payment accordingly. If the proceeds are insufficient and questions of priority arise he can protect himself by requiring some party interested to call him to account under § 2761, and the Surrogate on such accounting can make appropriate direction in the premises.

Authority is found in § 2563, which was left unamended because of its location, for allowing the executor or administrator "out of the proceeds of the sale brought into court his expenses . . . . a reasonable sum for his own services . . . . and such a further sum, as the Surrogate thinks reasonable, for the necessary services of his attorney and counsel therein." But these payments if allowed are in lieu of commissions. § 2564. It would seem, therefore, that if he takes commissions under § 2761 he may not get paid for services under § 2563. And if he applies under § 2563 then he must be denied commissions *on the sale* under § 2761 by force of § 2564.

Another question, under the reconstructed statute, is whether expenses of administration are payable out of the proceeds. The question is equally pertinent whether it be proceeds of a sale of decedents' realty to pay debts, or proceeds on payment of a surplus on foreclosure (§ 2799). Before the amendments it was held such expenses could not be so paid. *Matter of Hatch*, 182 N. Y. 320.

Ketchum, Surr., in *Matter of Liscomb*, 60 Misc. 647, discusses in an able opinion the effect of the amendment. The text is § 2761 "the executor . . . . must . . . . execute . . . . in the same manner . . . . as if he were acting . . . . under a like power . . . . in a will." And by applying the sections under which such an executor would proceed and which would govern his account and the expenses allowable thereon (§§ 2726, 2729, 2730) he shows that expenses of administration are clearly allowable out of the proceeds of execution of such a power. Then he points out, and this seems conclusive, that by § 2764, quoted below, the legislative intent is made clear. "It is there provided," he says, "that upon a purchase by a creditor, the amount which may be allowed to him

upon the purchase price on account of his claim is . . . . dependent upon whether the proceeds are sufficient to satisfy" not only the "debts and funeral expenses" for which the property could be decreed to be sold, but also the "costs and expenses of administration."

§ 960. **Preventing the sale by bond.**

> A decree empowering an executor or administrator to mortgage, lease or sell shall not be granted if any of the persons interested in the estate give bonds to the surrogate in such sum and with such sureties as he directs and approves, with condition to pay all the debts, legacies and expenses of administration so far as the goods, chattels, rights and credits of the deceased are insufficient therefor, within such time as the surrogate may direct. **§ 2765, Code Civil Proc.**

§ 961. **Purchaser's title not affected by certain irregularities.**

> The title of a purchaser in good faith at a sale pursuant to a decree made as prescribed in this title is not, nor is the validity of a mortgage or lease made as prescribed in this title, in any way affected, where a petition was presented and the proper persons were duly cited and a decree authorizing a mortgage, lease or sale was made as prescribed in this title, by any omission, error, defect or irregularity occurring between the return of the citation and the making of the decree, except so far as the same would affect the title of a purchaser at a sale made pursuant to the directions contained in a judgment rendered by the supreme court. **§ 2763, Code Civil Proc.**

In case of inadvertent error in description the decree can be amended. *Sheldon* v. *Wright*, 5 N. Y. 497. But no amendment can be made without notice to every party. *Matter of Hearman*, 34 N. Y. St. Rep. 231.

§ 962. **The sale.**—Since the sale may be as if under a power, and as a power may be to sell "at public or private sale," so the Surrogate may authorize a sale in any manner in which a testamentary power could be carried out. If he orders a public sale, then, presumably, all the provisions governing such sales would be applicable. But in any event, the Code gives allowance on bid to creditor purchasing, by the following section:

> If a creditor of the decedent becomes the purchaser of any of the decedent's real property, the surrogate may, upon his application, direct the amount of his claim to be allowed, in the first instance, upon the purchase price; and such purchaser shall only be required to pay the balance at the time of the sale. But, in case the proceeds of the decedent's real property shall be insufficient to satisfy the costs and expenses of administration and the debts and funeral expenses of the decedent, the purchasing creditor shall be allowed and credited, upon the judicial settlement of the accounts of the executor or administrator, only the amount he may be entitled to receive upon his claim and shall then pay the difference between the amount originally allowed and the amount he is entitled to receive. In case any purchaser has credit on his bid, as aforesaid, no deed shall be delivered to him until the judicial settlement of the accounts of the executor or administrator nor until he shall have paid the entire amount required under the provisions of this section. **§ 2764, Code Civil Proc.**

Provision is also made for credit to be given secured by purchase money mortgage, as follows:

> The surrogate may, in the order directing the execution of the decree, or in a separate order made before the sale, allow a sale to be made upon a credit, not exceeding three years, for not more than three-fourths of the purchase money, to be secured by the purchaser's bond, and his mortgage on the property sold, except where the sale is that of an interest under a contract; in which case, the order may prescribe the security to be given. **§ 2771, Code Civil Proc.**

Before the Code it was held that the administrator could also sell upon credit, even in the absence of a direction by the Surrogate, if all the creditors consented. *Maples* v. *Howe*, 3 Barb. Ch. 611. The representative can sell this purchase money mortgage as he could other personal property, but the proceeds would have to go to the creditors unpaid under the decree, then to the heirs and devisees.

§ 963. **Who may not be purchasers upon the sale.**—The law exacts scrupulous good faith on the part of him who acts as trustee for another, or holds any other fiduciary relation to another. A trustee is not permitted to purchase the trust property, or be directly or indirectly interested in such purchase. He is not permitted to make the purchase as agent for another, or through an agent for himself. And it matters not if he pays all the property is worth, nor if the sale is advantageous to the *cestui que trust.* It is a matter of course for courts of equity to set the sale aside upon the application of the *cestui que trust.* The object of the rule is to afford the *cestui que trust* the most ample protection against fraud and injustice, and to remove out of the way of the trustee all inducements and temptations to speculate upon the trust property, or to manage and manipulate the same for his own benefit. This rule applies to executors and administrators as well as to other agents, and it prohibits one from being the purchaser of property which he is under a duty to sell for another, and from being the seller of property which he is under a duty to purchase for another. *Terwilliger* v. *Brown*, 44 N. Y. 237. Willard, in his Equity Jurisprudence, at p. 189, says: "It is a rule which applies universally to all who come within the principle, which principle is, that no party can be permitted to purchase an interest in property, and hold it for his own benefit, when he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account, or for his individual use. And a sub-agent is just as much disqualified as an agent is to make a purchase in opposition to the rights and interests of his principal."

These are familiar principles which have always been recognized and acted upon in courts of equity. *De Caters* v. *Le Ray De Chaumont*, 3 Paige's Ch. 179; *Davoue* v. *Fanning*, 2 Johns. Ch. 257; *Hawley* v. *Cramer*, 4 Cow. 735; *Cruger* v. *Ring*, 11 Barb. 364; *Moore* v. *Moore*, 5 N. Y. 262; Story's Eq. Jur. 322.

Sales and purchases made by trustees in violation of this rule were not held to be absolutely void, but voidable at the election of the *cestui que trust*. *Forbes* v. *Halsey*, 26 N. Y. 53, 65. But this rule was extended by the Revised Statutes (2 R. S. 104, § 27) so as to make such sales, when made in violation of the rule by executors and administrators under the order of a Surrogate, in proceedings to sell real estate for the payment of debts, absolutely void. This section is as follows: "The executors or administrators, making the sale and the guardians of any minor heirs of the deceased, shall not, directly or indirectly, purchase or be interested in the purchase of any part of the real estate so sold. All sales made contrary to the provisions of this section shall be void."

This section is now incorporated with slight modifications in § 2774 of the Code, which is as follows:

> An executor or administrator upon the estate, a freeholder appointed to execute a decree, or a general or special guardian of an infant, who has an interest in any of the real property to be sold, shall not, directly or indirectly, purchase, or be, or, at any time before confirmation, become interested in a purchase at the sale; except that a guardian may, when authorized so to do by the order of the surrogate, purchase, in his name of office, for the benefit of his ward. A violation of this section renders the purchase void. **§ 2774, Code Civil Proc.**

§ 964. **Vacating sale—Resale.**—Former §§ 2775 and 2776 gave express power to the Surrogate to vacate a sale, and if he did not, required him to confirm it and direct the execution of conveyance. They are now repealed. Nevertheless, as before the Code, the power to vacate a sale, or relieve a purchaser from completing, had been upheld. *Matter of Lynch*, 33 Hun, 309, 311, citing *Matter of Dolan*, 88 N. Y. 309 (1882). The repeal would seem to have been based on the provisions being unnecessary and redundant.

So the cases under the repealed sections may still be effective.

Where the description which had been published of the land sold was incorrect and faulty, and the sum bid upon the sale was disproportionate to its value, and the Surrogate was satisfied that at least ten per cent more ought to and might be obtained by a resale, the sale was vacated and a resale was ordered, and the purchaser at the vacated sale was authorized to be repaid his ten per centum deposited, together with his auctioneer's fees. *Matter of Campbell*, 1 Tucker, 240. But in the same case it was held that the purchaser's disbursements for the examination of title after the sale, could not be repaid him by authority of the Surrogate as there was no statutory authorization for such a direction.

But in *Matter of John*, 18 N. Y. Supp. 172, Surrogate Ransom directed, upon relieving a purchaser from a sale, a return of the purchase money paid, the auctioneer's fees and the expenses incurred in the examination of the title.

In *Matter of Slater*, 17 Misc. 474, 480, citing *Matter of John, supra*, no direction seems to have been made with regard to such repayment.

The power of the Surrogate to vacate the sale and to direct the reimbursement of the purchaser was asserted also in *Matter of Lynch*, 33 Hun, 309, 311.

To authorize the Surrogate to vacate the sale, it must appear to his satisfaction that the proceedings were unfairly conducted, or, second, that the sum bid or agreed to be paid was less than the value of the property at the time of the sale; and at the same time that a sum exceeding the sum bid or agreed to be paid by at least ten per centum exclusive of the expense of a new sale may be obtained upon a resale. There are two points to be noted in this connection: first that these two requisites must exist together (see *Kain* v. *Masterton*, 16 N. Y. 174, 178); and second, that the value of the property in regard to which the price bid or agreed to be paid is claimed to be inadequate, must be taken as of the time of sale. It is not contemplated that the consummation of the sale being delayed for any reason, it can be vacated upon proof that in the meantime the property has risen in value. *Ibid.*

In the case of *Delaplaine* v. *Lawrence*, 3 N. Y. 301, the procedure included the offering of evidence before the Surrogate tending to show that the aggregate price for which the farm had been sold was disproportionate to its value; and in the second place a bond was executed, approved by, and filed with, the Surrogate to secure the enhanced price demanded by the statute at the resale. This procedure was approved by the Court of Appeals in *Kain* v. *Masterton, supra.*

§ 965. **Confirming the sale.**—While § 2776, directing the making of an order confirming the sale, is repealed, yet § 2774 is left unchanged. It prohibits certain persons from being interested in the purchase, or becoming so "*at any time before confirmation.*" This impliedly requires the former practice to be continued, and an order of confirmation to be entered.

Suggested form of order confirming sale under section 2776, Code Civ. Proc.

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

In the Matter of the Sale of the Real Estate of Deceased, for the payment of h debts.

A decree having been duly entered by the Surrogate of the county of on the day of in the year one thousand nine hundred authorizing as executor, etc., late of the town of in said county, deceased, to sell the real estate mentioned and described in the said decree to enable h to

pay the debts therein mentioned of the said deceased, and said having executed and filed the bond required by § 2758 of the Code of Civil Procedure, and having this day made return of h proceedings under the said decree, by which said return it appears that [if the sale was private, state details concisely. If it was public recite detail compliance with the law, as to notices, posting, attendance, time of day, and offer of property] and that h did on the said sale, sell the premises described in said decree as follows:

To for the sum of dollars, that being the highest sum bidden for the same, and h being the highest bidder therefor.

And the said having this day appeared before the Surrogate in person, and by h counsel and having moved for an order confirming the sale and and the Surrogate having examined the proceedings upon the aforesaid decree and having examined the said on oath touching the same, and it appearing to the Surrogate that the said sale was legally made and fairly conducted and that the sum bidden for the lot and parcel of the real estate so sold not disproportionate to value.

Now on motion of attorney for said

It is ordered and decreed, and the Surrogate pursuant to the statute in such case made and provided, doth order and decree that the sale of the said real estate, so as aforesaid made by the said be and the same is hereby confirmed. [And the surrogate, pursuant to the statute aforesaid, doth order and direct the said as aforesaid, to execute (*or* deliver) conveyance of the said lot and parcel of the said real estate so sold by h as aforesaid, to the purchasers thereof at the said sale, upon their complying with the terms of such sale.]

WITNESS Surrogate.
and the seal of the Court.
the day and year first above written.

{ L. S. }

Surrogate.

It was always held that the order of confirmation is one of the essential steps in order to the validity of the conveyance, and the sale is void unless the order of confirmation to the purchaser is obtained previous to the conveyance. *Rea* v. *McEachron*, 13 Wend. 465. Consequently, if the executor does not apply for the confirmation of the sale, the purchaser may move therefor. It seems that the provision in former § 2775 that, when the report of sale has been made the Surrogate must inquire into the proceedings and may take oral testimony respecting the same, refers to

the fairness and good faith of the sale and not the regularity and propriety of all the prior proceedings before the Surrogate. It was so held in *Bostwick* v. *Atkins*, 3 N. Y. 53, 58, before the Code.

It has been more recently held that a Surrogate should not confirm a sale if the petition upon which it was ordered was defective in any of the statutory jurisdictional requirements. *Kelly's Estate*, 1 Abb. N. C. 102. And it would seem as if in case any jurisdictional defect is pointed out to the Surrogate upon application to confirm the sale and it is a defect which cannot be cured by amendment, it is his duty to refuse to confirm the report, for the purchaser could not be compelled to complete the purchase if the proceeding is open to some fatal objection, and nothing would be gained by confirming the report.

In *Stillwell* v. *Swarthout*, 81 N. Y. 109, 114, the Court of Appeals held that, where no report of sale had been made to the Surrogate and where the original order to show cause under the former statute (2 R. S. 101, § 5) was returnable in a time nearly a week less than the statutory time, the administrator was fully justified in abandoning the proceedings for the sale of the real estate. It seems moreover that, if the Surrogate refuses to set the sale aside, the parties interested are not confined to their remedy by appeal but may attack the sale by a direct proceeding in the Supreme Court. See *Terwilliger* v. *Brown*, 44 N. Y. 237, 243; *Forbes* v. *Halsey*, 26 N. Y. 53. In this latter case the sale had been confirmed, and yet it was held void in an action of ejectment for the land against subsequent innocent purchasers for value. It was held, notwithstanding the confirmation by the Surrogate, that the sale was absolutely void, and that the title to the land remained in the heirs-at-law of the intestate.

§ 966. **Compelling purchaser to complete purchase.**—There is some uncertainty in the decisions as to the power of the Surrogate to effectuate the sale so far as the purchaser is concerned. So far as the parties to the proceeding are concerned his jurisdiction over them is undoubted, and of course he has full power to control the executor or freeholder who made the sale and to compel him to execute and deliver the deed upon compliance on the part of the purchaser with the terms of the sale (see § 2776). He may also direct a repayment to the purchaser of his deposit and auctioner's fees (see *Matter of Lynch*, 33 Hun, 309; *Estate of Campbell*, 1 Tucker, 240). The last case held that he has no power to direct a repayment of moneys expended in searching the title. See, *per contra*, § 964 above. But so far as the purchaser is concerned, he not being a party to the proceedings in any sense, it has been held no direction of the Surrogate compelling him to complete his purchase can be made.

In 1839 Chancellor Walworth held, *obiter* (*Butler* v. *Emmet*, 8 Paige, 12, 23), that there was very little doubt that a Surrogate had no jurisdiction and power to compel the purchaser under a regular order of sale made by him to take title and pay the purchase money. This rule was reasserted by Surrogate Coffin, in *Wolfe* v. *Lynch*, 2 Dem. 610, in which he said that if the purchaser refuses to comply with the terms of the sale he could not

be coerced by the Surrogate's Court to do so. This case was reversed upon appeal (33 Hun, 309), but the appeal merely involved the power of the Surrogate to entertain a petition presented by the purchaser praying to be relieved from his purchase and to have the money he had paid out refunded to him.

Matter of Dolan, 88 N. Y. 309, reversed 26 Hun, 46, and affirmed a determination by Surrogate Calvin (see opinion at foot of p. 611, *et seq.*, 2 Dem.). Surrogate Calvin held upon application by the purchasers at sale ordered by him to be relieved from their purchase upon certain objections, that the objections were such as could be cured by the entry of papers or orders filed *nunc pro tunc*, and that the proceedings so cured were regular, that the Surrogate had complete jurisdiction over the matter, "that the purchasers at said sale who have not completed their purchase and taken their deed of conveyance are legally bound to do so and that the several motions herein should be denied." After the decision by the Court of Appeals, the purchasers accepted the decision and completed the purchase. In spite of this decision, however, and subsequently to it Surrogate Coffin again held (*Cromwell* v. *Phipps*, 6 Dem. 60), that he had no power to compel the purchaser to complete, and reiterated this view in *In re Estate of Bellesheim*, 1 N. Y. Supp. 276. It would seem that the correct rule is that, so far as compelling the executor or freeholder to complete his part of the transaction is concerned, the Surrogate's power is clear, although he is without power to put a purchaser into possession (*Matter of Georgi*, 37 Misc. 242, aff'd 44 App. Div. 180; *Kerslaw* v. *Thompson*, 4 Johns. Ch. 609, 613; *Matter of N. Y. Central, etc.*, 60 N. Y. 116), but so far as the purchaser is concerned the Surrogate's Court is without power in the premises, and this appears the more clear from the fact that if the executor has agreed to sell at private sale, the Surrogate would not have jurisdiction over the matter so as to compel the contracting purchaser to complete his contract. The executor would have to resort to a court of equity for a specific performance of the contract, and this, it would seem, is the only remedy in case the purchaser refuses to complete the purchase. Of course the purchaser upon such a sale is entitled to a marketable title (see Gerard on Real Estate, 484), and he cannot be compelled to accept title where he would be left, after receiving the deed, to the uncertainty of a doubtful title or the hazard of a contest which might affect the value of the property if he desired to sell it. *Jordon* v. *Poillon*, 77 N. Y. 518. Title should in all cases be beyond reasonable doubts and free from dangerous uncertainties, particularly in special statutory proceedings. *Matter of Mahoney*, 34 Hun, 501, 503. For it is a familiar rule that to divest a person of his property by a special statutory proceeding, as the heirs of a decedent are divested by the proceeding under discussion, every direction of the statute must be strictly complied with. *Ibid.* Hence, regularity of the proceedings is material. Where citation was not duly published, the purchaser at the sale was relieved from completing. *Matter of Georgi*, 44 App. Div. 180.

A conveyance of real property, made pursuant to this title, does not affect, in any way, the title of a purchaser or mortgagee, in good faith and for value, from an heir or devisee of the decedent, unless letters testamentary or letters of administration, upon the estate of the decedent, were granted, by a surrogate's court having jurisdiction to grant them, upon a petition therefor, presented within four years after his death. **§ 2777, Code Civil Proc.**

§ 967. **Sale of decedent's interests under contracts.**—The effect of conveyance of decedent's interest in real property held under contract, is thus defined:

A conveyance of the decedent's interest in all the real property, held by him under a contract for the purchase thereof, operates as an assignment of the contract to the purchaser; and vests in him, his heirs and assigns, all the right, title, and interest of all the persons entitled, at the time of the sale, in and to the decedent's interest in the real property. **§ 2782 Code Civil Proc.**

The effect of conveyance of part of decedent's interest under contract is covered by the next section:

A conveyance of the decedent's interest in a part only of the real property, held under such a contract, transfers to the purchaser all the decedent's right, title and interest in and to the part so sold; and all rights, which would be acquired thereto, by the executor or administrator, or by any person entitled, at the time of the sale, to the interest of the decedent therein, by perfecting the title to the property contracted for, pursuant to the contract. Upon fully complying with the contract, the purchaser has the same right to enforce performance thereof, with respect to the part conveyed to him; and the executor or administrator, or his assignee, has the same right to enforce performance, with respect to the residue, as the decedent would have had, if he was living. Any title acquired by the executor or administrator, or his assignee, with respect to the part not sold, must be held in trust for the use of the persons entitled to the decedent's interest; subject to the dower of the widow, if any. **§ 2783, Code Civil Proc.**

§ 968. **Decedent's contract to purchase lands; how enforced.**—Where a decedent leaves an unfulfilled contract whereby he agreed to purchase land, the vendor's remedy seems to be against the estate. His lands descend to his heirs, and this includes his equitable interest in the land under contract. *Grosvenor* v. *Allen*, 9 Paige, 75. In *Taylor* v. *Taylor*, 3 Bradf. 54, the question arose whether the moneys due on a decedent's contract were payable by his heirs or legal representatives. The Surrogate followed *Johnson* v. *Corbett*, 11 Paige, 265, 273, where it was held the land which the decedent had contracted to buy, but which had not been conveyed, would be considered as real estate belonging to the heirs-at-law. And as between them and the personal representatives, the balance due for the purchase money would be a charge upon the personal property of the decedent, and should be paid by his executors for the benefit of the

heirs. *Quære?* Could the Surrogate compel them? See generally *Swartwout* v. *Burr*, 1 Barb. 495; *Schrappel* v. *Hopper*, 40 Barb. 425.

§ 969. **Infants' interests.**—Where the rights of infants are involved, irregularities in the appointment of a guardian *ad litem*, which had not actually affected the rights of the infant, will not be held fatal, provided they are corrected in time. See *Matter of Luce*, 29 Hun, 145; *Price* v. *Fenn*, 3 Dem. 341. But where the appointment of the guardian is fatally defective, as for example where it does not appear that he ever knew that he had been appointed nor had ever consented in fact to act; and on the contrary appeared for and protected the interests of other parties in the proceedings, the rights of the infant cannot be divested or affected by the proceedings. *Stillwell* v. *Swarthout*, 81 N. Y. 109. And it is provided also that:

> Where the records of the surrogate's court have been heretofore, or hereafter, removed from one place to another, in either the same or another county, and twenty-five years have elapsed after a sale or other disposition of real property, or of an interest in real property, as prescribed in this title, the due appointment of a guardian for each infant party to the special proceeding must be presumed, and can be disproved only by affirmative record evidence to the contrary. **§ 2785, Code Civil Proc.**

This section sufficiently safeguards the right of infants, as it allows for a reasonable period in which any infant affected can have attained his majority and asserted his rights.

§ 970. **Disposition of the proceeds of the sale.**—The sale having been made, and confirmed, and the executor being possessed of the proceeds, we note that §§ 2786–2797 which regulated the disposition, by careful method and machinery, of those proceeds are all repealed. § 2798 relating to disposition of surplus moneys paid into the Surrogate's court does not apply, for these proceeds are not under the amended law paid into the court at all.

There will be two controlling elements as the law now stands.

(*a*) The property sold belonged to the heirs and devisees, and was only sold to enable the representative to pay claims, given a right to payment by the law, and the expenses incident thereto.

If there be any residue it belongs to its original owners.

(*b*) The decree, if properly drawn, will have contained explicit directory provisions, on compliance with which the representative may be relieved of further answerability.

(*c*) As noted in § 959 above, costs and expenses of administration may also be defrayed.

§ 971. **Miscellaneous provisions of title.**—There are five sections in the title that are left to be considered. The repeal of the sections relating to distribution, and as to the progress of proceedings to sell realty to pay debts while an action or proceeding is pending to sell the same or other realty, makes § 2798 confusing in its reference to "a special proceeding

specified in the last section," and the clause "if the sale was made in any other manner the surplus exceeding the lien . . . . must be paid," i. e., into the Surrogate's court.

It is clear in the first place that there is now no requirement explicitly requiring the representative to pay the proceeds he receives into the court. He has given a bond, and an accounting, voluntary or compulsory, may be had on this very subject. Hence § 2798 and § 2799 relate exclusively to proceeds of sale in a proceeding other than one brought expressly under Title V.

But in this proceeding it may be necessary to compute and provide for the widow's dower. This is covered by § 2800, added in 1905 (ch. 430).

§ 972. **The dower interests.**—Section 2800 provides:

> Where the widow of the decedent, or a party to the proceeding, has an existing right of dower in the real estate directed to be sold the court must consider and determine whether a more advantageous sale can be made of such real estate by including the sale of such right of dower; and, if it shall be determined by the court that a larger sum will be realized on such sale, applicable to the payment of debts and funeral expenses, by including in such sale the right of dower, the interest of the party entitled thereto shall pass thereby; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim by virtue of that right. The regulations and provisions of article two title one of chapter fourteen of this act, prescribing the rules of practice in relation to the right of dower in actions for the partition of real estate, so far as the same may be applicable, shall govern and control the disposition of moneys realized on such sale which shall belong to the owner of said right of dower. **§ 2800, Code Civil Proc.**

Sections 2794 and 2795 being repealed, the practice is made now identical with that in partition. The Carlisle table of mortality has been substituted for the Northampton table by amendment to the General Rules of Practice. This table is printed for convenience. Rule 70 directs the computation to be at five per cent. So if a widow is thirty-four, her expectation of life is 14.260 years (see table). If the property to which her dower attaches is worth, or brings, $10,000, the computation is made by multiplying five per cent of the $10,000, by the figures 14.260. The product is the gross sum in lieu of dower.

CARLISLE TABLE OF MORTALITY

Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.
0	12.083	35	14.127	70	6.336
1	13.995	36	13.987	71	6.015
2	14.983	37	13.843	72	5.711
3	15.824	38	13.694	73	5.434
4	16.271	39	13.541	74	5.190
5	16.590	40	13.389	75	4.989
6	16.735	41	13.244	76	4.792
7	16.790	42	13.101	77	4.609
8	16.786	43	12.956	78	4.422
9	16.742	44	12.805	79	4.210
10	16.669	45	12.648	80	4.014
11	16.581	46	12.480	81	3.799
12	16.495	47	12.301	82	3.606
13	16.406	48	12.107	83	3.406
14	16.316	49	11.892	84	3.211
15	16.227	50	11.660	85	3.009
16	16.145	51	11.409	86	2.830
17	16.067	52	11.154	87	2.685
18	15.988	53	10.892	88	2.597
19	15.905	54	10.624	89	2.495
20	15.818	55	10.347	90	2.339
21	15.727	56	10.063	91	2.321
22	15.629	57	9.771	92	2.412
23	15.526	58	9.478	93	2.517
24	15.417	59	9.199	94	2.569
25	15.304	60	8.940	95	2.596
26	15.188	61	8.712	96	2.555
27	15.065	62	8.487	97	2.428
28	14.942	63	8.258	98	2.278
29	14.827	64	8.016	99	2.045
30	14.723	65	7.765	100	1.624
31	14.617	66	7.503	101	1.192
32	14.506	67	7.227	102	0.753
33	14.387	68	6.941	103	0.317
34	14.260	69	6.643		

§ 973. **The effect of foreclosure proceedings on lands being disposed of to pay decedent's debts.**—It is very clear that in the absence of statutory provision, considerable confusion might be occasioned by the fact that the property sought to be disposed of in proceedings under this title of the Code might be subject to a mortgage past due and liable to foreclosure. It is manifest that the rights of the mortgagee in respect of the property upon which his mortgage is a lien are superior to those of the general creditors of the decedent and that their rights to have their debts paid out of the real property of the decedent in certain contingencies cannot in any respect outweigh the rights of the holder of the mortgage.

Therefore it was provided by former §§ 2797, 2798 and 2799:

First. What effect an action to foreclose shall have upon proceedings for the disposition of decedent's real estate.

Second. In what cases the surplus moneys arising on foreclosure and other judicial sales shall be paid into the Surrogate's Court for distribution.

Third. How the surplus on foreclosure so paid into the Surrogate's Court is to be distributed.

These sections have been repealed.

If it appeared to the satisfaction of the Surrogate that the interest of all parties would be promoted by a stay he could order it. It is evident that there may well be cases where such a stay would be prejudicial to the creditors, as where the property is in such a condition that the proceedings pending in the Surrogate's Court can readily proceed to a sale long before the determination of the proceedings in the Supreme or other court, and also where the property could be sold to advantage subject to the lien of the mortgage and substantially the whole equity realized for the benefit of the creditors and persons interested. The Surrogate was given a discretion the exercise of which would be guided by the circumstances in each particular case, and it was held the proceedings should not be stayed where it is evident that to allow the foreclosure sale to precede the sale in the Surrogate's Court proceedings would be to sacrifice the property, as where the estate or parties interested are not in a position to protect themselves upon such sale.

In an early case (*Breevort* v. *M'Jimsey*, 1 Ed. Ch. 551), Vice-Chancellor McCoun, discussing such a case, pointed out that proceedings to sell real property for the purpose of raising money to pay debts, was a power vested in executors and administrators by statute, and is to be exercised in behalf of creditors only, that the proceeds are not left in the hands of the representative to be applied or distributed in the course of administration, but must be paid to the Surrogate in whose hands the money is regarded as equitable assets for the payment of debts, and that the surplus belonged to the heir or devisee. And consequently, where a decree of foreclosure and sale of the same premises had been had and was in force, the representative would be restrained by perpetual injunction from prosecuting his proceeding in the Surrogate's Court. He remarked: "The property is sold to as good an advantage, and the probability is to a better advantage, as to price, since there is as much confidence in a mortgage sale under the decree of this court as in a sale by an administrator." *Id.*, p. 554. And he indicated the usual manner in which equity could dispose of the surplus moneys to the creditors or other persons interested therein.

The facts discussed by the learned vice-chancellor are those contemplated in the enactment of these sections of the Code. See opinion in full, and see Wiltse on Mortgage Foreclosures, §§ 702, 745, 746, and cases cited. But the repeal of § 2797 leaves the law as it was. That is, the Supreme Court can still restrain the proceeding in the Surrogate's Court. Regardless of this special authority, it would seem that the Surrogate in the exercise of his general power to control the representative whose

letters he granted can also enjoin him in a proper case from proceeding to a sale. In other words § 2797 is repealed as unnecessary.

§ 974. **Paying of surplus, arising on judicial sales in other courts, in to the Surrogate.**

> Where real property, or an interest in real property, liable to be disposed of as prescribed in this title is sold, in an action or a special proceeding specified in the last section, to satisfy a mortgage or other lien thereupon, which accrued during the decedent's lifetime, and letters testamentary or letters of administration, upon the decedent's estate were, within four years before the sale, issued from a surrogate's court of the state having jurisdiction to grant them, the surplus money must be paid into the surrogate's court from which the letters issued pursuant to the provisions of section twenty-five hundred and thirty-seven of this Code, and the receipt of the county treasurer shall be a sufficient discharge to the person paying such money. If the sale was made pursuant to the directions contained in a judgment or order the surplus remaining after payment of all the liens upon the property, chargeable upon the proceeds, which existed at the time of the decedent's death, must be so paid. If the sale was made in any other manner, the surplus exceeding the lien to satisfy which the property was sold, and the costs and expenses, must within thirty days after the receipt of the money from which it accrues, be so paid over by the person receiving that money. **§ 2798, Code Civil Proc.**

This section requires payment of surplus arising on foreclosures and other judicial sales into the Surrogate's Court, in cases where letters testamentary or letters of administration upon the decedent's estate issued within four years before the sale. The statute originally read (see Laws, 1871, ch. 834, amending L. 1867, ch. 658): "Four years previous to the *making* of the sale on which such surplus moneys arise." This was held to refer to the sale itself and not to the commencement of the proceedings or actions in which the sale was had. Thus, where more than four years had elapsed between the issuing of the letters of administration, and the date of the sale, but not between the issuing of the letters of administration and the bringing of the foreclosure action, the General Term in the First Department held that the legislature has in view the act of selling, so that by the words "making the sale" the legislature intended to fix a specific time from which to reckon back the period of four years. *White* v. *Poillon*, 25 Hun, 69, 71.

It must be noted in the second place that the provision of § 2798 is confined to cases where real property . . . . is sold . . . . to satisfy a mortgage or other lien thereupon *which accrued during the decedent's lifetime.*

And it was held (*German Savings Bank* v. *Sharer*, 25 Hun, 409), that this was not such a sale as was contemplated by the statute as it then stood. See ch. 658 of L. 1867, as amended by ch. 170 of L. 1870, requiring surplus moneys to be paid over to the Surrogate.

In *Matter of Stillwell*, 68 Hun, 406, the General Term in the First Department, O'Brien, J., intimated that where the Surrogate had jurisdiction

of the subject-matter and of parties in a proceeding of this character, and similar questions to those which are before him are pending in another forum he is not obliged to delay exercising his own jurisdiction. *Id.*, at p. 409. "Where there are concurrent remedies which are resorted to by different parties, the judge or court called upon to determine questions then before them, in the absence of any good reason for not exercising jurisdiction, should not delay and await the result of an action or proceeding in another court."

The court held in the same case, the point having been raised that §§ 2797 and 2798 of the Code were unconstitutional and void, that they were perfectly constitutional, in that "the provisions of these sections are not mandatory." But upon appeal to the Court of Appeals, 139 N. Y. 337, 341, it was held that while the legislature cannot limit or abridge the general jurisdiction of the Supreme Court as conferred by the constitution, it may without restricting its general jurisdiction, within the meaning of the constitution, nevertheless designate where surplus moneys arising from the sale of lands in foreclosure or partition actions, where the owner is dead, may be deposited. And the court says, O'Brien, J.: "These sections of the Code treat the surplus in the cases there specified in the same way as the proceeds of real estate sold under the order of the Surrogate. They were intended to save the expense incident to the distribution of the surplus where the mortgagor is alive, and to facilitate the orderly settlement of the estates of deceased persons. . . . A statute that provides for the deposit of surplus moneys, arising from the sale of the lands of a deceased person, in the Surrogate's Court, having jurisdiction of the settlement and distribution of his estate, and providing for proceedings in that court for its distribution among the parties entitled, subject to the appellate jurisdiction of the Supreme Court, upon the law and the facts, does not violate any provision of the constitution.

It has been held (*Comey* v. *Clark*, 23 N. Y. St. Rep. 402) that where the surplus fund had not been paid into the Surrogate's Court and the persons interested had appeared in the surplus proceedings in the Supreme Court, that it was then too late for a creditor whose claim had been rejected in these proceedings to move that the surplus be paid into the Surrogate's Court. The object of this payment into the Surrogate's Court where the sale is made within four years from the issuing of letters, is the protection of the decedent's general creditors; and it is to be noted that the Code does not provide that this payment into the Surrogate's Court is only where proceedings have been or shall be duly commenced in the Surrogate's Court under §§ 2750 and 2751.

The language of § 2798 is "where real property or an interest in real property *liable to be disposed of as prescribed in this title* is sold," etc. This means, that where the condition exists which would justify the beginning of proceedings for the disposition of decedent's real estate to pay debts and funeral expenses, and the sale in the other judicatory is made within the time limited by the section, then the Surrogate becomes the proper

depositary and distributor of the surplus funds. This is still more clear from the language of § 2799, which distinctly contemplates by its second paragraph the very case where a petition for the disposition of property is not pending, or has not been presented, as well as a case where such a proceeding is pending but has not gone to a decree, and in such a case the rights and priorities of the persons interested must be established and a decree for the disposition must be made "as if it was the proceeds of real property sold" under the Surrogate's decree. § 2979, Code Civ. Proc. See *Matter of Callaghan*, 69 Hun, 161, 164.

If the property sold under foreclosure was property devised subject to a valid and imperative power of sale for the payment of debts and funeral expenses, the surplus should not be paid into the Surrogate's Court. *Matter of Coutant*, 24 Misc. 350.

§ 975. **Distribution of surplus.**

> Where money is paid into a surrogate's court, as prescribed in the last section, and a petition for the disposition of property, as prescribed in this title, is pending before him; or is presented at any time before the distribution of the money; *the decree may provide that the money be paid to the executor or administrator to be applied by him* as if it was the proceeds of the decedent's real property, sold pursuant to the decree. If such a petition is not pending or presented, or if a decree for the disposition of the decedent's property is not made thereupon, a verified petition, praying for a decree, directing the distribution of the money among the persons entitled thereto, may be presented by any of those persons. Each person, who would be entitled to share in the distribution of the proceeds of a sale, must be cited to show cause, why such a decree should not be made. Service of the citation may be made upon all the persons designated therein, by publishing the same in two newspapers designated as prescribed in article first of title second of this chapter, at least once in each of the four successive weeks immediately preceding the return day thereof, except that personal service must be made upon the husband, wife, heirs and devisees of the decedent, and also upon every other person claiming under them, or either of them, who resides in this state. Upon the return of the citation, the rights and priorities of the persons interested must be established, and a decree for distribution must be made. **§ 2799, Code Civil Proc.**

This section, revised in 1904, shows by the italics above the change accomplished. If a proceeding under this title is pending the fund, in the discretion of the Surrogate, may be ordered paid to the representative. This will be proper if the fund in the proceeding is inadequate. But even if it be not so inadequate, it may be simpler and more direct to make such an order and wind up the distribution by one final order, with all the "persons entitled" before the court.

The following authorities are unaffected by the amendment.

The provisions of this section are explicit and must be exactly followed. See *Matter of Solomon*, 4 Redf. 509.

That the executor is not entitled to receive and distribute this surplus held in *Matter of Gedney*, 33 Misc. 360, is no longer controlling.

A provision in the Supreme Court judgment that the proceeds be deposited in the Surrogate's Court is sufficient authority for the Surrogate's proceeding to distribute the same. *Ibid.; S. C.*, 33 Misc. 166. It seems some such direction in the judgment or by subsequent order is a prerequisite to the Surrogate's acting. *Ibid.* Such judgment is also conclusive as to the rights of and amounts due to the creditors. *Ibid.* This may necessitate keeping the funds distinct.

Where moneys are paid by judgment of the Supreme Court in partition into court because three years have not elapsed since the issuance of letters, that court under § 1538 of the Code has the right to the final distribution of the fund and there is no longer provision for directing its payment into the Surrogate's Court for distribution as if it were proceeds of land sold under his decree. *Matter of Dusenbury*, 34 Misc. 666.

Under the same section the only duty of the Surrogate in the premises is to furnish a certificate, when the three years have elapsed, of that fact and of the further fact that no proceedings for the mortgage, lease or sale of the real property of said decedent for the payment of his debts or funeral expenses or both is pending. No payment can be made out of this fund so deposited until this certificate is obtained. Therefore if such a proceeding be pending in the Surrogate's Court duly commenced and prosecuted, the Surrogate may progress the matter to decree and to that end determine the liens of the creditors against the decedent's moneys so deposited, representing as they do, part of his real estate. When the surplus is in the Surrogate's Court, the petition for distribution may be made by "any of those persons" (§ 2799), i. e., "the persons entitled thereto." A creditor is such a person, even though at the time the period may have elapsed in which he could have made and filed an original petition under title 5. *Matter of Bernstein*, 58 Misc. 115.

If no proceeding under title 5 is pending then the provision as to citation of other persons entitled is mandatory. It is a prerequisite to his jurisdiction to order distribution. *Matter of Schuessler*, 49 Misc. 203.

§ 976. **Restitution, for assets subsequently discovered.**

> Where a decree has been made for the application of the proceeds of real property to the payment of the decedent's debts, or funeral expenses, as prescribed in this title, and assets, which should have been applied thereto, are afterward discovered; or, for any other reason, money or other personal property of the decedent, which should have been applied thereto, afterward comes to the hands of the executor, administrator, legatee or next of kin, the heir, devisee, or other person aggrieved may maintain an action to procure reimbursement therefrom. **§ 2801, Code Civil Proc.**

The amendment of 1904 to this section consisted in striking out after "funeral expenses" the words "or judgment liens established and ordered paid."

§ 977. **Infant's interest.**—Section 2796, now repealed, contained provision as to an infant's share. This is now covered by the general provisions of § 2746 as amended this year on the report of the Consolidated

Laws Commission. This appears in the chapters on Accounting and Distribution.

§ 978. **Conveyance by representative pursuant to decedent's contract.** —Section 2801*a*, added to title 5 by ch. 502 of the Laws of 1908, provides for a special proceeding on citation to all persons (therein specified as entitled) for leave to carry out the contract and discharge the estate of liability. The section avoids the necessity of an action for specific performance. The representative is to be the petitioner, he may require and accept indemnity against the cost of the proceeding. When all parties are before the Surrogate, and proofs have been taken, the Surrogate is given full power. He "shall make such order as justice requires" and if he directs a conveyance, the representative may be compelled by contempt proceedings to obey the decree.

The section is too long to quote and is too explicit to need discussion. The persons entitled to citation may show that the enforcement of the contract is subject to a valid defense. If so the Surrogate must dismiss, and the purchaser must resort to his appropriate remedy in another court. But it is a summary way if no such defense exists of closing the matter, and the conveyance, delivery and acceptance "shall be deemed a complete fulfillment" of decedent's contract. *Quære*, is the proceeds personalty?

It clearly is. See cases cited in 3 Abbott's N. Y. Encyc. Digest, at pp. 1058–1059.

PART VII

TESTAMENTARY TRUSTEES AND GUARDIANS

CHAPTER I

TESTAMENTARY TRUSTEES

§ 979. **What is a testamentary trustee?**—The expression "testamentary trustee" includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will or by any competent authority to execute a trust created by a will. § 2514, Code Civ. Proc., subd. 6. And it includes such an executor or administrator where he is acting in the execution of a trust created by the will which is separable from his functions as executor or administrator. *Ibid.* It is the duties imposed by the will, not the name applied, that measure the office or its liabilities. A may be called "my executor," and yet be for the purposes of the beneficiaries and of the courts a testamentary trustee. *Mee* v. *Gordon*, 187 N. Y. 400, 407, citing *Tobias* v. *Ketcham*, 32 N. Y. 319, 327; *Ward* v. *Ward*, 105 N. Y. 68, 74.

The functions are quite separate. The duties are thus differentiated by the Surrogate, in *Matter of Burr*, 48 Misc. 56 (Parsons, Surr.): "It is the duty of the executor to collect the assets, preserve the same from waste, and to pay the debts and legacies; while, with a trustee, his duty is to invest and manage the particular fund or trust estate, in accordance with the directions contained in the instrument creating the trust, and the law governing such estate." See *Tremenheere* v. *Chapin*, 56 Misc. 208, where one, named as executor and trustee, by a codicil, in lieu of A, if he predeceased testatrix, was held not entitled to administer a *special* trust in the will, which gave, to the trustees therein named, who might survive A, the power to name his successor in that particular trust. Again, for example as to their joint and several duties, it is said in *Egbert* v. *McGuire*, 36 Misc. 245: "The rule is that where the administration of a trust is vested in cotrustees they all form but one, as trustees, and must execute the duties of their office jointly. Tiff. & Bul. Trusts, 539; *Sinclair* v. *Jackson*, 8 Cow. 543. The power of trustees is equal and undivided. They cannot, like executors, act separately; all must join in sales, conveyances or other disposition of trust property. Hill, Trustees (4th Am. ed.), *305;

Perry, Trusts (5th ed.), § 411; *Sinclair* v. *Jackson, supra; Ridgeley* v. *Johnson,* 11 Barb. 527. Where, therefore, one only of two trustees signs a lease, it is void as against the trustees or any one claiming under them. *Earle* v. *McGoldrick,* 15 Misc. Rep. 136; Hill, Trustees (5th Am. ed.), *305; *Anon* v. *Gelpcke,* 5 Hun, 245, 255.

" In *Busse* v. *Schenck,* 12 Daly, 12, the court said: 'Trustees have different powers and authorities from executors. One executor may act alone in the administration of the estate, and his acts will be binding upon the estate. Trustees, however, must act jointly. They can make no contracts in regard to the estate; they cannot change the position of the estate, and they can do nothing except by united action.' Of course, there are exceptions to this rule as to many others. Thus, the necessities of the case may require that one of the trustees have the authority in an emergency to act without waiting for consultation with his cotrustee; as, if a leak in a roof occurs, or any sudden emergency should arise which requires immediate action. It was, therefore, held that where one of two trustees was in Europe, the one remaining here might lawfully execute a satisfaction piece of a mortgage. *People ex rel. Adams* v. *Sigel,* 46 How. Pr. 151."

The theory of implied power in one trustee, where the other goes abroad and absents himself, is that the trustee who withdraws from the country impliedly leaves the trust in the management and control of the trustee who remains in charge, and his power becomes commensurate with then existing conditions. *Necessitas facit licitum quod alias non est licitum.* But where the absent trustee leaves an attorney here empowered to act for him, and this is known to the cotrustee, such implied power does not exist. This distinction of functions is important. For example, it is held that where A and B were executors of and trustees under the will of C, a release to them as executors merely did not release them as trustees. *Doritz* v. *Doritz,* 40 App. Div. 236; *Matter of Taggard,* 138 N. Y. 610. So a release to "Maximilian Toch, individually and as trustee" was held by Fitzgerald, Surr., not to release him as administrator c. t. a. See as to functions of each, *O'Brien* v. *Jackson,* 42 App. Div. 171, 173.

The question as to when and how the duties of a trustee are separable from those of an executor or administrator with the will annexed (it has been stated) is not so easy of solution, as that of when and how they are not separable. See *Matter of Clark,* 5 Redf. 466, 468. See for instances of the latter: *Valentine* v. *Valentine,* 2 Barb. Ch. 430; *Stagg* v. *Jackson,* 1 N. Y. 206; *Clark* v. *Clark,* 8 Paige, 152; *Hood* v. *Hood,* 85 N. Y. 561.

The case of *Hood* v. *Hood, supra,* affords a good illustration of a case where functions of executor were not so separable.

In this last case, the testator, after providing for the payment of some general legacies, devised and bequeathed the residue of his estate, real and personal, to his executors, in trust, to sell the real estate, and collect and realize the personal estate, to divide the proceeds into shares, and invest for the benefit of his widow and children. One of the executors, being

a resident of the State of New Jersey, gave a bond with sureties for the faithful discharge of his duties, as required by law. In an action on the bond, to recover moneys alleged to have been wasted by the executor, the sureties sought to escape liability on the ground that the *devastavit* was committed by him when acting as trustee, while they were sureties for him as executor, only. The Court of Appeals, following *Stagg* v. *Jackson*, and other cases, held that, under the will, the whole estate, under the doctrine of equitable conversion, was legal assets, and hence the liability of the sureties continued throughout, as he was accountable only as executor. In all such cases, although a trust, or power in trust, is created, the trustee, or donee of the power, acts, and is liable for the fund, only in his capacity as executor.

In *Matter of Clark, supra,* Surrogate Coffin indicated the character of a case where the two offices of trustee and executor are separable. He says (at p. 470):

"For instance, a testator, possessed of a large personal estate and seized of several parcels of real estate, might direct the conversion of all, save one parcel of the realty, into personalty, so that it should become legal assets; and, as to that parcel, create a trust in the executor to receive the rents and profits, and apply them, under subd. 3 of § 55, of the article on Uses and Trusts. In such a case, as the law formerly stood, he could have rendered his account, as to the legal assets, to the Surrogate, and as to the rents, issues and profits, to the chancellor only. Hence, in such a case, the offices are separable."

This question of separability of trust duties and the ordinary duties of an executor, often arises where an executor dies, upon whom trust duties were laid under the will and an administrator with the will annexed is appointed. Such an administrator has no power to execute trusts relative to the decedent's real estate but succeeds only to the ordinary powers of administration and can only execute such powers of sale under the will as are imperative in their terms. See *Mott* v. *Ackerman*, 92 N. Y. 539. See discussion in ch. 2 of part IV. *Horsfield* v. *Black*, 40 App. Div. 264, 267.

Where the will creates an active express trust annexed to the office of executor, and the executor dies leaving the trust unexecuted, a case may be presented for the appointment of two distinct officers, the one to administer the estate as administrator with the will annexed and the other to execute the trust as successor trustee. See *Matter of Application of Hecht*, 71 Hun, 62. "The administrator with the will annexed takes the power of the executor named, where the power or trust appears to be annexed to the office, unless a personal confidence in the discretion of the *person* named is plainly expressed or implied." I Thomas on Estates Created by Will, 719, discussing *Bain* v. *Matteson*, 54 N. Y. 663; *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497; *Hall* v. *Hall*, 78 N. Y. 535, 539, and other cases. See also Personal Property Law, § 20, as to when trust vests in Supreme Court on death of sole, or last surviving trustee.

Where a will appoints executors and also devolves upon one or more of such executors the execution of certain trusts, it must be borne in mind that by qualifying as executors, the persons named as trustees do not necessarily accept the trust nor will the fact that they do not qualify as executors prevent them from accepting and executing the trust. See *Green* v. *Green*, 4 Redf. 357, 359, citing *Judson* v. *Gibbons*, 5 Wend. 224; *Williams* v. *Conrad*, 30 Barb. 524; *Fish* v. *Coster*, 28 Hun, 64. But an executor is not deemed to hold a fund as trustee until the fund has been legally ascertained, identified and set apart from the general estate. There must be a definite entry by the trustee upon his separate functions in that capacity. *Matter of Williams*, 26 Misc. 636, 646, citing *Matter of Hood*, 98 N. Y. 369; *Cluff* v. *Day*, 124 N. Y. 203; *Matter of Underhill*, 35 App. Div. 434; *Johnson* v. *Lawre*, 95 N. Y. 165. But the acceptance of the office of executor without any disclaimer of the trust will usually be regarded as an acceptance of the accompanying trust. *Green* v. *Green*, *supra*, citing 3 Redf. on Wills, 430, and cases cited. The presumption thus arising, however, may be overcome by proof that the executor declined the trust. One may disclaim a trust as effectually by words or acts without deeds, as by deeds. *Ibid.* But unless and until a testamentary trustee distinctly repudiates the trust, to the actual knowledge of the beneficiary, no statute runs against the beneficiary's right to call him to an accounting. *Matter of Martin*, 27 Misc. 416. But if the testamentary trustee disclaim or refuse the trust the Surrogate could not fill the vacancy prior to 1903. His power was express; to appoint a successor in place of one "so removed" (§ 2472), i. e., removed by him was his authority by § 2472 and by § 2818. But by amendment to § 2818 in 1903 (see below) he is given power in additional cases, e. g., of death before probate, or of renunciation in writing. The Supreme Court may appoint a person "to execute a trust created by a will." See § 2818. This distinction between an executor and a testamentary trustee is thus important. The discussion of "commissions" below, emphasizes this, for in certain cases there specified, the same person may earn double commissions. Title 6 of ch. 18 of the Code of Civil Procedure contains certain provisions exclusively in relation to testamentary trustees to which resort must be had in the cases thereby covered to the exclusion of the remedial practice afforded in cases of executors. Thus, where certain beneficiaries under a will made an application for a payment on account of income, citing the executors of the will as such, and proceeding under §§ 2717 *et seq.*, of the Code, Surrogate Ransom dismissed the proceeding on the ground that by the language of the will the respondents were plainly constituted testamentary trustees of the particular fund, the income of which the beneficiaries claimed, and that this being so, the application must be brought under §§ 2804 and 2805 of the Code and the respondents should have been cited in their capacity as testamentary trustees. See *Matter of Byrnes*, 2 Connoly, 522. And he remarked in this connection: "To constitute a testamentary trustee, it is necessary that some express trust be created by the will. Merely calling

them testamentary trustees does not make them such." *Matter of Hawley*, 104 N. Y. 250. See also 1 Thomas on Law of Estates Created by Will, Express Trusts. See also new Real Property Law, art. 4, "Uses and Trusts."

Every executor and every guardian is, in a general sense, a trustee, for he deals with the property of others confided to his care. But he is not a trustee in the sense in which that term is used in courts of equity and in the statutes. *Wood* v. *Brown*, 34 N. Y. 337; *Cleveland* v. *Whiton*, 31 Barb. 544.

§ 980. **Surrogate's jurisdiction over testamentary trustees.**—The powers of Surrogates did not originally extend to jurisdiction over testamentary trustees. *Matter of Hawley*, 104 N. Y. 250, 263, citing *Savage* v. *Olmstead*, 2 Redf. 478, 483; *Furniss* v. *Furniss*, *Ibid.* 497. And under the Revised Statutes the Surrogate had no jurisdiction to settle the accounts of testamentary trustees. The powers at present enjoyed by Surrogates in this respect depend upon particular statutes. The first statute giving power to Surrogates to settle accounts of testamentary trustees was the act of 1850 (Laws, 1850, ch. 292), which amended the Revised Statutes (2 R. S. 210, § 1, subd. 3), so as to provide that any trustee appointed by any last will and testament or appointed by competent authority to execute any trust created by any last will and testament, might from time to time render and finally settle their accounts before the Surrogate of the county in which the will was proved.

This act was amended by ch. 115 of the Laws of 1866, by inserting a provision that on all such accountings by trustees, the Surrogate should allow to the trustee or trustees the same commissions as were allowed by law to executors and administrators.

The present statutory provisions are contained in title 6 of ch. 18, being §§ 2802 to 2820, both inclusive. The general rule must be borne in mind that a Surrogate takes no incidental powers or constructive authority by implication which are not expressly given by the statute. See *Wood* v. *Brown*, 34 N. Y. 337, 343; *Craig* v. *Craig*, 3 Barb. Ch. 76; *In re Woodsworth*, 2 Barb. Ch. 351; *In re Andrews*, 1 Johns. Ch. 99; *Bulkey* v. *Van Wyck*, 5 Paige, 536; *Matter of Hawley*, 104 N. Y. 250, 263. But in the chapter on Accountings the unusual powers given the Surrogate are discussed in detail; e. g., under § 2812 where power is given to determine controversies in order to settling the account.

In addition the Surrogate is given power by subd. 3 of § 2472, to direct and control the conduct, and settle the accounts of testamentary trustees, to remove trustees, and to appoint a successor in place of a testamentary trustee so removed. And we noted in the preceding section his enlarged powers of appointment by ch. 370, Laws 1903, amending § 2818. But he cannot coerce the discretion of the trustee. *Matter of Foster*, 30 Misc. 573. Nor, it seems, can he entertain applications for instructions or directions to the trustee in the execution of his trust. *Ibid.* Such applications are to be made in the Supreme Court, on such notice to all persons in interest

as it may prescribe; and even that court will not act as attorney for the trustee, but only assume to determine his conduct in face of conflicting decisions of law or where the law is still doubtful.

While our courts may hold to be valid trusts intended to be executed in a foreign country, yet the presumption is that, in default of the testator's nominee serving, the courts of that country will assume jurisdiction, appoint a trustee, and control his conduct. *Kurzman* v. *Lowy*, 23 Misc. 380.

Title 6 of ch. 18 of the Code, which is about to be discussed, contains the provisions specifically governing the procedure upon the exercise by the Surrogate of these powers.

§ 981. **Same subject.**—By § 2802, discussed below, the testamentary trustee may invoke the jurisdiction of the Surrogate for the purpose of filing an intermediate, annual or final account.

By § 2803 the Surrogate is given power to compel the filing of an intermediate account. *Accounting of Jackson*, 16 Weekly Dig. 345. And by a subsequent section, § 2807, he may compel a judicial settlement of the account of a testamentary trustee. See chapter on Accountings.

§ 982. **The estate of a testamentary trustee.**—A testamentary trustee takes title to the trust estate by the instrument creating the trust. He takes this title the same as though his legal title had been conveyed to him by a deed. *T. G. T. Co.* v. *C., B. & Q. R. R. Co.*, 123 N. Y. 37. In this respect his title differs from that of an executor, and, therefore, in the case of a foreign testamentary trustee this difference is very important. An executor merely acts by force of the probate of the will and derives his authority from the letters. So a foreign executor or administrator who seeks to enforce his rights and remedies in this State must take out ancillary letters. A testamentary trustee needs no ancillary appointment here but may sue in the courts by virtue of his office. *Ibid.; English* v. *McIntyre*, 29 App. Div. 439, 446; *Bloodgood* v. *Mass. Benefit Life Assn.*, 19 Misc. 460, 462.

The Real Property Law, ch. 50, Consol. Laws, thus provides by § 100: "Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust. . . ." See also Personal Property Law, ch. 41, Consol. Laws, § 12.

Where testamentary trustees are created by a will, it is good practice even where the executors are the persons named as trustees, as soon as their duties as executors cease, that their accounts in respect of such trust property should be fully and finally closed and a fixed and certain sum or the distinct and very securities specified in the will should be set apart to be held by them in their new capacity as testamentary trustee. Such a practice will prevent serious confusion in many cases, and where the offices of trustee and executor are wholly distinct and separable, the right to commissions in the several capacities (see *Ward* v. *Ford*, 4 Redf. 34; *Hall* v. *Campbell*, 1 Dem. 419; *Meeker* v. *Crawford*, 5 Redf. 450, cases cited and note) can be determined by the courts with more certainty, and free

from the element of doubt and confusion introduced by a blending of the functions of the two without accounting or setting apart of the trust fund. See *Bacon* v. *Bacon*, 4 Dem. 5, 13, and cases discussed in opinion.

§ 983. **Compelling testamentary trustee to carry out provisions of a will.**

Petition to compel payment of debt, legacy, etc.

Where a person is entitled, by the terms of the will, to the payment of money, or the delivery of personal property, by a testamentary trustee, he may present to the surrogate's court a written petition, duly verified, setting forth the facts which entitle him to the payment or delivery, and praying for a decree, directing payment or delivery accordingly; and that the testamentary trustee may be cited to show cause, why such a decree should not be made. If the petitioner is so entitled, only upon the happening of a contingency, or after the expiration of a certain time, he must show in his petition, that his right to the money or other property has become absolute. Upon the presentation of the petition, the surrogate must issue a citation accordingly. **§ 2804, Code Civil Proc.**

If the petitioner is defeated in his application, the Surrogate may award the trustee costs under § 2561. *Matter of McCormick*, 40 App. Div. 73.

This section substantially adapts present § 2722 to proceedings against a testamentary trustee, and makes generally applicable the rules already laid down in the discussion of that section.

But it does not authorize such delivery of specific property, in lieu of cash, as is contemplated by § 2744. That is limited to accounting proceedings. This section, 2804, does not contemplate partial distribution before final accounting. *Matter of Hunt*, 110 App. Div. 533. For the trustee has the right to retain the assets of the trust until final decree.

The allegations made prerequisite to the sufficiency of a petition under § 2804 are as follows:

(*a*) That petitioner is entitled by the terms of the given will to payment of money or the delivery of personal property.

(*b*) That respondent is the testamentary trustee under said will charged with the duty of making such payment or delivery.

(*c*) That the petitioner is entitled to such payment absolutely, (1) either by the terms of the will, or, (2) by reason of the happening of the contingency or expiration of the time indicated in the will.

The remark above made that the provisions of § 2722 (former number 2717) are adapted to proceedings against testamentary trustees, must not be taken as in any way interfering with the general rule, that in proceedings against testamentary trustees the remedial practice provided by the Code must be exclusively resorted to. Thus, where an executor was also testamentary trustee, and an application was made to the Surrogate by a beneficiary to compel the performance of an act which was incumbent upon him as a trustee and not as an executor, the proceedings were dismissed because he was cited under § 2717, now § 2722, the proper proceeding being under §§ 2804 and 2805. See *Estate of Burns*, 26 Abb. N. C. 380.

Section 2804 limits the right to make this application to a person en-

titled by the terms of the will. This has been held to exclude the assignee of such a person. See *Matter of Rogers*, 2 Connoly, 639; *Tilden* v. *Dows*, 3 Dem. 240, 241. Thus, where a person entitled under the will, transferred a part of his share to others and the duration of the trust having expired the assignee applied for a decree directing the trustees "to render a final account of their proceedings and pay to your petitioner said share," etc., Surrogate Coffin held (*Rogers Locomotive & Machine Works* v. *Rogers*, 16 N. Y. Supp. 197) that these two proceedings, the first under §§ 2807 and 2809, to have a judicial settlement of the account of the testamentary trustee, and the other under § 2804 for the compulsory payment by the trustee to a person entitled by the terms of the will, were proceedings which could not well and never should be joined. That as assignee, the petitioner was not entitled to bring the one proceeding, and accordingly in so far the petitioner prayed for relief under § 2804, he dismissed the proceeding. With regard to the accounting prayed for he held the petitioner entitled as being within the definition of § 2809 "any person beneficially interested in the execution of any of the trusts."

But where a petitioner alleged that she was entitled to half the income derived from the testator's residuary estate and prayed that the trustees under the will might be directed to pay her $1,500 on account thereof and the petitioner asked that the trustees might be cited to show cause why a decree should not be made for such payment and why the petitioner should not have such other and further relief in the premises as to the court should seem proper; and the trustees filed duly verified answers in writing sufficient to show that it was doubtful whether the petitioner's claim was valid and legal, it was held (*Matter of O'Dell*, 52 Hun, 88, 89) that such answers under § 2805 of the Code of Civil Procedure required the Surrogate to dismiss the petition in so far as the application for the $1,500 was concerned; but the General Term of the First Department upheld the action of the Surrogate of New York County in adding to the order dismissing the application, a direction based upon the prayer for "other and further relief" that the trustees should file an intermediate account showing in detail their receipts and expenditures in the execution of their trust.

This proceeding, moreover, may not be brought against a testamentary trustee who has been discharged, so as to enable the Surrogate to direct such trustee to pay over to the petitioner the income of the trust received by him prior to his removal. *Moorehouse* v. *Hutchinson*, 4 Dem. 362.

While it appears that only the petitioning beneficiary can obtain relief in the proceeding, all the beneficiaries must be cited. *Matter of Foster*, 30 Misc. 573. But it would seem that a beneficiary could in lieu of being cited apply for leave to intervene and petition on such intervention for the requisite relief.

The form of the petition may readily be adapted from that under § 2722 to compel payment by an executor of a legacy or any other pe-

cuniary provision under a will, bearing in mind the necessary allegations above emphasized.

Where an application is made by a beneficiary of a trust fund to compel trustees to apply the income of the fund to the support, maintenance and education of the applicant, it may be necessary for the Surrogate to construe the trust and determine whether or not the request of the applicant is one which the trustee is bound to comply with. Thus, where trustees were directed by the will to apply the income of the trust fund to the support, maintenance and education of an infant, and the infant, having married, made demand for the whole of the income, the Surrogate of Kings County held that it was proper upon such an application to take into consideration the amount of the income, the circumstances under which the infant was being supported and maintained, and the requirements of the infant under such circumstances. *Matter of McCormick*, 22 Misc. 309, 313. The general principle involved was very fully and ably discussed by Surrogate Jenks in *Gladding* v. *Follett*, 2 Dem. 58, which was affirmed by the General Term, 30 Hun, 219, and by the Court of Appeals, 95 N. Y. 652. This case is authority for the rule that, where a trust is created to collect income and use the same for the education and support of a beneficiary during minority, the duty of applying the income arising from the fund is imperative, notwithstanding a direction by the testator that the income of the fund should be used "for the education and support of the beneficiary in the discretion of the trustee;" but it is not authority for the rule that the whole of such annual income must be of necessity applied to and expended upon the support and maintenance of an infant; and it would seem that the courts should exercise a shrewd discretion and scrutinize the application with care where the infant has married and the application is plainly inspired by the husband of such infant.

A general guardian may apply for an order directing the trustees, under §§ 2804 and 2805, to apply the trust income or a reasonable part thereof, to the maintenance and education of his ward under the terms of the will. *Matter of Scherrer*, 24 Misc. 351. But he cannot, in the same proceeding, be repaid advances for past support of his infant. *Ibid.*

§ 984. **Same—Proceedings upon return of citation.**

Upon the return of a citation, issued as prescribed in the last section, if the testamentary trustee files a written answer, duly verified, setting forth facts, which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality, absolutely or upon his information and belief, a decree must be made, dismissing the petition, without prejudice to an action in behalf of the petitioner for an accounting; otherwise, the surrogate must hear the allegations and proofs of the parties, and must make such a decree in the premises, as justice requires. In a proper case, the decree may require the testamentary trustee, who is unable to deliver personal property to which the petitioner is entitled, to pay the value thereof. **§ 2805, Code Civil Proc.**

See § 2718 and § 2720.

The verified answer must set forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and must also deny the validity and legality of the claim. See *Matter of Muller*, 25 App. Div. 269; *Hurlburt* v. *Durant*, 88 N. Y. 121; *Matter of Macaulay*, 94 N. Y. 574; *Matter of Miller*, 70 Hun, 61. Where the claim is that an assignment of a beneficiary's interest in a trust is invalid under § 15 of the Personal Property Law or § 103 of the Real Property Law, the allegation in the trustee's answer that such assignment has been made, does not deny the validity of the petitioner's claim, nor warrant dismissing the petition. *Matter of Foster*, 37 Misc. 581, Thomas, Surr. He must also allege the "facts showing" it to be invalid. *Ibid*, citing *Matter of McCarter*, 94 N. Y. 558. This rule of inalienability applies by analogy to trusts of personalty. *Mills* v. *Husson*, 140 N. Y. 99, 105; *Cochrane* v. *Schell*, 140 N. Y. 516.

Where it appeared that payment had been made to the petitioner, which had been held to have been improperly made, and it also appeared that the question of propriety of these payments was being litigated, it was held, that while the substance of the allegations in the answer was that there was nothing owing to the petitioner, yet as the executor did not in so many words deny the validity or legality of the petitioner's claim and no facts were shown rendering it doubtful that the claim of the petitioner to the specific sum applied for was valid and legal, the proceeding would not be dismissed and the application would be granted. *Matter of Muller, supra*, affirmed on opinion of Arnold, Surr.

In *Matter of the Estate of Elizabeth McCarter*, above cited, the Court of Appeals held that an answer by a testamentary trustee to a petition under these sections merely alleging that the petitioner had deprived himself of any right in the fund by assignment of the same and setting up in bar an action pending in the Supreme Court in which the trustee was plaintiff, and said beneficiary and others defendants, for the purpose of settling conflicting claims to the fund, was not an answer denying the validity or legality of the petitioner's claim. And the court further held that even if it had been shown that such an action was pending and that it was necessary, its pendency was of no importance in the absence of that denial which the Code requires by § 2805. And the court cites *Hurlburt* v. *Durant*, 88 N. Y. 121, and *Fiester* v. *Shepard*, 92 N. Y. 251, giving construction to the statute relating to the liability of executors under similar circumstances. And the court held, therefore, that there was no ground on which the Surrogate could refuse to entertain the proceedings, and that his order made therein, that the trustee should file an account, could not be said to be one which justice did not require. See § 2805. And so an answer by testamentary trustees to the effect that they have no knowledge or information sufficient to form a belief as to whether the petitioner's claim is valid and legal does not require the dismissal of the application under § 2805. *Moorehouse* v. *Hutchinson*, 4 Dem. 362.

§ 985. **Bringing all parties, likely to be affected by the decree prayed for, before the court.**—Where an application is made to compel an exec-

utor or administrator to pay over money or property, it has been shown that it is part of the petitioner's burden to show that the application of money in the representative's hands to the payment or satisfaction of his claim may be made without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction. § 2722, subd. 2.

In proceedings wherein a testamentary trustee is the respondent, the Code provides a different procedure by which any person likely to be affected by the granting of the petitioner's application may be brought in by citation or supplemental citation at any stage of the proceeding, whether upon the presentation of the petition, the return of the citation, or the hearing. The provision is as follows:

> Where it appears, upon the presentation of a petition as prescribed in the last section but one, that a decree, made pursuant to the prayer thereof, might affect the rights of other persons, with respect to the estate or fund held by the testamentary trustee, the citation must also be directed to those persons. Where that fact appears, upon the return of the citation, or upon the hearing, and it also appears presumptively that the petitioner is entitled to a decree, all the persons, whose rights may be so affected, must be brought in by a supplemental citation, before a decree is made. **§ 2806, Code Civil Proc.**

But where a proceeding has been abandoned by consent, it cannot subsequently be brought to a hearing by a party seeking to intervene, nor can such a party, whether creditor or person interested, intervene for that purpose. *Matter of Wood*, 5 Dem. 345.

§ 986. **Resignation of trust.**—By the amendment to § 2818 in 1903, the right of a person, named trustee in a will (which means one who is a testamentary trustee in the legal sense above elaborated), to renounce by instrument in writing is recognized. The meaning of the section as amended seems to have been to cover the contingency of death *or* renunciation, *prior to the probate of the will;* but it does not so state. It reads "when a person . . . . dies prior to the probate . . . . or . . . . renounces . . . . or is . . . . allowed to resign."

In view of § 2814, about to be discussed, it would seem that § 2818 contemplates that the renunciation, in order to be a substitute for the special proceeding for resignation, must be tendered if not before probate, at least on the very threshold of administration, before assuming or becoming chargeable with possession or control of the trust fund or estate. By renunciation is implied to *forego* the office, and all that acceptance would involve. Forego in turn implies an act preliminary in point of time. In this view the exact wording of § 2818 would be immaterial. Section 2615 does not require the citation on probate of the testamentary trustee, unless he be the executor, and hence he may not be confronted with the duty of electing to serve until actual probate. We pass accordingly to the question of resignation:

> A testamentary trustee may, at any time, present to the surrogate's court a written petition, duly verified, praying that his account may be judicially settled; that a decree may thereupon be made, allowing him to resign his

trust, and discharging him accordingly; and that all persons who are entitled, absolutely or contingently, by the terms of the will or by operation of the law, to share in the fund or estate, or the proceeds of any property held by the petitioner as a part of his trust, may be cited to show cause, why such a decree should not be made.

The petition must set forth the facts upon which the application is founded; and it must, in all other respects, conform to a petition presented for a judicial settlement of the account of a testamentary trustee, as prescribed in this title.

The surrogate may, in his discretion, entertain or decline to entertain the petition. If he entertains it the proceedings must be, in all respects, the same as upon a petition for a judicial settlement of the petitioner's account, except that, upon the hearing, the surrogate must first determine, whether sufficient reasons exist for granting the prayer of the petition; and, if he determines that they exist, he must make an order accordingly, and allowing the petitioner to account, for the purpose of being discharged.

Upon the petitioner's fully accounting, and paying all money belonging to the trust, and delivering all books, papers, and other property of the trust, in his hands, either into the surrogate's court, or as the surrogate directs, a decree may be made, accepting his resignation, and discharging him accordingly. **§ 2814, Code Civil Proc.**

The application for leave to resign involves preliminarily a willingness to account for and deliver up the property confided to the trustee. *Matter of Olmstead*, 24 App. Div. 190. And not only that, but the law contemplates that the actual surrender of the trust property for which he is found accountable, shall be complete before the decree is made. *Ibid.* Consequently, if, by reason of litigation or for other cause, the property is not in shape to be turned over, the decree should be denied, or its entry deferred, until such cause is removed.

§ 987. **The procedure.**—The petition should be substantially as follows:

Petition for leave to resign a testamentary trust under § 2814, Code Civil Procedure.

Surrogate's Court,
County of

Title. }

The petition of of respectfully shows:

I. Your petitioner is a testamentary trustee, under the last will and testament of late of deceased (*state whether petitioner is the original trustee, or is a successor trustee, in which case recite death, or removal of original trustee, and petitioner's appointment by the Supreme Court, or Surrogate*) which was duly probated in this court on the day of 19

Note. See paragraph 2 of § 2814.

II. *Here allege the facts in relation to the trust created by the will, and the extent to which it has been executed.* (*Note.*)

III. *Here allege prior accountings, if any, by the trustee, and recite any directions made by the Surrogate upon such accountings and allege compliance therewith.*

IV. And your petitioner further shows that, e. g., he is about to depart from the United States and to reside abroad

for a number of years, and it will be impracticable for him to properly attend to the duties of the above trust while so out of the United States (*or state other sufficient reasons*); (*note*) (and the persons beneficially interested in the trust are all of full age, and their consents, duly acknowledged, to your petitioner's resignation and discharge are filed herewith). (*Note.*)

Note. See text below as to what is and what is not "sufficient reason."

Note. See *Estate of Phillips*, 2 Law Bull. 45.

V. And your petitioner accordingly desires to render his account of all his proceedings as trustee under the last will and testament of said deceased, and to pay over such moneys and deliver over such property constituting such trust as he may upon such accounting be lawfully charged with, to the person by law entitled to be paid or to receive the same.

VI. That all the persons who are entitled, absolutely or contingently, by the terms of the will, or by operation of law, to share in the fund or estate or the proceeds of any property held by the petitioner as a part of his trust are:

NAME	DESCRIPTION	RESIDING AT

Wherefore your petitioner prays that his account be judicially settled, that a decree may thereupon be made allowing your petitioner to resign his trust and discharging him accordingly, and that the said and and may be cited to attend such settlement and to show cause why such a decree should not be made.

Dated the day of 19

(Signature.)

(Verification.)

The courts have been disinclined to accept resignations of trusts created by will, and the words "the Surrogate must first determine whether sufficient reasons exist for granting the prayer of the petition" have been somewhat strictly observed.

Leave to resign was refused upon a petition alleging that the trustee was "too busy with her own private matters and no longer desires to be busied" with her trust. *Baier* v. *Baier*, 4 Dem. 162.

In this case the *cestuis que trustent* opposed the application, and in such cases the Surrogate will emphasize the rule as to "sufficient reason."

The mere fact that the testator contemplated the removal or resignation of one or more trustees appointed by his will does not lessen this burden of showing sufficient reason. *Cruger* v. *Halliday*, 11 Paige, 314.

In *Tilden* v. *Fiske*, 4 Dem. 357, it appeared that the petitioning trustee had been actively discharging the trust for sixteen years; that the trust was nearly executed; that he was going abroad to live, and could not longer devote himself to it, and that his resignation would not be likely to embarrass the further execution of the trust. Held, that sufficient reasons existed under § 2814.

So where a trustee who had never actively assumed the duties of the trust, all of which had been discharged by his cotrustees, Calvin, Surr., acting under ch. 359, L. 1870, § 3, discharged the trustee on the ground the estate would not be jeopardized by his removal, and he seemed "to be unnecessary to its security."

Where a trustee has accepted a trust and a legacy given upon condition he should execute it, his reasons for resigning must be clear and convincing. *Craig* v. *Craig*, 3 Barb. Ch. 76. The application for leave to resign not being an incident of the trust, the trustee must pay his own counsel fee in the proceeding. *Matter of Freygang*, 3 Law Bull. 60. A resignation of a testamentary trustee for "sufficient reasons" does not disentitle him to his lawful commissions. *Matter of Allen*, 96 N. Y. 327, 331. See *post, sub* Accountings. But the granting of compensation in such case is within the court's discretion and cannot be claimed as of course, as if the trusts had been fully executed. *Ibid.*, and see *Matter of Baker*, 35 Hun, 272.

The words "lawful commissions" above used in connection with the voluntarily retiring testamentary trustee, of course means such commissions as the court may properly grant.

The *Allen* case, however, is one in which the record shows that the General Term denied the resigning trustee the one-half commissions on the *principal*, but granted full commissions on *income received and paid out*. The reason underlying this decision is that a succession of resigning trustees might seriously deplete the estate.

In *Johnson* v. *Bell* (not reported), Judge Bischoff made a decree of the same kind on the ground that whatever the discretion of the court as to allowing commissions on income, yet where the trustee puts the estate to expense by proceedings in the way of resignation, the court has no discretion to give commission on the corpus, and in case of resignation the elementary condition of the acceptance should be that the trustee should forego such commissions.

Such a rule, of course, is in the interest of the beneficiaries, however inequitable its enforcement may seem as against one who in good faith proposes his resignation in order that the trust may be more faithfully administered by someone else. As a matter of fact, in practice, such commissions are frequently allowed.

If the petition is entertained, and the Surrogate has first determined "whether sufficient reasons exist" then an order is to be made and entered, allowing petitioner to account.

Where the proceeding is on consent of adult parties, the entertaining of the petition might seem to dispense with such order, if, as is not infre-

quently the practice, the petition and consents are accompanied by a proper account to which the consents explicitly relate and allege their approval.

§ 988. **Petition for security from testamentary trustee.**

Any person, beneficially interested in the execution of the trust, may present to the surrogate's court a written petition, duly verified, setting forth, either upon his knowledge, or upon his information and belief, any fact, respecting a testamentary trustee, the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for such a person to give security, in order to entitle himself to letters; and praying for a decree, directing the testamentary trustee to give security for the performance of his trust; and that he may be cited to show cause, why such a decree should not be made.

Upon the presentation of such a petition, the surrogate must issue a citation accordingly.

Upon the return of the citation, a decree, requiring the testamentary trustee to give such security, may be made, in a case where a person so named as executor can entitle himself to letters testamentary, only by giving a bond; but not otherwise. **§ 2815, Code Civil Proc.**

The first paragraph of this section refers to § 2638, discussed in part IV, ch. 1, and makes applicable the decisions collated in that connection, *q. v.* This section covers both sole trustees and cotrustees. Where there are several trustees, the application under this section may be made as to anyone, and he must satisfy the Surrogate of his qualifications irrespective of those of his cotrustees. *Matter of Sears*, 5 Dem. 497. Their solvency and responsibility will not extend to relieving him of the burden of giving a bond.

Section 2815, however, has been held to apply only to the trustees named in the will. *Matter of Whitehead*, 3 Dem. 227, 232. As to other trustees, i. e., those appointed to succeed a removed or resigned trustee, Rollins, Surr., held that of them bonds could be required by a Surrogate whenever necessary. *Ibid.* See opinion. Moreover, it has been held that § 2815 is not the sole authority whereunder security may be required of a testamentary trustee. Where such a trustee applied to have a decree upon accounting opened and modified so as to have certain property delivered to him as trustee, it was held proper to require security of him on granting the application. *Kelsey* v. *Van Camp*, 3 Dem. 530.

The security, given as prescribed in the last section, must be a bond to the same effect, and in the same form as an executor's bond. Each provision of this chapter, applicable to the bond of an executor, or to the rights, duties, and liabilities of the parties thereto, or any of them, including the release of the sureties, and the giving of a new bond, apply to the bond so given, and to the parties thereto. **§ 2816, Code Civil Proc.**

§ 989. **Removal of testamentary trustee.**

In either of the following cases, a person beneficially interested in the execution of the trust, may present to the surrogate's court a written petition, duly

verified, setting forth the facts, and praying for a decree removing a testamentary trustee from his trust; and that he may be cited to show cause, why such a decree should not be made:

1. Where, if he was named in a will as executor, letters testamentary would not be issued to him, by reason of his personal disqualification or incompetency.

2. Where, by reason of his having wasted or improperly applied the money or other property in his charge, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge, or by reason of other misconduct in the execution of his trust, or dishonesty, drunkenness, improvidence, or want of understanding, he is unfit for the due execution of his trust.

3. Where he has failed to give a bond, as required by a decree, made as prescribed in the last two sections; or has willfully refused, or without good cause neglected, to obey a direction of the surrogate, contained in any other decree, or in an order, made as prescribed in this title; or any provision of law, relating to the discharge of his duty. **§ 2817, Code Civil Proc.**

This section assimilates the practice in regard to testamentary trustees to that in cases of executors under § 2685, *q. v.*, *ante*. It recognizes the status of the trustee as one in whom the testator placed a personal confidence, and the same principles obtain, as with executors, in applying the rules as to what constitutes disqualification, improvidence, etc. As to the third subdivision of the section, however, the disregard of a valid order or decree or provision of law, the test is as to the order or decree that it must have been "made as prescribed in this title," and as to the "provision of law" it must relate to the discharge of the trustee's duty.

When the trustee is also an executor, his removal as trustee, it has been held, does not of itself terminate his executorship (*Deraismes* v. *Dunham*, 22 Hun, 86), even where the removal as trustee is on the ground of incompetency due to lunacy. *Matter of Wadsworth*, 2 Barb. Ch. 381. See § 996 and 997, *post*, discussion of § 2819.

Before the Code it was held, where the *cestuis que trustent* were of full age, and objected to the incumbent trustee, not upon any of the statutory grounds but on purely personal grounds, that the court would endeavor to be guided by their desire and preference. *Ex parte Morgan*, 66 N. Y. 618, aff'g 63 Barb. 621. In this case the trustee was not accused of any wrongdoing, and had discharged his trust theretofore with fidelity.

This, doubtless, no longer applies except in cases where the trustee is a successor trustee. One whom the testator has personally selected and designated should not be set aside at the mere wish of the beneficiary. Where it does not appear that he is not properly caring for the property in his hands, or that he is in any way imperiling the estate or sacrificing its interests, no ground is furnished for removing an acting trustee under a will. *Baldwin* v. *Palen*, 24 Misc. 170, 176, and cases cited.

The allegations of a petition for a removal of a testamentary trustee must be explicit, and must bring the case within the Code provisions. Allegations on information and belief are insufficient. *Ferris* v. *Ferris*, 2 Dem. 336.

§ 990. **Same subject.**—The chief object the court keeps in view is the safety of the trust. Misuse of funds or improper investments endanger the trust property. But so also it is held, do hostile and unfriendly relations between a trustee and his cotrustees (*Deraismes* v. *Dunham*, 22 Hun, 86), if they are irreconcilable, and make the execution of the trust impracticable, but not if they amount to mere ill-feeling. *Russak* v. *Tobias*, 12 Civ. Proc. Rep. 390.

For cases on removal of testamentary trustees see:

Fraudulent misuse of funds. *Hooley* v. *Gieve*, 82 N. Y. 625; *Matter of Smith*, 7 N. Y. Supp. 327; *Ex parte Wiggins*, 29 Hun, 271; *Matter of Mallon*, 38 Misc. 27.

Improvidence. *Matter of Cady*, 103 N. Y. 678; 1 Silv. 220.

Incompetency. *Matter of Cohn*, 78 N. Y. 248.

Insolvency. *Ex parte Paddock*, 6 How. Pr. 215.

Improper investments. *Matter of O'Hara*, 62 Hun, 531; *Matter of Wotton*, 59 App. Div. 584.

Disregard of the trust. *Hatton* v. *McFaddon*, 15 N. Y. St. Rep. 124; *Matter of Havemeyer*, 3 App. Div. 519; *Matter of McKeon*, 37 Misc. 658.

So the passive acquiescence or negligent indifference of a trustee as to his cotrustees' misuse of the trust moneys is good ground for his removal. *Matter of Mallon, supra.* So also dissensions between cotrustees to such an extent as to imperil the trust, or obstruct proper administration is proper ground for removing the offending trustee. *Deraismes* v. *Dunham*, 22 Hun, 86; *Quackenboss* v. *Southwick*, 41 N. Y. 117; *Oliver* v. *Frisbie*, 3 Dem. 122.

The Appellate Division may review the Surrogate's action in removing a testamentary trustee; but no appeal will lie to the Court of Appeals if it affirms his action, in cases where there is evidence to sustain his decision. *Matter of McGillivray*, 138 N. Y. 308.

§ 991. **Investments by trustee.**—The substantive law as to what investments a testamentary trustee may properly make is carefully stated, and the cases discussed and digested in Mr. Thomas's treatise on the "Law of Estates Created by Will." See vol. I, pp. 741 *et seq.*, and references.

It is also exhaustively covered in the American & English Enc. of Law. For the purposes of a work on practice, it may be sufficient to summarize concisely the rules.

If the will contains mandatory directions as to investment it establishes for the trustees a positive rule which it is not in their power to disregard without committing a breach of trust. *Matter of Irwin*, 59 Misc. 143, Thomas, Surr., citing *Denike* v. *Harris*, 84 N. Y. 89; *Matter of Stewart*, 30 App. Div. 371.

In the next place, § 111 of Decedent Estate Law is the present source of authority, outside the will. It gives authority to invest the trust funds in the same *kind of* securities as those in which savings banks *of this State* are by law authorized to invest.

The law regulating this is now in the Banking Law, new § 146 and § 147, as re-enacted in Consolidated Laws, ch. 2, *q. v.*

The ultimate consideration is the safety of the trust. The will may either give to the trustee specific securities with directions to hold the same or the proceeds thereof, or it may direct executors to pay a sum of money over to themselves or another in trust to invest and keep invested. Where the will is silent on the subject of the character of investments to be made by the trustee, he will be limited to so-called statutory investments, and any other kind of securities such as stocks in private corporations or of *quasi* public corporations will be treated as made at his peril and a violation of his trust. The leading case in this State is *King* v. *Talbot*, 40 N. Y. 76. From time to time the legislature adds to the list of securities in which savings banks and the representatives of estates of decedents or of infants may invest trust funds. Municipal or railroad securities so having passed the scrutiny of the legislature are considered to come within the legislative intent as to what is required in the way of prudent investments.

The New York laws make legal the mortgage bonds of the following railroad corporations: Chicago & Northwestern, Chicago, Burlington & Quincy, Michigan Central, Illinois Central, Pennsylvania, Delaware & Hudson, Delaware, Lackawanna & Western, New York, New Haven & Hartford, Boston & Maine, Chicago & Alton, Morris & Essex, Central of New Jersey, United New Jersey Railroad & Canal, provided the issuing corporation shall have earned and paid regular dividends of not less than 4% on all issues of capital stock for ten years next preceding the investment and provided the capital stock shall equal or exceed one-third of the par value of all bonded indebtedness, and provided further that the bonds shall be secured by first mortgage on either the whole or some part of the property, such mortgage being executed and recorded prior to January 1, 1905; also the mortgage bonds of the Chicago, Milwaukee, St. Paul and Chicago, Rock Island & Pacific Railroads, subject to provisions similar to those preceding.

Investment is also authorized in the mortgage bonds of any railroad incorporated in any of the United States, which actually owns in fee not less than 500 miles of standard gauge railway, provided that for five years, next preceding the investment, matured principal and interest has been paid on all mortgage indebtedness, that 4% or more has been paid during the same period on all issues of capital stock and that the gross earnings for the five years shall have been not less in amount than five times the amount necessary to pay the interest on all bonded indebtedness. The bonds, however, must be first mortgage upon not less than 75% of the road owned in fee, or a refunding mortgage issued to retire all prior lien debts outstanding.

Generally speaking, government or state securities or bond and mortgage on unincumbered real estate affords the range of safe investments for trustees. Savings banks are supposed to be limited to 50% mortgage

loans on real estate. Trustees are usually safe in making loans to the extent of 60% of a *bona fide* appraised valuation of the property offered as security.

Cautious and prudent trustees usually secure such an appraisal from a competent real estate expert before accepting the loan. Reasonable fees, usually $10 for each appraisal, when paid by the trustee and not by the borrower are so clearly in the interest of the trust that they ought to be allowed as reasonable disbursements of a trustee upon his accounting.

§ 992. **Same subject—Directions given by will.**—In view of the personal relationship of the person acting under the will of the decedent, involving his knowledge of such person and his confidence in his judgment and discretion, the courts will not only sustain investments made by such trustee where the will gave such trustee, either explicitly or by reasonable implication, the discretion to go beyond the range of the ordinary trustee securities, but may hold the trustee liable for disregarding *mandatory* directions of the will. *Matter of Irwin*, 59 Misc. 143. Testators often provide for this in order to provide a net income larger than would result where the trustee is so confined.

Thus where the trustee was directed to keep the securities of a trust estate "invested in good, sound, dividend-paying securities," and was given power to "invest and reinvest the trust estate at his own discretion," it was very properly held that he might continue to hold the securities found by him as the investments deliberately chosen by the testator, and that when he had occasion to sell the same, that he might reinvest in those of a similar character and subject always to the exercise of prudent discretion and good business judgment. *Duncklee* v. *Butler* (Special Term), 30 Misc. 58 (citing *Thompson* v. *Brown*, 4 Johns. Ch. 619; *Brown* v. *Campbell*, 1 Hopk. Ch. 233; *Lawton* v. *Lawton*, 35 App. Div. 389). Russell, J., observes:

"The testator selects for his trustee and executor a person in whose business judgment he has entire confidence. He, therefore, knows, so far as anyone can know, that any discretion intrusted to such a person will be properly used. He would not ask that a stricter rule should obtain than he exercised for himself, where the investments are simply designated for dividend-paying capacity, as well as security, and there is no implication or expectation of the estate being otherwise involved or concerned in business transactions. The testator undoubtedly desired a fair rate of income for the beneficiaries, and well knew that the highest class of court securities could afford but a small yearly return.

"The language used by this testator, considered with his own conduct in the manner of investments, affords a conclusive interpretation as to his intent, and, therefore, under the proper construction of the will, the executor and trustee may retain the safe investments now in his hands, and as a necessary corollary may reinvest, as necessity compels, in similar securities, using always the fair business discretion which the law requires."

In the *Lawton* case above cited, the court held that similar discretion so to retain securities left by the testator was given by a provision directing him to "convert the whole of my estate into money provided an equitable distribution cannot otherwise be made," and by the further provision in directing him to hold the share of minor children and keep the same invested in such securities as to the said executor shall seem best. In this case a loss resulted on certain securities which could not be sold for the amount which had been paid for them, and the court held that as he had acted with care and prudence he should not be held liable for such loss.

It must be borne in mind that trustees are expected to *keep* the funds of the estate properly invested, and if they allow money to lie idle, the burden is on them upon their accounting to justify the noninvestment. Otherwise they will be liable for the interest which the fund might have earned if properly invested. Six months, it seems, is the maximum period usually allowed for funds to lie idle. *Lent* v. *Howard*, 89 N. Y. 169. It was held in *Matter of Maxwell*, 1 Conn. 230, that uninvested money may properly be deposited by a trustee in a bank of good repute; of course in his name as trustee and separate from his private funds. In *Matter of Knight*, 21 Abb. N. C. 388, the trustee was held liable for moneys lost through deposit in a bank that failed. The deposit of idle money should preferably be in a trust company which allows interest on such deposits.

Excepting in a case where the trustee has such discretion, as was given, for example, in the case of *Duncklee* v. *Butler*, and takes securities in which the testator himself made investment, it is unwise to invest in securities which place the fund represented thereby beyond the jurisdiction of the court. *Ormiston* v. *Olcott*, 84 N. Y. 339. To justify such investments requires either ample discretion given by will or exceptional circumstances to be shown to the satisfaction of the court. It may be observed, generally, that such investments are made at the trustee's peril.

A familiar phrase in wills, in this regard, is "good dividend-paying, or income-producing securities listed on the New York Stock Exchange." The object of this is to add the prudent and business regulations of that body, increasingly vigilant, that will in time prevent the listing of purely speculative securities.

Mr. Loring in his "Trustees' Handbook," p. 97, summarizes the rule in *King* v. *Talbot*, by saying: "The ideal man would invest in real estate, bonds of individuals secured by first mortgages on real estate, first mortgage bonds of corporations and principal securities." Bonds of a railroad corporation should be scrutinized with care as the securities underlying them may be a mere franchise, or their tracks, or assets liable to deterioration. See *Judd* v. *Warner*, 2 Dem. 104.

§ 993. **Erecting separate trusts.**—Ordinarily, it is the duty of a trustee of several trusts to keep them separate and separately invested. The object of this general rule is that each beneficiary may be able to trace the administration of the trust in which he is interested from the moment of its erection to the time of the accounting. Nevertheless, the courts,

where no loss occurs and where it can be done profitably and safely, will approve the investment of the funds as a unit where a number of trusts created by the same will are confided to the same trustee or trustees. *Matter of Johnson*, 57 App. Div. 494, 503.

As was said in *Blake* v. *Blake*, 30 Hun, 469, 471: "The actual division of the estate into five parts is not necessary to initiate the trust. It was for the mutual benefit of all that the estate was kept together, and no one objected at the settlements that there was no actual division. Legally it is divided. The shares are separate, and each gets his proper income therefrom."

And in *Schermerhorn* v. *Cotting*, 131 N. Y. 48, the courts say (at p. 61): "Income and principal given in equal shares out of one fund kept *in solido* for mere convenience of investment may be severed, and independent trusts created for the several beneficiaries, and thus the shares and interests will be several even though the fund remain undivided."

Some trust companies will invest the aggregate of several small trusts in one mortgage loan and issue "participation certificates," as a matter of bookkeeping, to each trust. Others discountenance the practice. It seems hardly fair to charge commissions in each estate when the transaction is but one, and may continue undisturbed for years. Otherwise, there seems to be no valid objection to the practice.

§ 994. **Sinking fund.**—Where securities are properly bought, at a premium above par value, and by reason of the long continuance of the trust and the approaching maturity of the security, the price depreciates for the reason that at maturity only the face of the security is collectible, it is important to know whether the trustee should set apart a "sinking fund" to offset such depreciation. This may frequently prove a material inquiry by reason of the claims of those entitled to income to receive the same without diminution, for the sinking fund is primarily intended for the protection of the remaindermen. My attention has been called to an excellent pamphlet, entitled "Amortization," prepared by the trust department of one of our trust companies, from which I quote this definition:

"Amortization . . . . is the gradual charging off and extinction of the premium paid for a bond, by setting aside, *at each interest period*, a certain amount of the fixed interest the bond bears, the amounts set aside being so calculated that, at the maturity of the bond they will equal the premium paid."

The pamphlet contains illustrative tables of how to work out the amount, and a reprint of the laws as to investment.

In *McLouth* v. *Hunt*, 154 N. Y. 179, the Court of Appeals in an elaborate opinion appeared to discountenance any such inroad upon the income in any case where the intention of the testator is clear that his beneficiaries from year to year should enjoy the same. See opinion at pp. 191 *et seq.* The court balances the benefit of the remaindermen and that of the life tenant and observes that while securities commanding a premium may depreciate in selling value, so also may they appreciate.

In *Matter of Hoyt*, 160 N. Y. 607, the court reiterated the view that the intention of the testator, if discernible from the will, should control, and the court remarks significantly:

"It seems quite impossible, in giving to the language of the fourth subdivision of the will its plain and ordinary meaning, to spell out an intention on the part of the testator to provide a sinking fund to be deducted from the income in order to make good the premium paid in purchasing the securities."

In *McLouth* v. *Hunt*, Judge O'Brien summarizes the law as follows:

"Notwithstanding the conflict of authority to which I have just referred, there is one principle or rule applicable to this case, with respect to which the parties are all at agreement, and that is that the questions are not to be determined by any arbitrary rule, but by ascertaining, when that can be done, the meaning and intention of the testatrix, to be derived from the language employed in the creation of the trust, from the relations of the parties to each other, their condition and all the surrounding facts and circumstances of the case." See also *Matter of Johnson, supra.*

In a more recent case, *Matter of Stevens*, 187 N. Y. 471, the rule stated in *N. Y. Life Ins. & Trust Co.* v. *Baker*, 165 N. Y. 484, is adhered to, namely that, in the absence of a clear direction in the will *to the contrary*, a trustee, *buying securities at a premium*, must maintain the principal *intact from loss* by such premium. But, if the trustee receives the securities from the testator's estate *and holds them*, there the rule in the *McLouth* case applies.

§ 995. **Successor—Trustees—Appointment by Surrogate.**

Where a person named in a will as sole testamentary trustee dies prior to the probate of the will, or by an instrument in writing renounces his appointment, or when a sole testamentary trustee dies, or becomes a lunatic, or is, by a decree of the surrogate's court, removed or allowed to resign, and the trust has not been fully executed, the same court may appoint his successor, unless such an appointment would contravene the express terms of the will. Where one of two or more persons named in a will as testamentary trustees dies prior to the probate of the will, or, by an instrument in writing renounces his or their appointment, or where one of two or more testamentary trustees dies, or becomes a lunatic, or is by decree of the surrogate's court removed or allowed to resign, a successor shall not be appointed, except where such appointment is necessary in order to comply with the express terms of the will, or unless the same court, or the supreme court, shall be of the opinion that the appointment of a successor would be for the benefit of the cestui que trust. Unless and until a successor is appointed, the remaining trustee or trustees may proceed and execute the trust, as fully as if such trustee or trustees had not died, renounced, become a lunatic, been removed or resigned. Where a decree removing a trustee or discharging him upon his resignation, does not designate his successor, or the person designated therein does not qualify, the successor must be appointed and must qualify, as prescribed by law for the appointment and qualification of an administrator with the will annexed.

§ 2818, Code Civil Proc.

This section, as now amended, is the sole statutory authority for one person to execute a power imposed on several, *when both or all are living*, and all but one renounced or refused to act. *Matter of Wilkin*, 90 App. Div. 324.

The commissioners originally confined the Surrogate's power to appoint a successor to a trustee to cases where the trustee had been removed or permitted to resign. *Tompkins* v. *Moseman*, 5 Redf. 402, 404. But the section now provides for all the four cases of death, insanity, removal or resignation, as well where there is a sole testamentary trustee as where there are several, and by the amendment of 1903, for case of renunciation also.

Hence the Supreme Court no longer has exclusive jurisdiction, even under the Real Property Law. *Matter of Chase*, 40 Misc. 616. See also *Matter of Brady*, 58 Misc. 108. In this case the point was squarely presented. An application was actually pending in the Supreme Court. But the Surrogate appointed a successor to a deceased sole surviving trustee on settling his executor's account under § 2606.

Previous to the Revised Statutes, where a trustee died the trust property, if real estate, passed to the heir or devisee; and if personal, it went by operation of law to the executor or administrator of the trustee charged with the trust, who held it in the same character in which the decedent held it. *De Peyster* v. *Ferrers*, 11 Paige, 13, 14.

By § 68, 1 R. S. 730, it was provided that, where the surviving trustee of an express trust died, the trust should not descend to his heirs, nor pass to his personal representatives, but that the trust, if still unexecuted, should vest in the Court of Chancery, to be executed by some person to be appointed for the purpose. *Matter of Valentine*, 3 Dem. 563. See *Benedict* v. *Dunning*, 110 App. Div. 303; *Royce* v. *Adams*, 123 N. Y. 402, 405, and cases cited.

By the Code of 1880 power was conferred upon Surrogates' Courts to appoint successors, and after the Code went into effect (L. 1882, ch. 185), the legislature substantially re-enacted the provisions of § 68, *supra*, under the title "An act in relation to trustees of personal estates." This act, however, it was held, related solely to the case where one who was a trustee, as distinguished from an executor, died, leaving the trust unexecuted. *Matter of Post*, 9 N. Y. Supp. 449. But doubt having arisen as to the effect of this act upon the powers of the Surrogates, § 2818 was re-enacted with amendments in 1884 (ch. 408) in its present form. The present status is to give the Surrogate's Court and the Supreme Court concurrent power. Where the vacancy is the result of proceedings in the Surrogate's Court, looking to the removal or resignation of a testamentary trustee, it is unlikely that the Supreme Court would assume jurisdiction to appoint the successor. See *Royce* v. *Adams*, 123 N. Y. 403, 405, and cases cited. See also provisions of Real Property Law, § 111 ("trust estate not to descend") and Personal Property Law, § 20 ("when trust vests in Supreme Court").

The power to appoint a successor is discretionary, and discretionary orders of the Surrogate will be reversed only for abuse of discretion. *Russell's Estate*, 19 N. Y. Supp. 743; *Matter of Hecht*, 71 Hun, 62. It is the proper practice to cite upon the application for the appointment of a new trustee all the persons beneficially interested. *Matter of Valentine*, 3 Dem. 563; *Milbank* v. *Crane*, 25 How. 193. The executor of a deceased trustee has no such interest *ex officio*.

In selecting a successor, the Surrogate will consult the desires of the *cestuis que trustent*, if of age, the condition and character of the trust estate, and has the right to require the new trustee to give bonds for the faithful performance of the trust duties. *Matter of Whitehead*, 3 Dem. 227; *Estate of Brick*, 9 Civ. Proc. Rep. 397; *Estate of Gilbert*, 3 N. Y. St. Rep. 208; *Russak* v. *Tobias*, 12 Civ. Proc. Rep. 390. He ought not to appoint the beneficiary (*Rogers* v. *Rogers*, 111 N. Y. 228; *Woodward* v. *James*, 115 N. Y. 346), but such appointment does not necessarily defeat the trust. *Rankine* v. *Metzger*, 69 App. Div. 264, 269. If the trustee of a power is disqualified, it has been held proper in certain cases to appoint the beneficiary to execute it. *People* v. *Donohue*, 70 Hun, 317; *Rogers* v. *Rogers*, *supra*. The Surrogate is limited by the wording of § 2818 to cases where the "express terms of the will" require the contemplated action. Although the trust was one devolving upon the executor as a part of his duties as executor, upon his death the trust cannot devolve upon an administrator with the will annexed, but must devolve upon a successor trustee. See ch. II, part IV, on administration with the will annexed; *Matter of Hecht*, 71 Hun, 62, 66; *Matter of Waring*, 99 N. Y. 115.

The provisions of the personal property law, being ch. 41 of the Consolidated Laws, must be borne in mind. Section 20 of that law provides that "On the death of the surviving trustee of an express trust the trust estate does not pass to his next of kin or personal representatives, but if the trust be unexecuted, it vests in the Supreme Court and shall be executed by some person appointed by the court whom the court may invest with all or any of the power and duties of the original trustee. The beneficiary of the trust shall have such notice as the court may direct for the application for the appointment of such person." Such person so appointed to execute the trust is entitled to compensation in the discretion of the court, not exceeding executor's commissions. This is so, by amendment of 1902, and covers trusts of realty and personalty. Prior to such amendment, the courts could allow regular salary to the person so appointed, who was in effect its agent in the execution of the trust.

Section 2606 of the Code of Civil Procedure contains provisions for accounting by the executor or administrator of a deceased testamentary trustee, both voluntary and compulsory.

This will be found to be discussed in part VIII, *post*, where the general topic of accountings by trustees and the procedure upon accountings is discussed in more detail.

§ 996. **Proceedings where testamentary trustee is also executor or administrator.**

Where the same person is a testamentary trustee, and also the executor of the will, or an administrator upon the same estate, proceedings taken by or against him, as prescribed in this title, do not affect him as executor or administrator, or the creditors of, or persons interested in, the general estate, except in one of the following cases:

1. Where he presents a petition, praying for the revocation of his letters, he may also, in the same petition, set forth the facts, upon the showing which he would be allowed to resign as testamentary trustee; and may thereupon pray for a decree allowing him so to resign, and for a citation accordingly.

2. Where a person presents a petition, praying for the revocation of letters issued to an executor or administrator; and any of the facts set forth in the petition are made, by the provisions of this title, sufficient to entitle the same person to present a petition, praying for the removal of a testamentary trustee; the petitioner may pray for a decree, removing the person complained of in both capacities, and for a citation accordingly.

In either case, proceedings upon the petition for the resignation or removal, as the case requires, of the testamentary trustee, and for the judicial settlement of his account, may be taken, as prescribed in this title, in connection with, or separately from, the like proceedings upon the petition for the revocation of the letters, as the surrogate directs. **§ 2819, Code Civil Proc.**

§ 997. **Right to commissions where testamentary trustee is also executor or administrator.**—(See *post*, discussion of double commissions under "Accounting.") Apart from the question of the double status of persons who are both executors and trustees, in proceedings taken by or against them, covered by § 2819, the question frequently arises whether there is such a separation of functions as to entitle the incumbent to commissions in both capacities. In *Robertson* v. *De Brulatour*, 188 N. Y. 301, Judge Gray discusses this subject. He shows how the commissions of trustees were formerly allowed upon the same rule as applied to executor and administrators (see Code, §§ 2730, 2802, 2811). That rule was based upon receiving and paying out *sums of money*. Hence it did not allow commissions on securities received in specie, in advance of their conversion into money, or unless turned over in specie but as cash (citing *McAlpine* v. *Potter*, 126 N. Y. 285; *Phœnix* v. *Livingstone*, 101 N. Y. 451). Therefore, it is pointed out that the amending of § 3320 in 1904, by allowing to trustees of an express trust commissions to be calculated on all sums *of principal*, and on income, was an intentional change made in the light of the former provision as construed by the courts. In *Matter of Roosevelt*, 5 Redf. 601, Rollins, Surr., discussed the law at length. The trustees, who were also the executors under the will, had set apart the trust property, divested themselves as executors of it by making formal assignments thereof under the separate trusts to themselves as trustees. As executors their accounts were settled and full commissions awarded them on the property so turned over.

Upon the accounting as trustees their claim to trustee commissions upon

the capital fund was asserted and objected to. It was held that the case turned upon the separation of functions. So long as the characters of executor and trustee are coexistent, only one commission could rightfully be paid; but when there has been a separation of duties, and the duties have been performed in the two capacities, separate commissions were properly to be allowed. See also *Hurlburt* v. *Durant*, 88 N. Y. 121, 127; *Drake* v. *Price*, 5 N. Y. 430; *Hall* v. *Hall*, 78 N. Y. 536, 539; *Cram* v. *Cram*, 2 Redf. 244; *In re Pike*, *Id.* 255; *Wood* v. *Ford*, 4 *Id.* 34; *In re Carman*, 3 *Id.* 46.

A separation of functions marked by an executor's accounting and a Surrogate's decree, is the most satisfactory in its effect. It leaves no room for doubt. But it is not the only way. *Hurlburt* v. *Durant*, *supra*. The separation may be determined by the court upon the facts and without the interposition of such judicial proceedings. There are two inquiries, the one, did the testator design a separation of functions and duties? the other, has such separation actually taken place? *Matter of Roosevelt*, *supra*, p. 621.

§ 998. **Application of this title.**

> The provisions of this title apply to a trust created by the will of a resident of the state, or relating to real property, situated within the state, without regard to the residence of the trustee, or the time of the execution of the will. **§ 2820, Code Civil Proc.**

§ 999. **General observations as to administration of the trust.**—Where there are two or more testamentary trustees, and they disagree as to the trust property, respecting its custody, provision is made for submission of the controversy to the Surrogate. In such a case

> The surrogate may, upon the application of either of them, or of a creditor or person interested in the estate, and proof, by affidavit, of the facts, make an order, requiring them to show cause, why *the surrogate should not give directions in the premises.*
>
> Upon the return of the order, the surrogate may, in his discretion, make an order, directing that any property of the estate or fund be deposited in a safe place, in the joint custody of . . . . testamentary trustees, or subject to their joint order; or that the money of the estate be deposited in a specified safe, bank, or trust company, to their joint credit, and to be drawn out upon their joint order. Disobedience to such a direction may be punished as a contempt of the court. **§ 2602, Code Civil Proc.**

The Surrogate has under this section discretionary power (*In Matter of Hoagland*, 51 App. Div. 347), and his direction for joint deposit and custody of a fund will be upheld even though the dissenting trustee claims the property in question to be his own. See opinion.

But this section does not authorize a Surrogate to try an issue as to title or ownership between corepresentatives, one of whom asserts individual title or ownership. Nor does § 2472 confer such power. *Matter of Freligh*, 42 Misc. 11. In this case A, the respondent, refused to disclose secret formula in which he claimed decedent had given exclusive rights to him by contract for a term of years.

§ 1000. **The trustee's bookkeeping.**—The practice is increasing of having the accounts of important trust estates set up and written up by expert accountants. But certain definite rules are to be observed by the trustee who keeps his own account. The trouble arises out of the necessity of keeping "principal" and "income" separate. The fundamental idea of a trust is to provide for A for life, or for a time, by the application of that which the fund trusteed will produce. There are two things to provide:

(*a*) Keeping the fund intact.

(*b*) Giving the beneficiary all the creator of the trust intended.

As already seen, this may condition the creating of a "sinking fund." But it also crops up in other contingencies. Increment is received by the trustee. Shall it go as a product of the fund to the income-beneficiary, or as a profit of the trust to the remainderman? Thus considered the question is readily answered.

The following will illustrate the points:

Nature of increment	Goes to life tenant	Added to principal
Rights to subscribe to new stock enuring to holders of record.		*Matter of Roberts*, 40 Misc. 512, Heaton, Surr.; *Est. of Downing*, Thomas, Surr., N. Y. Law J., March 12, 1903, citing *Est. of McKee, id.*, January 10, 1902.
If sold.		*Matter of Harteau*, 53 Misc. 201, Church, Surr.; *Matter of Kernochan*, 104 N. Y. 618.
Stock dividends.	If declared out of profits. *Lowry* v. *Farmers' L. & T. Co.*, 172 N. Y. 137; *McLouth* v. *Hunt*, 154 N. Y. 179; *Matter of Roberts*, 40 Misc. 512.	If arising from sale of corporate assets. *Matter of Curtis*, 29 N. Y. St. Rep. 469.
Corporate intent may govern.	*Matter of Kernochan*, 104 N. Y. 618.	
Increased value over purchase cost.		*Stewart* v. *Phelps*, 71 App. Div. 91.
When apportioned on sale of corporation assets for stock of purchasing company.	*Matter of Rogers*, 161 N. Y. 108.	
		Matter of Elting, 33 Misc. 675.
Dividends declared before testator died.	Can be claimed by widow given "all the income." *Matter of Franklin*, 26 Misc. 107.	*Matter of Kernochan, supra; Brundage* v. *Brundage*, 60 N. Y. 544.
"Surplus and undivided profits" realized on.	*Matter of Stevens*, 187 N. Y. 471.	

The other side of the question is as to disbursements. Shall they be charged to the fund, or shall the income bear the burden. Here, again, the will may be controlling; but, the will being silent or ambiguous, the following will illustrate the principle that governs:

Nature of payment	Charged to income	Charged to principal
	If the will gives "net income." The expenses of the trust. See *Woodward* v. *James*, 115 N. Y. 346. Including attorney's fees. *Matter of Brownell*, 60 Misc. 52.	
Expense of construction of will establishing the trust.	Apportioned. *Brown* v. *Brown*, 41 N. Y. 507.	
Ordinary repairs, taxes, interest on mortgages, insurance:	*Wilcox* v. *Quimby*, 73 Hun, 524; *Matter of Menzie*, 54 Misc. 188; *Matter of Albertson*, 113 N. Y. 434; *Stevens* v. *Melcher*, 152 N. Y. 551; *Chamberlin* v. *Gleason*, 163 N. Y. 214.	
Assessment for permanent improvements.		*Matter of Menzie, supra*, and cases cited; *Peck* v. *Sherwood*, 56 N. Y. 415.

In *Stevens* v. *Melcher*, the court says "Ordinarily the duty devolves upon . . . . life tenants, or trustees for equitable life tenants, of preserving the premises, defraying the expenses of ordinary repairs, and of paying the taxes, and the accruing interest upon mortgages." See cases reviewed by Haight, J.

CHAPTER II

GUARDIANS

§ 1001. **Definitions.**—A guardian is one upon whom, by operation of law, or by appointment made by will, or deed, or a court having jurisdiction, is devolved the duty of caring for the person or property, or both, of a minor.

A guardian may be a guardian in socage, a general guardian, a temporary guardian, or a guardian by will or deed. Special guardians or guardians *ad litem* have been treated of under the head of Parties, *ante*.

"Where a minor, for whom a general guardian of the property has not been appointed, shall acquire real property, the guardianship of his property, with the rights, powers and duties of a guardian in socage, belongs:"

1. To the father;

2. If there be no father, to the mother;

3. If there be no father or mother, to the nearest and eldest relative of full age, not under any legal incapacity; and as between relatives of the same degree of consanguinity, males shall be preferred.

The rights and authority of every such guardian shall be superseded by a testamentary or other guardian appointed in pursuance of this article. The Domestic Relations Law, art. 6, § 80.

§ 1002. **The parents' rights of guardianship.**—"A married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them." *Ibid.*, § 81.

"Upon the death of either father or mother, the surviving parent, whether of full age or a minor, of a child likely to be born, or of any living child, under the age of twenty-one years and unmarried, may, by deed or last will, duly executed, dispose of the custody and tuition of such child during its minority or for any less time, to any person or persons." *Ibid.*

The duties of a parent, guardian, or guardian in socage, are defined by the same statute, as being the same as those of a general guardian. Such duties and liabilities are as follows:

(*a*) He "shall safely keep the property of his ward that shall come into his custody;" (*b*) he "shall not make or suffer any waste, sale or destruction of such property or inheritance;" (*c*) but "shall keep in repair and maintain the houses, gardens and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with such other moneys belonging to his ward as shall be in his possession;" (*d*) he "shall deliver the same to his ward, when he comes to full age, in at least as good condition as such guardian received the same, inevitable decay and injury

alone excepted;" (*e*) he "shall answer to his ward for the issues and profits of the real estate, received by him, by a lawful account." *Id.*, § 83.

The penalty of waste, sale or destruction of the ward's inheritance is the loss of custody of the ward and of the property, and of treble damages (*Id.* § 83), if it should appear that he acted negligently, or in bad faith. See *Kullman* v. *Cox*, 26 App. Div. 158. When a father to whom a guardian has been directed to pay the ward's net income, subsequently is appointed guardian himself, this does not supersede the decree under which he was entitled to apply the child's income for her support or maintenance, nor will he be held to as strict accountability in regard to vouchers for his disbursements if his use of the income was legal and conformable to such decree. When the ward is a female, and marries lawfully during her minority, it terminates the guardian's rights as to her person, but not as to her property. *Id.* § 84.

§ 1003. **Guardians in socage.**—Such a guardian will be recognized in the courts. Of course, there must be real property, an estate of inheritance, vested in the minor, to create this relationship. *Whitlock* v. *Whitlock*, 1 Dem. 160; *Houghton* v. *Watson*, 1 Dem. 299, 301. But if it exists, the guardian may make proper leases (*Thacher* v. *Henderson*, 63 Barb. 271), and in his own name (*Id.*); but only for the guardianship term (*Putman* v. *Ritchie*, 6 Paige, 390), he may sue in ejectment for his ward's lands. *Matter of Hynes*, 105 N. Y. 560; *Holmes* v. *Seeley*, 17 Wend. 75; *Byrne* v. *Van Holsen*, 5 Johns. 66. But under the prohibition of the statute he cannot alien the lands, and his contract so to do has no validity or binding force, unless by virtue of peculiar circumstances he has specifically been given the right. *Thacher* v. *Henderson, supra.* If such guardian has no means, he or she may use the income, or "so much thereof as may be necessary," for the support and education of the child. It is wise to secure permission of court so to do. Yet if this be not done in advance, the guardian, acting in good faith, may counterclaim an equivalent sum to that expended in accounting proceedings, and the court can then pass on the propriety of the expenditures." *Williams* v. *Clarke*, 82 App. Div. 199. For the reason above stated, he will have no right, as such guardian, to claim or receive a legacy left to his ward. *Houghton* v. *Watson, supra; Williams* v. *Storrs*, 6 Johns. Ch. 353. A general guardian must in such a case be appointed. The father or mother cannot *virtute parentis*, demand the moneys due the child. *Ibid.*

The appointment of a general or testamentary guardian terminates the rights of a guardian in socage. *Otis* v. *Thompson*, Hill & D. Supp. 131; Dom. Rel. Law, § 80.

If a guardian in socage volunteers to put his own money into the improvements of the child's real property he has no claim to recoupment such as to enable his creditors to reach it through the realty. *Hickey* v. *Dixon*, 42 Misc. 4.

§ 1004. **General guardians.**—General guardians may be appointed, in the first place, by will or deed, and when so appointed, the act above

quoted from requires (§ 81) that the person appointed shall not exercise the power or authority of a guardian until the will is duly probated, or the deed executed and recorded as required by § 2851 of the Code, to the discussion of which below, reference can be made.

§ 1005. **Guardians appointed by Surrogate's Court.**—In addition to the mode of appointment referred to, the Surrogate's Court has now power to appoint guardians of the person or property or both (*In re Herbeck*, 16 Abb. Pr. N. S. 214) of minors residing or having property within the Surrogate's County. This is by virtue of the following provisions of the Code.

> The surrogate's court has the like power and authority to appoint a general guardian, of the person or of the property, or both, of an infant, which the chancellor had, on the thirty-first day of December, eighteen hundred and forty-six. It has also power and authority to appoint a general guardian, of the person or of the property, or both, of an infant whose father or mother is living, and to appoint a general guardian, of the property only, of an infant married woman. Such power and authority must be exercised in like manner as they were exercised by the court of chancery, subject to the provisions of this act. The same person may be appointed guardian of an infant in both capacities; or the guardianship of the person and of the property may be committed to different persons. **§ 2821, Code Civil Proc.**

The powers given by this section are apparently broad; but they have been exercised within reasonable limits set by the decisions. Thus, the Surrogate will not appoint where the parent has made proper testamentary provision for the custody of his child (*People* v. *Kearney*, 31 Barb. 430), and, it seems, that if the parent, by formal instrument surrenders the child to an institution, the Surrogate will not have power to deprive the institution, without its consent of the custody of the child's person, though he may appoint a general guardian of its property. *Id.*, and see history of proceedings in 1 Redf. 292, 294, 297.

And, on the other hand, the powers given the Surrogate's Court being similar to those exercised by the Court of Chancery, and being required to be exercised in like manner, it is proper for a Surrogate to annex reasonable terms or conditions to his appointments, looking to the welfare and happiness of the ward. Thus, if for sufficient reasons the guardianship of a child is given, in the parent's lifetime, to someone other than the parent, access of the parent to the child at proper times and intervals may be provided for. Where the parents or either of them are living, they have a prior right "to influence and direct the conduct, residence, education, occupation and associates of the child." *In re Barre*, 5 Redf. 64. Therefore it is only where the parent is unfit for the duty or incapacitated for the responsibility, that the court will call in third persons. *Id.*, *Ledwith* v. *Ledwith*, 1 Dem. 154; *Matter of Tully*, 54 Misc. 184.

§ 1006. **Parent's appointment when binding.**—The Domestic Relations Law provides, in § 81, upon the death of either father or mother, the surviving parent, whether of full age or a minor, of a child likely to be born,

or of any living child under the age of twenty-one years and unmarried, may, by deed or last will, duly executed, dispose of the custody and tuition of such child during its minority or for any less time, to any person or persons. Either the father or the mother may in the lifetime of them both, by last will duly executed, *appoint the other* the guardian of the person and property of such child, during its minority.

If a parent make a testamentary appointment, ignoring the rights of the surviving parent it is invalid. *Matter of Burdick*, 47 Misc. 28; *Matter of Zwickert*, 26 N. Y. Supp. 773; *Matter of Haggerty*, 9 Hun, 175; *Matter of Schmidt*, 77 Hun, 201; *Matter of Alexander*, 70 N. Y. St. Rep. 431.

In such case, the Surrogate is free to act under §§ 2822 and 2827. *Ibid.*

This parental right is not in conflict with the other parent's right to safeguard *property* interests by means of a testamentary trustee or guardian of the property. Nor does this preference of the parent as personal guardian control the Surrogate in safeguarding the property. A fit custodian of the person might be an unfit administrator of property interests. *Ibid.*

In *Matter of Jacquet*, 40 Misc. 575, the Surrogate says: "The absolute power of the court to appoint a guardian other than the parent cannot be disputed. The welfare of the child is the primary consideration." "But the parent's right will not be lightly disregarded." *Ibid.*, citing *People* v. *Mercein*, 3 Hill, 399; *People ex rel. Nickerson*, 19 Wend. 16.

§ 1007. **Appointment by Surrogate.**—The practice to be followed in the appointment of general guardians, differs according to whether the child is over or under the age of fourteen years. In the one case the infant makes the application and nominates the guardian sought to be appointed, or under the amendment of 1909, below, the Surrogate may act of his own motion, so far as the property is concerned. In the other case the application is by a relative, or some other person, on behalf of the infant, and the Surrogate nominates the guardian.

When the infant is fourteen or over, the practice is thus regulated:

> In either of the following cases, an infant of the age of fourteen years or upwards, may present, to the surrogate's court of the county in which he resides; or, if he is not a resident of the state, to the surrogate's court of the county in which any of his property, real or personal, is situated; a written petition, duly verified, setting forth the facts upon which the jurisdiction of the court depends, and praying for a decree appointing a general guardian, either of his person, or of his property, or both, as the case requires; and, if necessary, that the persons, entitled by law to be cited upon such an application, may be cited to show cause, why such a decree should not be made:
>
> 1. Where such a general guardian has not been duly appointed, either by a court of competent jurisdiction of the state, or by the will or deed of his father or mother, admitted to probate or authenticated, and recorded, as prescribed in § 2851 of this act.
>
> Where a general guardian so appointed has died, become incompetent or disqualified; or refuses to act; or has been removed; or where his term of office has expired.
>
> Where the petitioner is a non-resident married woman, and the petition

relates to personal property only, it must affirmatively show that the property is not subject to the control or disposition of her husband, by the law of the petitioner's residence. **§ 2822, Code Civ. Proc.**

By ch. 231 of the Laws of 1909 the following was added, taking effect September 1st:

Where an infant in one of the cases mentioned in this section has refused, or for ten days has failed, to present the petition, the surrogate, upon notice to be given in such manner as he shall direct, to the infant and the persons who would be entitled by law to be cited upon the application of the infant, shall proceed to the appointment of a general guardian of the property of the infant in the same manner as if the infant had duly presented the petition.

This amendment enables, and directs, the Surrogate to act on the infant's failure. But his appointment in such case is of a guardian of the property, not of the person.

Contents of petition; citation.

A petition, presented as prescribed in the last section, must also state whether or not the father and mother of the petitioner are known to be living. If either of them is known to be living, and the petition does not pray that the father, or, if he is dead, that the mother, may be appointed the general guardian, it must set forth the circumstances which render the appointment of another person expedient; and must pray that the father, or, if he is dead, that the mother, of the petitioner may be cited to show cause, why the decree should not be made.

A citation, issued to the father of the petitioner must be served at least ten days before it is returnable.

Where the case is within subdivision second of the last section, the petition must pray that the person formerly appointed general guardian may be cited, unless it is shown that he is dead.

The surrogate must inquire, and ascertain as far as practicable, what relatives of the infant reside in his county; and he may, in his discretion, cite any relative or class of relatives of the infant, residing in that county or elsewhere, to show why the prayer of the petition should not be granted. **§ 2823, Code Civil Proc.**

Citation where petitioner is a married woman.

The last section applies, where the petitioner is a married woman; except that her husband must also be cited, and that the surrogate may, in his discretion, make a decree, appointing a guardian of her property, without citing her father or her mother. **§ 2824, Code Civil Proc.**

§ 1008. **Same—Provisions of the general rules of practice.**—The general rules of practice also contain provisions necessary to be kept in mind. They are as follows:

"*Rule* 52. Except in cases otherwise provided for by law, for the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upward, or some relative or friend, if the infant is under fourteen, may present a petition to the court, stating the age and residence

of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which such person bears to the infant, and the nature, situation and value of the infant's estate."

"*Rule* 53. Upon presenting the petition, the court shall, by inspection or otherwise, ascertain the age of the infant, and if of the age of fourteen years or upward, shall examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount of value of the rents and profits of the real estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian."

§ 1009. **Same—The petition.**—The petition must be presented to the Surrogate of the county where the infant resides. § 2822, Code Civ. Proc. But this relates only to residents of the State. Where the minor is a non-resident of the State, the jurisdiction of the Surrogate depends upon the *situs* of property of the minor within his county.

The case of *Matter of Hosford*, 2 Redf. 168, limiting the power of the Surrogate as outlined in *McLoskey* v. *Reid*, 4 Bradf. 334, is superseded by the express language of § 2822, which provides for infants who are not residents of the State invoking the Surrogate's Court's jurisdiction, and the protection of their property in this State by a local general guardian. See also L. 1875, ch. 442, and L. 1870, ch. 59. Foreign general guardians have no local standing under their foreign letters; but the device suggested in the *Hosford* case of having a general guardian appointed in the foreign jurisdiction and having him apply here for ancillary or local letters, is unnecessary (*Andrews* v. *Townshend*, 21 J. & S. 522), and roundabout, although in certain cases § 2838 of the Code makes ample provision for such ancillary appointment.

The Code sections and general rules of practice quoted above indicate clearly the general form and contents of the petition.

It should be substantially as follows:

Petition by infant over 14 years of age. § 2822, Code Civil Procedure.

Surrogate's Court,
County of

Title. }
}

To the Surrogate's Court of County:

The petition of residing in the County of (*or if a non-resident, state facts showing real or personal property within said County*) respectfully showeth:

That your petitioner is not married and is a minor over fourteen years of age, and was years of age on the day of 19 . That the father of your petitioner, is and resides at . That the mother of your petitioner, is and resides at . That the only other relations of your

petitioner residing in said County, as far as he knows or can ascertain, are:

Note. Matter of Feely, 4 Redf. 306.

residing at (*Note.*)
residing at
residing at
residing at
residing at

That your petitioner is entitled to certain property and estate, and that to protect and preserve the legal rights of your petitioner, it is necessary that some proper person should be duly appointed the guardian of person and estate during minority.

Your petitioner therefore nominates, subject to the approbation of the Surrogate, of the of in said County of to be such guardian, and prays that a citation may be issued out of and under the seal of this Court, requiring the said on a day to be therein specified, to show cause why a decree should not be made appointing the said such general guardian, pursuant to the statute in such case made and provided. And your petitioner will ever pray, etc.

Dated this day of 19

(Signature.)

(Verification.)

County, ss.:

Affidavit as to infant's property.

County, being duly sworn, doth depose and say, that he is acquainted with the property and estate of the above-named minor, and that the same consists of real and personal estate; and that the personal estate of the said minor does not exceed the sum of and that the annual rents and profits of the real estate of said minor do not exceed the sum of

Sworn to before me, this day of 19

Consent of the proposed general guardian.

I hereby consent to become the guardian of the above-mentioned minor, pursuant to the prayer of the foregoing petition.

Dated this day of 19 (*Note.*)

Note. This must be acknowledged, and if acknowledgment is taken without the County of the Surrogate, the certificate of the Clerk of the County where it is acknowledged must be attached.

County, ss.:

Oath of general guardian.

I, of the of County of do solemnly swear and declare that I will well, honestly and faithfully discharge the duties of general guardian of according to law.

Sworn to before me, this day of 19

Post Office Address.

§ 1010. **Same subject.**—The persons required to be cited may, if adult, waive the issuance and service of the citation and signify their consent to the entry of the decree, by duly acknowledged waivers.

But even then the Surrogate should make some inquiry into the circumstances. The Surrogate's Court is the Orphans' Court and must protect all minors appealing to its jurisdiction. The court must be satisfied and not merely the child's relatives. They are not parties but are cited so as to give information to the Surrogate. *Kellinger* v. *Roe*, 7 Paige, 362; *Cozine* v. *Horn*, 1 Bradf. 143. And the citation of living parents is jurisdictional. If neglected the decree may be vacated. *Matter of Jacquet*, 40 Misc. 575.

When § 2823 was adopted the father's right of custody and control was superior to the mother's. But now by § 81 (formerly § 51) of the Domestic Relations Law their rights and duties are joint and equal. Hence, it is now the rule that the Surrogate's discretion to require notice to a living parent is thereby conditioned, so that letters issued to the father without notice to the mother will be vacated. *Matter of Drowne*, 56 Misc. 417.

§ 1011. **Same—The inquiry.**—The interests of the infant are first to be consulted. *Bennett* v. *Byrne*, 2 Barb. Ch. 216. The Code provides:

> Upon the return of the citation, the surrogate must make such a decree in the premises, as justice requires. He may, in his discretion, hear allegations and proofs from a person not a party. Where a citation is not issued, the surrogate must, upon the presentation of the petition, inquire into the circumstances. For the purpose of such an inquiry, or of an inquiry into the amount of security to be required of the guardian, he may issue a subpœna, requiring any person to attend before him, to testify respecting any matter involved therein. If he is satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by the appointment of a general guardian, either of his person or of his property, he must make a decree accordingly, except that a guardian of the person of a married woman shall not be appointed. In a proper case, he may appoint a general guardian in one capacity, without a citation; and issue a citation, to show cause against the appointment of a general guardian, in the other capacity. **§ 2825, Code Civil Proc.**

§ 1012. **The Surrogate's duty.**—The Surrogate must be satisfied that the allegations of the petition are true in fact. § 2825, Code Civ. Proc. This means the necessary allegations of the petition.

(*a*) *The residence of the infant* is a material fact. If a resident of another county of the State, the Surrogate of that county is the one to whom to apply. *Ex parte Bartlett*, 4 Bradf. 221. But the question of residence is one for the Surrogate to determine (*Matter of Sherman*, 70 Hun, 465), and if there is evidence to uphold his determination it will not be disturbed on appeal. *Ibid.* Residence cannot be imposed upon a child by force or fraud. If a minor be sent into this State from without the State without authority, the child's real residence is not thereby divested. *Matter of Daniels*, 71

Hun, 195. But if the child has an actual, though but a temporary, residence in the Surrogate's county, the Surrogate has jurisdiction to act. *Matter of Pierce*, 12 How. Pr. 532. But upon the death of parents, it is held, the parents' residence still remains that of the child, and cannot be changed, in contemplation of law, except by a guardian. *Matter of Hughes*, 1 Tucker, 38, and cases cited. But, it seems, if the petition contains all the jurisdictional averments, an appointment made thereupon is valid and stands until vacated or reversed, although the infant never in fact resided in the Surrogate's county. *Dutton* v. *Dutton*, 8 How. Pr. 99.

(*b*) *The amount of the property, its character and location*, are material facts. The petition should state what the property is (1) so as to show the necessity of appointing a guardian of the property, and (2) so as to enable the court to fix the penalty of the bond. *Johnson* v. *Borden*, 4 Dem. 36.

(*c*) *The living relatives of the minor* ought to be named in the petition, so that the Surrogate may direct them to be cited. But this is unnecessary if the nearest living relatives join in the application, or the nearest living relative is the person nominated for appointment. *Matter of Feely*, 4 Redf. 306, 308, citing *People* v. *Wilcox*, 22 Barb. 178; *Underhill* v. *Dennis*, 9 Paige, 202, 207; *White* v. *Pomeroy*, 7 Barb. 640; *Holley* v. *Chamberlain*, 1 Redf. 333.

§ 1013. Who should be appointed.

Guardian to be nominated by infant.

A guardian appointed upon the application of an infant of the age of fourteen years or upwards, as prescribed in this article, must be nominated by the infant, subject to the approval of the surrogate. **§ 2826, Code Civil Proc.**

This section was not framed so as to confer upon a minor the right, upon attaining the age of fourteen years, to "emancipate himself at pleasure from parental control," by nominating a guardian. *Ledwith* v. *Ledwith*, 1 Dem. 154, 156. It merely gives such infant the right of nomination, and subject to the Surrogate's approval, when and only when a guardian is to be appointed "as prescribed in this article" of the Code. And whether a guardian is or is not to be appointed rests in the judgment and discretion of the Surrogate.

The Surrogate's approval is conditioned by the facts of each particular case. He is to safeguard the best interests of the minor (*Burmester* v. *Orth*, 5 Redf. 259); and will consider the wishes of living relatives, or the proven wishes of deceased parents. *Cozine* v. *Horn*, 1 Bradf. 143; *Ex parte De Marcellin*, 24 Hun, 207. It has been said that the wishes of the parents "should have a preponderating influence." *Smith* v. *Smith*, 2 Dem. 43. But if the wish of the parent is to be himself or herself appointed, the Surrogate's scrutiny as to fitness will be the same as were any more remote relative to be nominated. Thus a mother who is shown to have led a disreputable life from girlhood may be said to have thereby forfeited her preferential right to legal guardianship (*Matter of Meech*, 1 Connoly, 535),

and a father, divorced for cruelty to and inhuman treatment of his wife, will not be deemed a suitable person to whom to confide the child or its property. *Griffin* v. *Sarsfield*, 2 Dem. 4, 7. So if the parent be immoral or depraved (*Matter of Raborg*, 3 N. Y. St. Rep. 323), or if there be hostility between the child and the parent (*Johnson* v. *Borden*, 4 Dem. 36), the Surrogate may pass the parent over.

But, in general, the courts favor those nearest of kin, possessing the necessary qualifications of character and capacity, and will prefer such to creditors or strangers. *Morehouse* v. *Cooke*, Hopkin's Ch. 226.

Where the Surrogate passes over a parent in appointing a general guardian for the child, he may provide, so far as the guardianship of the person is concerned, for parental access under proper regulations. *Derickson* v. *Derickson*, 4 Dem. 295. But Surrogate Ransom declared himself without power to direct that notice of all acts of the guardian should be given to the parent passed over, and that he should be consulted in all that referred to the management of the child. *Matter of Lindley*, 1 Connoly, 500.

Prior to 1860 a mother who had remarried was not looked upon, as a rule, with favor as a suitable appointee. See *Holly* v. *Chamberlain*, 1 Redf. 333. But the objection is no longer a valid one. *Matter of Hermance*, 2 Dem. 1, 3. The paramount consideration is the minor's welfare, and all questions of kinship therefore *may* be disregarded, and relatives passed over in favor of a stranger nominated by a minor. *Matter of Vandewater*, 115 N. Y. 699, aff'g 27 Week. Dig. 314. See *Matter of Buckler*, 96 App. Div. 397, where a trust company was appointed in lieu of two disputing sisters. And unless it affirmatively appears that the Surrogate abused his discretion, or reached his conclusion without due inquiry, his determination will not be set aside. *Ibid.* It has been held to be such an abuse of discretion where a Surrogate failed to require notice to be given to relatives from whom he could naturally expect to receive full information as to the minor's circumstances, or where he failed to make proper inquiry into the facts. *Underhill* v. *Dennis*, 9 Paige, 202; *White* v. *Pomeroy*, 7 Barb. 640; *Matter of Welch*, 74 N. Y. 299.

§ 1014. **Where infant is under fourteen.**—Where an infant is under fourteen, and the appointment of a guardian is necessary, the Code provides (§ 2827) for the appointment, the practice being nearly identical with that already indicated. The differences are:

(1) The Surrogate must nominate the guardian.

(2) Who is not a general guardian, but a *temporary* guardian.

(3) Who serves only until the child attains the age of fourteen *and* a successor is appointed.

The section is as follows:

> *Appointment of temporary guardian for infant under fourteen.*
>
> A relative of an infant under fourteen years of age, or any other person in behalf of such an infant, may present, to the surrogate's court of the county in which the infant resides; or, if he is not a resident of the state, to the surrogate's

court of the county in which any of the infant's property, real or personal, is situated; a written petition, duly verified, setting forth the facts, upon which the jurisdiction of the court depends, and praying for a decree appointing a guardian of the person, or of the property, or both, of the infant, to serve until the infant attains the age of fourteen years, and a successor to the guardian is appointed. The cases in which such a guardian may be appointed, the contents of the petition, and the proceedings thereupon, are the same, as prescribed in the foregoing sections of this article, with respect to the appointment of a general guardian, upon the petition of an infant of the age of fourteen years or upwards; except that the surrogate must nominate, as well as appoint the temporary guardian. **§ 2827, Code Civil Proc.**

The temporary guardianship provided for by this section is for all practical purposes the same as that of an ordinary general guardian. This appears from the following section of the Code:

Term of office of temporary guardian.

The term of office of a guardian, appointed as prescribed in the last section, expires when the infant attains the age of fourteen years. But after the infant attains that age, the person so appointed continues to retain all the powers and authority, and is subject to all the duties and liabilities, of a guardian of the person, or of the property, or both, pursuant to his letters; until his successor is appointed and has qualified, or until his letters are revoked, for some other cause, by the decree of the surrogate's court; and his sureties are responsible accordingly. **§ 2828, Code Civil Proc.**

See as to the rule before the Code, *Matter of Dyer*, 5 Paige, 534; *Matter of Nicoll*, 1 Johns. Ch. 25.

§ 1015. **Inquiry into the facts as to the minor's property.**

Where a general guardian of the property of an infant is appointed, as prescribed in this article, the surrogate must inquire into the infant's circumstances, and must ascertain, as nearly as practicable, the value of his personal property, and of the rents and profits of his real property. **§ 2829, Code Civil Proc.**

It has already been stated that this is a most material inquiry. The bond of the guardian to be appointed depends upon it. *Johnson* v. *Borden*, 4 Dem. 36. The question of his suitability may turn upon it. If the property be small in value, or so circumstanced as to require a minimum of administration, one may be eligible who would be deemed unequal to the responsibility of caring for a large property variously invested. Or it may be the Surrogate will appoint one person guardian of the person, and another guardian of the property. *Matter of Beebe*, 11 N. Y. Supp. 522.

§ 1016. **The appointment.**—If the Surrogate, after making the inquiry contemplated by the Code, is satisfied (*a*) that the allegations of the petition are true in fact; (*b*) that the interests of the infant will be promoted by the appointment of a general guardian; (*c*) that the person proposed is a suitable person, he must "make such a decree in the premises as jus-

tice requires." § 2825, Code Civ. Proc. His decree may follow in general this form:

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Decree appointing general guardian under § 2825, or 2827, Code of Civil Procedure.

In the Matter of the Guardianship of } infant }

On reading and filing the duly verified petition of (*note*) in behalf of an infant fourteen years of age, praying for a decree appointing a guardian of the person and estate of said infant and the persons required by law, or directed by the Surrogate, to be cited, having been duly cited, and having duly appeared (*or state the facts in this respect*) and the Surrogate having heard the allegations and proofs, and duly inquired into the circumstances of said infant and ascertained the value of personal property and of the rents and profits of real property, and being satisfied that the allegations of the petition are true in fact, and that the interests of said infant will be promoted by the appointment of a guardian; [and the nomination of said as general guardian being approved by the Surrogate]: (*note.*)

Now, on motion of attorney for

It is ordered and decreed, that be and he is hereby nominated and appointed guardian of the person and estate of said infant and upon h taking an oath or affirmation to well, faithfully and honestly discharge the duties of guardian of the infant and executing to said infant h bond, with at least two sureties in the penalty of dollars, conditioned as prescribed by law, and approved of by the Surrogate, and filing the same with the clerk of this court that letters of (if under § 2827 *say* " temporary ") guardianship issue to h accordingly. (*If it be desired that the letters be limited in any respect, insert the appropriate provision.*)

Note. If under § 2825 petition may be by infant over 14 and may nominate.

If under § 2827 it will be by some one "on behalf of" infant *under* 14 and cannot nominate.

Surrogate.

Should the letters be directed to be limited, some such clause as the following should be incorporated in the letters when issued:

These letters are limited to receiving and administering the following personal property of said infant set forth in said petition, and for which said bond has been given, and said guardian is restrained from receiving and administering upon any other personal property, now owned by said infant or which said infant may hereafter become entitled to, until the further order of said Surrogate on additional further satisfactory security.

§ 1017. **Qualification by a general guardian.**—The Code provides distinct modes of qualifying in the two several capacities of guardian of the property and guardian of the person, of a minor.

Before letters of guardianship of *an infant's property* are issued by the surrogate's court, the person appointed must, besides taking an official oath, as prescribed by law, execute *to the infant*, and file with the surrogate, his bond with at least two sureties, in a penalty fixed, by the surrogate, not less than twice the value of the personal property, and of the rents and profits of the real property; conditioned that the guardian will, in all things, faithfully discharge the trust reposed in him, and *obey all lawful directions* of the surrogate *touching the trust*, and that he will, in all respects, render a just and true account of all money and other property received by him, and of the application thereof, and of his guardianship, whenever he is required to do so by a court of competent jurisdiction.

But the surrogate may, in his discretion, limit the amount of the bond to not less than twice the value of the personal property, and of the rents and profits of the real property for the term of three years.

But in case where *it appears to be impracticable* to give a bond sufficient to cover the whole amount of the infant's personal property, the surrogate may, in his discretion, accept security, to be approved by the surrogate, not less than twice the amount of the particular portion of the infant's property which the guardian will be authorized under the letters to receive, and issue letters thereon limited to the receiving and administering only such personal property for which double the security has been given, and restraining the guardian from receiving any other personal property of the infant until the further order of the surrogate on additional further satisfactory security. **§ 2830, Code Civil Proc.**

Before letters of guardianship *of an infant's person* are issued by the surrogate's court, the person appointed must take the official oath, as prescribed by law. The surrogate may also require him to execute to the infant a bond, in a penalty fixed by the surrogate, and with or without sureties, as to the surrogate seems proper; conditioned, that the guardian will in all things faithfully discharge the trust reposed in him, and duly account for all money or other property which may come to his hands, as directed by the surrogate's court. **§ 2831, Code Civil Proc.**

Reference should be had to the General Rules of Practice. Rules 52–54. And it is to be noted that in New York County provision is made in the rules of the Surrogate's Court for the examination of the guardian's sureties as to their sufficiency (Rule 17) and for reducing the bond by a deposit of the securities or a part of them with some approved depositary. Rule 15. It was held in *Matter of Flynn*, 58 Misc. 628, that the statutory provision making a surety company equivalent to "two sufficient sureties" was not applicable under Rule 59. This rule relates to the payment to a general guardian of moneys arising from the sale of the infant's real property only. Dowling, J., points out that § 811 of the Code is applicable only where the bond required is one to be given under a provision of the Code itself, and not to a bond given under a rule of the Supreme Court which itself controls the proceeds of the infant's realty.

It is needless to add that if the guardian or one of the sureties become insolvent or their circumstances so precarious as to endanger the ward's property, the Surrogate has power to require further security. *Genet* v. *Tallmadge*, 1 Johns. Ch. 561; *Monell* v. *Monell*, 5 *Id.* 248. The sureties must justify in respect of the particular fund committed to their principal. Where one is made guardian of several infants, he must give a bond as to the estate of each, and his sureties must justify in respect to their ability as to the aggregate penalties of the several bonds. *Anonymous*, 4 Hun, 414. And the guardian unless he be an ancillary guardian (see *post*) may be required to give a bond in the county of any Surrogate to whom he may apply for order directing the turning over to him, as guardian, of a legacy, or of moneys, or securities. His bond in such case is conditioned for the proper application of the money or property delivered to him. *Rieck* v. *Fish*, 1 Dem. 75.

§ 1018. **Payment of legacy or distributive share to a general guardian.**

Decree as to share of infant.

Where a legacy or distributive share is payable to an infant, the decree may, in the discretion of the surrogate's court, direct it, or so much of it as may be necessary, to be paid to his general guardian, to be applied to his support and education; or when it does not exceed fifty dollars, the decree may order it to be paid to his father, and if his father be dead, then to his mother, for the use and benefit of such infant.

Said court may, in its discretion, by its decree, direct any legacy or distributive share, or part of a legacy or distributive share, not paid or applied as aforesaid, which is payable to an infant, to be paid to the general guardian of such an infant, upon his executing and depositing with the surrogate in his office, a bond running to such infant, with two or more sufficient sureties, duly acknowledged and approved by the surrogate, in double the amount of such legacy or distributive share, conditioned that such general guardian shall faithfully apply such legacy or distributive share, and render a true and just account of the application thereof, in all respects, to any court having cognizance thereof, when thereunto required; the sureties in which bond shall justify as required in this act unless the surrogate shall determine that the general bond given by the guardian is ample, and of sufficient amount to cover such legacy or distributive share.

The said court may, in its discretion, from time to time, authorize or direct such general guardian to expend such part of such legacy or distributive share, in the support, maintenance and education of such infant as it deems necessary.

On such infant's coming twenty-one years of age, he shall be entitled to receive, and his general guardian shall pay or deliver to him, under the direction of the surrogate's court, the securities so taken, and the interest or other moneys that may have been paid to or received by such general guardian, after deducting therefrom such amounts as have been paid or expended in pursuance of the orders and decrees of said court, so made as aforesaid, and the legal commissions of such guardian; and the said general guardian shall be liable to account in and under the direction of the surrogate's court, to his ward, for the same; in case of the death of said infant, before coming of age,

the said securities and moneys, after making the deductions aforesaid, shall go to his executors or administrators, to be applied and distributed according to law, and the general guardian shall in like manner be liable to account to such administrator or executor. If there be no general guardian, or if the surrogate's court do not order or decree the payment or disposition of the legacy or distributive share in some of the ways above described, then the legacy or distributive share, or part of the same not disposed of as aforesaid, whether the same consists of money or securities, shall, by the order or decree of the surrogate's court, be paid and delivered to and deposited in said court, by paying and delivering the same to and depositing it with the county treasurer of the county, to be held, managed, invested, collected, reinvested and disposed of by him, as prescribed and required by section two thousand five hundred and thirty-seven of this act.

The regulations contained in the general rules of practice, as specified in section seven hundred and forty-four of this act, and the provisions of title three of chapter eight of this act apply to money, legacies and distributive shares paid to and securities deposited with the county treasurer, as prescribed in this section; except that the surrogate's court exercises with respect thereto, or with respect to a security in which any of the money has been invested, or upon which it has been loaned, the power and authority conferred upon the supreme court by section seven hundred and forty-seven of this act. Sections forty-six, forty-seven, forty-eight, forty-nine, fifty and fifty-one of part two, chapter six, title three, article two, of the Revised Statutes, are repealed. **§ 2746, Code Civil Proc.**

It was held, under this section that the bond, called for in the second paragraph, is one additional to the bond required by § 2830, above quoted, and that too although the penalty of the original bond was based on the very amount of the share receivable under § 2746. *Matter of Miller*, 29 Misc. 272, and cases on p. 273. But if such additional bond be not exacted, the sureties on the general bond are not released. *Accounting of Brown*, 72 Hun, 160.

But in 1900, ch. 554, the section was amended to prevent such hardship by giving the Surrogate discretion to determine whether the general bond is ample and of sufficient amount to cover such legacy or share.

Heaton, Surr., in a careful opinion in *Matter of Fisk*, 45 Misc. 299, goes over the question of the payment by a testamentary trustee to a duly appointed guardian of the income of a trust for the support and maintenance of the infant. He may safely do so, without seeing to the application thereof.

§ 1019. **Parental right not a substitute for letters.**—Section 81 of the Domestic Relations Law giving a married woman joint guardianship rights with the father does not operate, on his death, to constitute her "general guardian" by virtue merely of her motherhood and without letters or bond. She cannot therefore without formal appointment receive a legacy or distributive share. *Matter of Schuler*, 46 Misc. 373, citing *Estate of Burnham*, Surr. Dec., 1896, p. 437.

§ 1020. **Ancillary guardianship.**—Full provision is made in the Code

for letters to a foreign guardian, that is, a guardian appointed by a court of competent jurisdiction, of the property of a minor residing without the State.

> Where an infant, who resides without the state and within the United States, is entitled to property within the state, or to maintain an action in any court thereof, a general guardian of his property, who has been appointed by a court of competent jurisdiction, within the state or territory where the ward resides, and has there given security, in at least twice the value of the personal property, and of the rents and profits of the real property, of the ward, may present, to the surrogate's court having jurisdiction, a written petition, duly verified, setting forth the facts, and praying for ancillary letters of guardianship accordingly. The petition must be accompanied with exemplified copies of the records and other papers, showing that he has been so appointed, and has given the security required in this section, which must be authenticated in the mode prescribed in § 45 of the Decedent Estate Law, for the authentication of records and papers, upon an application for ancillary letters testamentary, or ancillary letters of administration.
>
> 2. Where an infant who resides without the state and within a foreign country is entitled to personal property within the state, or to maintain an action, or special proceeding in any court thereof respecting such personal property, a general guardian of his property, authorized to act as such within the foreign country where the ward resides, may apply to the surrogate's court of the county where such personal property or any part thereof is situated, for ancillary letters of guardianship on the personal estate of such infant, and the person so authorized must present to the surrogate's court having jurisdiction a written petition duly verified, setting forth the facts and praying for ancillary letters of guardianship on the personal estate of such infant. The petition must be accompanied with the exemplified copies of the records and other papers showing the appointment of such foreign guardian, or where such foreign guardian has not been appointed by any court, with other proof of his authority to act as such guardian within such foreign country, and also with proof that pursuant to the laws of such foreign country, such foreign guardian is entitled to the possession of the ward's personal estate. Exemplified copies of the records, where used pursuant to this subdivision, must be authenticated by the seal of the court, or officer, by which or by whom such foreign guardian was appointed, or the officer having the custody of the seal or of the record thereof, and the signature of a judge of such court, or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by the certificate, under the principal seal of the department of foreign affairs, or the department of justice of such country, attested by the signature or seal of a United States consul. **§ 2838, Code Civil Proc.**

This section covers the case of any foreign guardian, whose appointment our courts could be expected, in comity, to recognize. The requirements laid down are such as to safeguard as fully as is reasonable, the interests of the nonresident minor. The foreign letters are only recognized as giving the guardian a status to petition in our courts for the ancillary appointment (*West* v. *Gunther*, 3 Dem. 386), but do not operate in and of them-

selves to give him a right to the custody of the property here. *Trimble* v. *Dzieduzyiki*, 57 How. 208; *Morrell* v. *Dickey*, 1 Johns. Ch. 153; *McLoskey* v. *Reid*, 4 Bradf. 334.

The Code safeguards are clear and distinct. The foreign guardian must show appointment (*a*) by a court of competent jurisdiction, (*b*) of the State, territory or country, where the ward resides (not of some other State only). *Griffin* v. *Sarsfield*, 2 Dem. 4. Secondly, he must show, if his appointment be within the United States, that he has given security as required by § 2838, or, if his appointment be in a foreign country, that under its law he is entitled to the possession of the ward's personal estate.

That is to say, he must prove the foreign law, and the existence of the facts making it applicable; for example, if the foreign law makes it a prerequisite that he should give a bond, he must show that he has given the bond so required. Section 2838 requires the foreign guardian to present a petition "duly verified." In *Matter of Whittemore*, 1 Connoly, 155, doubt was expressed as to the regularity of an appointment based upon a petition verified by the petitioner's attorney. The doubt would seem to be unfounded. Nor does it seem necessary to cite and use the method referred to in *Russell* v. *Hartt*, 87 N. Y. 18, where a power of attorney was relied on to give another than the executrix the right to present a will for probate. The words "duly verified" clearly contemplate a verification under the Code, under which in a proper case the attorney's verification is ample, if the necessary allegations are set forth.

As to the Surrogate having jurisdiction, the locus of the property determines that. Where the property is stock of a domestic corporation the rule laid down in *Matter of Arnold*, 114 App. Div. 244 (a transfer tax case) is doubtless the one applicable, to wit: that such stock is property within the county where the corporation has its principal place of business.

These provisions for an application by the foreign guardian for an ancillary appointment, are not to be taken as preventing a nonresident minor, over fourteen, having property in this State, from petitioning the proper Surrogate for the appointment of a resident general guardian. *Johnson* v. *Borden*, 4 Dem. 36.

§ 1021. **Same subject—The procedure.**

> Where the surrogate is satisfied upon the papers presented, as prescribed in the last section, that the case is within that section, and that it will be for the ward's interest that ancillary letters of guardianship should be issued to the petitioner, he may make a decree granting ancillary letters accordingly. Such a decree may be made without a citation, or the surrogate may cite such persons as he thinks proper to show cause why the prayer of the petition should not be granted. But before the ancillary letters are issued, the surrogate must inquire whether any debts are due from the ward's estate to residents of the state; and if so, he must require payment thereof. **§ 2839, Code Civil Proc.**

The Surrogate must be satisfied the application is within § 2838. Where

on the hearing it appeared that in the foreign jurisdiction the petitioner had merely given an undertaking without penalty or seal, and not such a bond as our statute required, the Surrogate refused to make the appointment, as the statute then required a "bond" as distinguished from the "security" now required. *In re Fitch*, 3 Redf. 457. As the statute now stands, the word "security" doubtless means such as is required by the foreign court, with the limitation that it must be "in at least twice the value of the personal property, and of the rents and profits of the real property of the ward." Section 2838.

The petition should be substantially as follows:

Petition under § 2838, Code of Civil Procedure.

Surrogate's Court,
County of

Title. }

To the Surrogate's Court, County of

The petition of of respectfully shows to this court and alleges:

I. That your petitioner is the general guardian of the property of a minor, duly appointed by the court, a court of competent jurisdiction under the laws of the (*name the state or territory*) where your petitioner and said ward reside, and your petitioner has there given security, in at least twice the value of the personal property, and of the rents and profits of the real property of the said ward, as will more fully appear from the exemplified copies of the records and other papers, accompanying this petition, showing that he has been so appointed and has given the security required by § 2838 of the Code of Civil Procedure. *Or if petitioner is guardian of a ward residing in a foreign country, say:*

Ia. That your petitioner, a resident of is authorized to act as general guardian of the property of a minor, a resident of (*name the foreign country*) by virtue of (*here allege the law, or the appointment of a court, in the said country*) as will more fully appear from the exemplified copies of the records and other papers, showing your petitioner's authority to act as such (*note language of* § 2838, ¶ 2) accompanying this petition, and your petitioner also alleges that pursuant to the laws of such foreign country your petitioner is entitled to the possession of said ward's personal estate.

Note. Where the guardian is from a foreign country he can only claim *personal* property. Where he is from another state or territory there is no such restriction. See § 2838.

II. And your petitioner shows that there is property (*note*) within the state of New York to which said ward is entitled (*or* that said ward is entitled to maintain an action, *or* special proceeding in the state of New York to) (*here state nature of action and parties thereto*).

III. *If any debts are due from the ward's estate to residents of the state, allege the fact specifically, giving creditors' names, addresses and amount of claim.* See § 2839.

IV. Wherefore, your petitioner prays that ancillary letters

of guardianship of the property (*say personal only if petitioner is guardian in a foreign country*) of said a minor be granted to your petitioner.

(Date.)

(Signature.)

(Verification.)

§ 1022. Effect of ancillary letters.

Ancillary letters of guardianship are issued as prescribed in the last section, *without security* and *without an oath of office.*

If issued in a case provided for in subdivision one of section 2838, they authorize the person to whom they are issued to demand and receive the personal property, and the rents and profits of the real property of the ward, to dispose of them in like manner as a guardian of the property appointed as prescribed in this article; to remove them from the state, and to maintain or defend any action or special proceeding in the ward's behalf.

If issued in a case provided for in subdivision two, of section 2838, such ancillary letters of guardianship authorize the person to whom they are issued to demand and receive the personal estate of the ward, and to dispose of it in like manner as a guardian of property appointed as prescribed in this article, and to maintain or defend any action or special proceeding respecting such personal estate in the ward's behalf.

But in neither case do such letters authorize such ancillary guardian to receive from a resident guardian, executor, or administrator, or from a testamentary trustee, subject to the jurisdiction of a surrogate's court, money or other property belonging to the ward, in a case where letters have been issued to a guardian of the infant's property, from a surrogate's court of a county within the state, upon an allegation that the infant was a resident of that county, except by the special direction, made upon good cause shown, of the surrogate's court from which the principal letters were issued, or unless the principal letters have been duly revoked. **§ 2840, Code Civil Proc.**

Application of the last section to former guardians.

The last section applies to letters granted, before this chapter takes effect, by a surrogate's court of the state, to a guardian appointed by a court of another state, or a territory of the United States, upon presentation of an exemplified transcript of the record of the appointment. **§ 2841, Code Civil Proc.**

The provision of § 2839 must not be disregarded, as to the payment of any debts due from the ward's estate to local creditors.

In § 1017 above it is indicated that a guardian appointed, say in New York County where his bond is filed, may not demand of the Surrogate, say of Erie, payment of property due his ward in that Surrogate's jurisdiction, without, if required, filing a bond there conditioned for the proper application of the money. And in § 1018 the rule of § 2746 is stated that a general guardian to whom his ward's legacy is directed to be paid must give an additional bond. See *Estate of Flagg*, 10 N. Y. St. Rep. 694; *Lowman* v. *R. R. Co.*, 85 Hun, 188. But, while a domestic guardian may be required to give such a bond, it seems it cannot be required of an

ancillary guardian. Section 2840 expressly provides that ancillary letters, if granted, shall be issued without security, and the ancillary guardian shall thereupon be authorized to demand and receive the personal property of the ward, and to remove the same from the State. *In re Hunt's Estate*, 34 N. Y. Supp. 1088. In the case cited Arnold, Surrogate, held that the receipt of the ancillary guardian would be a full protection to the executors in paying over to him the legacies in question.

§ 1023. **Revocation of letters of guardianship.**—The letters of a general guardian may be revoked. This applies to ancillary letters. *Johnson* v. *Johnson*, 4 Dem. 93.

The revocation may be upon application of the guardian, or of the ward, or on his behalf.

In the latter case, that is where the proceeding is not a voluntary one on the guardian's part, the Code provides:

> In either of the following cases, the ward, or any relative or other person in his behalf, or the surety of a guardian, may, at any time, present to the surrogate's court, a written petition, duly verified, setting forth the facts, and praying for a decree, revoking letters of guardianship, either of the person, or of the property, or both; and that the guardian complained of may be cited to show cause, why such a decree should not be made:
>
> 1. Where the guardian is disqualified by law, or is, for any reason, incompetent to fulfil his trust.
>
> 2. Where, by reason of his having wasted or improperly applied the money or other property in his charge, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the real or personal property of the ward, or by reason of other misconduct in the execution of his office, or his dishonesty, drunkenness, improvidence, or want of understanding, he is unfit for the due execution of his office.
>
> 3. Where he has wilfully refused, or, without good cause, neglected, to obey any lawful direction of the surrogate, contained in a decree or an order; or any provision of law, relating to the discharge of his duty.
>
> 4. Where the grant of letters to him was obtained, by false suggestion of a material fact.
>
> 5. Where he has removed, or is about to remove, from the state.
>
> 6. In the case of the guardian of the person, where the infant's welfare will be promoted by the appointment of another guardian. **§ 2832, Code Civil Proc.**

The proceeding may be instituted by the ward or in his behalf by any relative or other person. *Bolling* v. *Coughlin*, 5 Redf. 116, 119. A guardian who resigns, and then litigates with his successor, cannot in his own name petition that his successor's letters be revoked. The ward is the one interested. *Matter of Twichell*, 117 App. Div. 301. The petition should disclose all the material facts and allegations bringing the case within one or more of the subdivisions of § 2832. The language in subd. 6 as to the promotion of the infant's welfare, does not mean, it has been held, that that consideration alone will weigh as a ground for removal. A sufficient

ground for revocation of letters must be shown under one of the five preceding subdivisions as well. *Corn* v. *Corn*, 4 Dem. 394, 398; *Ledwith* v. *Union Trust Co.*, 2 Dem. 439; *Estate of Kerrigan*, 2 McCarty, 334. But, in *Matter of McConnon*, 60 Misc. 22, Beckett, Surr., removed a stepfather as general guardian. He was a Protestant. His ward's own father was born, lived, and died a Catholic. The boy desired to follow the father's faith. The charges against the stepfather were dismissed and the removal was based entirely on the "general welfare" clause, in view of the diversity of religious belief. He cites *Matter of Jacquet*, 40 Misc. 575. In that case the court approved the English rule "that a guardian is to have sacred regard to the religion of the father in dealing with the child, and, unless under very special circumstances, to see that the child is brought up in the religious faith of the father, *whatever that religion may have been.*" See also *Matter of Crickard*, 52 Misc. 63, citing *Matter of Feely*, 4 Redf. 306; *Bolling* v. *Coughlin*, *supra*. This seems to bring the status of a guardian close to that of a godfather, and might be carried to unhappy extreme.

The remarriage of a woman who was general guardian had been held to be a proper ground for revoking her letters. *Swartwout* v. *Swartwout*, 2 Redf. 52; *Matter of Elgin*, 1 Tuck. 97; *Newhouse* v. *Gale*, 1 Redf. 217, 219. See L. 1837, p. 530, § 34. But the statute, 2 L. 1867, p. 783, § 2, removing the common-law disability, and authorizing a Surrogate to appoint married women as guardians, and the language of the Domestic Relations Law, § 81, make it clear that under § 2832 remarriage would not of itself be a sufficient ground for removal.

There is a distinction properly to be noted at this point between general guardians appointed by the Surrogate and testamentary guardians. Section 2472, Code Civ. Proc., by subd. 7, gives the Surrogate's Court general power to "appoint and remove guardians, in the cases, and in the manner prescribed by law." The various causes which will justify the Surrogate in removing a guardian appointed under title 7 of ch. 18 of the Code are specified in § 2832, just quoted. But the Surrogate's authority as regards testamentary guardians is restricted within narrower limits. For § 2858 (*post*) permits their removal only "in cases where a testamentary trustee may be removed as prescribed in title sixth of this chapter." This refers to § 2817, *q. v.* *Mackay* v. *Fullerton*, 4 Dem. 153.

And it must again be emphasized that, whatever the nature of the guardianship, the Surrogate can act only under the circumstances required by the statute. *Ledwith* v. *Union Trust Co.*, 2 Dem. 439, 441. That the guardian in office is inferior to one proposed to be substituted for him, is not of itself a ground for the removal of the former. *Ibid.*

§ 1024. **Grounds for removal.**—The grounds indicated by § 2832 for revoking letters of guardianship are substantially similar to those provided in the same connection in case of executors and administrators, and the same discussion is applicable here. Where the appointment of a guardian was originally improperly secured, as by concealing material

facts from the Surrogate (*Bolling* v. *Coughlin*, 5 Redf. 116), or by neglecting to give notice to relatives residing in the county (*Ex parte Feely*, 4 Redf. 306), the appointment will be revoked by the Surrogate under his general powers to vacate decrees so improperly secured. To warrant a revocation of letters under § 2832, the statutory causes must exist and be alleged and proven. See 9 Am. & Eng. Ency. of Law, pp. 97, 98. Fixed habits of intemperance (*Kettletas* v. *Gardner*, 1 Paige, 488; *Matter of Moore*, 18 Weekly Dig. 42); attempts to profit individually at the ward's expense by improper use of its funds (*Matter of Cooper*, 2 Paige, 34; *Matter of O'Neil*, 1 Tuck. 34); the insolvency of the guardian and one of his sureties (*Matter of Cooper*) are all proper grounds to allege; and the Surrogate may in such a proceeding enjoin the guardian from disposing of the assets of the ward pending the Surrogate's inquiry. *Matter of Plumb*, 4 N. Y. Supp. 135, and see § 2834.

Citation; hearing; decree.

Upon the presentation of a petition, as prescribed in the last section, the surrogate must inquire into the matter; and, for that purpose, he may issue a subpœna to any person, requiring him to attend and testify in the premises. If the surrogate is satisfied that there is probable cause to believe, that the allegations of the petition are true, he must issue a citation to the guardian complained of; and, upon the return thereof, if the material allegations of the petition are established, he must make a decree, revoking the guardian's letters accordingly; except that, where the case is within subdivision third or fourth of the last section, he must dismiss the proceedings, under the like circumstances and upon the like terms, as prescribed in sections 2686 and 2687 of this act, where a similar complaint is made against an executor or administrator. **§ 2833, Code Civil Proc.**

This section provides for two inquiries by the Surrogate, the one preliminary to the citation, the other upon its return. The first is merely formal, the other goes to the merits. Pending the inquiry the Surrogate has the power above noted of safeguarding the ward's estate. The Code provides for an order, which amounts to an injunction order, suspending the guardian, wholly or partly from the exercise of his powers and authority. The provision is as follows:

Upon issuing a citation as prescribed in the last section, the surrogate may, in his discretion, make an order suspending the guardian, wholly or partly, from the exercise of his powers and authority, during the pendency of the special proceeding. A certified copy of an order so made must accompany the citation, and be served therewith; but, from the time when it is made, the order is binding upon the guardian and upon all other persons, without service thereof, subject to the exceptions and limitations prescribed in sections 2603 and 2604 of this act, with respect to a decree revoking letters. **§ 2834, Code Civil Proc.**

Where such an order is desired the petition should allege facts requiring it, and ask the Surrogate to make it. The order may be in the following form:

Order under § 2834, Code of Civil Procedure.

Surrogate's Court,
County of

In the Matter of the Application of for the Revocation of Letters of Guardianship heretofore issued to A. B. as General Guardian of the Person and Property of C. D. a minor.

A petition having been presented to the Surrogate's Court in the county of by (*or* on behalf of) C. D. a minor over (*or* under) the age of fourteen years containing allegations under § 2832 of the Code of Civil Procedure praying for a decree revoking letters of guardianship heretofore issued to A. B. as general guardian of the person and property of said minor; and the Surrogate having inquired into the matter (*and if he issued a subpœna under* § 2833 *set out the facts*) and being satisfied that there is probable cause to believe that the allegations of the petition are true and a citation accordingly being about to issue to said A. B. requiring him to show cause why the prayer of said petition should not be granted; and the Surrogate being persuaded that pending the above entitled proceeding the interests of said ward require that said guardian be suspended from the exercise of his powers and authority (*state in what respect and to what extent*), it is, on motion of the Surrogate, (*note*)

Note. The order may also be made on motion of petitioner's attorney.

Ordered, that during the pendency of the above entitled proceeding for the revocation of his letters of guardianship, or until the further order of the Surrogate, the said A. B. be and he hereby is suspended from the exercise of his powers and authority as general guardian (*state again in what respects and to what extent*) and he is hereby prohibited from (*state terms of injunction*).

(Date.)

Surrogate.

In *Matter of Plumb*, 4 N. Y. Supp. 135, it was held that an injunction order could be made *after* the citation had issued. The order of suspension made under this section must be made so as to be served *with* the citation. § 2834, Code Civ. Proc.

§ 1025. **The decree.**—Upon the entry of the decree, revoking the guardian's letters, his powers cease. § 2603, Code Civ. Proc. It is proper, where he is removed for misconduct, or disregard of lawful orders of the court, or for other wrongdoing, to charge him personally with the costs of the proceedings. Such costs become an inherent part of the decree against the guardian, and if he fails to pay them his sureties are liable for them as much as they would be for any other money he might be adjudged to pay. *Phillips* v. *Liebmann*, 10 App. Div. 128, 130. The costs

directed to be paid "are a part of the debt for which the sureties are liable." *Douglass* v. *Ferris*, 138 N. Y. 192.

By the decree the Surrogate may require the guardian to "account for all money and other property, received by him; and to pay and deliver over all money and other property in his hands into the Surrogate's Court, or to his successor in office, or to such other person as is authorized by law to receive the same." § 2603, Code Civ. Proc. The form of decree can be adapted from that revoking letters of an executor.

§ 1026. Voluntary proceedings for revocation of letters.

A guardian, appointed as prescribed in this title, may, at any time, present to the surrogate's court a written petition, duly verified, setting forth the facts upon which the application is founded, and praying that his account may be judicially settled; that a decree may thereupon be made, revoking his letters, and discharging him accordingly; and that the ward may be cited to show cause, why such a decree should not be made. The surrogate may, in his discretion, entertain or decline to entertain the application. **§ 2835, Code Civil Proc.**

Proceedings thereupon.

If the surrogate entertains an application, made as prescribed in the last section, he must issue a citation, as prayed for in the petition; and he may also require notice of the application to be given to such other persons, and in such a manner, as he deems proper. Upon the return of the citation, a guardian ad litem for the ward must be appointed; and the surrogate may also, in his discretion, allow any person to appear and contest the application, in the interest of the ward. Upon the hearing, the surrogate must first determine whether sufficient reasons exist for granting the prayer of the petition. If he determines that they exist, and that the interests of the ward will not be prejudiced by the resignation of the guardian, the surrogate must make an order accordingly, and allowing the petitioner to account, for the purpose of being discharged. Upon his fully accounting, and paying all money which is found to be due from him to the ward, and delivering all books, papers, and other property of the ward in his hands, either into the surrogate's court, or in such a manner as the surrogate directs, a decree may be made, revoking the petitioner's letters, and discharging him accordingly. **§ 2836, Code Civil Proc.**

The clause originally requiring a new guardian to be appointed has been omitted, the subject being provided for by § 2605, *q. v.*

This voluntary application may be made "at any time," but good and sufficient reasons for the resignation must be exhibited. The decisions in relation to a resignation of his trust by a testamentary trustee are more or less pertinent. Section 2859 makes §§ 2835 and 2836 applicable to the resignation of a guardian appointed by will or deed. The distinction will probably be made which arises out of the element of personal trust and confidence reposed, by the testator or nominator, in the guardian by will or deed, as distinguished from the Surrogate's appointee. Ordinarily, however, the Surrogate will not insist upon the retention of his functions by one to whom the duties of guardianship have become irksome or burdensome. The ample provisions of the Code as to requiring an accounting,

and the remedies against the guardian and his sureties make the personality of the incumbent less important than in cases of testamentary trusts.

Guardians' applications to be allowed to resign have been allowed for such reasons as the following: that the guardian's relations to the trustee of the estate in which the ward is a person interested are unfriendly and litigious (*In re Wright*, 20 N. Y. Supp. 86); that the ward prefers that another person should act. *Ibid.* It must appear that the interests of the ward will not be prejudiced if the resignation is accepted. § 2836, Code Civ. Proc. The decree follows the accounting and turning over the ward's estate under the Surrogate's directions. But this account, referred to in the last sentence of § 2836, is merely tentative. *Matter of Wright*, 20 N. Y. Supp. 86. See also *Skidmore* v. *Davis*, 10 Paige, 316. It is merely intended to ascertain the amount due, or the property which ought to be delivered up and is made as a matter of course. See *Matter of Tyndall*, 48 Misc. 39. This appears from the following:

> *Ward or new guardian may require accounting.*
>
> Notwithstanding the discharge of a guardian, as prescribed in the last section, his successor or the ward may compel a judicial settlement of his account, as prescribed in article second of this title, in the same manner and with like effect, as if the decree discharging him had not been made. With respect to all matters connected with his trust, his sureties continue to be liable, until his account is judicially settled accordingly. **§ 2837, Code Civil Proc.**

But § 2837, cannot be extended further than its clear intent. Thus the sureties cannot compel an account under it. The section gives this right only to the ward or the guardian's successor. *Estate of Voelpel*, 4 Law. Bull. 79. See *Breslin* v. *Smyth*, 3 Dem. 251. The surety has ample rights under § 2847, discussed below.

This section, 2837, means that, on this new accounting, any provision of the first decree, improperly or improvidently made, may be scrutinized, modified or reversed. *Matter of Tyndall, supra; Matter of Hawley*, 104 N. Y. 266.

§ 1027. **Appointment of successor.**—Where a general guardian, who was duly appointed, either by a court of competent jurisdiction of the State, or by the will or deed of the child's father or mother, dies, or becomes incompetent or disqualified, or refuses to act, or has been removed, or when his term of office has expired, the Surrogate has power to entertain an application for the appointment of a successor guardian. § 2822 Code Civ. Proc. See also § 2860 as to sole guardians by will or deed, § 1042 below. Upon such an application the practice is as already stated. But under § 2823 care must be taken to cite the former general guardian, unless it is shown that he is dead.

As the fact of the removal of the former guardian is jurisdictional, since the appointment of a successor depends on the termination of the prior incumbency, it is evident that the application should not be made until the prior guardian is actually removed. This occurs upon the entry of the decree discharging him, which is not until after the accounting is had and

the fund turned over. That the papers are "marked for decree" subject to the passing of the guardian's account, is not enough, not even when they have been so marked and the accounting has been had, and no objections filed, can the application be begun on the assumption the decree will be signed. If the accounting party unreasonably delays the entry of the decree, an order to show cause can be had to expedite the matter, or if the delay is necessary, the infant can be provided for *ad interim* by proceedings under § 2846.

The infant's right to nominate the successor, of course, depends upon whether he is over fourteen years of age or not. § 2826, Code Civ. Proc.

Where he is under fourteen it is proper for the relative or next friend to be diligent in initiating the application, particularly where there exist any relations of hostility. Where two relatives are in conflict in such a matter, and the Surrogate can discern that the real cause of discord is the desire to control the infant's estate, the Surrogate, who has the power to nominate the temporary guardian, will weigh especially the interests of the child in the designation of the guardian of the person.

§ 1028. **Supervision and control of a general guardian.**—Article second of title seven (§§ 2842–2850, inclusive), deals with the powers of the court to supervise and control a general guardian and to settle his accounts.

§ 1029. **Annual inventory—Account.**—In the first place, it is made his duty to file an annual inventory and account.

> A general guardian of an infant's property, appointed by a surrogate's court, must, in the month of January of each year, as long as any of the infant's property, or of the proceeds thereof, remains under his control, file in the surrogate's court the following papers:
>
> 1. An inventory, containing a full and true statement and description of each article or item of personal property of his ward, received by him, since his appointment, or since the filing of the last annual inventory, as the case requires; the value of each article or item so received; a list of the articles or items, remaining in his hands; a statement of the manner in which he has disposed of each article or item, not remaining in his hands; and a full description of the amount and nature of each investment of money, made by him.
>
> 2. A full and true account, in form of debtor and creditor, of all his receipts and disbursements of money, during the preceding year; in which he must charge himself with any balance remaining in his hands, when the last account was rendered, and must distinctly state the amount of the balance remaining in his hands, at the conclusion of the year, to be charged to him in the next year's account. **§ 2842, Code Civil Proc.**
>
> Substituted for L. 1837, ch. 460, part of § 57.

This section does not require the service of this intermediate or informatory account upon the guardian's sureties, but it is proper this should be done if requested by them, as it has been held that a refusal so to do may justify the Surrogate in making an order, on the application of the sureties, requiring the guardian to file a new bond or be removed from office. *Matter of Bushnell*, 17 N. Y. St. Rep. 813.

This section, in the second place, is directory only. That is to say, if the guardian fails to file the inventory and account he cannot be removed therefor. It gives the Surrogate the authority for making an order requiring him to do so, for disobedience of which order he may be removed. *Ledwith* v. *Union Trust Co.*, 2 Dem. 439. But it does not give anyone else the right to apply for such an order. *Welch* v. *Gallagher*, 2 Dem. 40. The proceedings are *ex parte*, and are made wholly dependent upon the Surrogate for their fulfilment. *Ibid.* Provision is made under other sections (see § 2847) for compelling a judicial settlement of a guardian's account. See *Draper* v. *Anderson*, 37 Barb. 168; *Matter of Hawley*, 104 N. Y. 250, 264. But the account under § 2842 is intended merely to inform the court as to the manner in which the guardian is discharging his trust, and not, as the Court of Appeals observed (*Matter of Hawley, supra*, at p. 266), "to confer jurisdiction upon the Surrogate to judicially settle the guardian's accounts while the guardianship continues."

The inventory and account under § 2842, Code Civ. Proc., is furnished in printed form by the Surrogate's office.

§ 1030. **Filing the inventory and account—The affidavit.**

With the inventory and account, filed as prescribed in the last section, must be filed an affidavit, which must be made by the guardian, unless, for good cause shown in the affidavit, the surrogate permits the same to be made by an agent or attorney, who is cognizant of the facts. The affidavit must state, in substance, that the inventory and account contain, to the best of the affiant's knowledge and belief, a full and true statement of all the guardian's receipts and disbursements, on account of the ward; and of all money and other personal property of the ward, which have come to the hands of the guardian, or have been received by any other person by his order or authority, or for his use, since his appointment, or since the filing of the last annual inventory and account, as the case requires; and of the value of all such property; together with a full and true statement and account of the manner in which he has disposed of the same; and of all the property remaining in his hands, at the time of filing the inventory and account; and a full and true description of the amount, and nature of each investment made by him, since his appointment, or since the filing of the last annual inventory, and account, as the case requires; and that he does not know of any error or omission in the inventory or account, to the prejudice of the ward. The surrogate must annex a copy of this and the last section, to all letters of guardianship of the property of an infant issued from his court. **§ 2843, Code Civil Proc.**

Annual examination of guardian's accounts.

In the month of February of each year, and thereafter until completed, the surrogate must, for the purposes specified in the next section, examine or cause to be examined, under his direction, all inventories and accounts of guardians filed since the first day of February of the preceding year. The examination may be made by the clerk of the surrogate's court, or by a person specially appointed by the surrogate to make it, who must, before he enters upon the examination, subscribe and take, before the surrogate, and file, with the clerk of the surrogate's court, an oath faithfully to execute his duties, and to make a true report to the surrogate. Where the surrogate seasonably certifies in

writing to the board of supervisors, or, in the county of New York, to the board of aldermen, that the examination required by this section cannot be made by him, or by the clerk of the surrogate's court, or by any clerk, employed in his office and paid by the county, the board must provide for the compensation of a suitable person to make the examination. § **2844, Code Civil Proc.**

Proceedings when account defective, etc.

If it appears to the surrogate, upon an examination made as prescribed in the last section, that a general guardian of an infant's property, appointed by letters issued from his court, has omitted to file his annual inventory or account, or the affidavit relating thereto, as prescribed in the last section but one; or if the surrogate is of the opinion, that the interest of the ward requires that the guardian should render a more full or satisfactory inventory or account; the surrogate must make an order, requiring the guardian to supply the deficiency, and also, in his discretion, requiring the guardian personally to pay the expense of serving the order upon him. Where the guardian fails to comply with such an order, within three months after it is made; or where the surrogate has reason to believe that sufficient cause exists for the guardian's removal, the surrogate may, in his discretion, appoint a fit and proper person special guardian of the ward, for the purpose of filing a petition in his behalf, for the removal of the guardian, and prosecuting the necessary proceedings for that purpose. § **2845, Code Civil Proc.**

See Rule 21, Surrogates' Rules, New York County.

These sections do not require extended discussion.

§ 1031. **Surrogates may direct as to infant's maintenance.**

Upon the petition of the general guardian of an infant's person or property; or of the infant; or of any relative or other person in his behalf; the surrogate, upon notice to such persons, if any, as he thinks proper to notify, may make an order, directing the application, by the guardian of the infant's property, to the support and education of the infant, of such a sum as to the surrogate seems proper, out of the income of the infant's property; or, where the income is inadequate for that purpose, out of the principal. § **2846, Code Civil Proc.**

Section 2472 of the Code, by subd. 7, gives the Surrogate power to "compel the payment and delivery by guardians of money or other property belonging to their wards." An application having been made under these two sections, for an order directing a guardian of the property to pay from moneys of his ward in his hands for the maintenance of the ward by petitioner for a year under an agreement made by her with the guardian of the person (*Matter of Kerwin*, 59 Hun, 589), the guardian of the property filed an answer disputing the claim, and the Surrogate thereupon dismissed the proceeding for lack of jurisdiction. The General Term reversed the order and held that the intention of § 2846 was to give the Surrogate jurisdiction in such cases, and said, "there is no limitation of the power of the Surrogate," i. e., in §§ 2846 and 2472, "to direct the guardian of the property of an infant to make a suitable and proper application of the income, or of the property itself to the support of the infant. We know of no authority which restricts the jurisdiction of the Surrogate to cases where the demand for the support is undisputed." It was held, accordingly

that it was the Surrogate's duty to grant or refuse the application upon the merits. See next section as to expenditure for infant's maintenance. But the section is not a warrant for securing to a guardian reimbursement for services rendered the ward *before his appointment. Matter of Tyndall,* 48 Misc. 39. For §§ 2719 and 2731 apply only to a representative. *Matter of Marcellus,* 165 N. Y. 70.

In *Welch* v. *Gallagher,* 2 Dem. 40, 42, Spring, Surr., had held that § 2846 did not contemplate providing for the payment of a debt already incurred. But Ransom, Surr. (*Matter of Ogg,* 1 Connoly, 10), held that a Surrogate had power to make an allowance for past maintenance. See *Matter of Bostwick,* 4 Johns. Ch. 102. In *Hyland* v. *Baxter,* 98 N. Y. 610, it was held that an allowance for past maintenance may be made to executors, trustees or guardians, whether upon an accounting or upon petition. It is true that the court said, at p. 614: "The power *of a court of equity* to make an allowance out of the estate of infants for past maintenance" was affirmed, etc. But, at p. 616, Andrews, J., says: "The fact that this question is an equitable one, and depends upon equitable grounds, is not a ground of objection to the jurisdiction. The Surrogate's Court . . . . has jurisdiction to determine questions either legal or equitable arising in the course of proceedings in the execution of powers expressly conferred, and which must be decided therein," citing *Jumel* v. *Jumel,* 7 Paige, 591; *Boughton* v. *Flint,* 74 N. Y. 476; *Riggs* v. *Cragg,* 89 N. Y. 480. See also *Matter of Putney,* 61 Misc. 1. In *Matter of Stoehr,* 23 N. Y. Supp. 280, Coleman, Surr., distinguished the *Kerwin* case; but the case before him involved a claim for money and services alleged to have been expended and rendered in the care of the infant's property, which claim was not an adjudicated one, and was disputed by the guardian, while § 2846 contemplates payments for the "support and education" of the ward. The *Kerwin* case may be taken as an authority for holding that when a claim is made for reimbursement for such a disbursement for a ward, the Surrogate has power to pass upon it, on its merits, and is not divested of jurisdiction by an answer controverting the validity of the claim. The *Matter of Wentz,* 9 Misc. 240, denied an allowance for past maintenance upon the merits, and not for want of jurisdiction. In *Matter of the Estate of Haslehurst,* 4 Misc. 366, Lansing, Surr., pointed out that a claim for past support of infants contains other elements than does an ordinary debt, and depends for its allowance, not alone on the fact of the disbursements, but on various other circumstances, and thus, though disputed, is not strictly a disputed debt, referring to *In re Wandell,* 32 Hun, 545.

It is hardly necessary to set forth precedents for an application of this nature.

§ 1032. **Disbursements before appointment.**—The Surrogate, as above hinted, cannot authorize the reimbursement of the guardian for moneys paid out to secure appointment or in contemplation thereof. *Matter of Grant,* 56 App. Div. 176; *Matter of Tyndall,* 48 Misc. 39; *Matter of Marcellus,* 165 N. Y. 70. In the case of *Clowes* v. *Van Antwerp,* 4 Barb. 416,

it was held that upon the settlement of the accounts of a general guardian the Surrogate is not authorized to make any allowance to such guardian for services rendered or expenses incurred by him previous to his appointment as guardian. That case was affirmed by the Court of Appeals upon the opinion of the General Term as reported above. *Clowes* v. *Van Antwerp*, 6 N. Y. 466. In *Ex parte Dawson*, 3 Bradf. 130, the infant, a citizen of this State, had been clandestinely taken to England, and it was held that the guardian was justified in attempting to recover the custody of his ward by invoking the aid of the English courts, and that the expenses of such a proceeding were a proper charge on the infant's estate. But in that case it appeared that the proceeding had been taken by the guardian after his appointment as such, and the allowance was made because it seemed to the Surrogate that it was the duty of the guardian to take such steps as were necessary to recover the possession of the infant, of whose person he had been appointed guardian. In the *Grant* case, *supra*, the mother before her appointment had incurred legal expenses amounting to $1,700, in *habeas corpus* proceedings to get the custody of her child. It was held that her application was solely as mother, and had no relation to her duty as guardian.

§ 1033. **General maintenance of ward.**—The maintenance and education of the ward is the guardian's primary duty. And by § 288 of the Penal Code, it is a misdemeanor if he "wilfully omits, without lawful excuse, to perform a duty, by law imposed upon him, to furnish food, clothing, shelter, or medical attendance to a minor." *People* v. *Pierson*, 176 N. Y. 20. [See § 1023, *ante*, as to religious education.]

If there be no fund available to him, but executors or trustees hold a fund under direction to "accumulate" for the benefit of his ward, it is his right and duty to petition the court for the application therefrom of so much as may be requisite, *Matter of Wagner*, 81 App. Div. 163, even in a case where the fund was to go to another if the ward should not attain the age of twenty-five. The reason being that if the accumulation were not *for the infant's benefit*, the accumulation would be invalid. *Smith* v. *Parsons*, 146 N. Y. 116. See also *Matter of Goodwin*, 122 App. Div. 800.

Again, the infant's real estate may be sold for this same purpose and the proceeds paid to the guardian. *Allen* v. *Kelly*, 171 N. Y. 1, 6, citing § 2846. The guardian's sureties are liable for his improper use of any such moneys so paid to him. Where they are paid to him *for investment* the Surrogate must exact additional security under General Rule 59. If he omit to do so, *semble* the surety may not be liable. *Ibid.* Section 2846 is explicit in providing that payment out of the ward's estate shall be made out of the income thereof, save "where the income is inadequate for that purpose." This, it has been held, does not authorize the principal to be resorted to where there is income uncollected and the debtors are solvent. *Matter of Plumb*, 52 Hun, 119, 122. For the income "is the primary fund from which to give support and maintenance" to the ward. *Matter of Wandell*, 32 Hun, 545. And the payments must be for the *support and educa-*

tion of the ward, and their amount rests primarily in the judgment and discretion of the guardian, taking all the ward's circumstances into consideration with the condition and productiveness of its property. Over this judgment of the guardian stands as a safeguard the discretion of the Surrogate to approve or disapprove. This being the case the Surrogate will authorize payments of definite specific bills, for support or for education of a particular character. *Matter of Plumb, supra.* The Surrogate will not under this section sign *omnibus* orders, good for a year or for an indefinite time. *Ibid.* Nor should the Surrogate permit the general guardian to pay lump sums to the ward's natural guardian. Although it is proper to direct the application of the ward's net income to its support, and to that end to have it paid to its father regularly. *Matter of Plumb,* 24 Misc. 249. Section 2348 of the Code permits the sale of an infant's real estate to provide for its maintenance and education. See *Allen* v. *Kelly,* 171 N. Y. 1, 7. The proceeds may be turned over to the general guardian, with appropriate directions as to its use. *Ibid.*, citing *Clark* v. *Montgomery,* 23 Barb. 464; Code, §§ 2746, 2846. The general guardian is amenable to the Surrogate's Court, and is answerable for the proper application of the moneys he is allowed to disburse. *Quin* v. *Hill,* 6 Dem. 39; *Houghton* v. *Watson,* 1 Dem. 299. The natural guardian is a competent person to ask for the order under this section, however. If the general guardian chooses to make the natural guardian his disbursing agent, he is liable for any misappropriation of the moneys. *Quin* v. *Hill, supra.* Where, before his formal appointment as her guardian, a father, too poor to support his daughter out of his own means, nevertheless incurred expenses for her maintenance, and after his appointment made application for leave to reimburse himself out of her property, it was held to be proper to give him leave. Every such case stands upon its own peculiar facts. The appeal is to the Surrogate's sound discretion. *Matter of Bushnell,* 17 N. Y. St. Rep. 813; *Matter of Wright,* 22 N. Y. St. Rep. 83. But if a guardian contracts for the ward's care and maintenance the liability is a personal one. The execution of such a contract "as guardian," etc., does not remove this liability. *Aldrich* v. *Moore,* 26 N. Y. St. Rep. 964; *Nethercott* v. *Kelly,* 24 N. Y. St. Rep. 171. Nor can the person contracted with look to the ward after he attains his majority. Where a guardian maintained her ward, her own child, as one of the family, it was held proper for the Surrogate, upon her final accounting, to allow her such expenditures as would have been proper to provide for by a maintenance order, had she at the outset applied for it. *Matter of Klunck,* 33 Misc. 267. In this case the Surrogate approximated the share in the family expenses incurred in the running of the house. See *Shaw* v. *Bryant,* 90 Hun, 374, aff'd 157 N. Y. 715. See also *Hyland* v. *Baxter,* 98 N. Y. 610; *Browne* v. *Bedford,* 4 Dem. 304, and cases cited; *Shepard* v. *Stebbins,* 48 Hun, 247, 252.

It is proper in certain cases for a Surrogate to appoint a guardian of property of an infant for the express purpose of disbursing a fund con-

tributed or raised for the express purpose of maintaining the child. For instance, *In the Matter of Stotesbury*, New York County, unreported, the father of a child who was an invalid, for the purpose of sending the invalid away, under the advice of physicians, for his health, borrowed money on a life insurance policy assigned for that purpose to the use of the infant. A guardian was appointed by the Surrogate to take the proceeds and to disburse them under a running order, so as to maintain the child, as long as the fund should last, in the place to which by advice of physicians he had been sent. In such a case the use of the principal of the fund was not only necessary but was contemplated in the very appointment of the guardian. There can be no question that the Surrogate had the power which he exercised in the premises. In *Matter of Bartsch*, 60 Misc. 272, Ketcham, Surr., doubted the power of the Surrogate to authorize a guardian himself to borrow on a policy; but such order had in fact been made.

Where the principal of the ward's property is encroached upon, the guardian has the burden of showing that such encroachment was necessary and proper. The advantage of securing an order under this section is manifest, as it will serve as a protection to the guardian upon his accounting. But if no order was had then the guardian must justify the payment by clear proof. *Matter of Wandell*, 32 Hun, 545, 548, citing 2 Story's Eq. Jur. § 1355; *Voessing* v. *Voessing*, 4 Redf. 360, and cases cited on p. 365; *Clark* v. *Clark*, 8 Paige, 152; *Matter of Bostwick*, 4 Johns. Ch. 102; *Kelaher* v. *McCahill*, 26 Hun, 148; *In re Clements*, 17 W. Dig. 431. Upon an accounting the considerations, that will weigh in determining whether the guardian was justified in making a particular payment, are, the amount of the income; the age of the ward; the ward's educational need; the ward's health, whether requiring more than ordinary attention or attendance; the previous station in life; also the present and probable future social standing. The rule to be applied in passing his accounts is that of fidelity and ordinary diligence and prudence in the execution of his trust. In the absence of fraud his acts will be liberally construed. *Matter of Wandell, supra.*

It is no answer to an application under § 2846, that the ward declines to reside with the guardian. The support and education of the ward is not contingent on such residence. *Matter of Wentz*, 9 Misc. 240. See § 1035 below.

§ 1034. **Limitations on the general guardian.**—The power of the general guardian to deal with the ward's property is very limited. The object of his appointment is to conserve the property until the ward is of the age to take it over. The power to lease it, for the term of his guardianship, under certain restrictions has been already referred to. But, not only will the guardian be held personally liable for any improper dealing with the trust property, but acts to the detriment of the estate will be treated as having been made without power and will not be enforced by the court. Thus, where a general guardian, who was also executor, sought by an agreement to impose a restriction on his ward's real estate which the court

held to be burdensome, and likely to impair its rental value, it was held the ward's interest could not be affected thereby, whatever the individual liability he may have incurred. *Curry* v. *Keil*, 19 App. Div. 375. He may be surcharged with loss on improvident or unnecessary sale of realty. *Matter of Nowak*, 38 Misc. 713.

The general guardian has no inherent power to convert the ward's personal property into real property. *Matter of Bolton*, 20 Misc. 532. He must apply to the Supreme Court for authority to do so. *Matter of Decker*, 37 Misc. 527. The Supreme Court may, as the Court of Chancery frequently did, permit a guardian to purchase real property for the ward's benefit, as, for example, to provide a suitable home. *Ibid.* When, however, this is done, the rule is that the original descendible or inheritable character of the property is not changed. *Ibid.*, at p. 534, and cases cited. The broad rights and powers of the Court of Chancery to sanction certain uses of an infant's money, passed to the Supreme Court, which holds them now, even over guardians appointed by the Surrogate's Court. Dayton on Surrogates (5th ed.), 819, and cases cited; *Matter of Bolton, supra.* In *Forman* v. *Marsh*, 11 N. Y. 544, the court says: "The right of the guardian to change the nature of the estate of his ward was acknowledged by the Court of Chancery at an early period, but it was restricted by two qualifications: First, that the charge should be for the manifest advantage of the infant; and second, that the right of succession to the property, in case of the death of the infant, should not be changed." See also *Horton* v. *McCory*, 47 N. Y. 21, 26; Story's Eq. Jur. § 1357.

If the guardian takes the responsibility of changing the personal property of the ward into real property, his act will be sustained only if it be such and done under such circumstances that the court would have originally upon application granted him leave to do so. *Matter of Bolton, supra*, at p. 536, and see cases cited on p. 537. See also Tyler on Infancy and Coverture, p. 260, § 175; *Matter of Decker*, 37 Misc. 527, 529.

And the infant may when he arrives at full age elect to take the land, or the money with interest (Story's Eq. Jur. § 1357; *Matter of Bolton, supra*), and if he die before his majority his sole legatee may exercise this right of election. *Matter of Bolton*, at p. 539, citing *Matter of Gilbert*, 39 Hun, 61; *Matter of Brunaman*, 67 N. Y. St. Rep. 44; *Lockman* v. *Reilly*, 95 N. Y. 64; *Bayer* v. *Phillips*, 17 Abb. N. C. 429; *Wood* v. *Mather*, 44 N. Y. 256.

The general guardian will not be permitted to profit individually in dealing with the ward's estate to the ward's prejudice. But if a guardian in socage buy in on a foreclosure sale property owned by the ward's father, and the act is in good faith, it is not void. But the court will impress a trust in favor of the children subject to equitable conditions. *O'Brien* v. *General Synod, etc.*, 10 App. Div. 605, and cases cited. And the purchase is voidable only at the instance of the ward. See *Dugan* v. *Denyse*, 13 App. Div. 214, and cases cited.

Nor can he invest in personal securities. *Matter of Decker, supra.* Thus it has been held:

"A guardian who invests in personal security assumes the risk of loss thereby and he must bear the expenses of litigation, in efforts to collect funds so invested." *Torry* v. *Frazer*, 2 Redf. 486.

"A guardian has no authority to invest upon personal security, upon bond, promissory note, or other personal security, and if he does he shall be personally answerable if the security prove defective." Dayton on Surr. (3d ed.) 521; *Bogart* v. *Van Velsor*, 4 Edw. Ch. 718, 722; *Ackerman* v. *Emott*, 4 Barb. 626.

"A guardian should not loan the money of his ward upon personal security." *Matter of Bushnell*, 17 N. Y. St. Rep. 813; *S. C.*, 4 N. Y. Supp. 472.

"The guardian has no right to invest the property of the infant in bank stock." *Ackerman* v. *Emott*, 4 Barb. 626.

When the same person acts in two separate capacities, as say administrator and guardian, and he is directed in the one capacity to pay or deliver to himself in the other capacity money or property held by him in the former capacity, he is deemed to have done so, and his sureties are liable if he is shown not to have done so. *Matter of Noll*, 10 App. Div. 356, 359, aff'd 154 N. Y. 765; Code Civ. Proc. § 2596; *Fardette* v. *U. S. F. & G. Co.*, 86 App. Div. 50. See *Matter of Maybee*, 40 Misc. 518, distinguishing the liability as conditioned by priority of appointment to either office, e. g., A, being guardian is appointed administrator, in which capacity he is not liable for money in his hands or control as guardian. But if A, being administrator is appointed guardian he is liable as guardian for moneys of the estate in his hands as such. In whatever capacity he accounts, the question seems to be whether the money received in either capacity is an asset in fact of the other trust, regardless of the capacity in which he may have originally received it.

But if a guardian receives from a trustee a security forming part of the *corpus* of the fund, which proves worthless through no act of his, as where a second mortgage was wiped out by the foreclosure of a first mortgage, the guardian is not liable to the ward. *Bumstead* v. *Sanders*, 39 N. Y. St. Rep. 618.

A guardian has the right to incur reasonable legitimate administration expenses. Thus a trust company acting as guardian was allowed sums paid to agents for collecting rents. *Garvey* v. *Owens*, 35 N. Y. St. Rep. 133.

§ 1035. **Personal relation to ward.**—A guardian is not entitled to the services or society of his ward. *Ide* v. *Brown*, 178 N. Y. 26, 31. As a rule, he has no power to make a contract binding on the person or property of the ward, unless authorized by a statute. *Ibid.*, citing *Wuesthoff* v. *Germania Life*, 107 N. Y. 580, 588, and Woerner on Guardianship, § 49.

His protection, if he do contract, is derived from his right to charge the estate for expenses or obligations necessarily and properly incurred in the discharge of his duty. *Ibid.*, citing *Warren* v. *Union Bank of Rochester*, 157 N. Y. 259.

Ide v. *Brown* involved a contract by the guardian binding the ward to live with A "during his life." Held not only not binding on the ward, but unenforceable against estate of A, who had in turn agreed to make certain testamentary provision for the child.

§ 1036. **Guardians appointed by will or deed.**

Will or deed containing appointment to be proved, etc., and recorded.

A person shall not exercise, within the state, any power or authority, as guardian of the person or property of an infant, by virtue of an appointment contained in the will of the infant's father or mother, being a resident of the state, and dying after this chapter takes effect, unless the will has been duly admitted to probate, and recorded in the proper surrogate's court, and letters of guardianship have been issued to him thereupon; or by virtue of an appointment contained in a deed of the infant's father or mother, being a resident of the state, executed after this chapter takes effect, unless the deed has been acknowledged or proved, and certified, so as to entitle it to be recorded, and has been recorded in the office for recording deeds in the county, in which the person making the appointment resided, at the time of the execution thereof. Where a deed containing such an appointment is not recorded, within three months after the death of the grantor, the person appointed is presumed to have renounced the appointment; and if a guardian is afterwards duly appointed by a surrogate's court, the presumption is conclusive. **§ 2851, Code Civil Proc.**

See also § 81 Domestic Rel. Law.

When such an appointment or designation is made by will or deed, upon its taking effect the person named has the rights and powers and is subject to the duties and obligations of a guardian. And the designation or appointment becomes from the same time valid and effectual against every other person claiming the custody and tuition of the minor, as guardian in socage or otherwise. Domestic Relations Law, § 82. This law further provides that such guardian by will or deed "may take the custody and charge of the tuition of such minor, and may maintain all proper actions for the wrongful taking or detention of the minor, and shall recover damages in such actions for the benefit of his ward. He shall also take the custody and management of the personal estate of such minor, and the profits of his real estate, during the time for which such disposition shall have been made, and may bring such actions in relation thereto as a guardian in socage might by law."

§ 1037. **The appointment.**—Section 81, formerly § 51 of the Domestic Relations Law, was amended in 1899, by adding "Either the father or mother may, in the lifetime of them both, by last will duly executed, appoint the other the guardian of the person and property of such child, during its minority." It is a power statutory in its origin (Schouler on Dom. Rel. 398), and does not exist in the absence of a statute conferring it. *Wuesthoff* v. *Germania Life Ins. Co.*, 107 N. Y. 580, 588. See *Matter of Kellogg*, 187 N. Y. 355, where a father attempted, though survived by the mother, to appoint by will third parties as such guardian, it was held,

while the appointment was void under § 51, the directions as to the trust funds given to the several infants were valid as powers in trust to be executed by such third parties. See also discussion by Bartlett, J., dissenting. In *Matter of Walker*, 54 Misc. 177, however, Brown, Surr., held the appointment of another than the surviving parent, was simply inoperative so long as he survived, and that the will should be probated, but letters of testamentary guardianship could not issue thereunder so long as he survived. See also *Matter of Waring*, 46 Misc. 222, citing *People ex rel. Byrne* v. *Brugman*, 3 App. Div. 155; *Matter of Schmidt*, 77 Hun, 201; *Griffin* v. *Sarsfield*, 2 Dem. 4. The *Waring* case was one where a woman divorced from her husband who survived her appointed a third party by will guardian of person and property of the children whose custody was awarded to her by the divorce decree. And the power to appoint by "deed" in the clause preceding this amendment is construed as meaning a testamentary instrument in the form of a deed, to operate only after the death of the parent. See *Wuesthoff* case, *supra*, and see § 2851, last paragraph. A parent cannot appoint a guardian of the estate of his child separate from the guardian of its person. *Matter of Brigg*, 39 App. Div. 485.

The Code, by § 2851, recognizes the fact that the guardians by will or deed are domiciliary guardians, appointed by "residents of the State." Our statutes relate exclusively to domiciliary guardianships under wills or deeds of residents of this jurisdiction. *Wuesthoff* v. *Germania Life Ins. Co.*, *supra*. A guardian appointed by virtue of the statute of another State, cannot exercise any authority here over the person or property of his ward. "His rights and powers are strictly local, and circumscribed by the jurisdiction of the government which clothed him with his office." *Id.*, citing *Morrell* v. *Dickey*, 1 Johns. Ch. 153.

When the will does not specify the duration of the guardianship it continues during the minority (*Matter of Reynolds*, 11 Hun, 41), and if more than one guardian is named, and no provision made as to a successor for either in case he does not serve, a failure of either to qualify vests all the powers and rights in the one qualifying. *Ibid.*

The statute provides that the surviving parent may dispose of the custody and tuition of the child during its minority "to any person or persons." So the appointment of a woman, with whom testator cohabited as his wife, as guardian of their children is proper. *Gelston* v. *Shields*, 16 Hun, 143, aff'd 78 N. Y. 275. But the appointment must be by a parent. A grandparent is not within the intent of the statute. *Fullerton* v. *Jackson*, 5 Johns. Ch. 278; *Hoyt* v. *Hilton*, 2 Edw. Ch. 202. See *Matter of Kellogg*, 187 N. Y. 355, and cases examined by Cullen, Ch. J. If a grandfather desires to provide for the maintenance and education of his minor grandchild, he can accomplish his purpose by a devise or bequest to his executors in trust, directing the application of the rents and profits, or of the income to the child's needs during minority. In such a case the executors retain and control the fund or property to the exclusion of a guardian. *Fullerton* v. *Jackson*, *supra*.

§ 1038. **Qualifying.**

Where a will, containing the appointment of a guardian, is admitted to probate, the person appointed guardian must, within thirty days thereafter, qualify as prescribed in section 2594 of this act; otherwise he is deemed to have renounced the appointment. But the surrogate may extend the time so to qualify, upon good cause shown, for not more than three months. And any person interested in the estate may, before letters of guardianship are issued, file an affidavit, setting forth, with respect to the guardian so appointed, any fact which is made by law an objection to the issuing of letters testamentary to an executor. Sections 2636 to 2638 of this act, both inclusive, apply to such an affidavit, and to the proceedings thereupon. A person appointed guardian by will may, at any time before he qualifies, renounce the appointment by a written instrument, under his hand, filed in the surrogate's office. **§ 2852, Code Civil Proc.**

The rule laid down by this section is new. Before the Code the practice was to bring a proceeding to require the guardian named to qualify in a time specified. See L. 1877, ch. 206. And prior to 1877, the guardian's right to act depended on the will and not on his qualifying. *Geoghegan* v. *Foley*, 5 Redf. 501; 2 R. S. 150, §§ 1, 2. The official oath is similar to that taken by an executor or administrator. See § 2594, Code Civ. Proc.

The fact that the appointment is made to take effect upon the happening of a contingency does not make § 2852 inapplicable. The appointee must qualify within the statutory time, regardless of whether the contingency has or has not occurred. Then when the contingency does occur he has the right to his letters. *Estate of Constantine*, 22 N. Y. St. Rep. 883.

Whenever facts exist which would in probate proceedings enable a person interested to object to the issuing of letters to an executor, and the case is one where the objection could be obviated by his giving a bond, a guardian appointed by will or deed may be required to give security for the performance of his trust. §§ 2853, 2854, Code Civ. Proc.

The letters of guardianship must issue if the person named qualifies and no objections are filed or sustained.

§ 1039. **Control of the guardian.**—The Code gives the Surrogate full power of supervision and control over such guardians. They can be compelled to file informatory or intermediate accounts and an inventory.

The provision is as follows:

Inventory and intermediate account may be required.

Upon the petition of the ward, or of any relative or other person in his behalf, the surrogate's court having jurisdiction to require security, as prescribed in the last three sections, may, at any time, in the discretion of the surrogate, make an order requiring a guardian appointed by will or by deed, to render and file an inventory and account, in the same form, and verified in the same manner as the inventory and account required to be filed annually by a guardian appointed by a surrogate's court, as prescribed in article second of this title. The order may also require such an inventory and account to be filed, in the month of January of each year thereafter. Sections twenty-eight hun-

dred and forty-two to twenty-eight hundred and forty-five of this act, both inclusive, apply to such an inventory and account, and to the filing thereof, as if the guardian had been appointed by the surrogate's court. The provisions of section twenty-eight hundred and forty-six of this act shall apply to a guardian appointed by will or deed with the same effect as if such guardian had been mentioned in said section, and the proceedings therein prescribed may be had in the case of any such guardian in the same manner as if he were a general guardian. **§ 2858, Code Civil Proc.**

The discussion of §§ 2842–2845, is applicable in this connection. The power to direct the testamentary guardian as to the infant's maintenance is given by the final paragraph of § 2855 added in 1896 by ch. 61.

§ 1040. **Removal of a guardian appointed by will or deed.**—The Surrogate's power over such guardians extends to their removal upon application of the ward, or on the ward's behalf.

Upon the petition of the ward, or of any relative or other person in his behalf, the surrogate's court, having jurisdiction to require security from a guardian appointed by will or deed, may remove such a guardian, in any case where a testamentary trustee may be removed, as prescribed in title sixth of this chapter; and the proceedings upon such a petition are the same, as prescribed in that title for the removal of a testamentary trustee. Where a citation is issued, upon a petition for the removal of such a guardian, he may be suspended from the exercise of his powers and authority, as if he had been appointed by the surrogate's court. **§ 2858, Code Civil Proc.**

The causes of removal are declared to be identical with those necessary to be alleged to secure the removal of a testamentary trustee. This is a limiting of the power Surrogates have over guardians whose authority depends wholly upon judicial appointment. *Mackay* v. *Fullerton*, 4 Dem. 153. But in construing the statute relating to the removal of testamentary trustees in this connection the courts must bear in mind the distinction between the duties of a trustee and of a guardian. For example, the term "incompetency" may have a different signification in its two applications. The idea of unsuitableness is common to both, but in relation to a guardian, it has relation not only to mental condition and moral status, but also imports that in the interests of the child in respect of nurture, care, education and safety, the court may take into consideration the relative social and pecuniary position of the guardian and the infant. *Damarell* v. *Walker*, 2 Redf. 198, 205.

The personality of the trustee is quite immaterial if he possess integrity in his trust. The relations of a guardian to his ward are more personal, and in the case cited the Surrogate observed that if a man of wealth should in a period of insanity nominate by his will a servant of unrefined habit of life the guardian of his child, the Surrogate would not hesitate to decree her removal.

The questions of fact upon an application for such a removal may be referred to a referee, who may take proof of and report the same. *Matter of King*, 42 How. 607.

§ 1041. Resignation.

A guardian appointed by will or by deed, may be allowed to resign his trust, by the surrogate's court, having jurisdiction to require security from him. The proceedings for that purpose, and the effect of a decree made thereupon, are the same, as where a guardian appointed by the surrogate's court presents a petition, praying that his letters may be revoked, as prescribed in article first of this title. **§ 2859, Code Civil Proc.**

§ 1042. **The decree revoking letters.**—Whether he is removed or resigns, the guardian may, by the decree revoking his letters, be required to account for all money and other property received by him; and to pay and deliver over all money and other property in his hands into the Surrogate's Court, or to his successor in office, or to such other person as is authorized by law to receive the same. § 2603, Code Civ. Proc.; *Phillips* v. *Liebman*, 10 App. Div. 128, 129; *Matter of Hicks*, 54 App. Div. 582. Upon the entry of the decree his powers as guardian cease. Section 2603.

Appointment of successor.

Where a sole guardian, appointed by will or by deed, has been, by the decree of the surrogate's court, removed or allowed to resign, a successor may be appointed by the same court, with the effect prescribed in section 2605 of this act; unless such an appointment would contravene the express terms of the will or deed. **§ 2860, Code Civil Proc.**

PART VIII

ACCOUNTINGS AND DISTRIBUTION

CHAPTER I

ACCOUNTING FOR THE ESTATE

§ 1043. **The obligation to account.**—The obligation to account for every administrative act or neglect to act rests upon all who undertake to administer an estate or a fund. See Schouler on Ex'rs and Adm'rs (2d ed.), 631. This obligation may disappear if the representative and beneficial title be completely merged. E. g., A is widow, sole executrix and sole legatee of B. Having paid all debts and funeral expenses, there is no one at whose instance she may be compelled to account and there is no occasion for her to do so. *Blood* v. *Kane*, 130 N. Y. 514; *Matter of Kinsella*, 50 Misc. 235.

Generally speaking, where there is a "person interested" or a "creditor" there is a right to an accounting. It goes without saying when there is a beneficiary or *cestui que trust*.

This obligation to account is usually expressly set forth in the bond which administrators or like persons are required to file, but it is not dependent upon any such express stipulation. It rests upon executors, administrators, administrators with the will annexed, temporary administrators, testamentary trustees, guardians by will or deed and representatives of deceased executors, administrators, guardians or testamentary trustees. This is so much ingrained in the policy of our law that the courts have held a provision in a will invalid which attempted to free an executor from the obligation to account. *Matter of Gilbert*, 11 N. Y. Supp. 743. The sections of the Code about to be discussed provide, in some detail, the procedure whereby the Surrogate or some person interested beneficially or otherwise in the estate may enforce this obligation.

The Code prescribes

(*a*) Who may be made to account;

(*b*) Who may require such accounting;

(*c*) When such accounts may or must be rendered;

(*d*) The procedure upon such accounting.

§ 1044. **What is an accounting?**—An account, for the purposes of this

discussion, may be described as a statement in writing, verified, containing, in concise detail, the history of the dealings with the trust estate or fund. It embodies a narrative of the representative's conduct as such (using the term to include everyone whom a Surrogate may require to account) in relation to the debtors to, the creditors of, or the persons interested in the estate, together with a full statement of every receipt and expenditure, grouped as to their character in appropriate schedules. It should indicate the growth or shrinkage of the property administered upon, its original and present character and value, and the balance, if any, available for distribution. Where the administration has been pursuant to a testamentary instrument it should show compliance therewith.

It should be prepared in contemplation of the right reserved to certain persons, or classes of persons, to test its several items in respect of accuracy or propriety, by means of objections to be litigated before the Surrogate, or, in proper cases, his referee.

An accounting is the special proceeding in which such an account is subjected to the Surrogate's judicial scrutiny. This scrutiny does not always take the form of any final determination. When it does the account is said to be judicially settled. As will be noted below, some accounts are not capable of judicial settlement, but are by the statute expressly declared to be intermediate or informatory merely, not open to be attacked or impeached, but merely intended to disclose the status of the fund at a particular time.

§ 1045. **Kinds of accounts.**—This suggests the first distinction, which is between accounts intermediate, and those which are, somewhat inexactly, called final. The adjectives are used arbitrarily.

> The expression "*intermediate account,*" denotes an account filed in the surrogate's office, for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands, and not made the subject of a judicial settlement. **§ 2514, Code Civil Proc. subd. 9.**
>
> The expression "*judicial settlement,*" where it is applied to an account, signifies a decree of a surrogate's court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes specified in the statute; and an account thus made conclusive is said to be "*judicially settled.*" **§ 2514, Code Civil Proc. subd. 8.**

A final account is one that is capable of being judicially settled. It need not be final in the sense of being the last account of the one accounting. An executor or testamentary trustee may, thus, render and have judicially settled several final accounts.

Accounts may also be either *voluntary* or *compulsory.*

A voluntary account, as the term implies, is one rendered by the representative or trustee or guardian of his own motion; while a compulsory account is one rendered at the direction of the Surrogate, of his own motion, or at the instance of a person entitled to require it.

§ 1046. **The Surrogate's jurisdiction.**—The jurisdiction of the Supreme Court, as successor to the Court of Chancery, over the action for an ac-

counting, in which any trustee (using the term generically) may be called to account for his trust, is clear and has been repeatedly asserted and sustained. But it needs no discussion in this work further than to observe, in the first place, that it is not an exclusive jurisdiction by any means, but rather concurrent, so far as those are concerned over whom the Surrogate is given jurisdiction by the Code. See *Matter of Arkenburgh, No.* 2, 11 App. Div. 193.

In the second place, it has become the well-settled policy of the Supreme Court not to exercise its power at all unless the necessity for superseding the Surrogate's jurisdiction is clear. *Hard* v. *Ashley*, 117 N. Y. 606, 611; *Hynes* v. *Alexander*, 2 App. Div. 109, 111; *Matthews* v. *Studley*, 17 App. Div. 303; *Borrowe* v. *Corbin*, 31 App. Div. 172, and cases cited (followed in *Meeks* v. *Meeks*, 51 Misc. 538); *Westerfield* v. *Rogers*, 63 App. Div. 18, 21; *Garlock* v. *Vandevort*, 128 N. Y. 378; *Post* v. *Ingraham*, 122 App. Div. 738; *Bushe* v. *Wright*, 118 App. Div. 320, 328. If it does act it will apply the same rules and principles that would control the Surrogate. So, under § 2606, *Volhard* v. *Volhard*, 119 App. Div. 266. So under § 2729; *Matter of Smith*, 120 App. Div. 199; *Matter of Nutting*, 74 App. Div. 468. The reason lies in the fact that the Surrogate's Court is a tribunal constituted expressly to take jurisdiction in the premises, and has been given powers appropriate and adequate for the purpose. *Chipman* v. *Montgomery*, 63 N. Y. 221; *Uhlman* v. *N. Y. Life Ins. Co.*, 109 N. Y. 421. The settlement of decedents' estates is peculiarly within its cognizance, and "a court of equity will not take cognizance of an action for the settlement of an estate, disconnected with the enforcement of a special and express trust, unless special reasons are assigned, and facts stated to show that complete justice cannot be done in the Surrogate's Court. *Chipman* v. *Montgomery, supra,* headnote and opinion by Allen, J., at p. 235; *Matter of Fogarty*, 117 App. Div. 583, and cases at p. 585; *Shorter* v. *Mackey*, 13 App. Div. 20, and cases cited; *Levett* v. *Polhemus*, 86 App. Div. 495; *Widmayer* v. *Widmayer*, 76 Hun, 254; *Seymour* v. *Seymour*, 4 Johns. Ch. 409. If no proceeding be pending in the Surrogate's Court, the Supreme Court in a proper case will not refuse jurisdiction. *Ludwig* v. *Bungart*, 48 App. Div. 613; *Steinway* v. *Von Bermuth*, 59 App. Div. 261; *Ludwig* v. *Bungart*, 33 Misc. 177, 179; *Meeks* v. *Meeks*, 34 Misc. 465. If it be necessary to stay proceedings for an accounting in the Surrogate's Court, pending an action for the same relief in the Supreme Court, application must be made to the Surrogate. *Matter of Llado*, 50 Misc. 227. The Supreme Court has no power to stay such a proceeding in his court. *Rutherford* v. *Meyers*, 50 App. Div. 298; *Hamilton* v. *Cutting*, 60 App. Div. 293.* And it is, accordingly, not optional with executors or administrators, accounting on their own motion, or at the instance of creditors, legatees, or next of kin, to pass by the Surrogate's Court without assigning particular and sufficient reason. *Ibid.; Matthews* v. *Studley*, 17 App. Div. 303, 312; *Hard* v. *Ashley*, 117 N. Y. 606, 611. Of course, if a proceeding be already pending in the Supreme Court, the Surrogate may properly refuse to require

* But see § 1062 below.

an accounting in his court of the same acts. *Matter of De Pierris*, 79 Hun, 279. Or, if prior to an accounting, it is clear there must first be a determination of an issue which the Surrogate cannot try, then he may dismiss the petition pending in his court. *Matter of Fogarty*, 117 App. Div. 503, citing *Matter of Spears*, 89 Hun, 49. The Surrogate's jurisdiction is definite. Section 2472 gives him power to settle the accounts of executors, administrators, testamentary trustees and guardians, "in the cases, and in the manner prescribed by statute." *Ibid.* But he has no jurisdiction over an accounting in respect of a fund not belonging to an estate over which he has jurisdiction. For example, the proceeds of a fire insurance policy upon real property belong to the heirs. While the administrator may sue for, and recover such proceeds he holds them as trustee of the heirs and not as representative of the decedent, and therefore cannot be made to account in the Surrogate's Court for such proceeds. *Matter of Kane*, 38 Misc. 276, 280; *Lawrence* v. *Niagara F. I. Co.*, 2 App. Div. 267; *Wyman* v. *Wyman*, 26 N. Y. 253, 258. The Supreme Court will retain jurisdiction if the issue necessarily underlying the adjudication is one the Surrogate cannot try, e. g., equitable set-off. *Meeks* v. *Meeks*, *supra*. Or where the title of an assignee of a legacy is involved. *Citizens' Cent. Nat. Bank* v. *Toplitz*, 113 App. Div. 73.

The decision of the Surrogate, embodied in his decree, is conclusive as *res adjudicata*, between the same parties in any subsequent controversy on the same point, even in the Supreme Court. *Westerfield* v. *Rogers*, 174 N. Y. 230, 243; *Matter of McGarren* (or *McGoughran*), 124 App. Div. 312.

The sections of the Code relating to the several cases in which such accounts may be settled are exhibited in the following table:

Table of Accountings

	Intermediate voluntary	Intermediate compulsory	Final voluntary	Final compulsory
By Executor or Administrator.	§ 2725	§ 2725, subds. 1–4	§ 2728	§§ 2726, 2727
Temporary Administrator.				§ 2726
Executor or Administrator of deceased Executor, Adm'r, G'dn or test. trustee.			§ 2606	§ 2606
General Guardian of Person.			§§ 2848, 2849	§§ 2837, 2848
General Guardian of Property.		Annual inventory account §§ 2842, 2845	§ 2849	§§ 2837, 2847
Guardian by Will or Deed.		§ 2855	§ 2856	§ 2856
Testamentary Trustee.	§ 2802	§ 2803	§ 2810	§§2807–2809
Ex'r, Adm'r, G'dn or Test. Trustee whose letters have been revoked.			§ 2728	§ 2605
Ancillary Ex'r or Adm'r.	§ 2702	§ 2702	§ 2702	§§ 2700–2702
Executor *de son tort*.				§ 2706
Freeholder in proceedings to dispose of decedent's real estate.				§ 2726

The jurisdiction to settle accounts is a local jurisdiction. It belongs "exclusive of every other Surrogate's Court" to the Surrogate who granted the letters to the one accounting, or, as it sometimes reads, the "Surrogate's Court having jurisdiction to require security." *Duffy* v. *Smith*, 1 Dem. 202, 207, 208; § 2476, Code Civ. Proc. It is no exception to this rule that such Surrogate may require an accounting by the executor or administrator of one to whom he issued letters, even though such representative was appointed by another Surrogate, for the accounting he may require is limited solely to the estate administered under the letters he himself granted. *Popham* v. *Spencer*, 4 Redf. 399, 401.

§ 1047. **Intermediate voluntary accountings.**

A. A representative.—Section 2725 of the Code provides, in its first paragraph, that "an executor or administrator, at any time, may voluntarily file in the Surrogate's office an intermediate account, and the vouchers in support of the same." Section 2802 of the Code similarly provides, in its first paragraph, that "any trustee created by any last will and testament, or appointed by any competent authority to execute any trust created by such last will and testament, may at any time file an intermediate account." He may also "annually render and finally judicially settle his accounts." These annual accounts, passed by the Surrogate, are conclusive upon those cited, as to the amounts from time to time involved and the payments made. *Bowditch* v. *Ayrault*, 138 N. Y. 222, 231; *Matter of Hoyt*, 160 N. Y. 607, 618. Section 2702 of the Code makes applicable to ancillary executors or administrators the provisions, in this respect, relating to executors and administrators generally. There seems to be no provision, however, for a voluntary intermediate accounting by temporary administrators or by guardians. A further word as to the conclusiveness of the decree. See *Matter of Elting*, 93 App. Div. 516, and *Glover* v. *Holley*, 2 Bradf. 291. These cases hold that where, e. g., payments of income have been made, accounted for, and the account settled, and it is afterwards claimed they were not proper charges on income, they must be deemed settled by former decrees and remain unaffected by the subsequent decision, if made, that thereafter such payments are not proper income charges. See cases cited in *Matter of Elting*, *supra*, at p. 518.

Of course, this conclusiveness applies to and binds only parties to the former accountings. § 2813, Code Civ. Proc. In the *Elting* case a remainderman, infant not *in esse* when the former decrees were made, was likewise held concluded, on the authority of *Rhodes* v. *Caswell*, 41 App. Div. 229.

But in *Matter of Hurlburt*, 51 Misc. 263, Thomas, Surr., states the rule in a more limited form: "The decree of a Surrogate is not conclusive upon the parties in *establishing a rule of law* which will control in the later administration of the estate." But, in construing a will his power is limited by the exigencies of the particular proceeding and the facts then before him. So he permitted capital account to be made good from income ac-

count on the final settlement where in order to pay income beneficiaries on an intermediate settlement such capital had been drawn upon. See cases cited at p. 266.

B. Testamentary trustee.—Section 2802 of the Code is as follows:

> *Intermediate accounting; when voluntary; general provision.*
>
> Any trustee created by any last will and testament, or appointed by any competent authority to execute any trust created by such last will and testament, may at any time file an intermediate account, and may also annually render and finally judicially settle his accounts before the surrogate of the county having jurisdiction of the estate or trust, in the manner provided by law for the final judicial settlement of the accounts of executors and administrators; and may for that purpose obtain and serve in the same manner the necessary citations requiring all persons interested to attend such final settlement; and the decree of the surrogate on such final settlement may be appealed from in the manner provided for an appeal from a decree of a surrogate's court on the final settlement of the accounts of an executor or administrator, and the like proceedings shall be had on such appeal.
>
> In all such annual accountings of such trustees, the surrogate before whom such accounting may be had shall allow to the trustee or trustees the same compensation for his or their services, by way of commission, as are allowed by law to executors and administrators, besides their just and reasonable expenses therein; and also the additional allowance provided for in section 2562 of this act.
>
> The decree of the surrogate on such final annual settlement of an account provided for in this section, or the final determination, decree or judgment of the appellate tribunal in case of appeal, shall have the same force and effect as the decree or judgment of any other court of competent jurisdiction on the final settlement of such accounts, and of the matters relating to such trust which shall have been embraced in such accounts, or litigated or determined on such settlement. **§ 2802, Code Civil Proc.**

Section 2802 emphasizes the extent of the Surrogate's power over testamentary trustees. By virtue of title 6 of ch. 18, as well as of §§ 2472 and 2481, he now has jurisdiction over their accounts, to hear and determine all issues arising on their account, to accept their resignation, to remove them for misconduct, to appoint a successor, and has in short in these matters all the powers of a court of equity. *Gladding* v. *Follett*, 2 Dem. 58, 65. The power to determine controversies arising on the accounting is given by § 2812, *q. v.* Section 2802 by its final paragraph makes the decree of the Surrogate of the same force and effect as the decree or judgment of any other court of competent jurisdiction upon the final settlement of the account, and of all matters relating to the trust which have been embraced in such an account, or litigated or determined on such settlement. Moreover, § 2802 gives the Surrogate the same powers or authority in reference to testamentary trustees as he has in regard to executors or administrators. *Matter of Roosevelt*, 5 Redf. 603; *Van Sinderen* v. *Lawrence*, 50 Hun, 272. But this section does not divest the Supreme Court as a court of equity of its concurrent jurisdiction (*Matter of*

Valentine, 3 Dem. 563, discussing L. 1882, ch. 185 and L. 1884, ch. 408, i. e., § 2818, Code Civ. Proc.), although the court will not exercise its jurisdiction when similar proceedings are pending before the Surrogate's Court. *Cass* v. *Cass*, 41 N. Y. St. Rep. 36. The Surrogate's jurisdiction is limited to *testamentary* trustees. He cannot take or settle the account of trustees under a deed. *McSorley* v. *Leary*, 4 Sandf. Ch. 414.

§ 1048. **Intermediate compulsory account.**—The Surrogate's jurisdiction to compel the filing of an intermediate account extends so as to include nearly every one to whom he may issue letters. This is shown by the foregoing table. Where such an account is filed voluntarily there is no particular object in laying down any rule as to its form and contents; it need only be as full and accurate as the one filing it desires, for it is chiefly for his protection that the right to file it is given.

But where it is filed compulsorily, the Surrogate may impose any reasonable requirement as to its form and contents. See appendix to 6 Dem., p. 506, and *In re Dwight's Estate*, 9 N. Y. Supp. 927, 928. Wherever the Surrogate has the power to compel the representative of an estate to render an account, that involves the authority to consider and pass upon its accuracy. *Matter of Ritch*, 2 Redf. 330; *Tucker* v. *McDermott*, 2 Redf. 312. For if he had not this power, the direction to file an account could be evaded by filing an untrue, or an insufficient account. Surrogate Ransom accordingly asserted the right (6 Dem. 512), to compel the accounting party to submit to an examination, of his own motion, just as if objections had been filed and the account contested. He based this on the obvious fact that without the exercise of such power the power to compel the filing of an account which might be false or defective would fail in many cases to benefit the estate or the parties interested therein.

The Surrogate's order is a judicial mandate "to render an account of his proceedings, not to the extent he shall deem proper, nor a part of his proceedings, but his proceedings as executor from the day he qualified until the day he answers the order." *In re Jones*, 1 Redf. 263.

The form and contents of the account to be filed are admirably summarized by Surrogate Ransom (*Matter of Dwight*, 9 N. Y. Supp. 927, 928), where he observes:

"The account required by the order of the Surrogate is an intermediate account. . . . The account should state if an inventory has been filed; and, if none has been filed, the account itself should furnish the information usually thus supplied. It should likewise state whether or not advertisements for claims have been published, what claims have been presented, what allowed, and what rejected; and the time and manner in which they were rejected or disputed, and the reason therefor. Also, what claims have been presented and allowed since the expiration of the publication of the advertisement for claims. The accountant should then proceed to credit himself with funeral charges and expenses of administration, with moneys paid to creditors (naming them) and payments to legatees or next of kin. He should state the age of legatees and next of kin, if any

are minors, and whether they have guardians, and, if so, their names and places of residence, and how appointed. If there is any other fact which has occurred, as part of his proceedings, which may affect the estate or the rights of any distributee, or his own rights, he is bound to state it. He must not only state in what character his payments were made, as whether to creditors, legatees, or next of kin, or for expenses for funeral charges or of administration, distinctly, but he must produce vouchers supporting each payment; or, in cases of claims under $20.00, where no voucher is produced, he must make and present, in lieu of voucher, his own oath positively to the fact of payment, when made, and to whom. Unless the order of the Surrogate, requiring an executor or administrator to render an account of his proceedings, is obeyed in this manner, as plainly indicated by the statute, he will not have made the proper response to the order."

It has very properly been observed that the same degree of strictness in regard to an intermediate account will not be exercised as in the case of one which is to be the subject of judicial settlement. But the power of the Surrogate, where the circumstances seem to call for it, to insist upon the filing of such an account as the statute contemplates, is clear. He may do so of his own motion, if he desire. *Anon.*, 14 N. Y. St. Rep. 490. The statute contemplates an account that will disclose the acts of the person and the condition of the estate. § 2514, Code Civ. Proc., subd. 9.

The former statutes expressly provided for an examination of the representative. *Tucker* v. *McDermott*, 2 Redf. 312, 316. In this case the Surrogate referred the account to an auditor. This it would seem he had no power, or would now have no power, to do. Such power was in fact expressly denied in *Matter of De Russy*, 14 N. Y. Supp. 177, aff'd 128 N. Y. 619. This does not mean the Surrogate cannot refer, under § 2546 for his own information, any question of fact involved. *Estate of Scofield*, 3 Law Bull. 37. A *proper* account can be compelled. The proceeding is a special proceeding, against which the statute may run (*Matter of Hale*, 6 App. Div. 411, 413), and while of course a final account can be ordered, and judicially settled at the instance of proper parties, this fact should not be taken as divesting the Surrogate of the substance, and leaving him but the shadow of the power given by § 2725.

It may be added, apropos of the statement that the filing of an intermediate account, on the motion of the Surrogate, is a special proceeding, that the Surrogate should not require such an account if it be made to appear that it is unnecessary, or will not benefit the estate, or any person interested. Thus where it was shown that the executors had actually made distribution and adjusted their accounts with the parties in interest, the Appellate Division in the First Department reversed a Surrogate's order for the filing of an intermediate account. *Matter of Hale, supra.*

§ 1049. **Same subject—Cases when proper.**

A. As to representatives.

In either of the following cases, the surrogate may, in his discretion make

an order, requiring an executor or administrator to render an intermediate account:

1. Where an application for an order, permitting an execution to issue on a judgment against the executor or administrator, has been made by the judgment creditor, as prescribed in section eighteen hundred and twenty-six of this act.

2. On the return of a citation, issued on the petition of a judgment creditor, praying for a decree, granting leave to issue an execution on a judgment rendered against the decedent in his lifetime, as prescribed in section thirteen hundred and eighty-one of this act.

3. On the return of a citation, issued on the petition of a creditor, or person entitled to a legacy, or other pecuniary provision, or a distributive share, praying for a decree directing payment thereof, as prescribed in section twenty-seven hundred and twenty-two of this act.

4. Where eighteen months have elapsed since letters were issued, and no special proceeding, on a petition for a judicial settlement, of the executor's or administrator's account is pending. **§ 2725, Code Civil Proc., in part.**

Former §§ 2722, 2723, consolidated.

The reasons for these subdivisions are obvious.

Subdivision 1. There is no object in permitting execution to issue against the executor or administrator, as such, unless he has funds or property available to satisfy the judgment. *Matter of Clark*, 2 Abb. N. C. 208; *Matter of Thurber*, 37 Misc. 155.

The power to direct the filing of an intermediate account is of like nature with the other powers to make inquiry as to the debts and assets which is conferred upon the Surrogate by § 1826, *q. v. Matter of Cong. Unitarian Soc.*, 34 App. Div. 387, 388. The Code contemplates no preferential rights under the execution; but only that the one applying for leave to issue it may have his just proportion of the available assets. *Schmitz* v. *Langhaar*, 88 N. Y. 503. The Surrogate is the one to determine what that just proportion is. *Sippel* v. *Macklin*, 2 Dem. 219. And this is practically the only satisfactory way by which he can arrive at such a determination. *Melcher* v. *Fisk*, 4 Redf. 22; *St. John* v. *Voorhies*, 19 Abb. Pr. 53; *Hauselt* v. *Gano*, 1 Dem. 36, 38.

Subdivision 2. The reason is similar for directing an intermediate account when application is made under § 1381 for a decree granting leave to issue execution, under a judgment secured against a decedent in his lifetime, against the decedent's estate. Upon the information such account may give him usually hinges his determination whether or not to make the decree prayed for. He has power to make "such a decree in the premises as justice requires." § 1381, Code Civ. Proc., subd. 2.

Subdivision 3. The reason for this subdivision may be found in the language of § 2722 which requires a dismissal of the petition to compel payment of a claim, where it is not proved "to the satisfaction of the Surrogate, that there is money or other personal property of the estate, applicable to the payment or satisfaction of the petitioner's claim," etc. The executor by this intermediate account affords the court the informa-

tion it requires. *Matter of Macaulay*, 94 N. Y. 574, 579. A widow having a bequest in lieu of dower is covered by the provision of this subdivision. *Matter of Tisdall*, 110 App. Div. 857.

Subdivision 4 gives the Surrogate power of his own motion to stir up inactive representatives. It is an important power and one which it is in the interest of all beneficiaries of decedents' estates that he should possess. Many of the controversies which arise upon the judicial settlement of accounts are traceable to the long delay in securing judicial scrutiny and sanction of the conduct of the representative. It would be a wise rule were all Surrogates to bring to the attention of representatives the fact that eighteen months have elapsed since the issuance of letters and that no accounting has been had, and specify the sections of the Code applicable to the case. It would in the end facilitate the business of the court, and might operate to save to many estates the consequences of the conduct of executors and administrators who have, perhaps ignorantly, or under improper advice, been making investments or disbursements forbidden by law, or otherwise incurring liabilities to the persons interested in the estate.

§ 1050. **Same—Objections to intermediate accounts.**—Objections may be filed, to an intermediate account, and litigated. The Code expressly so provides:

> And any party may contest an intermediate account rendered under section twenty-seven hundred and twenty-five of this act in case the same shall not be consolidated pursuant to section twenty-seven hundred and twenty-seven of this act. **§ 2728, Code Civil Proc.**, in part.

And see *Estate of Liesel*, 18 N. Y. St. Rep. 392. Section 2562 empowers the Surrogate to allow the representative, "upon an intermediate accounting required by the Surrogate" for counsel fees and other expenses, "not exceeding ten dollars for each day *occupied in the trial*, and necessarily occupied in preparing his account for settlement, and otherwise preparing *for the trial.*" The words "for settlement" of course do not relate to the intermediate account, which cannot be judicially settled, but the section clearly contemplates some possible controversy over an intermediate account. The only way to controvert an account is by filing objections. In the case of an intermediate account the objections must be confined to the question of sufficiency under the Code (§ 2514, subd. 9), as, for instance, that the account does not disclose the acts of the person filing in a given respect, or in any respect, or that it does not reveal the condition of the estate. Or if the vouchers, or the affidavit, required by § 2729 are not filed with the account, that might be a proper ground of objection. See *Buchan* v. *Rintoul*, 70 N. Y. 1, 3.

It has been held that where it appears upon an intermediate accounting that the accounting representative has wasted or lost funds or property of the estate, he may be charged therewith. *Estate of Silverman*, Law Journal, November 27, 1895, and cases cited.

§ 1051. Same.

B. As to general guardians.—The table in § 4, *ante*, indicates that general guardians are amenable to a compulsory intermediate accounting. This is true in this sense. The sections specified in the table relate to the annual inventory and account which such guardians are required to file. This annual account is in effect intermediate. The Surrogate is given power by § 2845 to compel the guardian to supply any deficiency which, on the examination to be made under § 2844, appears in the account filed, or to file "a more full or satisfactory account. This fixes the character of this account. It is clearly not a final account, nor is it intended to be judicially settled. The Court of Appeals has explicitly held (*Matter of Hawley*, 104 N. Y. 250), that it is intended merely to inform the court as to the manner in which the guardian is discharging his trust; and the court describes it as an intermediate account incapable of judicial settlement, and denied the right, consequently, to fix or allow commissions thereupon. It is to be noted that these proceedings are *ex parte*, wholly dependent upon the Surrogate. *Welch* v. *Gallagher*, 2 Dem. 40.

Section 2844 gives the Surrogate power to appoint a person specially to examine, under his direction, all inventories and accounts of guardians filed since the first day of February of the preceding year. In New York County this has been availed of and Rule 21, *q. v.*, of that court covers the practice in case that person, so appointed, certifies that a guardian has made no report or that the report is not satisfactory.

If the guardian fail to comply with the subsequent order of the Surrogate, the latter will appoint a special guardian to petition for his removal.

C. As to guardians by will or deed.—Section 2855, dealing with guardians by will or deed, defines this annual account as intermediate, and makes applicable §§ 2842–2845 to such guardians. But in case of such guardians the proceeding is not *ex parte*, but the order is made upon petition of the ward, or of any relative or other person in his behalf. § 2855, Code Civ. Proc.

D. As to testamentary trustees.—Section 2803 gives the Surrogate power to require a testamentary trustee to render an intermediate account "upon petition of a person interested, absolutely or contingently in the estate or funds . . . . or in the application thereof, or of the income or other proceeds thereof." *Matter of Jackson*, 16 Week. Dig. 345.

> *Intermediate accounting; when compulsory.*
>
> Upon the petition of a person interested, absolutely or contingently, in the estate or fund in the hands of a testamentary trustee, or in the application thereof, or of the income or other proceeds thereof, the surrogate may, in his discretion, make, at any time, an order requiring a testamentary trustee to render an intermediate account. **§ 2803, Code Civil Proc.**

The distinction between the powers given by these two sections is an important one. Section 2514, Code Civ. Proc., by subd. 9, defines an intermediate account as "an account filed in the Surrogate's office, for the

purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands *and not made the subject of a judicial settlement.*"

The expression "judicial settlement" (see § 2514, subd. 8) where it is applied to an account signifies "a decree of a Surrogate's Court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes or for certain purposes specified in the statute."

Thus, it is clear that an intermediate account is one made during the execution of the trust. Upon such an account no decree is required, and the Surrogate has no jurisdiction to make any. *Matter of Hawley*, 36 Hun, 258, 262, reversed in another particular in 100 N. Y. 206. Intermediate accounts are "intended merely as landmarks along the line of the execution of the trust and are solely for the benefit of the trustee." But judicial settlements of accounts are had upon notice to all parties interested and contemplate a trial, a judicial determination and a judgment, and they are conclusive upon all who have notice. *Ibid.* This power to compel an intermediate account is not contingent upon allegations of fraud or misconduct on the part of the trustee. A person interested absolutely or contingently in the estate or fund in the hands of a testamentary trustee, or interested in the application thereof, or of the income or other proceeds thereof, has a right even though the trustee is acting in good faith and is exercising the discretion vested in him wisely and properly, to call upon him from time to time to disclose the nature and character of the property in his hands constituting the trust fund, to show its value, the income derived therefrom, and the expenses which the trustee is incurring in its management, for the purpose of being able to watch over and look after his interest. *Hancox* v. *Wall*, 28 Hun, 214, 218. The Surrogate may, in his discretion, grant or deny him such disclosure.

In *Matter of McCarter*, 94 N. Y. 558, 561, the Court of Appeals emphasizes this right of a person interested in the trust fund, and held a petition to be sufficient which set out the facts that the petitioner was a person interested in the trust, alleged that he was by the terms of the will entitled to the interest arising from the trust fund, that it was so invested as to yield an annual income of which at least $337.75 was in the hands of the trustee and that he refused to pay it over to the petitioner, and that more than one year had elapsed since the probate of the will, and that there had been no judicial settlement of the account of the trustee. These allegations (in the absence of the dispute of the validity or legality of the claim herein below discussed) were held to be ample to justify the Surrogate in hearing allegations and taking proofs and in making the usual decree.

As has been noted, however, the trustee may oust the Surrogate of his jurisdiction by filing a verified answer setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality, as required by § 2805. In the absence of such an answer the Surrogate must order the account to be filed. It has been held

to be immaterial that an action is pending in the Supreme Court between the trustee and the petitioner involving conflicting claims to the fund in question. *Estate of McCarter*, 18 Week. Dig. 433.

It has further been held that such an account may be made the subject of objection and inquiry, but the inquiry will be limited to testing its accuracy; all questions of conduct and propriety of expenditures, etc., must be deferred until a judicial settlement. *Glaskin* v. *Sheehy*, 2 Dem. 289, Rollins, Surr.

E. As to ancillary executors or administrators.—Section 2702 makes applicable to a person holding ancillary letters all provisions of ch. XVIII relating to the rights, powers, duties and liabilities of executors and administrators, except those relating to the disposition of a decedent's real estate. If then the conditions described in any subdivision of § 2725 exist, as it is conceivable some of them might exist, the Surrogate may direct, of his own motion, and in his discretion, the filing of an intermediate account. Such occasions are of rare occurrence.

§ 1052. **Voluntary final accounts.**—The third column in the table in § 4, *ante*, indicates three classes who are not given an absolute right to a voluntary judicial settlement of their accounts.

The first is a temporary administrator. *Bible Society* v. *Oakley*, 4 Dem. 450. When an executor under the will, or a permanent administrator is appointed, it is his duty to require the temporary administrator to account. The case may be supposed, however, of a temporary administration pending a protracted contest, where it may become necessary for the temporary administrator to resign and be discharged and for another temporary administrator to be appointed. A Surrogate would be sustained under such circumstances in receiving and settling his voluntary account, as he would that of a general administrator, under § 2605. Usually the successor or the permanent representative can be relied upon to require a settlement in order to fix definitely the amount with which he is himself to be chargeable. Moreover, even were a Surrogate to receive and settle the voluntary account of a temporary administrator this could not deprive the permanent representative when appointed or even the succeeding temporary administrator of his right to compel a second judicial settlement.

The second class is the freeholder who may be appointed under § 2774* in certain emergencies to execute a decree for the mortgage, lease or sale of a decedent's property to pay his debts. His bond which he was required to file only requires him to account "whenever he is required to do so, by a court of competent jurisdiction."

The third class, an executor *de son tort*, obviously will not seek a voluntary settlement of his account. But, as in the treatise on Reptilia in the Emerald Isle, it may be noted that the Decedent Estate Law provides, in § 112, that executors *de son tort* are abolished!

§ 1053. **Same subject—Who can so account.**—It is now necessary to

*Section 2767 repealed, but § 2774 implies retention of power, as does §2726.

enumerate the Code provisions permitting voluntary accountings by the various persons who may be entitled to begin the proceeding.

A. Executors and administrators.—These representatives are given ample opportunity of securing a judicial settlement of their accounts. It is provided that:

> In either of the following cases, an executor or administrator may present to the surrogate's court his account and a written petition, duly verified, praying that his account may be judicially settled; and that the sureties in his official bond or the legal representatives of such surety and all creditors or persons claiming to be creditors of the decedent, except such, as by vouchers annexed to the account filed, appear to have been paid, and the decedent's husband or wife, next of kin and legatees, if any; or, if either of those persons has died, his executor or administrator, if any, may be cited to attend the settlement:
>
> 1. Where one year has elapsed since letters were issued to such executor or administrator.
>
> 2. Where notice requiring all persons having claims against the deceased to exhibit the same, with the vouchers thereof, to such executor or administrator has been duly published according to law. **§ 2728, Code Civil Proc.,** in part.

(See § 2743, *post.*)

These provisions are sufficiently explicit. It is essential that one of the two cases specified exist. As to the expiration of one year from letters, the object is to safeguard against proceedings to revoke probate, as well as to avoid an accounting before the time when debts may have been liquidated and legacies be payable. See, as to construction of this first subdivision, *Matter of Bronner*, 30 Misc. 31; *Matter of Lawson*, 36 Misc. 96; *Matter of Lansing*, 37 Misc. 177. While the Code intimates that as soon as notice is published an account may be filed (*Matter of Crowley*, 33 Misc. 624), yet only an administrator in intestacy can progress such account to distribution, by operation of § 2743. See *Matter of Lawson*, 36 Misc. 96, and *post*, Distribution. Hence executors, or administrators c. t. a. are required in practice to wait one year. There is one other case provided: An executor or administrator who has been cited to a compulsory accounting under §§ 2726 and 2727 may on the return of the citation issued in such proceeding present a petition such as is prescribed in § 2728 provided one year has expired since his letters issued to him. § 2727, Code Civ. Proc., quoted *post*. When this occurs the hearing on the first citation is adjourned till the return day of the citation issued on the petition of the representative. Then, on such return day, the involuntary and voluntary proceedings are consolidated, the Surrogate retaining in the consolidated proceeding any power he could exercise in either of the proceedings consolidated. *Ibid.; Estate of James Mulry*, N. Y. Law Journal, March 14, 1900; *Matter of Hodgman*, 10 N. Y. Supp. 491; *Matter of Shipman*, 82 Hun, 108, 112. Proceedings not of exactly similar scope must not be consolidated. *Matter of Wood*, 34 Misc. 209.

A voluntary accounting proceeding terminates with the death of the

accounting person. *Pease* v. *Gillette*, 10 Misc. 467. See *Herbert* v. *Stevenson*, 3 Dem. 236. Also, *Matter of Schlesinger*, 36 App. Div. 77; *Matter of Steencken*, 51 App. Div. 417; *Matter of Koch*, 33 Misc. 672. But by amendment to § 2606, quoted below, full provision is made for reviving such proceeding. If one of two accounting executors die before the decree, it was, before this amendment, held that the Surrogate could enter no decree charging a liability upon the deceased executor, but only fix the amount of property in the hands of the survivor, and provide for its being distributed or safeguarded as might seem wisest. *Matter of Steencken*, *supra*. See *Matter of Tredwell*, 85 App. Div. 570.

An administrator with the will annexed, it has been held, need not wait until a year has elapsed since letters issued to himself. *Matter of Burling*, 5 Dem. 47, 49; *Cuthbert* v. *Jacobson*, 2 Dem. 134. This is based on the theory that he continues the previous administration. It would seem, assuming the theory to be correct in this connection, that one year should have elapsed since letters issued to the original representative, whom he succeeds. This was not raised in the case cited. In *Matter of Crowley*, 33 Misc. 624, Thomas, Surr., held that he had no power to *compel* the second representative to account until a year expired from the date letters issued to him, following *In re Menck*, 5 N. Y. St. Rep. 341. In this case the original administration had continued seven years.

Section 2728 prescribes further who are proper parties to such an accounting, who may contest the account, and what the Surrogate's duty is in the premises. (The provision here omitted as to contesting intermediate accounts may be found in § 1050, above.)

> If one of two or more co-executors or co-administrators presents his account and a petition for a judicial settlement of his separate account, it must pray that his co-executors or co-administrators may also be cited. Upon the presentation of account and a petition, as prescribed in this section, the surrogate must issue a citation accordingly. On the return of a citation issued as prescribed in this section the surrogate must take the account, and hear the allegations and proofs of the parties respecting the same. Any party may contest the account, with respect to a matter affecting his interest in the settlement and distribution of this estate. . . .
>
> A creditor, or person interested in the estate, although not cited, is entitled to appear on the hearing, and thus make himself a party to the proceeding. When letters issued to an executor or administrator have been revoked, he may present to the surrogate's court a written petition, duly verified, praying that his account be judicially settled, and that his successor, if a successor has been appointed, and the other persons specified in this section be cited to attend the settlement. **§ 2728, Code Civil Proc.**, in part.

In New York County, Rule 24 requires the account offered for settlement to be filed with the petition. This is the general rule elsewhere as well. In issuing the citation, care must be taken that its requirement meet the prayer of the petition. Where a petition prayed that certain persons be cited to "attend the accounting" of an executrix, and for a

judicial settlement of the account of such executrix, it was held that the citing of parties simply "to attend the accounting" of the executrix was not sufficient to base a judicial settlement upon, and that the accounting must be treated as an intermediate one. *Schlegel* v. *Winckel*, 2 Dem. 232, 235. The Surrogate has power, under the last paragraph of § 2728 above quoted, to determine whether a person seeking to intervene is indeed a person interested. Hence, where decedent left living nephews and a niece surviving him, it was held that on the administrator's accounting descendants or representatives of deceased uncles and aunts could not take and were therefore not interested. *Matter of Thompson*, 41 Misc. 223. See *Matter of Strickland*, 22 N. Y. St. Rep. 901, holding that "creditors" includes "persons claiming to be creditors."

B. Executor or administrator of deceased executor, etc.—The somewhat nonconsecutive arrangement of the Code is illustrated by the fact that the provisions relating to accountings by executors or administrators of deceased executors, administrators, guardians or testamentary trustees, are to be found not in title 4, but in title 2, of ch. XVIII. The connection is not altogether illogical, as it follows immediately the provisions as to appointing a successor to one whose letters have been revoked and compelling such to account. These provisions are contained in § 2606. So far as they relate to a voluntary accounting, they are as follows:

> An executor or administrator of a deceased executor, administrator, guardian, or testamentary trustee may voluntarily account for the acts and doings of the decedent, and for the trust property which had come into his possession *or into the possession of the decedent.* And on the death heretofore or hereafter of any executor, administrator, guardian, or testamentary trustee while an accounting by or against him as such is pending before a surrogate's court, such court may *revive* said proceeding against his executor, administrator or successor, and proceed with such accounting, and determine all questions and grant any relief that the surrogate would have power to determine or grant in case such decedent had not died, or in a case where the executor or administrator of said last mentioned decedent, acting at the time of such revival, had voluntarily petitioned for an accounting as provided for in this section.
>
> On a petition filed either by or against an executor or administrator of a deceased executor, administrator, guardian or testamentary trustee, or on a revival and continuation of an accounting, pending by or against such decedent at the time of his death, the successor of such decedent and all persons who would be necessary parties to a proceeding commenced by such decedent for a judicial settlement of his accounts, shall be cited and required to attend such settlement. The surrogate's court may at any time, on its own motion, or on the motion of any party to any one of two or more such proceedings, consolidate such proceedings, but without prejudice to the power of the court to make any subsequent order in either of them. . . . The surrogate's court has also jurisdiction to compel the executor or administrator, or successor of any decedent, at any time to deliver over any of the trust property which has come to his possession or is under his control, and if the same is delivered over after a decree, the court must allow such credit upon the decree as justice requires. **§ 2606, Code Civil Proc.**, in part.

When the first edition of this work was issued the section provided after the words "may voluntarily account," "for any of the trust property which has come to his possession, and upon his petition such successor, or surviving executor, administrator, guardian or other necessary party shall be cited and required to attend such settlement." And the author (reviewing the cases which held that under this section there could not be a voluntary accounting for all the acts of the decedent in his representative capacity, excepting in a compulsory proceeding at the instance of the successor or survivor, executor, administrator or guardian or of a creditor or person interested in the estate or a guardian's ward), suggested that this offered an illustration of *casus omissus*. For this limited account as voluntarily rendered was only conclusive as to property which had come into the accounting party's possession.

The language of the section as it now stands is comprehensive. It was amended by ch. 409 of the Laws of 1901, and subsequently by ch. 349 of the Laws of 1902. The latter merely inserting the words "theretofore or hereafter" in the provision as to the death of any accountant during the proceeding, in which case revival thereof could be directed by the Surrogate. Where there is a "revival" it must be on notice to all the parties to the proceeding sought to be revived. *Matter of Tredwell*, 77 App. Div. 155, 159.

The limitations, therefore, originally indicated *In re Trask's Estate*, 49 N. Y. Supp. 825, and similar cases (see *Matter of Williams*, 26 Misc. 636), are done away with and the representative of the deceased representative may now file voluntary account of the acts and doings of the decedent and for the trust property which has come into his possession or had come into the possession of his decedent. A decree upon such an accounting will be conclusive as to the whole trust estate as against all those who are cited and the representative of the decedent, executor, administrator, guardian or testamentary trustee may be relieved from all further liability in respect of said trust estate. It has been held that where deceased executor held a fund ample to cover annuities, and was also residuary legatee, and her executor turned over the fund to coexecutor of deceased executrix, who wasted it, held he could not be compelled to account out of deceased executrix's residuary estate. *Matter of Smith*, 46 App. Div. 318. The representative of decedent can only be charged with what is found to have come into his hands. See *Farmers' Loan & Trust Co.* v. *Pendleton*, 179 N. Y. 486, 493, citing *Matter of Ryalls*, 74 Hun, 205; 80 Hun, 459.

If the decedent was one of several executors or administrators or guardians or trustees, the survivors may proceed and complete the administration of the trust estate, pursuant to the letters. § 2692, Code Civ. Proc.; *Hood* v. *Haywood*, 124 N. Y. 1. And, ordinarily, their final accounting will serve every purpose requisite to the protection of creditors and persons beneficially interested. But if decedent's representative does voluntarily account and all parties are brought in the Surrogate has

power to judicially settle such account. *Matter of Furniss*, 86 App. Div. 96.

This proceeding under § 2606 is subject to the ten-year limitation. The statute runs from the death of the representative whose executor or administrator is called to account. *Matter of Rogers*, 153 N. Y. 316.

C. General guardians.—Guardians may present a petition for the judicial settlement of their accounts (§ 2849, Code Civ. Proc.), in any case where they could be required to do so under §§ 2847 or 2848. The language of § 2848 indicates that a guardian must show, to justify the application, that he has received money or property of the ward for which he has not accounted. When he is a guardian of the person he may allege that he has money or property of the ward which he has not paid or delivered to the general guardian of the infant's property.

The guardian himself may secure a judicial settlement of his account under these provisions:

> A guardian may present to the surrogate's court a written petition duly verified, praying for a judicial settlement of his account and a discharge from his duties and liabilities, in any case where a petition for a judicial settlement of his account may be presented by any other person as prescribed in either of the last two sections. The petition must pray that the person who might have so presented a petition, *and also the sureties* in his official bond of such guardian or the legal representatives of such surety may be cited to attend the settlement. **§ 2849, Code Civil Proc.**

The persons directed to be cited must all be cited. *Eberle* v. *Schilling*, 32 Misc. 195.

If the guardian has expended more than the ward's property for his support and maintenance, such an accounting in the Surrogate's Court is the proper way to establish the fact. It has been held that such a determination of a balance in his favor is prerequisite to an action in the Supreme Court for such balance. See *Colon's Estate*, 1 Tuck. 244. But it was held that his claim to have expended his own money for the ward, not fixed by such accounting, was not a claim upon which he could stand to compel an accounting by executors of a will giving a legacy to the ward, so as to secure in such proceeding the satisfaction of his overpayments.

Section 2850 prescribes the procedure upon all such accountings whether voluntary or compulsory:

> Upon the presentation of a petition, as prescribed in either of the last three sections, the surrogate must issue a citation accordingly. Section two thousand seven hundred and twenty-seven, sections two thousand seven hundred and thirty-three to two thousand seven hundred and thirty-seven, both inclusive, and sections two thousand seven hundred and forty-one and two thousand seven hundred and forty-four of this act, apply to a guardian accounting as prescribed in this article, and regulate the proceedings upon such an accounting. The accounting party must annex to every account produced and filed by him an affidavit, in the form prescribed in this article for the affidavit to be annexed by him to his annual inventory and account. A guardian

designated in this title is entitled to the same compensation as an executor or administrator. **§ 2850, Code Civil Proc.**

Note. §§ 2733–2737 are now in §§ 2729 and 2730; and § 2734 is now in § 2729.

D. Guardian by will or deed.—The Code assimilates the accounting procedure for this class of guardians to that already discussed, whether the judicial settlement be prayed by the guardian himself, or by one of those entitled under § 2847 or § 2848. This is by virtue of § 2856, which is as follows:

> The surrogate's court having jurisdiction to require security may compel a judicial settlement of the account of a guardian appointed by will or by deed, in any case where it may compel a judicial settlement of the account of a general guardian; and the proceedings to procure such a settlement are the same as if the guardian so appointed by will or by deed had been a general guardian. A guardian appointed by will or by deed may present to the surrogate's court a written petition, duly verified, praying for a judicial settlement of his account, and a discharge from his duties and liabilities, in any case where a petition for a judicial settlement of his account may be presented by any other person as prescribed in this article. The petition must pray that the person who might have so presented a petition may be cited to attend the settlement. Upon the presentation of such petition the surrogate must issue a citation accordingly. Sections twenty-seven hundred and thirty-three to twenty-seven hundred and thirty-seven, both inclusive, and sections twenty-seven hundred and forty-one and twenty-seven hundred and twenty-four of this act apply to a guardian accounting as prescribed in this article, and regulate the proceedings upon such an accounting. A guardian designated in this title is entitled to the same compensation as a general guardian. **§ 2856, Code Civil Proc.**

Some of the sections referred to in the latter part of this section have been repealed. Section 2733 relates to advancements, and permits the Surrogate to adjust such advancements in his decree for distribution. Section 2734 covers the case where the ward might be a married woman. Sections 2735, 2736 and 2737 were repealed by ch. 686, Laws 1893. So also was § 2741. Section 2744 enables the Surrogate, upon making his decree, to order specific property to be delivered in lieu of the money value of the property with which the guardian is chargeable.

It is additionally provided that

> a decree, made upon the judicial settlement of the account of a guardian appointed by will or by deed, as prescribed in this article (*i. e.* art. 3, title 7, of ch. XVIII) or the judgment rendered upon appeal from such decree, has the same force as a judgment of the Supreme Court to the same effect. **§ 2857, Code Civil Proc.**

It is only where the accounting is founded upon the guardian's petition that the sureties must be cited (see § 2849, *ante*, under C), otherwise there is no occasion to cite them, and the decree is binding upon them in the absence of fraud and collusion. *Eberle* v. *Schilling*, 32 Misc. 195, 197; *Casoni* v. *Jerome*, 58 N. Y. 315; *Douglass* v. *Ferris*, 138 N. Y. 192.

E. Testamentary trustees.—Section 2810 prescribes the procedure on the judicial settlement of the account of a testamentary trustee upon his own petition.

Judicial settlement on petition of trustee.

When one year has expired since the probate of the will, or when the trusts, or one or more distinct and separate trusts, created by the will, have been, or are ready to be, fully executed, a testamentary trustee may present to the surrogate's court a petition, duly verified, setting forth the facts, and praying that his account may be judicially settled; and that all the persons who are entitled, absolutely or contingently, by the terms of the will, or by operation of law, to share in the fund, or in the proceeds of property held by the petitioner, as a part of his trust, may be cited to attend the settlement. Thereupon the surrogate must issue a citation accordingly. Sections 2729, 2730, and 2731 of this act apply to the proceedings upon the return of a citation, issued as prescribed in this section, and to the testamentary trustee whose account is to be settled. Any person, although not named in the citation, who is beneficially interested in the estate or fund which came to the petitioner's hands, or in the proceeds thereof, is entitled to appear upon the hearing, and thus make himself a party to the special proceeding. **§ 2810, Code Civil Proc.**

It is clear from an examination of the Code that the sections (2729, 2730 and 2731) referred to are the sections now consolidated in § 2728. For it is the identical language of § 2810 as it stood in 1892. The other sections were consolidated in 1893. It has been held that these sections, read together, limit the right to voluntarily intervene in proceedings under § 2810. Persons not named in the citation may appear "upon the hearing." *Matter of Wood*, 5 Dem. 345, if beneficially interested in the estate or fund which came to the accounting person's hands, or in the proceeds thereof. Such intervention is not permitted, however, until the hearing, and an application prior thereto is premature, and must be denied, or deferred until the hearing. *Estate of Wood*, 7 N. Y. St. Rep. 721.

Certain provisions of title fourth are made applicable to all accountings by such trustees by the Code as follows:

Sections 2734 to 2737, both inclusive, sections 2739 to 2741, both inclusive, and sections 2743, 2744, and 2746 of this act, apply to and regulate the like matters, where a testamentary trustee accounts, as prescribed in this title; except as otherwise prescribed in the next two sections. To each account, filed as prescribed in this title, must be annexed an affidavit, in the form prescribed in section 2733 of this act, for the affidavit to be annexed to the account of an executor or administrator; except that the expression, "the trust created by the will," with such other description of the trust, as is necessary to identify it, must be substituted in place of the words, "the estate of the decedent." **§ 2811, Code Civil Proc.**

F. Persons whose letters have been revoked.

When letters issued to an executor or administrator have been revoked, he may present to the surrogate's court a written petition, duly verified, praying that his account be judicially settled. **§ 2728, Code Civil Proc.**, in part.

Upon such proceedings, the successor if one has been appointed, must be cited, as well as all persons who are proper parties under § 2728 to the usual voluntary accounting by executors or administrators. *Ibid.*

G. Persons holding ancillary letters.—Sections 2700, 2701 and 2702, *q. v.*, all indicate that ancillary executors or administrators are liable to account, and may voluntarily account. The last section makes applicable to them all provisions applicable to domestic representatives, excepting as above noted, those relating to the disposition of decedent's real estate to pay his debts. But the main purpose of an ancillary administration must be kept in mind. It is recognized in § 2700. It is to transmit the assets collected in this State to the State or country of principal administration. *Matter of Fitch*, 160 N. Y. 87, 92; *Matter of Dunn*, 39 App. Div. 510. All local rights may be protected by precautionary clauses in the decree awarding the letters, or by order made during the administration. He is entitled to be credited upon his accounting all money or other property so transmitted at any time before he may have been directed to retain it.

§ 1054. **Compulsory accountings—Who may be required to account.**—The table in § 4, *ante*, indicates that the Surrogate's power to compel a judicial settlement of the accounts of all persons holding letters from his court, or dealing with estates under his jurisdiction, is comprehensive.

The next chapter deals generally with the procedure. Before passing to it we note the distinctive Code provisions that apply particularly to compulsory accountings by guardians and trustees. And first as to guardians.

§ 1055. **Compulsory account by guardian.**—The cases where the judicial settlement on a guardian's account may be compelled are specified in § 2847 of the Code.

> A written petition, duly verified, praying for the judicial settlement of the account of a general guardian of an infant's property, and that he may be cited to attend the settlement thereof, may be presented to the surrogate's court, in either of the following cases:
>
> 1. By the ward, after he has attained his majority.
> 2. By the executor or administrator of a ward, who has died.
> 3. By the guardian's successor, including a guardian appointed after the reversal of a decree, appointing the person so required to account.
> 4. By a surety in the official bond of a guardian whose letters have been revoked; or by the legal representative of such surety. Citation under this subdivision must be directed to both the guardian and the ward. **§ 2847, Code Civil Proc.**

These provisions cover, by reference from other sections of the Code, guardians of the person (see § 2848) and guardians by will or deed (see § 2856).

They may, therefore, be discussed generally in this connection. The Code distinguishes between guardians of the property, guardians of the

person, and guardians by will or deed; but it will be noted below that the procedure as to requiring them to account is assimilated. Where a parent assumes control of an infant's property, without authority, he may be required to account as guardian, nevertheless. *Van Epps* v. *Van Dusen*, 4 Paige, 64.

§ 1056. **Accounting at the ward's instance, after majority.**—Upon the judicial settlement of a guardian's accounts after the ward's majority, the guardian is entitled to set up any agreement of adjustment or settlement he may have made with the ward after he or she has attained the age of twenty-one years. When a guardian agreed with such a ward that the amount he was chargeable with was $17,143, and the ward accepted in settlement thereof an assignment of a mortgage for $18,000, and receipted therefor, it was held, subsequently, upon a compulsory accounting by the guardian at the ward's instance, that the Surrogate must accept the receipt as conclusive evidence that the ward had received the assignment in satisfaction of the sum therein stated. *Downing* v. *Smith*, 4 Redf. 310. For he had no jurisdiction to set aside or try the validity of the settlement. *Ibid.*, citing *Bevan* v. *Cooper*, 72 N. Y. 329; *Sampson* v. *Wood*, 10 Abb. N. S. 223, notes; *Decker* v. *Newton*, 1 Redf. 477, 484. The Court of Appeals has held that although a receipt can be contradicted by parol evidence as to the consideration part of it, yet if it contains words showing that the sum was received in settlement or compromise of a claim it cannot be contradicted by parol evidence as to that part of it. *Coon* v. *Knapp*, 8 N. Y. 402. It may be shown, however, by parol evidence that the sum received in settlement is less than the whole amount actually due. *Ryan* v. *Ward*, 48 N. Y. 204; *Miller* v. *Coates*, 66 N. Y. 609.

Section 2847 being the only authority in the Code for compelling the account of a guardian (*Welch* v. *Gallagher*, 2 Dem. 40, 42), the petitioner must bring himself within its intent. The mother of infants who has advanced money to their use, cannot compel an accounting by their general guardian to procure reimbursement. *Ibid.* The proper course to pursue to secure such reimbursement is for the guardian to make application to the court for leave to use so much of the principal, if there be no accumulated income, as may be necessary. *Voëssing* v. *Voëssing*, 4 Redf. 360, 364. And if the guardian make a payment on his own responsibility the court will ratify and sanction it upon proof that it was necessary, and for the welfare of the ward. *Ibid.*, and cases cited.

The decree to be made upon such an accounting may decree payment of the balance found due to the person entitled thereto. *Seaman* v. *Duryea*, 11 N. Y. 324; *Matter of Camp*, 126 N. Y. 377. In the latter case the guardian accounting was entitled to a life use of the fund he held as guardian. The Court of Appeals held that his acceptance of the fund as guardian did not reduce or affect his rights as life tenant (p. 387) and that the ward on coming of age had no right to demand the immediate payment of the principal of the fund.

The facts in the case showed, however, that the guardian had lost the

corpus of the fund. This it was held did not enlarge the jurisdiction of the Surrogate.

§ 1057. **The surety's right.**—The surety given by § 2847 the right to compel an accounting, is only the surety in the official bond of a guardian *whose letters have been revoked*, or the legal representative of such a surety. This section is exclusive, and the surety of a guardian whose letters have not been revoked cannot call him to account in the Surrogate's Court. *Smith* v. *Lusk*, 2 Dem. 595, 597.

§ 1058. **The guardian of the person.**

> A petition, for the judicial settlement of the account of a general guardian of an infant's person, may be presented, as prescribed in the last section, or by the general guardian of the infant's property; but, upon the presentation thereof, proof must be made, to the surrogate's satisfaction, that the guardian so required to account, has received money or property of the ward, for which he has not accounted; or which he has not paid, or delivered, to the general guardian of the infant's property. And a guardian of the estate only of a minor shall be, for the purpose of this chapter, deemed a general guardian. **§ 2848, Code Civil Proc.**

The proof to be presented to satisfy the Surrogate that the guardian called to account has money or property of the ward for which he ought to account, may be, primarily, in the form of an affidavit. If the guardian respondent puts its allegations in issue, the Surrogate may cause him to be examined, before himself or before a referee to hear and report.

§ 1059. **Deceased guardians.**—The decisions holding that the Surrogate could not compel the representatives of a deceased guardian to account and pay over a balance found due from him (such as *Andrake* v. *Cohen*, 32 Hun, 225, and *Farnsworth* v. *Oliphant*, 19 Barb. 30), are no longer authoritative in view of the language of § 2606, which expressly gives this power. *Matter of Camp*, 91 Hun, 204; *Matter of Hicks*, 54 App. Div. 582.

The application for a compulsory accounting may be made as soon as the executor of the deceased guardian is appointed. *Matter of Wiley*, 119 N. Y. 642. For procedure, see chapter on Accountings, *post.*

§ 1060. **Limitation.**—So long as property of the ward remains in the guardian's hands, unaccounted for, he remains liable to account. *Matter of Camp*, 126 N. Y. 377, 389. The guardian, by holding the property, occupies the position of a trustee, so far as to prevent the running of the Statute of Limitation in his favor. *Ibid.* See also *Kane* v. *Bloodgood*, 7 Johns. Ch. 89. But if there be acts or relations between the guardian and ward, upon the latter's attaining full age, upon which an abandonment or repudiation of the trust may be predicated, then the statute begins to run, and the ward must commence legal proceedings within the statutory period of six years. *Matter of Barker*, 4 Misc. 40, 42. But in such case it should appear that the *cestui que trust* had knowledge of the denial or repudiation of the trust relation, and that the guardian was not guilty of fraud. *Ibid.*

§ 1061. **Compelling judicial settlement of account of testamentary**

trustee.—Surrogates have full power to settle the accounts of testamentary trustees. §§ 2492, subd. 3, 2814, 2818, Code Civ. Proc; *Conant* v. *Wright*, 22 App. Div. 216.

This power of a Surrogate to settle the accounts of testamentary trustees, must be exercised in the manner prescribed by the Code. These provisions are contained in §§ 2807 to 2813, both inclusive.

When surrogate may compel judicial settlement.

In either of the following cases, the surrogate's court may, from time to time, compel a judicial settlement of the account of a testamentary trustee:

1. Where one year has expired, since the will was admitted to probate.

2. Where the trustee has been removed, or, for any other reason, his powers have ceased.

3. Where the trusts, or one or more distinct and separate trusts, created by the terms of the will, have been executed, or are ready to be executed; so that the persons beneficially interested are, by the terms of the will, or by operation of law, entitled to receive any money or other personal property from the trustee. **§ 2807, Code Civil Proc.**

Under this section it has been held that the Surrogate's jurisdiction extends over a trustee appointed by the Supreme Court to execute the trusts created by a will in lieu of the original testamentary trustee. See *In re Pitcher*, 4 Law Bull. 32, and § 2514, Code Civ. Proc., subd. 6. This practice is, however, unusual.

Where there are several distinct trusts the trustees may be made to account as to any one or all of the separate trusts. *Matter of Willets*, 112 N. Y. 289.

Who may apply therefor.

A petition, praying for a judicial settlement, as prescribed in the last section, and that the testamentary trustee may be cited to show cause, why he should not render and settle his account, may be presented:

By any person beneficially interested in the execution of any of the trusts;

Or by any person in behalf of an infant so beneficially interested;

Or by a surety in the bond of the testamentary trustee, given as prescribed in this title, or by the legal representative of such a surety.

Upon the presentation of the petition, the surrogate must issue a citation accordingly, unless the account of the testamentary trustee has been judicially settled, within a year before the petition is presented; in which case, the surrogate may, in his discretion, entertain, or decline to entertain, the petition. **§ § 2808, Code Civil Proc.**

The provision that "any person, in behalf of an infant" may apply for the accounting does not require the appointment of a special guardian until the proceeding acquires permanency.

Proceedings upon return of citation.

Sections 2727 and 2728 of this act apply to the proceedings upon a citation, issued as prescribed in the last section, and to the testamentary trustee to whom the citation is directed. **§ 2809, Code Civil Proc.**

If under §§ 2727 and 2728 the trustee himself upon the return day applies for a voluntary accounting, the first proceeding dies and there is then no occasion for appointing a guardian in that proceeding.

If the trustee fails to do so and appears to show cause why he should not be required to account, then the Surrogate will give the infant opportunity to be heard by general or special guardian. *Matter of Wood*, 5 Dem. 345, 349.

§ 1062. **Surrogate's powers upon settling the account.**

> Upon a judicial settlement of the account of a testamentary trustee, a controversy which arises, respecting the right of a party to share in the money or other personal property to be paid, distributed, or delivered over, must be determined in the same manner as other issues are determined. If such a controversy remains undetermined, after the determination of all other questions upon which the distribution of the fund, or the delivery of the personal property depends, the decree must direct that a sum, sufficient to satisfy the claim in controversy, or the proportion to which it is entitled, together with the probable amount of the interest and costs, and, if the case so requires, that the personal property in controversy, be retained in the hands of the accounting party; or that the money be deposited in a safe bank or trust company, subject to the surrogate's order, for the purpose of being applied to the payment of the claim, when it is due, recovered, or settled; and that so much thereof, as is not needed for that purpose, be afterwards distributed according to law. **§ 2812, Code Civil Proc.**

The Surrogate cannot inquire into the validity of an assignment of interest by one originally interested in the estate. For the purposes of the accounting and his decree, the Surrogate must treat the assignment as valid, unless it is void by statute (*Matter of Foster*, 37 Misc. 581), and recognize the assignee as the person to whom payment should be directed to be made. *Young* v. *Purdy*, 4 Dem. 455, 462, citing *Stilwell* v. *Carpenter*, 59 N. Y. 414; *Bevan* v. *Cooper*, 72 *id.* 317; *McNulty* v. *Hurd*, 72 *id.* 518; *Boughton* v. *Flint*, 74 *id.* 476; *Sheridan* v. *The Mayor*, 68 *id.* 30. But no authority has been conferred upon the Surrogate to enter upon the hearing and determination of any collateral or incidental disputes, such as those involving the right or title of any claimants to an interest in the estate. *Van Sinderen* v. *Lawrence*, 50 Hun, 272, 274.

The sections, made applicable by reference, do no more than to regulate the power of the Surrogate, and prescribe the manner in which the proceedings are to be taken, the hearing to be had, and the disposition or distribution of the funds to be made. *Ibid.* The language of § 2812 does not confer extraordinary powers. The controversy "must be determined in the same manner as other issues," that is to say by *actions*, and thus *not before the Surrogate*. If an action is brought and is pending undetermined when the Surrogate is ready to make his decree, then a proportion may be retained to abide the event, under § 2812. But if no action is pending the Surrogate himself may not issue the dispute and must recognize the

one *prima facie* entitled. See opinion of Daniels, J., in *Van Sinderen* v. *Lawrence, supra.*

The Surrogate, if necessary, may pass on such questions as whether provision in the will for the widow is in lieu of dower. *Matter of Gordon,* 68 App. Div. 388. Dower is never deemed excluded merely because of a provision in the will unless the intent of testator is clear, either from express words or by necessary implication. *Konvalinka* v. *Schlegel,* 104 N. Y. 125. In this case the court held that it would not infer the intent to make the widow elect, merely from the extent of the provision made for her, or that she was devisee for life, or in fee, or because of the apparent injustice of her having both dower and the provision. *Closs* v. *Eldert,* 30 App. Div. 338; *Kimbel* v. *Kimbel,* 14 App. Div. 570; *Fuller* v. *Yates,* 8 Paige, 325. To compel election there should be a clear incompatibility, arising on the face of the will, between the claim of dower and the claim for the provision of the will. *Konvalinka* v. *Schlegel, supra,* and cases cited at p. 130.

Where justice requires, the Supreme Court can restrain the proceedings in the Surrogate's Court by injunction until the issue raised as to title to the fund, or to part of it, is settled. See *Matter of Wagner,* 52 Hun, 23, 28, aff'd 119 N. Y. 28; *Van Sinderen* v. *Lawrence, supra; Pettigrew* v. *Foshay,* 12 Hun, 486. But see § 1046 *ante.*

§ 1063. **Effect of decree.**

A decree, made upon a judicial settlement of the account of a testamentary trustee, as prescribed in this title, or the judgment rendered upon an appeal from such a decree, has the same force, as a judgment of the supreme court to the same effect, as against each party who was duly cited or appeared, and every person who would be bound by such a judgment, rendered in an action between the same parties. **§ 2813, Code Civil Proc.**

Illustrative Table of Final Compulsory Accountings (*Note*)

Containing Analysis of Code Provisions

Note. "Final" is used arbitrarily only, as indicating any account capable of being judicially settled.

Description of persons.	Cases when he may be required to account.	At whose instance.	Who must be cited.
A. Executor or administrator.	1. Where one year has expired since letters were issued to him. § 2726, C. C. P. 2. Where letters issued to him have been revoked, or, for any other reason, his powers have ceased. Ibid. 3. Where he has disposed of all or part of a decedent's real estate pursuant to a decree under title 5 of chap. 18. Ibid. 4. Where he has exercised a power under the will, as to decedent's realty, or the rents, profits or proceedings thereof, *and* a year has elapsed since his letters issued. Ibid. *Baldwin* v. *Smith*, 3 App. Div. 350.	1. A creditor. § 2727, C. C. P. *Ferris' Estate*, 1 Tuck. 15; *Matter of Gill*, 183 N. Y. 347. But not if his claim be disputed. *Matter of Whitehead*, 38 App. Div. 319. Even though there has been distribution, when there was no advertising for claims. *Matter of Blum*, 83 App. Div. 161. 2. A person interested in the estate or fund. Ibid. *Note.* This includes a child born after the making of a will, or any person in its behalf. Ibid. This also includes great-grandchild. *Matter of Watts*, 68 App. 357. See § 2514, subd. 11, defining "person interested." Includes legatee. *Matter of Rainforth*, 37 Misc. 660. 3. Surety of the representative. Ibid. *Note.* This includes the legal representative of such surety. Ibid. 4. A coexecutor. *Wood* v. *Brown*, 34 N. Y. 337; *Matter of Rumsey*, 45 St. Rep. 453. 5. Receiver of a legatee in supplementary proceedings. *Matter of Beyea*, 10 Misc. 198; *Matter of Rainey*, 5 id. 367. But not if executor is the judgment debtor. *Worrall* v. *Driggs*, 1 Redf. 449.	Primarily, the accounting representative. Subsequently, "if it appears that there is a surplus, distributable to creditors or persons interested, the Surrogate, at any time, may issue a *supplemental* citation, directed to the persons who must be cited on the petition of an executor or administrator" in voluntary proceedings. This includes (see § 2728), sureties on the official bond; or their legal representatives; all creditors, or persons claiming to be creditors of the decedent (except such as by vouchers annexed to the account filed appear to have been paid) decedent's husband or wife; next of kin; legatees, or personal representatives of foregoing.
B. Temporary administrator.	At any time. § 2726, C. C. P., subd. 4. As soon as permanent representative qualifies.	Surrogate. § 2726, C. C. P. Permanent representative. § 2605, C. C. P. Persons interested in the estate.	The temporary administrator. The permanent representative if he has qualified. If he has not, the accountiog may be deferred till he does. *Bible Society* v. *Oakley*, 4 Dem. 450.
C. Executor or administrator of deceased Ex'r, Adm'r, Guardian or Test. Trustee.	At any time after he shall have qualified. §§ 2603, 2605, 2606, C. C. P. *Matter of Wiley*, 119 N. Y. 642; *Matter of Rogers*, 153 N. Y. 316, 323; *Peltz* v. *Schultes*, 64 Hun, 369. *Note.* The representative stands, for all purposes of the accounting, in place of the decedent. *Matter of Clark*, 119 N. Y. 427.	Successor in the administration of the trust. §§ 2606, 2605, C. C. P. *Matter of Watson*, 64 Hun, 369. Surviving ex'r, adm'r or guardian. Ibid. Creditor. Person interested in estate. Ibid. Ward of deceased guardian. Ibid. Surviving trustee. *Matter of Kreischer*, 30 App. Div. 313, 315. Legatee of original testator. *Matter of Irvin*, 68 App. Div. 158.	The husband, widow, next of kin. Persons interested. The representative called to account. *In re Trask's Estate*, 49 N. Y. Supp. 825, 827.

ILLUSTRATIVE TABLE OF FINAL COMPULSORY ACCOUNTINGS—*Continued*

Description of persons.	Cases when he may be required to account.	At whose instance.	Who must be cited.
D. General Guardian *of property.*	1. After the ward attains his majority. § 2847, C. C. P. 2. After the ward's death. Ibid. 3. Upon reversal of decree appointing the guardian. Ibid. *Note.* These 3 cases are the only cases where a testamentary guardian's account can be compelled. *Matter of Hawley*, 104 N. Y. 250. 4. Upon the guardian's discharge. § 2837, C. C. P.	By the ward. § 2847, C. C. P. By the ward's legal representative. Ibid. By the new guardian when appointed. Ibid. *Matter of Hurlburt*, 43 Hun, 311. Generally. By the guardian's successor. Ibid. By the surety, or his representative. Ibid. By the successor or the ward. § 2837, C. C. P.	The guardian called to account. The ward or his legal representative. The successor, if any.
E. Of *the person.*	Same as 1–3 above under §§ 2847–2848, C. C. P.	Same as above, or by general guardian of the infant's property. § 2818, C. C. P.	Same.
F. Guardian by will or deed.	Same as in case of general guardian. See § 2856, C. C. P.	Same.	Same.
G. Testamentary trustee.	1. When a year has expired since will was admitted to probate. § 2807, C. C. P. subd. 1. 2. When the trustee has been removed, or for any other reason, his powers have ceased. Ibid. subd. 2. 3. Where the trusts, or one or more distinct and separate trusts, created by the terms of the will, have been executed, or are ready to be executed. Ibid. subd. 2. This means that the persons beneficially interested must be either by the terms of the will, or by operation of law, entitled to money or personal property from the trustee. Ibid.	By any person beneficially interested in the execution of any of the trusts. § 2808, C. C. P. If an infant, by anyone in his behalf. Ibid. Surety on trustee's bond or legal representative of such surety. Legatee after life interest. *In re Jones*, 30 Misc. 354.	See §§ 2809, 2727 and 2728. Personal representatives of life beneficiary. *Cogan* v. *McCabe*, 23 Misc. 739.
H. Person whose letters have been revoked.	Upon the revocation. § 2605, C. C. P.	Successor, § 2605, C. C. P. Remaining executor, administrator, guardian or trustee.	See §§ 2605 and 2707.
I. Ancillary executor or administrator.	When administration is complete, unless specific directions are set out in decree granting letters, *e. g.*, to account when local creditors shall have been paid.	Same as in case of ordinary executor or administrator.	
J. Executor *de son tort.* See § 112. Decedent's Estate Law as to remedy.	When his dealings with the property come to the Surrogate's knowledge?	Surrogate or any person interested or a creditor? The lawful representative? Any person entitled to the property. § 2706, C. C. P.	The wrongdoer. The lawful representative if any.
K. Freeholder in proceedings to sell decedent's realty to pay his debts.	In any case when the executor or administrator he takes the place of in executing the decree, could be required to account. § 2726, C. C. P., subd. 4.	Creditor or any person interested in or entitled to share in the proceeds.	All who are parties to the proceeding.

CHAPTER II

PREPARING THE ACCOUNT

§ 1064. **Form and contents of the account.**—It is advisable that every account intended for judicial settlement, whether the proceedings in which it is presented be voluntary or compulsory, should be prepared in view of the right of persons interested to object to its items, and put the accounting party to his proof in justification of their propriety of amount.

No one can be more interested than the accounting party himself in having his account properly made up, so as to include all legal debits and credits, and to disclose consecutively and intelligibly the history of his administration.

The law assumes that one who administers a trust will do so in a businesslike way. *Matter of Stanton*, 41 Misc. 278. For instance, it is a reasonable expectation that he should keep proper books of account. Where this has been done, it can seldom be necessary to employ experts to prepare the account. Only in exceptional cases, and to a limited extent, are disbursements for such accountant's services recognized and approved. Section 2562 provides for extra allowances upon accountings. See part II, ch. VI.

Within reasonable limits, he must himself administer the trust. *Matter of Harbeck*, 81 Hun, 26. But if a clerk or agent is necessary the reasonable expense thereof should be allowed as an expense of administration. *Matter of Binghamton Trust Co.*, 87 App. Div. 26, citing *Lent* v. *Howard*, 89 N. Y. 169, 178. Under peculiar conditions a trustee was allowed office rent. *Matter of Nesmith*, 140 N. Y. 610. So also agent's fees for collecting rents. *Wells* v. *Disbrow*, 20 N. Y. Supp. 518; *Garvey* v. *Owens*, 35 N. Y. St. Rep. 133; *Fisher* v. *Fisher*, 1 Bradf. 335. So also for a bookkeeper. *Merritt* v. *Merritt*, 32 App. Div. 442. See below as to expenses on contested accountings.

But it is the duty of an executor or administrator to prepare his own account, unless he can show that such preparation would be impossible. *Matter of Quin*, 1 Connoly, 381, 388, Ransom, Surr.

Lack of leisure to devote to its preparation is not an excuse acceptable to the courts. *Ibid.* But the fact that the account is voluminous, or intricate and involved, may be shown. *Ibid.* Still, if the difficulty arises from the fact that no books of account were kept, or no proper accounts, this extra expense must be borne by the accounting party. *Estate of Wilcox*, 11 Civ. Proc. Rep. 115; *O'Reilly* v. *Meyer*, 4 Dem. 161; *Matter of Woodard* 13 N. Y. St. Rep. 161.

In the case first cited the court allowed the accounting party toward

such disbursement the amount reasonably disbursable had he kept books. But the limits set by the Code must be kept in mind. In *Hall* v. *Campbell*, 1 Dem. 415, it was held that the account must be rendered and settled without any other expense to the estate than the sums authorized to be allowed to the party accounting by §§ 2561–2562, together with the taxable disbursements connected with the judicial proceedings, citing *Fowler* v. *Lockwood*, 3 Redf. 465, 467; *Brown's Accounting*, 16 Abb. (N. S.) 457, 469. If a disbursement for a bookkeeper's services is justified by setting out facts satisfying the Surrogate that his services were requisite to the proper preparation of the account, it can be allowed. *Underhill* v. *Newburger*, 4 Redf. 499, 506.

What has been said justifies the further rule that fees paid to an attorney *for preparing the account* will not be credited to the representative. See opinion of Ransom, Surr., in *In re Smith's Estate*, 2 Connoly, 418. The commissions and allowances made to the representative contemplate not only his administration, but all his acts until his discharge. As his account must when settled be the basis from which to ascertain, by computation, his remuneration, he should not make the preparation of what is, in effect, his bill to the estate, the basis of further charge to the estate. But the discussion in a preceding chapter on costs will show that the courts are reasonable and even liberal with counsel for services properly rendered during the administration period. The responsibility of determining what is reasonable rests primarily on the one administering, and it is important that he should be in a position to justify all such payments in case any objection be interposed thereto, upon his accounting. *Matter of Hosford*, 27 App. Div. 427, 433. Executors and administrators should insist upon itemized and fully itemized statements from their counsel, for this class of expenditures is a fruitful source of objections to accounts. Special guardians of infants, generally themselves attorneys, are peculiarly open to the temptation of objecting to such items. References are often made necessary and all the expenses and allowances incidental thereto entailed upon estates, by the fact that the vouchers for legal services are so insufficient in point of detail as to invite attack on the score of unreasonableness or exorbitance.

§ 1065. **Same subject—Skeleton outline.**—The readiest way to explain the form of an account is by examining a precedent. The account may properly be prepared in pursuance of the formula laid down by Surrogate Ransom, for an intermediate account, and quoted from in the foregoing chapter. The statutes do not prescribe any special form to be adopted in making up an account. *Solomons* v. *Kursheedt*, 3 Dem. 307, 312. Some Surrogates indicate their own requirements in this regard by supplying official forms, which practitioners in their courts are expected to use, with such modifications as the peculiarities of each estate may require. The following is the form prepared for use in the county of New York:

Surrogate's Court,
County of New York.

Account of proceedings.

In Matter of the Judicial Settlement of the Account of of Deceased.

To the Surrogate's Court of the County of New York:

of the County of New York, do render the following account of proceedings as of deceased: On the day of A. D. 19 Letters were issued to . On the day of A. D. 19 caused an Inventory of the personal estate of the deceased to be filed in this office, which personal estate therein set forth amounts, by appraisement by the appraisers duly appointed, to $ (*Note.*)

Note. If no inventory was filed, the account should furnish the information usually so supplied. *In re Dwight*, 9 N. Y. Supp. 927, 928.

Schedule A, hereto annexed, contains a statement of all the property contained in said Inventory, sold by at public or private sale, with the prices and manner of sale; which sales were fairly made by at the best prices that could then be had, with due diligence, as then believed; it also contains a statement of all the debts due the said estate and mentioned in said Inventory, which have been collected, and also of all interest or moneys received by for which legally accountable.

Schedule B, hereto annexed, contains a statement of all debts in said Inventory mentioned, not collected or collectible by together with the reasons why the same have not been collected and are not collectible; and also a statement of the articles of personal property mentioned in said Inventory unsold, and the reasons of the same being unsold, and their appraised value; and also a statement of all property mentioned therein lost by accident, without any wilful default or negligence, the cause of its loss and appraised value. No other assets than those in said Inventory, or herein set forth, have come to possession or knowledge, and all the increase or decrease in the value of any assets of said deceased is allowed or charged in said Schedules A and B.

Schedule C, hereto annexed, contains a statement of all moneys paid by for funeral and other necessary expenses for said estate, together with the reasons and object of such expenditure.

On or about the day of in the year 19 caused a notice for claimants to present their claims against the said estate to within the period fixed by law, and at a certain place herein specified, to be published in two newspapers, according to law, for six months, pursuant to an order of the Surrogate of the County of New York; to which order, notice and due proof of publication herewith filed refer as part of this account.

Schedule D, hereto annexed, contains a statement of all

the claims of creditors, presented to and allowed by or disputed by and for which judgment or decree has been rendered against together with the names of the claimants, the general nature of the claim, its amount, and the time of the rendition of the judgment; it also contains a statement of all moneys paid by to creditors of the deceased, and their names, and the time of such payment.

Schedule E, hereto annexed, contains a statement of all moneys paid to the legatees, widow, or next of kin of the deceased.

Schedule F, hereto annexed, contains the names of all persons entitled as widow, legatee, or next of kin of the deceased, to a share of estate, with their places of residence, degree of relationship, and a statement of which of them are minors and whether they have any general guardian, and if so, their names and places of residence, to the best of knowledge, information and belief.

Schedule G, hereto annexed, contains a statement of all other facts affecting administration of said estate, rights and those of others interested therein.

charge as follows:

With amount of Inventory, ... $
" Increase, as shown by Exhibit A.

credit as follows:

With amount of Loss on sales, as per Schedule B,
" Debts not collected, as per do.,
" Schedule C, ...
" Schedule D, ...
" Schedule E, ...

Leaving a balance of . . . . . $

to be distributed to those entitled thereto, subject to the deductions of the amount of commissions, and the expenses of this accounting. The said Schedules, which are severally signed by are part of this account.

§ 1066. **Same—Expenses of administration.**—"Expenses of administration" which would be covered by Schedule C of the precedent, is an elastic term. It includes such disbursements as a representative is called upon to make in securing the proper and orderly settlement of the estate, and in carrying out a will. *Matter of Pray*, 40 Misc. 516.

In a final accounting every item so incurred is charged. But when used in a will in connection with a pecuniary legacy the rule may be varied by the facts involved.

Thus, a testatrix left to one of several legatees the sum in a certain bank account "less the cost of tombstone and the expenses of the administration of my estate." In the case just cited it was held that this legacy should not be charged with the transfer tax nor with commissions earned, as they are apportionable on the various interests.

Unnecessary expenses will be disallowed. Thus a representative cannot "gratify a taste for litigation at the expense of the estate." *Matter of Stanton*, 41 Misc. 278.

The usual order requiring an account to be rendered for judicial settlement follows the statute and directs that the representative "do render an account of his proceedings as" executor or administrator or guardian or trustee. As has been well stated "Its comprehensiveness has its foundations in its simplicity. It reaches every part of his administration by the force of the terms used." *In re Jones*, 1 Redf. 263, 264, and see opinion pp. 265, 268, as to contents of such an account and the reasons for every requirement. See also *Wilcox* v. *Smith*, 26 Barb. 316; *St. Johns's Estate*, 1 Tuck. 126.

§ 1067. **What is to be accounted for.**—In preparing his account the executor or other accounting party must see to it that it includes all with which he is chargeable. If he asks credit for "uncollectible" assets, because of insolvency of debtor or such reason the burden is on him to satisfy the court that it was uncollectible. *Matter of Joost*, 50 Misc. 78, citing *Matter of Hosford*, 27 App. Div. 427, 434. But he need only account for that with which he is chargeable in his representative capacity. Thus, where a will conferred upon the person named as executor personally and not as executor a power to sell certain real property, it was held he could not account for the proceeds on his executor's accounting, nor be allowed commissions thereon therein. *Matter of Brown*, 5 Dem. 223. So also, where an executor disburses an annuity out of a fund contributed by the heirs, no trust being created by the will, he acts as the agent of the heirs, and cannot include the sums in his accounting. *Matter of Collins*, 144 N. Y. 522. And an executor who is also made a trustee by the will cannot be compelled as executor to account for the trust. *Matter of Cooper*, 6 Misc. 501. If the executor collects in moneys, which the will gives him no authority to administer, he incurs a personal liability to enforce which the Surrogate's Court has no jurisdiction. *Estate of Goetschius*, 2 Misc. 278. An executor being also the guardian of an infant may credit himself for the maintenance of such infants, where he has never had any money turned over to him as guardian. *Matter of Gearns*, 27 Misc. 76, 77, citing *Browne* v. *Bedford*, 4 Dem. 304. An executor may be allowed on the accounting moneys paid by them on land contracts by which testator at his death was obligated. *Matter of Davis*, 43 App. Div. 331, 334. The rule is stated in *Champion* v. *Brown*, 6 Johns. Ch. 398. See also *Williams* v. *Kinney*, 43 Hun, 8. Claims which cannot be liquidated until the Surrogate passes upon them at the accounting need not be set out in the account. When he has adjusted them, they are to be covered by the decree. *Matter of Kane*, 64 App. Div. 566, 571. Good practice calls, however, for some informatory schedule setting out the items, allowance of which will be claimed or contested by the accounting party, so that those cited may examine into them and act as they are advised.

What he must account for are the assets of the estate. But if the will

works an equitable conversion of realty, the proceeds become legal assets in the hands of the executor when received by him, and he is accountable therefor in the Surrogate's Court. *Stagg* v. *Jackson*, 1 N. Y. 206; *Hood* v. *Hood*, 85 N. Y. 561, 570. But he need not account for realty passing directly to a devisee. *Matter of Gill*, 42 Misc. 457.

Where the decedent's real estate was devised to executors, and they received the rents and profits thereof, and sold part and received the proceeds, it has held that these moneys were assets for the payment of debts and for distribution, and they were compelled to account therefor at the instance of judgment creditors of the estate under a deficiency judgment. *Glacius* v. *Fogel*, 88 N. Y. 434, 445. So where the decedent was a tenant *per autre vie*, his unexpired estate is a chattel real and goes to the executor or administrator. *Reynolds* v. *Collin*, 3 Hill, 441; *Norton* v. *Norton*, 2 Sandf. 296. So where a person had a life interest in certain stock, extraordinary dividends declared upon the stock belonged to him and became a part of the assets of his estate. *Woodruff's Estate*, 1 Tuck. 58. Where lands of the decedent are taken in exercise of the right of eminent domain, during his life, the proceeds are payable to his executors, if not paid to him in his lifetime. *Ballou* v. *Ballou*, 8 Week. Dig. 363. Growing crops are legal assets. *Bradner* v. *Faulkner*, 34 N. Y. 347; *Sherman* v. *Willett*, 42 N. Y. 146; *Wadsworth* v. *Allcott*, 6 N. Y. 64. But it is needless to multiply illustrations. The substantive law is well and clearly stated in the text-books. See, e. g., Schouler on Ex'rs and Admr's; part VII, ch. II; and Am. & Eng. Ency. of Law, subtopics.

§ 1068. **Same—Profit or loss.**—The account must show all increment of the estate. No executor or trustee can pay himself bonus or commissions or compensation in dealing with the trust estate except subject to the scrutiny and action of the court. *Matter of Sandrock*, 49 Misc. 371, and cases cited. Section 2729, hereafter quoted, provides that the representative shall neither profit by an increase nor suffer by a decrease (without his fault) of any part of the estate. He must account for the one and be allowed for the other. In *Matter of Thompson*, 41 Misc. 420, the estate securities had greatly depreciated because of a great and general "slump" in the market. The court cut the Gordian knot by decreeing distribution in kind and leaving to each beneficiary the responsibility of realizing at a loss or holding for a rise!

In *Matter of Mitchell*, 41 Misc. 603, executors accounted and were directed to pay themselves as trustees so much cash, which included the inventory value of a leasehold. But they realized twice the value on the sale of the leasehold but did not pay it to themselves as trustees. Held, they were still liable for such excess, withheld, as executors.

§ 1069. **Same—Assets of the estate—Savings bank accounts**—The limitation on size of interest-bearing accounts in savings banks has resulted in the multiplication of accounts by individuals under sundry names or capacities, primarily to secure the 4% interest on sums in excess of the bank's limit. The words "in trust" followed by real or fictitious bene-

ficiaries often tend to complicate the question and expose representatives to serious trouble and often to the expense of litigation.

When the executor or administrator is the "survivor" named in a joint account or the beneficiary of an "in trust" account the question has to come up. It may affect the transfer tax for one thing. The cases are voluminous. A few citations will put the reader on the track.

Surrogate Thomas reviewed the cases as to whether a trust interest was created in *Matter of Estate of P. V. Smith*, N. Y. Law Journal, March 13, 1903. The account was in name of A in trust for B.

In *Matter of Finn*, 44 Misc. 622, a widow, administratrix, took individual possession of three of decedent's savings banks pass books in his name "in trust for" herself, and also of a fourth in their joint names, J. F. or M. F. Held they were none of them the property of the estate. See opinion and cases.

If the "in trust for" form is so accompanied by delivery and acts or conduct sufficient to create a valid trust the estate has no right in the account. See *Matter of Biggars*, 39 Misc. 426. But if it be a mere "tentative trust" and revocable, it cannot become irrevocable, presumptively or in fact, until the depositor's death, or until he by unequivocal gift or act or declaration equivalent thereto divests himself of any right in or control of the account. See *Matter of Totten*, 179 N. Y. 112, and cases examined. *Matter of Dwyer*, 112 App. Div. 195; *Matter of Barefield*, 177 N. Y. 387; *Matter of Davis*, 119 App. Div. 35. See *Kelly* v. *Beers*, 194 N. Y. 49, two cases when account was payable to deceased and her daughter "or the survivor."

§ 1070. **The account must be verified.**—The Code requires a particular form of verification of every account filed in the Surrogate's Court. The provisions are as follows:

> *Affidavit to account; vouchers; examination of accounting party.*
>
> To each account filed with the surrogate, as prescribed in this article, must be appended the affidavit of the accounting party, to the effect that the account contains, according to the best of his knowledge and belief, a full and true statement of all his receipts and disbursements on account of the estate of the decedent, and of all money and other property belonging to the estate, which have come to his hands, or been received by any other person, by his order or authority, for his use, and that he does not know of any error or omission in the account, to the prejudice of any creditor of, or person interested in, the estate of the decedent. On an accounting by an executor or administrator, the accounting party must produce and file a voucher for every payment, except in one of the following cases:
>
> 1. He may be allowed, without a voucher, any proper item of expenditure, not exceeding twenty dollars, if it is supported by his own uncontradicted oath, stating positively the fact of payment, and specifying when and to whom the payment was made; but all the items so allowed against an estate, on all the accountings of all the executors or administrators, shall not exceed five hundred dollars.
>
> 2. If he proves, by his own oath or another's testimony, that he did not take

a voucher when he made the payment, or that the voucher then taken by him has been lost or destroyed, he may be allowed any item, the payment of which he satisfactorily proves by the testimony of the person to whom he made it; or, if that person is dead or cannot, after diligent search be found, by any competent evidence other than his own oath or that of his wife. But an allowance cannot be made, as specified in this section, unless the surrogate is satisfied that the charge is correct and just. The surrogate may, at any time, make an order requiring the accounting party to make and file his account, or to attend and be examined under oath, touching his receipts and disbursements, or touching any other matter relating to his administration of the estate, or any act done by him under color of his letters, or after the decedent's death and before the letters were issued, or touching any personal property owned or held by the decedent at the time of his death. No profit shall be made by an executor or administrator by the increase, nor shall he sustain any loss by the decrease, without his fault, of any part of the estate; but he shall account for such increase, and be allowed for such decrease on the settlement of his accounts. On the judicial settlement of the account of an executor or administrator, the surrogate may allow the accounting party for property of the decedent perished or lost without the fault of the accounting party. **§ 2729, Code Civil Proc.**, in part.

Former §§ 2733, 2734, 2735, 2741, consolidated; also R. S. 2564, § 57.

§ 1071. **Form of such affidavit.**—By ch. 293, Laws 1901, a new subd. 3 was added to this section, giving priority to reasonable funeral expenses, and prescribing a procedure to enforce payment thereof. This amendment is quoted under Payment of Debts, *ante*. The latter paragraph alone is pertinent to this discussion, and is as follows:

If upon any accounting it shall appear that an executor or administrator has failed to pay a claim for funeral expenses, the amount of which has been fixed and determined by the surrogate as above set forth or upon such accounting he shall not be allowed for the payment of any debt or claim against the decedent until said claim has been discharged in full; but such claim shall not be paid before expenses of administration are paid. **§ 2729, Code Civil Proc. subd. 3**, in part.

This subd. 3 has been held to apply to a claim accruing before it went into effect. *Matter of Kipp*, 70 App. Div. 567. For it is a mere regulation of procedure. But where an executor had duly paid out the fund in his hands before September 1, 1901, when subd. 3 went into effect, he cannot be held liable. *Matter of Kalbfleisch*, 78 App. Div. 464.

The following is a proper form for such affidavit to an account:

Affidavit to Account of Proceeding by Executor or Administrator under § 2729, C. C. P.

In the Matter of the Judicial Settlement of the Account of of Deceased.

County of ss.:

of being duly sworn, say that the charges made in the foregoing account of proceedings and schedules

annexed, for moneys paid by to creditors, legatees and next of kin, and for necessary expenses, are correct; that have been charged therein all the interest for moneys received by and embraced in said account, for which a legally accountable; that the moneys stated in said account as collected, were all that were collectible, according to the best of knowledge, information and belief, on the debts stated in such account at the time of this settlement thereof; that the allowances in said account for the decrease in the value of any assets, and the charges therein for the increase in such value, are correctly made; and that do not know of any error in said account or anything omitted therefrom which may in any wise prejudice the rights of any party interested in said estate. And deponent further say that the sums, under twenty dollars, charged in the said account, for which no vouchers or other evidences of payment are produced, or for which may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by as charged; and that said account contains, to the best of knowledge and belief, a full and true statement of all receipts and disbursements on account of the estate of said decedent, and of all money and other property belonging to said estate which have come into hands, or which have been received by any other person by or order of authority for use, and that do not know of any error or omission in the account to the prejudice of any creditor of or person interested in the estate of the decedent.

Sworn to before me this }
day of 19 }

§ 1072. **Vouchers.**—The rules as to vouchers are simple. The uncontradicted oath of the accounting party will support payments of items less than twenty dollars in amount severally, and not exceeding in the aggregate upon the whole administration five hundred dollars. § 2729, subd. 1; *Metzger* v. *Metzger*, 1 Bradf. 266; *Tickel* v. *Quinn*, 1 Dem. 425, 431; *Smith* v. *Bixby*, 5 Redf. 196. If he has vouchers for such items under twenty dollars, he must, however, file them. *Orser* v. *Orser*, 5 Dem. 21; *Matter of Woodward*, 69 App. Div. 285, 291. The fact that the vouchers are very numerous will not avoid their being filed. *Matter of Wicke*, 74 App. Div. 221. And the failure to file them is proper ground for a timely motion to vacate a decree settling the account. *Ibid.*

But for such items aggregating in excess of five hundred dollars, or where the amount of the payment was over twenty dollars but no voucher was taken, or having been taken was lost or destroyed, the facts as to payment must be satisfactorily proven by competent evidence. § 2729, subd. 2; *Matter of Rowland*, 5 Dem. 215. This means, of course, legal

proof. *Matter of Wilbur*, 27 Misc. 126. The best evidence is that of the person to whom he made the payment. But "if that person is dead or cannot, after diligent search be found," then any competent evidence may be offered other than the accounting party's own oath or that of his wife. This provision may be waived, and is waived if the contestant, himself, calls the executor as a witness on the disputed item. *Rose* v. *Rose*, 6 Dem. 26, 28. The Surrogate must be "satisfied that the charge is correct and just." See, for discussion of character of proof required, *Matter of Davis*, 43 App. Div. 331, 333.

The burden is on a contestant of impeaching an expenditure made by the accounting party for which a voucher is produced, such as a debt of decedent, showing upon its face the nature of the expenditure and its reasonableness. *Matter of White*, 6 Dem. 375, 388, and cases cited; *Matter of Hosford*, 27 App. Div. 427, 433; *Matter of Dittrich*, 53 Misc. 511. In the *Hosford* case the court says: "The burden of proving a claim made by an accountant to be allowed for counsel fees or other expenses rests upon him . . . ." he must show "what the services were, that they were necessary, and of the value charged." The court cites *Journault* v. *Ferris*, 2 Dem. 320; *Willson* v. *Willson*, 2 Dem. 462; *St. John* v. *McKee*, 2 Dem. 236; *Raymond* v. *Dayton*, 4 Dem. 333; *Casey's Estate*, 6 N. Y. Supp. 608. The distinction is this: expenses paid must be shown to be actual, necessary and reasonable. Debts paid must be shown to be actual and enforceable. See also *Matter of Smith*, 1 Misc. 269, 280.

If the voucher is not denied by objection, the accounting party need not establish the payment further than by the voucher. *Boughton* v. *Flint*, 74 N. Y. 476. In this case, Rapallo, J., held, at p. 485: "The accounting party is not bound to establish payments for which she presents vouchers unless they are denied by objections, and the burden of impeaching such payments is on the contestants. If the objections filed are insufficient, the Surrogate may allow further objections to be filed from time to time." *Matter of Warrin*, 56 App. Div. 414, 417; *Matter of Frazer*, 92 N. Y. 239; *Valentine* v. *Valentine*, 4 Redf. 265; *Carroll* v. *Hughes*, 5 Redf. 337; *Lockwood* v. *Thorne*, 18 N. Y. 285; *Schutz* v. *Morette*, 146 N. Y. 137; *Matter of Callahan*, 152 N. Y. 320.

Vouchers may be impeached upon any ground going to the fact of payment, the reasonableness of the expenditure, or the legality thereof. The objection may show that the signature to the voucher is a forgery, or that the amount it represents was not in fact due or payable. *Estate of Butler*, 39 N. Y. St. Rep. 851. Charles P. Daly, Surr., held (*Broome* v. *Van Vook*, 1 Redf. 444, 446), that in the absence of vouchers he must disallow an expenditure upon a conflict of testimony between the executor (who swore he made the payment) and the person to whom he claimed to have paid it (who denied having received it). The question was presented before Ransom, Surr. (*In re Langlois's Estate*, 2 Connoly, 481), of the power of the Surrogate to approve an account when no vouchers whatever were produced. The proof required was held to be such as would satisfy the

Surrogate. In this case, however, the objection raised was purely technical, and the evidence not in fact conflicting.

In *Matter of Cruger*, 34 N. Y. Supp. 191, it was held that an item of $100, paid for hotel bills of the decedent could not be allowed on the unsupported testimony of the accounting administratrix, there being no voucher whatever.

In *Matter of Gerow's Estate*, 23 N. Y. Supp. 847, the rule was fully elaborated that the evidence in support of an unvouched item must be competent evidence other than the oath of the accounting party. See p. 850, citing *Tickel* v. *Quinn*, 1 Dem. 425; *In re Rowland*, 5 Dem. 216; *In re Topping's Estate*, 14 N. Y. Supp. 495–498; *In re Taffs's Estate*, 8 N. Y. Supp. 282, 283; *Willcox* v. *Smith*, 26 Barb. 316; *In re Hertfelder's Estate*, 1 Law. Bull. 96.

The statutory rule is stringent but has been reasonably interpreted. For example, *Matter of Nichols*, 4 Redf. 284, 288, it was held that an executor could not be expected to prove to whom he had paid out various items of car fares and railroad fares, expended necessarily in business of the estate, or to produce vouchers therefor; but such disbursements were allowed.

It has been also held that an executor is not bound to require vouchers of a creditor whose claims are attested by the testator's books and sworn by the executor to be correct and due. *Gillespie* v. *Brooks*, 2 Redf. 349. The legality of payments is a proper issue to raise. An executor may not charge in his account items not constituting a legal charge upon the funds in his hands. *Matter of Selleck*, 111 N. Y. 284, 287. Such are, for instance, payments of taxes not a lien on property of the testator, at the time of his death, or taxes upon property not owned by the testator. *Ibid.* Even if he makes such payments at the request of the heirs, it will be deemed to be a personal transaction, and not properly to be incorporated into his accounting. The liability of an executor to pay taxes does not depend upon when the tax became a lien, but upon whether the decedent became personally liable for the same under the statute before his death. *Matter of Franklin*, 26 Misc. 107, 109; *Mygatt* v. *Washburn*, 15 N. Y. 316; *Rundell* v. *Lakey*, 40 N. Y. 513; *Matter of Babcock*, 115 N. Y. 450. Where it is objected that notes paid by the accounting party were fictitious, it is held the burden of proving honest payment is upon him (*Matter of Koch*, 33 Misc. 153). Whether or not to file objections to an account after examining the same, is often a serious question, with guardians especially.

The contesting of certain items may involve the estate in referee's fees, in *per diem* allowances, and in costs which may amount to more than the amount to be saved to the contestant's share. It has been held that a guardian, in such case, may have a preliminary examination of the accounting party before filing his objections (*Robert* v. *Morgan*, 4 Dem. 148), in order to determine the propriety of so doing.

§ 1073. **Neglect to set apart exempt property.**—In accounting for his administration the executor or administrator may be required to show

performance of every legal duty laid upon him. One such duty is that of setting apart exempt property to a surviving husband, wife or child. The Code provides:

> Where an executor or administrator has failed to set apart property for a surviving husband, wife or child, as prescribed by law, the person aggrieved may present a petition to the surrogate's court, setting forth the failure and praying for a decree, requiring such executor or administrator to set apart the property accordingly; or, if it has been lost, injured or disposed of, to pay the value thereof, or the amount of the injury thereto, and that he be cited to show cause why such a decree should not be made. If the surrogate is of the opinion that sufficient cause is shown, he must issue a citation accordingly. On the return of the citation, the surrogate must make such a decree in the premises as justice requires. In a proper case, the decree may require the executor personally to pay the value of the property, or the amount of the injury thereto. *The decree, made on a judicial settlement of the account of an executor or administrator, may award to a surviving husband, wife, or child, the same relief which may be awarded in his or her favor on a petition presented as prescribed in this section.* **§ 2724, Code Civil Proc.**

This exemption is covered by § 2713 of the Code, quoted and discussed, *ante*. The failure of the appraisers, to set apart the exempt property, does not divest a widow of her rights. She is not bound to move for an amendment of the inventory. Nor must she make the application contemplated by the first part of § 2724. The question can be adjusted on the accounting by the express letter of that section. *Matter of Maack*, 13 Misc. 368, 374. Where the widow herself is executrix she ought to wait until the accounting to have her exemptions adjusted. *Matter of Warner*, 53 App. Div. 565, 571.

The rights to property which ought to be set apart as exempt is an absolute right, and becomes so at the death of the decedent. *Vedder* v. *Saxton*, 46 Barb. 188. The representative's only right to it is a right of possession for purpose of including it in his inventory. *Ibid.*, and *Voelckner* v. *Hudson*, 1 Sandf. 215. It is a right that cannot be divested by the will, nor does a widow lose it by accepting a provision under the will. *Ibid.*

Upon the accounting, however, the executor or administrator cannot be credited exempt articles not actually set apart. If they were not so set apart a special application can be forthwith made under § 2724. *Cornwell* v. *Deck*, 2 Redf. 87. In such a case the creditors and next of kin should have notice. *Ibid.* If the executors not only did not set apart the property which should have been exempt, but sold it, they must account to the person entitled for the proceeds. § 2724, Code Civ. Proc.; *Sheldon* v. *Sheldon*, 8 N. Y. 31.

This is a different point than that involved in the claim occasionally made where the articles a widow, for example, asks to have set apart to her use are not in the estate, and their equivalent in cash is asked of the executors. This is properly allowed where the facts justify it. See discussion of § 2713, *ante*.

If it appear that the articles, or, in a proper case, the pecuniary equivalent were actually tendered and refused, the executor is entitled, having acted thereon, and delivered the same to the next of kin, to be protected against a change of mind on the accounting. *Matter of Campbell*, 96 App. Div. 561. The right being statutory and personal, the six years' statute of limitations applies and governs. *Ibid.* The refusal is a waiver, and binds the husband or wife *and* their representatives. *Ibid.*

§ 1074. **The schedules of the account.**—The form of executor's account shown in § 2 above, indicates what the schedules of such an account ought to contain. Those in a trustee's account may be far more complex. They may have to set forth:

I. (*a*) The property, securities or moneys constituting the principal of the personal estate at the testator's death, or at the time of the next preceding judicial settlement.

(*b*) The amount if any of accumulated income with which they may have been debited in the next preceding judicial settlement as income from the personal property.

(*c*) The real property held by them pursuant to the terms of the trust.

(*d*) The accumulated rents and profits of such real property with which they may have been debited on the next preceding judicial settlement.

II. (*a*) The additions to or any increase in personal principal.

(*b*) The additions to or any increase in personal income.

(*c*) The additions to or any increase in corpus of real property.

(*d*) The additions to or any increase in income from real property.

III. When the trustees have held real estate mortgages, a schedule should be set apart for them, showing payments of interest, increase or reductions in amounts outstanding, foreclosures, etc.

These and cognate schedules should be capable of being summarized as containing statements of all for which the trustees are legally accountable both on account of the principal and of the income of the estate. The schedules of disbursements should on the other hand substantially show:

(*a*) All moneys paid out of principal or income on account of necessary expenses of administration, with the reason or object of each expenditure.

(*b*) All payments made upon the real property of the trust, such as taxes, assessments, repairs, rents, commissions, insurance, etc., with the reason and object of each expenditure.

(*c*) All payments out of income to legatees or other beneficiaries.

(*d*) All payments out of principal to legatees or other beneficiaries.

These schedules are merely illustrative, and the order in which they are stated is a minor matter. There should always be the additional schedule, showing the property of every character remaining in the hands of the accounting party for further administration or distribution, and the schedule of all persons entitled as husband or widow, legatees, devisees, or next of kin, to any share in the estate under the will, with their place of residence, degree of relationship, their age, and if minors, whether they have guardians or not. As has been already intimated, this, or a similar,

schedule should show what allowance the executor will claim on his accounting for his reasonable expenses such as legal fees, etc. *Matter of Kane*, 64 App. Div. 566, 571. The amount cannot always be even approximated; but its character should be indicated.

The vouchers should be arranged so as to correspond with the schedules, particularly if there is any likelihood of contest. Thus if schedule G should be described as containing all payments of taxes, assessments, water rates, etc., made on the trust estate, the vouchers for all such payments should properly be strapped together and lettered to correspond. This will facilitate the court and the referee in its determination upon objection being made, as to the sufficiency of vouchers.

The delays in accounting proceedings are not infrequently due to an indifferent preparation of the account itself, and an unsystematic arrangement of the vouchers.

It is the duty of a special guardian to examine all vouchers for payments affecting the interests of his infants. His report is under oath. If he discovers that vouchers are missing, or clearly defective, or improper, he should interpose objection and may thus place the responsibility upon the court or referee. Still, in view of the fact that a contest is costly to the estate, good faith requires that he act with discretion and exercise his judgment. He is bound to assume the responsibility of his office, and may often fully discharge his trust by careful examination and avoid the necessity of objections.

CHAPTER III

THE PROCEDURE ON ACCOUNTINGS

§ 1075. **Initiating the proceeding.**—The tables already given indicate the persons by whom the various accounting proceedings may be initiated. The provisions of the Code as to the commencement and conduct of these different accountings are here to be discussed.

I. AS TO EXECUTORS AND ADMINISTRATORS GENERALLY

Since the provisions about to be discussed are made applicable to trustees' and guardians' accountings as already noted the procedure will be covered by the discussion under this heading.

The practice as to these representatives is set out in the following section of the Code:

Citation; order to account and proceedings thereon.

A petition, praying for the judicial settlement of an account, and that the executor or administrator be cited to show cause why he should not render and settle his account, may be presented, in a case prescribed in the last section by a creditor or a person interested in the estate or fund, including a child born after the making of a will; or by any person, in behalf of an infant so interested; or by a surety in the official bond of the person required to account, or the legal representative of such a surety. On the presentation of such a petition, a citation must be issued accordingly; except that in a case specified in subdivision first of the last section, if the petition is presented within eighteen months after letters were issued to the executor or administrator, the surrogate may entertain or decline to entertain it, in his discretion. On the return of a citation issued as prescribed in either of the foregoing sections of this article, if the executor or administrator fails either to appear, or to show good cause to the contrary, or to present in a proper case, a petition as prescribed in the next section, an order must be made, directing him to account within such a time, and in such a manner as the surrogate prescribes, and to attend from time to time, before the surrogate, for that purpose. The executor or administrator is bound by such an order, without service thereof. If he disobeys it the surrogate may issue a warrant of attachment against him, and his letters may be revoked, as where a warrant of attachment is issued to compel the return of an inventory. If it appears that there is a surplus, distributable to creditors or persons interested, the surrogate may, at any time, issue a supplemental citation, directed to the persons who must be cited, on the petition of an executor or administrator for a judicial settlement of his account, and requiring them to attend the accounting. The pendency of a proceeding against an executor or administrator to compel him to account, does not pre-

clude him from presenting a petition as prescribed in the next section. If such petition is presented at or before the return of a citation in and as prescribed in either of the foregoing sections of this title, the citation issued thereon need not be directed to the petitioner in the special proceeding pending against the executor or administrator, and the two proceedings *must* be consolidated. The Surrogate may, in his discretion, and on such terms as may be just, direct the consolidation of any two or more *of such proceedings* pending before him, and such consolidation does not affect any power of the surrogate, which might be exercised in either proceeding. **§ 2727, Code Civil Proc.**

Former §§ 2726, 2727, 2728, consolidated.

The cases as to consolidation of proceedings are noted, *ante*, p. 1087, *q. v.*

§ 1076. **The petition.**—The petition in such compulsory proceedings must set out all the jurisdictional facts. The petitioner must so describe himself as to bring himself within the statute. A legatee may thus petition. *Matter of Rainforth*, 37 Misc. 660. See Table of Compulsory Accountings, *ante*. Section 2514, subd. 11, gives petitioner right to accounting if his interest is made to appear by *duly verified petition*, but this does not deprive Surrogate of power (discretionary) to deny application where on face of proceedings it appears he is not entitled to order asked for. *Doritz* v. *Doritz*, 40 App. Div. 236, 238, citing *Matter of Wagner*, 119 N. Y. 28, 34. See also *Matter of Simonson*, 119 N. Y. 661. If he petitions as a creditor he must show the nature of his claim, and allege facts showing it to be a subsisting claim against the estate. The amount due and the time when it became due should appear. *Estate of Zeuschner*, 15 N. Y. St. Rep. 744. So, the executor may dispute the status of a petitioning creditor, whereupon the creditor must first establish his right as a creditor in a court having jurisdiction to try the claim. *Matter of Whitehead*, 38 App. Div. 319. And if on face of petition, it is clear his status as creditor is defective, the Surrogate will deny the application. *Doritz* v. *Doritz*, 40 App. Div. 236, 238; *Matter of Wagner*, 119 N. Y. 28, 34.

In *Matter of Reinach*, 41 Misc. 78, Thomas, Surr., refused to try an issue claimed to be raised by presentation and rejection of a claim. But, the executor having denied that the claim was in fact presented he asserted his right to try that issue, and, if it should be found it had been presented, then whether it had been accepted, citing *Matter of Miles*, 170 N. Y. 75.

When a daughter sought to compel her mother's administratrix to account, the answer interposed was payment. Held the answer was not fatal. *Matter of Williams*, 57 Misc. 537, citing *Matter of Kipp*, 41 N. Y. Supp. 259.

The prayer should conform to the Code, for the citation must follow the prayer of the petition. Where an executor was cited merely to "render an account," it was held, as already noted, that an account filed pursuant thereto was incapable of being judicially settled. *Schlegel* v. *Winckel*, 2 Dem. 232. The prayer should therefore be either that the respondent be cited to "render and settle his account," or to "file his account for judicial settlement." *Ibid.* The following may serve as a precedent:

Petition for compulsory accounting and judicial settlement under § 2727, C. C. P.

Surrogate's Court,
County of New York.

In the Matter of the Estate }
of Deceased. }

To the Surrogate's Court of the County of New York:

The petition of who resides at No. street: respectfully showeth: That your petitioner is a of deceased. (*Allege petitioner's status concisely, but specifically.*)

That letters on the estate of said deceased were granted by the Surrogate of the County of New York to on the day of

(*See below, and see table of compulsory final accountings as to what facts to allege as warranting petitioner to compel account as, for example:*)

That more than has elapsed since h appointment, and the said ha not rendered any account of proceedings as such.

Your petitioner, therefore, prays for a judicial settlement of the accounts of said and that a citation may be issued requiring the said to appear in this court, and show cause why should not render accounts, and why the same should not be judicially settled.

Petitioner.

(Verification.)

It must be remembered that if the prayer is merely that the account be judicially settled, the petitioner's letters cannot be revoked and a discharge be secured thereon. Where that is the intent the petition must so pray and the citation so specify. The words "final account" are used here, as repeatedly noted, not as the last or ultimate account. Executors and administrators, however, are not unapt to expect, when they are given to understand that a "final" account is to be "settled," that it will be followed by their discharge, and release from further responsibility. If this is intended to be accomplished, the petition and citation must be framed accordingly and the necessary parties brought in, or the estate may be subjected to the expense of a second proceeding. The table in the preceding chapter will show when such a petition may be made. The Code provisions, however, are as follows:

When surrogate may require judicial settlement of account.

In either of the following cases, the surrogate's court may, from time to time, compel a judicial settlement of the account of an executor or administrator.

1. Where one year has expired since letters were issued *to him.*

2. Where letters issued to him have been revoked, or, for any other reasons, his powers have ceased.

3. Where a decree for the disposition of real property, or of an interest in real property, has been made, as prescribed in title fifth of this chapter, and

the property, or a part thereof, has been disposed of by him pursuant to the decree.

4. Where he has sold, or otherwise disposed of, any of the decedent's real property, or the rents, profits or proceeds thereof, pursuant to a power contained in the decedent's will, where one year has elapsed since letters were issued to him.

The surrogate's court may compel a judicial settlement of the account of a temporary administrator at any time.

It may also compel a judicial settlement of the account of a freeholder, appointed to dispose of a decedent's real property, or interest in real property, as prescribed in title fifth of this chapter, in like manner as where the same has been disposed of by the executor or administrator. **§ 2726, Code Civil Proc.**

Former §§ 2724, 2725, consolidated.

§ 1077. **Time when accounting may be had.**—As to the time limit fixed by subd. 1, the practice in New York County is that stated in the *Crowley* case, reported in N. Y. Law Journal, January 16, 1901, where Thomas, Surr., construed the words "*issued to him*" as personal to the one sought to be made to account. He says:

"The proceeding is to compel judicial settlement of the account of Nora L. Crowley, as executrix. By the will of the decedent his wife, Elizabeth Crowley, and his daughter, Nora L. Crowley, were named as executors, and they were also made residuary legatees to share equally in his estate, after the payment of funeral expenses and expenses of administration. On May 9, 1893, letters testamentary were issued to Elizabeth Crowley, Nora L. Crowley not qualifying. In March, 1900, Elizabeth Crowley died, leaving the administration of the estate uncompleted. On April 27, 1900, letters testamentary were issued to Nora L. Crowley, and in July she collected and received something over $6,000, being the amount due on a mortgage representing a part of the estate. The petitioner is the administrator of the estate of Elizabeth Crowley. It thus appears that more than seven years have expired since letters were first issued and that less than one year has expired since letters were first issued to the executrix who is proceeded against. The question presented is as to the power of the Surrogate to require an accounting at this time. The language of the statute is that the Surrogate's Court may compel a judicial settlement of the account of an executor or administrator when one year has expired since letters were issued 'to him' (§ 2726, Code Civ. Proc.). An executor or administrator may proceed voluntarily to procure his account to be judicially settled where one year has expired since letters were issued 'to such executor or administrator' (§ 2728, Code Civ. Proc.). It would seem that these provisions were sufficiently explicit and that the application must be denied. There are some decisions which do not point to this result, and, though I cannot agree with them, they should be referred to. In *Cuthbert* v. *Jacobson*, 2 Dem. 134, upon somewhat similar facts, Bergen, Surr., on his own motion and without argument, directed an accounting on the ground that the year should be computed from the

granting of the first letters (citing § 2493, Code Civ. Proc). This section is to the effect that 'where it is prescribed by law that an act, with respect to the estate of a decedent, must or may be done within a specified time after letters testamentary or letters of administration are issued, and successive or supplementary letters are issued upon the same estate, the time so specified must be reckoned from the issuing of the first letters, except in a case where it is otherwise specially prescribed by law.' It is not applicable to the present question because the act of accounting and procuring a judicial settlement is not required to be done 'within a specified time after' the issue of letters. The provision has application only to acts which must or may be done, if at all, within a specified limited time, reckoned from the granting of letters. Such an act is the filing of a petition in a proceeding to sell land for the payment of debts within three years after letters issued (§ 2750, Code Civ. Proc.) It does not apply to an act which may only be done after the expiration of a specified time after the issue of letters, and can only be compelled after the expiration of that time. And even if that provision had application this case is not within it because it is 'specially prescribed by law' that the judicial settlement of the account of an executor can only be compelled when one year has expired after letters were issued 'to him.' In *Matter of Burling*, 5 Dem. 47, Coffin, Surr., distinguished an administrator *de bonis non* from an administrator receiving the original letters, and permitted him to account and distribute after one year from the issue of the original letters. This case is different in its facts from the one now before me, and, even if correct in its conclusions, has no application. A decision of Rollins, Surr., sustains my conclusion (*Estate of William Menck*, 5 State Reporter, 341). The application is denied on the ground of want of power to direct a judicial settlement of the account of the executrix before the expiration of a year from the time of the granting of letters to her."

Under subd. 2, see *Matter of Hood*, 104 N. Y. 103; *Estate of Lawrence*, 1 Tuck. 68. Under subd. 4 it must be noted that where there is a mere discretionary power of sale in the will, and where the proceeds of property so sold remain, in contemplation of law, real property, the occasion is not presented for an accounting, as is the case when the proceeds become personalty by equitable conversion. *Matter of McComb*, 117 N. Y. 378.

§ 1078. **Parties.**—It will be noted that the petition originally prays that the executor, or other accounting party, be cited. But § 2727 provides that if it appears that there is a surplus distributable, either to creditors or to persons interested, the Surrogate may, *at any time*, issue a supplemental citation, directed to the persons who must be cited in proceedings under § 2728. These are:

(*a*) The sureties or their legal representatives.

This only applies to voluntary accountings. *Matter of Storm*, 84 App. Div. 552; *McMahon* v. *Smith*, 24 App. Div. 25.

(*b*) All creditors or persons claiming to be creditors of the decedent,

except such as by vouchers annexed to the account filed, appear to have been paid;

(*c*) The husband or wife (if any) of the decedent;

(*d*) The next of kin;

(*e*) The legatees if any;

(*f*) Or the legal representatives of any necessary parties who may have died.

It is not an uncommon practice to cite them at the outset in order to avoid subsequent delays. In *Matter of De Forest*, 86 Hun, 300, it was held that the better practice was to serve the citation upon *all* creditors, including those who, it was claimed, had been paid in full, and had receipted for such payment. This ruling was based upon the ground that the creditor, being cited, might be able to establish either that the voucher was not his voucher, or that the payment was but partial. The rule now, however, is different. This decision was made at April Term, 1895. In that year § 2728 was amended (ch. 426, L. 1895), by excepting from creditors entitled to citation those who appeared to be paid, and the vouchers filed with the account were made *prima facie* proof of payment. All creditors' rights are preserved, however, by the later provision in the same section that "any creditor, or person interested in the estate, although not cited, is entitled to appear on the hearing, and thus make himself a party to the proceeding."

The creditors must be creditors of the decedent. Creditors of a distributee are not such creditors. *Duncan* v. *Guest*, 5 Redf. 440. But if a legatee or other person interested is a judgment debtor, and a receiver in supplementary proceedings has been appointed of such legatee, this receiver stands as to the estate in the judgment debtor's place, and is entitled to be made a party (*Monahan* v. *Fitzpatrick*, 16 Misc. 508); or even to petition for the accounting. *Matter of Beyea*, 10 Misc. 198; *Matter of Lilienthal*, Westchester County, Surr. Court, February, 1899. Anyone entitled to be made a party and not cited, is not concluded by the decree, and although the representative accounts and is discharged such person is entitled to compel an accounting and secure payment from the executor of any moneys misapplied as to him. *Matter of Lamb*, 10 Misc. 638. The citation of additional parties is discretionary with the Surrogate. The provision is "may" not "must." So it is held that he will not issue such supplemental citation, unless it is made to appear either on the face of the account or from other satisfactory allegation and proof that there is the distributable surplus contemplated by the section. *Matter of Rainforth*, 37 Misc. 660.

On the accounting of an executrix of one who was executor, a "person interested" in the estate of which he was such executor is a proper party to her accounting. *Matter of Walton*, 38 Misc. 723, citing *Matter of Quinn*, 30 N. Y. S. R. 212; *Bunnell* v. *Ranney*, 2 Dem. 327; *Solomons* v. *Kursheedt*, 3 Dem. 310.

Where one intervenes "upon the hearing" and makes himself a party

the Surrogate may then examine into and pass upon intervenor's status. *Matter of St. John*, 104 App. Div. 460.

§ 1079. **Resisting the proceeding to account.**—As it is not everyone who can compel an accounting the Surrogate has power to determine preliminarily whether the petitioner comes within any of the classes designated in the Code. The petitioner must have such an interest as the Code recognizes, and must petition in the capacity in which he has such interest. Thus, in an early case (*Colon's Accounting*, 1 Turk. 244), the petitioner was a general guardian claiming to have made to his ward advances in excess of receipts. He prayed that certain executors of a will, under which his ward was a legatee, should render an account. He petitioned personally, and his application was refused, as being that of a person who had no claim against the estate. See opinion.

The person sought to be called to account may also set up in answer the Statute of Limitations. See *Matter of Underhill*, 1 Connoly, 541; *Martin* v. *Gage*, 9 N. Y. 398. But it must be set up in time. *Ibid.; Van Vleck* v. *Burroughs*, 6 Barb. 341. It should be asserted upon the return day, but as no written reply is required to the objections, the defense may be availed of on the hearing. *Matter of Rothschild*, 42 Misc. 161, Thomas, Surr., citing *Matter of Chadeagne*, 10 Hun, 97. Where funds have come into the hands of a representative for which he has never accounted, and he has not effectually renounced the trust or been discharged, it was held the statute does not begin to run in his favor. *Matter of Taylor*, 30 App. Div. 213, 216. But this case was overruled in *Matter of Longbotham*, 38 App. Div. 607, which held the ten-year statute applicable in such a case; following *Matter of Rogers*, 153 N. Y. 316.

Where the primary object and result of the accounting will be to turn over the estate to a trustee under the will it is not improper for the executors in their answer to his petition to set up his incompetency to receive and administer the trust. *Hall* v. *Strong*, 117 App. Div. 912.

It not unfrequently occurs that estates are settled out of court, between the representatives and the persons interested, being competent and of full age. Such settlements are not against public policy. *Ledyard* v. *Bull*, 119 N. Y. 62, 71. And the representative who has made such a settlement and distribution on consent is entitled to set it up as a reason why he should not render an account for judicial settlement. *Matter of Pruyn*, 141 N. Y. 544. But if he does set up such an answer, it should be full and explicit. (See *Stowenel's Estate*, 1 Tuck. 241.) The right to set up satisfaction by the persons interested must be timely asserted, or it is waived. *Kellett* v. *Rathburn*, 4 Paige, 102. The releases relied on should be exhibited so that the Surrogate may determine whether the petitioner's rights, or those of one under whom he claims were thereby concluded. *Sayre* v. *Sayre*, 3 Dem. 264. But he cannot try the issue of validity of such releases. See *Matter of U. S. Trust Co.*, 175 N. Y. 304; *Matter of Wagner*, 119 N. Y. 28.

There are cases where the petitioner concedes the release but alleges that

it was secured by fraud or coercion, or otherwise improperly. The invalidity of the release being not within the Surrogate's jurisdiction to try he must treat the sworn allegation of its invalidity as a sufficient allegation of interest and direct the accounting thereon. *Reilley* v. *Duffy*, 4 Dem. 366, 368, Rollins, Surr., citing *Fraenznick* v. *Miller*, 1 Dem. 136; *Harris* v. *Ely*, 25 N. Y. 138; *Rieben* v. *Hicks*, 4 Bradf. 136; *Schmidt* v. *Heusner*, 4 Dem. 275. See also *Thomson* v. *Thomson*, 1 Bradf. 24; *Burwell* v. *Shaw*, 2 Bradf. 322; *Cotterell* v. *Brock*, 1 Bradf. 148; *Creamer* v. *Waller*, 2 Dem. 351. This is based on the requirement in § 2514 of the Code in subd. 11, that when the Code provides that a person interested may apply for an account, "an allegation of his interest, duly verified, suffices, although his interest is disputed;" and the exception is only when he has been excluded by a judgment, decree, or other final determination, and no appeal therefrom is pending. *Ibid.* But this rule must not be extended beyond its obvious intent. Where executors continued the decedent's partnership business, and a general creditor of the firm sought to compel an accounting by them as executors, the application was denied. *Frothingham* v. *Hodenpyl*, 41 N. Y. St. Rep. 398. The Court of Appeals discussed fully the discretion of the Surrogate, in *Matter of Wagner*, 119 N. Y. 28, 33, reviewing the various sections of the Code applicable, and held that the Surrogate could, where a full release was alleged, and not alleged *per contra* to be invalid, protect the executor from a further accounting. The person may be a "person interested;" as to that his verified allegation of interest suffices. But even then he may have disentitled himself to demand an accounting. *Ibid.*, opinion of Gray, J., at p. 34. See also *Matter of Pruyn*, 141 N. Y. 544, 546, where the doctrine is reasserted and emphasized.

The person entitled to demand an accounting is not required to demand his legacy, or his distributive share of the person called to account as a condition precedent. There is no such rule. *Matter of Dunham*, 1 Connoly, 323, 328. An account may be ordered rendered in order to disclose the condition of the estate. *Matter of Lawrence*, 16 N. Y. St. Rep. 971.

When an action is already pending in the Supreme Court for an accounting to which the petitioner is a party, it may be set up as a good and sufficient reason for denying the accounting in the Surrogate's Court. This is peculiarly proper if the petitioner in the Surrogate's Court is the plaintiff in the other court. *Matter of De Pierris*, 79 Hun, 279.

§ 1080. **As to others than executors and administrators.**—In part VII, which treats of testamentary trustees and guardians, the sections of the Code exclusively applicable to them are set forth. The procedure, except as there distinguished, is assimilated to accountings by the legal representatives. The precedents also may be readily adapted from those given in this connection.

§ 1081. **Objections.**—In the absence of a local rule, no pleadings or specifications are required in objecting to an account. *Matter of Consalus*, 95 N. Y. 341, 344. In the county of New York Rule VII requires:

"On an accounting by an executor, administrator, guardian or trustee, which may be contested, any party interested, or a creditor desiring to contest the account, *shall file specific objections thereto in writing*, and serve a copy thereof upon the accounting party (NOTE. In the absence of a specific rule to this effect, failure to serve a copy is no ground for overruling the objections. *Journault* v. *Ferris*, 2 Dem. 320) or upon his attorney in case he shall have appeared by attorney, and within eight days after the filing of the account in the office of the clerk of the court, where the accounting is a compulsory one, and within eight days after the return of the citation, where the accounting is a voluntary one, or within such further or other time in either case as shall be allowed by the Surrogate; *and the contest of such account shall be confined* to the items or matter so objected to. If it shall appear to the satisfaction of the court, by affidavit or petition, that an examination of the accounting party will be necessary to enable the contesting party to interpose his objections, such examination may be ordered by the court for that purpose."

This rule might well be made of general application, and is, in substance, in force in the majority of Surrogates' Courts throughout the State. The Court of Appeals had held (*Peck* v. *Sherwood*, 56 N. Y. 615, headnote), that "while it is a proper and a better practice to object specifically to the items of an executor's account which it is meant to question, yet under a general objection to any and all of the items, the Surrogate can inquire into and scrutinize the account, and is not bound by the executor's oath thereto, or the vouchers produced by him." But a "general" objection does not mean an indefinite objection. If an objection be so vague as not to raise a distinct issue as to the propriety or legality of a particular item or class of items, or as to the sufficiency of the account, the Surrogate may overrule it (*France* v. *Willets*, 4 Dem. 369), or he may allow the objection to be amended. The practice of Surrogates is liberal in this respect. See *Matter of Hall*, 7 Abb. N. C. 149. Rollins, Surr., held (*Thompson* v. *Mott*, 2 Dem. 154), that in determining whether, in a given case, objections are sufficiently specific, regard should be had to the particular circumstances of such case, and to the facilities afforded the contestant for compliance with the terms of the rule (Rule VII); and he adds: "Objections which might be deemed under some circumstances vague, might under other circumstances be regarded as sufficiently specific." He also held that he had power under § 2533 of the Code to require the objection filed to be verified. See also *Bainbridge* v. *McCullough*, 1 Hun, 488. In the absence of such a direction they need not be verified. *In re Mott*, 2 Dem. 154.

The wisdom of adhering to a rule whereby specific issues may be raised for trial in these proceedings was asserted by the General Term, First Department, in *Matter of Heuser*, 87 Hun, 262, 265. The accounting party ought to have notice of the claims to be urged by the objection, and have opportunity, by adjournments or even by rehearing, to meet them. *Ibid.* In *Matter of Hart*, 60 Hun, 516, the same court held that "in these pro-

ceedings the account and the objections thereto form the pleadings; and the objector to an account is as much bound to set up in such objections any claims which he proposes to make . . . . as the defendant in an action is bound to set up in his answer any claims which he proposes to urge." And the court further held that its power to amend the objections *nunc pro tunc*, in order to consider the issue upon the appeal, would never be exercised for the purpose of reversing a judgment, but only for the purpose of affirmance. *Ibid.*, p. 517. See Vouchers, ch. II, *ante*, as to burden of proof, and *Matter of Warrin*, 56 App. Div. 414.

Where parties come in after the time to file objections has expired, and ask leave to contest the account, the Surrogate may impose conditions as terms of granting the request. *Matter of Turfler*, 78 Hun, 258. And he may refuse such leave on the ground of laches. *Matter of Von Glahn*, 53 App. Div. 165, 167. If objections are not filed in time, the costs of reforming the account required to meet the objections ought not to be charged upon the executor. See *Matter of Peyser*, 5 Dem. 244. If the one desiring to contest is shown to have released his rights, the release is a bar to his filing objections to the account. *Matter of Irvin*, 24 Misc. 353. The validity of the release cannot be tried by the Surrogate. It must stand until set aside by a court of competent jurisdiction. *Ibid.; Matter of Randall*, 152 N. Y. 508. So where the one objecting is shown to have already objected to the same items on an accounting involving the same question, in which his objections were heard and overruled, and a decree duly made thereupon, he cannot be allowed to relitigate the same issues. *Matter of Clapp*, 30 Misc. 395.

It is the duty of a special guardian to put in issue by objection *any questionable item* in the account. *Matter of Parr*, 45 Misc. 564.

§ 1082. **Examination of account.**—In New York County, Rule 24 provides that "Upon an accounting, wherein there is no general or special guardian, no decree will be entered, until the account has been audited by a referee appointed for that purpose, *except upon the consent of all the parties.*"

Rule 11 provides: "In any proceeding for a judicial settlement of the account, wherein a special guardian shall be appointed or a general guardian shall appear to protect the interest of an infant party to such accounting no decree will be entered as upon default against such infant, but such decree shall be so entered only upon the written report of the guardian appearing for such infant that he has carefully examined the account, and finds it correct, and upon two days' notice to the guardian of the settlement thereof."

§ 1083. **Reference to try issues raised by objection.**—Where proper objections are filed, and issues duly raised, the Surrogate has power to try the same by reference under § 2546 of the Code. Such referee has, by the express terms of the statute, power to hear and determine all questions arising upon the settlement of such an account, which the Surrogate himself has power to determine. See *Matter of Gearns*, 27 Misc. 76, and cases

cited. It becomes important, therefore, to discuss first what these questions are.

§ 1084. **What questions may be heard and determined upon an accounting.**

DISPUTED CLAIMS

See amendment chap. 595, L. 1895, to § 1822, C. C. P., as to stipulating disputed claims over to final accounting for determination by Surrogate.

There has been a serious divergence of decisions as to the Surrogates' power to adjudicate upon disputed claims in these proceedings. These claims can be roughly divided into five classes.

(*a*) Claims of creditors paid or allowed by the one accounting or other disbursements made by him the propriety or legality of which payment is put in issue upon the accounting.

(*b*) Claims rejected by the one accounting and sought to be allowed at the instance of the claimant upon the accounting.

(*c*) Claims of the representative against the estate.

(*d*) Claims of the estate against the representative.

(*e*) Claims of the estate against any debtor.

In § 775, *ante*, the new § 2718*a* is discussed, *q. v.* If the special proceeding thus provided has been resorted to it will eliminate from the accounting a vexatious element. We noted in § 782 *et seq.* that a creditor whose claim was rejected could:

(*a*) Sue under § 1822.

(*b*) Consent to refer under § 2718.

(*c*) Stipulate its determination by the Surrogate on the final accounting.

(*d*) Secure a determination in advance of accounting under § 2718*a*.

See § 782 *et seq.* for discussion.

Section 2743 refers to the conclusive effect of a decree on accounting. This is preceded by a clause giving the Surrogate power to determine to whom a debt, claim, or distributive share is payable when

(*a*) Its validity has been admitted.

(*b*) Or has been established upon the "accounting or other proceeding in the Surrogate's Court or other court of competent jurisdiction." See *Matter of Clark* v. *Hyland*, 88 App. Div. 392, as to meaning of this.

§ 1085. **Claims or payments already adjusted and contested upon accounting.**—As to *a*, the Surrogate has power to pass upon the propriety or legality of payments made by the accounting party. The chief object of permitting objections to be filed is that just such issues may be raised. The executors having made the payment in question, and producing vouchers therefor, the burden is on the contestant to show that it was not a just debt of the estate, and the Surrogate's determination is conclusive. *Accounting of Frazer*, 92 N. Y. 239, 247; *Matter of Strickland*, 1 Connoly, 435, 437; *Matter of Stevenson*, 86 Hun, 325; *Matter of Cozine*, 104 App. Div. 182; *Matter of Brown*, 60 Misc. 35. But if his determination be

against the weight of evidence, it will be set aside. Thus, where the objector claimed that the accounting party should include in his account and charge himself with a stud horse which had been omitted as having been given away by gift *inter vivos* by the testator, it was held that the evidence of such a gift must be of "great probative force," clearly establishing every element of a valid gift, and that not being the case as to the evidence offered by the executor, he must be surcharged with the horse. *Matter of O'Connell*, 33 App. Div. 483.

For two cases involving expenditures made by way of compensation to a relative of the accountant, and claimed to be an expense of administration, see *Matter of Wagner*, 40 Misc. 490, employment of son sustained; and *Matter of Rainforth*, 40 Misc. 609, contract with son (to buy in claims at less than face, though charged as paid in full) held collusive and fraudulent. The general rule is well stated in *Matter of Hosford*, 27 App. Div. 427, 433: "On the final accounting before a Surrogate, an unassailed voucher for the payment of a debt of the deceased throws upon a contestant the burden of impeaching the justice, as well as the fact of the payment of the claim. The burden of proving a claim made by an accountant, to be allowed for counsel fees or other expenses, rests upon him . . . . (he must) show what the services were; that they were necessary, and of the value charged," citing *Journault* v. *Ferris*, 2 Dem. 320; *Willson* v. *Willson*, *id.* 462; *St. John* v. *McKee*, *id.* 236; *Raymond* v. *Dayton*, 4 *id.* 333; *In re Casey's Estate*, 6 N. Y. Supp. 608. Payments made after an account is filed must in order to be passed upon by the Surrogate be set up in a supplemental account to which objections may be duly interposed. *Matter of Arkenburgh*, 38 App. Div. 473. In *Matter of Watson*, 115 App. Div. 310 (2 dissents) the executors were surcharged a claim paid by them. They rejected the claim originally, and defended *pro forma* the ensuing action thereon, and made no objection under § 829 to evidence establishing its validity. Then they paid the judgment. Held collusive, citing *Matter of Saunders*, 4 Misc. 28; *Dye* v. *Kerr*, 15 Barb. 444.

§ 1086. **Claims of unpaid creditors.**—Prior to 1895, ch. 595, the Surrogate was without jurisdiction to determine the validity of a disputed claim or in any way examine the same. *Glacius* v. *Fogel*, 88 N. Y. 434. Also *Matter of Callahan*, 152 N. Y. 320; *McNulty* v. *Hurd*, 72 N. Y. 518. The law referred to amended § 1822 which limits the time within which a claimant against the estate of a decedent must begin an action for the recovery of his claim against an executor or administrator, by providing that, where an executor or administrator *disputes or rejects* the claim against his decedent's estate, *exhibited to him*, regardless of whether it be before or after he has commenced to publish notices to present claims, the claimant and the representative may enter into a *written consent* that the claim so disputed or rejected may be heard and determined by the Surrogate upon the judicial settlement of the accounts of the representative as provided by § 2743. (Amended to correspond by same act.) This consent must be *filed* with the Surrogate. The statute says the consent

"shall be filed by the respective parties;" but this undoubtedly means that the filing of the consent *duly executed by the respective parties* may be done by either party. In *Matter of Brown*, 76 App. Div. 185, the administratrix rejected the claim and filed her consent. The creditor had not joined in such consent, and filed his fourteen months later. Held, he was barred.

Since these amendments, the Surrogate can try such disputed claims, but only by the consent of the parties and only by such consent when regularly made and filed. *Matter of Gall*, 182 N. Y. 270. *Hart* v. *Hart*, 45 App. Div. 280; *Matter of Edmonds*, 47 App. Div. 229, 231; *Matter of Kirby*, 36 Misc. 312.

It follows from the power of the Surrogate to pass upon a claim so submitted by a filed consent that he has power under § 2546 to refer the same by a reference to hear and determine. *Matter of Hoes*, 54 App. Div. 281. Should it develop on the reference that no consent was filed, it is the duty of the referee to reject the claim. *Matter of Kirby*, *supra*.

This section provides a new practice which has been readily availed of by creditors in regard to which, so far as observation has gone, there have been no evils resulting from this enlargement of the Surrogate's jurisdiction in the matter of disputed claims.

The consent must be filed within six months after dispute or rejection; or if no part of the debt is then due, within six months after a part thereof becomes due, for the reason that if it is not so filed the claimant must commence his action within the time so limited. The *Brown* case above cited shows the risk of not doing this. So does *Matter of Bork*, 55 Misc. 175, citing *Clark* v. *Scovill*, 111 App. Div. 35. See *Clark* v. *Scovill*, 191 N. Y. 8, aff'g 116 App. Div. 923. This section, however, must be read together with § 1836 which gives the creditor a right to costs in the action to be brought by him against the executor or administrator if such defendant "did not file the consent provided in § 1872 at least ten days before the expiration of six months from the rejection thereof." Hence it appears from this, first, that to protect himself, the representative should see to the filing of the consent if it has been entered into, and second, that the creditor to entitle himself to costs, must wait five months and twenty days before beginning suit. If on the expiration of that time, the consent has not been filed, he has still ten days in which to commence his action. *Hart* v. *Hart*, 45 App. Div. 280; *Hoye* v. *Flynn*, 30 Misc. 636. See generally as to this subject, discussion under "Ascertaining the Debts." Therefore if the consent in writing be so filed with the Surrogate within that time, it would operate to postpone to the accounting the determination of the claim; and would also operate to confer upon the Surrogate jurisdiction to determine such disputed claim. This is the clear intent of the amendment. But in all other cases not so reserved he is expressly denied this power in a direct proceeding to compel payment of a debt or legacy, which proceeding the Code requires, by § 2722, must be dismissed if the validity of the claim is denied. The decisions have been contradictory as to the

intent of the statute, in § 2743 as it now stands, and in the former provisions of the Revised Statutes, in giving the Surrogate power to determine concerning a debt, claim or distributive share, who is the person to whom it is payable, the sum to be paid by reason thereof, and "all other questions concerning the same." They are well summarized by Rollins, Surr., in *Greene* v. *Day*, 1 Dem. 45. Section 2743 distinctly limits this power by the words, "where the validity of the debt, claim or distributive share is *admitted or has been established* upon the accounting or other proceeding in the Surrogate's Court, or other court of competent jurisdiction." It is now clear that the Surrogate cannot pass upon any disputed claim of this character. *Riggs* v. *Cragg*, 89 N. Y. 480. The real intent of the section might be plainer if its wording be transposed so as to read, "Where the validity of the debt, etc., is admitted upon the accounting or other proceeding in the Surrogate's Court, or has been established in another court of competent jurisdiction." The words, "all other questions concerning the same," mean any question other than that of the validity of the debt. *Estate of Orser*, 4 Civ. Proc. Rep. 129. Thus the Surrogate may decide to whom the debt, claim or distributive share is payable. For example, to the assignee of a legatee. *Tilden* v. *Dows*, 2 Dem. 489. (See also discussion of new remedy under § 2718*a*, at § 775, *ante*.)

Clark v. *Scovill*, 191 N. Y. 8, holds that the filing of a consent by a creditor is a "final and conclusive" election to submit to the Surrogate's jurisdiction and he must await the accounting, or compel it under § 2727.

The Surrogate has power to determine whether a claim has been admitted or rejected by the accounting executor. *Potts* v. *Baldwin*, 67 App. Div. 434, 437; *Matter of Miles*, 33 Misc. 147, aff'd 170 N. Y. 75; *Bowne* v. *Lange*, 4 Dem. 350, and cases cited at p. 351; *Matter of Von der Leith*, 25 Misc. 255. See opinion of Davie, Surr., in *Matter of Brown*, 60 Misc. 35, reviewing cases. If he finds it was disputed and rejected, and no proceeding begun for its enforcement, he may disregard it and decree distribution. But if he finds it to have been admitted, he must treat it as a liquidated and undisputed debt, which the representative is bound to pay, and because of which the creditor is entitled to be a party to the accounting, and to file objections to the account. *Ibid.; Matter of Doig*, 125 App. Div. 746.

A claim allowed by the representative but not actually paid is open to attack on the accounting. *Matter of Knab*, 38 Misc. 717. It stands on the same footing as a claim paid. Hence the burden of impeaching it is on the objectant, citing *Matter of Warrin*, 56 App. Div. 414. But if on its face it seems to be barred by the statute, Marcus, Surr., held the representative was bound to show that he considered the matter and believed the defense could not be successfully interposed.

§ 1087. **Representative's claims against estate.**—See, *ante*, sub. "Ascertaining the Debts." As to *c*, claims by the representative against the estate, the Surrogate may pass upon them. *Kyle* v. *Kyle*, 67 N. Y. 400, 408; *Boughton* v. *Flint*, 74 N. Y. 476; *Shakespeare* v. *Markham*, 72 N. Y. 400; *Smith* v. *Christopher*, 3 Hun, 585.

Section 2731 expressly so provides:

> *Determination of claims by surrogate, suspension of statute of limitations in certain cases.*
>
> *On the judicial settlement of the account of an executor or administrator he may prove any debt owing to him by the decedent.* Where a contest arises between the accounting party and any of the other parties respecting property alleged to belong to the estate, but to which the accounting party lays claim either individually, or as representative of the estate; or respecting a debt alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, the contest *must*, except where the claim is made in a representative capacity, in which case it *may*, be tried and determined in the same manner as any other issue arising in the surrogate's court.
>
> From the death of the decedent until the judicial settlement of the accounts of the executor or administrator the running of the statute of limitations against a debt due from the decedent to the accounting party, or any other cause of action in favor of the latter against the decedent, is suspended, unless the accounting party was appointed on the revocation of former letters issued to another person, in which case the running of the statute is so suspended from the grant of letters to him until the first judicial settlement of his account. After the first judicial settlement of the account of an executor or administrator the statute of limitations begins again to run against a debt due to him from the decedent, or any other cause of action in his favor against the decedent. **§ 2731, Code Civil Proc.**
>
> Former §§ 2739, 2740, consolidated.

This section substantially embodies the rule under the Revised Statutes, 3 R. S. 96 (6th ed.), § 43; *Barras* v. *Barras*, 4 Redf. 263; *Matter of Gardner*, 5 Redf. 14.

The Surrogate may not try a claim to property between the representative individually and a third party. *Matter of Finn*, 44 Misc. 622.

Prior to 1893, it was held that the representative was given this right to have his claim determined by the Surrogate upon his accounting because he is denied the right to begin a proceeding solely to establish such a personal claim. *Matter of Saunders*, 4 Misc. 28, 35; *In re Ryder*, 129 N. Y. 640; *Moyer* v. *Weil*, 1 Dem. 71. But this was because ch. 460, Laws 1837, had been repealed. Chapter 686, Laws 1893, amended § 2719 of the Code by restoring the provision of the act of 1837: "An executor or administrator shall not satisfy his own debt or claim out of the property of the deceased until proved to and allowed by the Surrogate." *Matter of Marcellus*, 165 N. Y. 70, 75. This restores, as applicable, such cases as *Kyle* v. *Kyle*, 67 N. Y. 400, 408; *Shakespeare* v. *Markham*, 72 N. Y. 400, etc. This, however, does not mean that now the representative must institute a separate proceeding. The Surrogate has power to take proof of and allow the claim when presented to him for determination. But he may not retain *ex parte* assets in satisfaction of his claim, without being chargeable therewith, and with interest. *Matter of Gardner*, 5 Redf. 14.

The circumstance that the executor is interested jointly with others in

the demand does not affect the authority to adjudicate with regard to it. *Estate of Eisner*, 8 N. Y. St. Rep. 748; *Neilley* v. *Neilley*, 89 N. Y. 352.

Even though the representative having the claim against the estate dies, the Surrogate's jurisdiction is not thereby divested. The representative of the deceased representative may urge and prove the claim. *Matter of Cooper*, 6 Misc. 501, 504.

See, as to mode of proving debt due by estate to executor or administrator, *Wood* v. *Rusco*, 4 Redf. 380, and *Matter of Humfreville*, 6 App. Div. 535. The proof must be the clearest legal proof. *Matter of Humfreville, supra; Van Slooten* v. *Wheeler*, 140 N. Y. 624; *Ellis* v. *Filon*, 85 Hun, 485; *Matter of Saunders*, 4 Misc. 28; *Matter of Furniss*, 86 App. Div. 96; *Matter of Arkenburgh*, 58 App. Div. 583.

By legal proof is meant evidence competent to prove the fact in issue. Hence § 829 may interpose an insuperable obstacle. See, e. g., *Matter of Blair*, 99 App. Div. 81.

There is no presumption in favor of such claims. *Matter of Cozine*, 113 App. Div. 23. Of course this does not apply to a mortgage debt or one reduced to judgment. Such a claim can only be attacked in a court of equity. *Matter of Eadie*, 39 Misc. 117, citing *Matter of Randall*, 152 N. Y. 508; *Matter of Bolton*, 159 N. Y. 129.

The representative must present his claim, accompanied by the affidavit verifying the same, before it can be allowed (*Terry* v. *Dayton*, 31 Barb. 519; *Matter of Saunders, supra*); but such verification alone in no way establishes the validity of the claim. *Matter of Saunders*, citing *Underhill* v. *Newburger*, 4 Redf. 499; *Williams* v. *Purdy*, 6 Paige, 168. The provision of § 2719 must be kept in view that "an executor or administrator shall not satisfy his own debt or claim out of the property of the deceased until proved to and allowed by the Surrogate," and also that "it shall not have preference over others of the same class." But if all the persons interested assent to his doing so, such payment of his own claim will be allowed on the accounting. *Ledyard* v. *Bull*, 119 N. Y. 62. The executor is called upon to prove his own claim as satisfactorily as he may require other creditors to prove theirs. *Wood* v. *Rusco*, 4 Redf. 380. But he is not bound in his representative capacity to object under § 829 to his personal testimony to transactions proving his own claim. Nor will the court of its own motion raise the objection. *Matter of Porter*, 60 Misc. 504.

In *Matter of Archer*, 51 Misc. 260, Thomas, Surr., held that he had power to pass on whether certain property assigned to the executor by testatrix, *inter vivos*, was his or belonged to the estate.

A person named as executor in a will, but not qualified as such, must proceed on any claim he has against the decedent as any other creditor would. *Snyder* v. *Snyder*, 5 Civ. Proc. Rep. 267. But if it be objected that his claim has been paid, he is not called upon to prove that it has not. Payment is an affirmative defense, and must be affirmatively proven.

Matter of Neil, 35 Misc. 254; *Lerche* v. *Brasher*, 104 N. Y. 157, and cases cited.

§ 1088. **Claims of estate against representative.**—As to *d*, the Surrogate has also power to pass on claims of the estate against the representative. § 2731, Code Civ. Proc. *supra; Matter of Cooper*, 6 Misc. 501; *Gardner* v. *Gardner*, 7 Paige, 112; *Kyle* v. *Kyle*, 67 N. Y. 400, 408. This includes a temporary administrator. *Matter of Eisner*, 5 Dem. 383.

The Code provides in § 2714 that

> The naming of a person executor in a will, does not operate as a discharge or bequest of any just claim which the testator had against him; but it must be included among the credits and effects of the deceased in the inventory, and the executor shall be liable for the same as for so much money in his hands at the time the debt or demand becomes due, and he must apply and distribute the same in the payments of debts and legacies, and among the next of kin as part of the personal property of the deceased.

It has been held, however, that while the Code is explicit, and the debt *must* be treated by the courts as money, that yet the debt will not for all purposes stand on the same footing as if he had actually received so much money (*Baucus* v. *Stover*, 89 N. Y. 1, 4); and so, if the executor is insolvent and cannot pay, he cannot be punished as for contempt in failing to pay or distribute the money equivalent of the debt. *Ibid.*

The Court of Appeals therefore observed that it would be well for a Surrogate in a decree which charges an executor with a debt as so much money, to specify the charge separately so as to save all the rights of the executor. And it has been held that such an executor's sureties cannot be proceeded against upon his failure to pay the debt so adjudged and which he is directed to distribute as money in his hands. *Baucus* v. *Barr*, 45 Hun, 582, 584, aff'd 107 N. Y. 624. Just as an executor must prove his own claim as fully and fairly as he requires other creditors to do, so must he deal with himself as a debtor, of the estate. *Warner* v. *Knower*, 3 Dem. 208.

See *Keegan* v. *Smith*, 60 App. Div. 168, for discussion as to conclusiveness of Surrogate's decree, on surety, as to question of representative's ability to pay a debt to the estate.

Where an executor had stated his debt to the estate as an item of his inventory, but disputed his liability thereon upon his accounting it was held, before the Code, that the auditor could pass upon the issue, and the Surrogate in fact affirmed the auditor's determination. *Matter of Leslie*, 3 Redf. 280. It is held that the Surrogate's power to pass on claims of this character extends, not merely to executors, but all representatives, *e. g.*, a temporary administrator. *Matter of Eisner*, 5 Dem. 383. An administrator indebted, under a mortgage debt to his intestate, in whose estate he had an interest, paid nothing in the way of interest after his creditor's death but undertook to stop interest by crediting the estate, as of the death, with principal and interest and debiting the estate with

the same amount on account of his distributive share. This was disallowed as unauthorized by § 2714. *Matter of Davis*, 37 Misc. 326, citing *Keegan* v. *Smith*, 33 Misc. 76, and *Soverhill* v. *Suydam*, 59 N. Y. 142.

See *Matter of Ablowich*, 118 App. Div. 626, limiting § 2714, to an executor "named in a will." In this case the administrator was held accountable, as for "money in his hands," for a debt his firm owed decedent. Also held that the revocation of his letters would not affect his obligation to account for it to his successor *de bonis non*.

§ 1089. **Claims of estate against debtor.**—As to *e*, it has been held that the Surrogate has not jurisdiction to determine the validity of a claim of an estate against a debtor who is not a representative of the decedent. *Van Valkenburg* v. *Lasher*, 53 Hun, 594, 597, citing *Matter of Colwell*, 15 N. Y. St. Rep. 742; *Greene* v. *Day*, 1 Dem. 45; *Kintz* v. *Friday*, 4 Dem. 540; *Matter of Kellogg*, 39 Hun, 275; *Matter of Keefe*, 43 Hun, 98. This rule is not affected by the fact that the debtor is a legatee and the executor is seeking to offset the debt as entire or partial satisfaction of the legacy. *Ibid.* But, in *Matter of Robinson*, 42 Misc. 169, the executor paid part of the legacy and offset the debt against the balance, and in his account stated the legacy as "paid." The Surrogate treated the issue raised as being whether the legacy was paid, which he held he had a right to try, and overruled the claim that the issue was whether a debt was due the estate.

The reason of the distinction above noted is simple: when the executor or administrator himself is the debtor he cannot in his representative capacity sue himself for the debt. But it is his duty to sue on and recover in debts due by third persons, and he is expected in his accounting to rehearse all such suits and account for the proceeds thereof.

The Surrogate's powers to pass upon disputed matters upon the accounting of a testamentary trustee are no broader than upon that of an ordinary representative.

Where a *judgment creditor* presents his claim it is not of the character contemplated by §§ 1822 or 2718. Hence it can neither be rejected nor referred. *Matter of Wait*, 39 Misc. 74. And under § 2743 the Surrogate may therefore determine to whom it is payable, to what extent, etc. *Ibid.*, citing *McNulty* v. *Hurd*, 72 N. Y. 521; *Matter of Browne*, 35 Misc. 362.

In the *Wait* case the administrator raised issues, other than payment, such as a change of rights due to transactions between decedent and the claimant. The Surrogate, having no power to pass on such issues, but only on the payments made on account in order to fix the amount due, and to whom it is payable, refused to dismiss the claim, held himself bound by the judgment, but withheld his decree for its payment for sixty days to afford the representative time to attack the judgment in a court of equity.

In *Matter of Griffith*, 49 Misc. 405, a peculiar situation existed. A, the deceased husband, had entered *pro confesso* a judgment against his wife who became his administratrix. On her accounting she did not refer to it.

Held, it must be charged to her as so much money in her hands for debts and distribution.

She claimed (*a*) the judgment was invalid. Held, it was binding on the Surrogate's Court.

(*b*) She was financially unable to pay it. Held, nevertheless she must return it as an asset and that its execution should be enforced or attempted in the usual way.

(*c*) She claimed that § 2714 applied only to executors. But it has repeatedly been held to apply to all representatives. (See cases cited.)

§ 1090. **Other questions adjudicable.**—Excluding all questions as to disputed claims of the various classes just discussed, the power of the Surrogate to pass on other questions concerning the validity of debts, claims or distributive shares "admitted or established" within the meaning of § 2743 is uncontroverted. This must be taken to mean that the Surrogate may determine to whom the payment is to be made, and how much is to be paid. The language of the section is clear.

> *Decree for payment and distribution.*
>
> Where an account is judicially settled as prescribed, in this article, and any part of the estate remains and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the persons so entitled according to their respective rights. In case of administration in intestacy the decree must direct immediate payment and distribution to creditors, next of kin, husband or wife of the decedent, or their assigns, where the administrator has petitioned voluntarily for judicial settlement of his account as, and in the case provided in subdivision two of section twenty-seven hundred and twenty-eight of this article. If any person who is a necessary party for that purpose has not been cited or has not appeared, a supplemental citation must be issued as prescribed in section two thousand seven hundred and twenty-seven of this act. *Where the validity of the debt, claim or distributive share is admitted or has been established upon the accounting or other proceeding in the surrogate's court or other court of competent jurisdiction, the decree must determine to whom it is payable, the sum to be paid by reason thereof and all other questions concerning the same.* With respect to the matters enumerated in this section the decree is conclusive as a judgment upon each party to the special proceeding who was duly cited or appeared and upon every person deriving title from such party. **§ 2743, Code Civil Proc.**

Section 2743 does not apply to a temporary administrator. When the time comes for him to pay over, he must do so to the executor or permanent administrator. *Matter of Philp*, 29 Misc. 263, 266.

By § 2481, subd. 11, the Surrogate is given power "to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred." And so in determining the questions he has power to pass upon under § 2743 the Surrogate may construe the will, so far as is necessary in order to decree distribution. *In re Verplanck*, 91 N. Y. 439, 450; *Garlock* v. *Vandevort*, 128 N. Y. 374; *In re Havens*, 8 Misc. 574; *Brown* v.

Wheeler, 53 App. Div. 6, 8; *Riggs* v. *Cragg*, 89 N. Y. 480; *Purdy* v. *Hayt*, 92 N. Y. 446; *Fraenznick* v. *Miller*, 1 Dem. 136.

In the *Havens* case it was held that the Surrogate had power to determine as a matter of fact whether a sole residuary legatee had assigned one-half of his legacy to another; and as a matter of law whether such agreement of assignment actually entitled the assignee to be paid part of the distributive share. See also *Matter of Heelas*, 5 Redf. 440. But the creditor of the one assigning his share cannot come in before the Surrogate and secure a determination as to the validity of such transfer (*Duncan* v. *Guest*, 5 Redf. 440), for the validity of the assignment cannot be tried. *Matter of Lawson*, 36 Misc. 96; *Matter of Randall*, 152 N. Y. 508, 517. See also authorities discussed in *Matter of Havens*, 8 Misc. 574. So it has been held that the question of legitimacy of children claiming to be distributees could be determined (*Matter of Laramie*, 24 N. Y. St. Rep. 702); or the capacity of an institution to take a legacy. *Matter of York*, 1 How. Pr. N. S. 16.

In *Matter of Lattan*, 42 Misc. 467, it was held that no claimants would be recognized save such as had legal titles. Those claiming adversely to the legal title on equitable grounds must seek a court of equity, citing *Matter of Brown*, 3 Civ. Proc. Rep. 39.

The Surrogate's power to pass upon a disputed legacy was asserted, and is well illustrated in *Tappen* v. *M. E. Church*, 3 Dem. 187, Rollins, Surr. The legacy was one of $500 to the trustees of a church "towards paying off the debt of the church." The executor disputed the legacy, claiming the church was not in debt, neither at the time, nor when the testator died. The Surrogate asserted his right to pass on this issue, and ordered a reference for the purpose. So the Surrogate may have to pass on the validity of a trust provision. *Matter of Pearson*, 21 N. Y. St. Rep. 128; *Matter of Collyer*, 4 Dem. 24. As to any matter the Surrogate is empowered to decide, his decree in the premises is made conclusive by § 2743. *Brown* v. *Wheeler*, 53 App. Div. 6, 8; *Sexton* v. *Sexton*, 64 App. Div. 385. So, if a creditor's claim is heard, and determined adversely, the decree is a bar to a subsequent action on the same claim. *Ibid.*

§ 1091. **The amount the accountant is chargeable with.**—The inventory, if any was filed, is *prima facie* evidence of the *quantum* of the estate. *Matter of Shipman*, 82 Hun, 108. But it is no more than *prima facie*. *Matter of Maack*, 13 Misc. 368. The executor may explain a discrepancy if any there be. *Ibid.* But if a person interested alleges that articles were omitted, or that the executor sold some and received more than he has charged himself with, the burden is on him of establishing the fact alleged, "with reasonable certainty," and of surcharging the account. *Matter of Mullon*, 145 N. Y. 98; *Matter of Stevenson*, 86 Hun, 325; *Matter of Arkenburgh*, 13 Misc. 744; *Matter of Smith*, *id.* 592; *Matter of Baker*, 42 App. Div. 370, 372; *Marre* v. *Ginochio*, 2 Bradf. 165.

Where executors are charged by the will with the duty of selling real estate they are required to act only as a prudent man would in dealing

with his own property. The mere fact of depreciation in value of the property is not enough to charge the executors with the loss. *Matter of Hosford,* 27 App. Div. 427, 430. The Court of Appeals has held: "There is and there can be, no rigid and arbitrary standard by which to measure the reasonable time within which the discretion of an executor directed to convert an estate into money must operate." *Matter of Weston,* 91 N. Y. 502, 510. Each case must stand upon its own facts.

But where an asset is specified in the inventory, in the nature of a *chose in action* or a claim of the decedent, and upon the accounting it appears it was never sued upon, or collected in, or reduced to possession, then the onus is upon the accountant to explain and justify the failure or neglect to act. *Matter of Hosford, supra; Harrington* v. *Keteltas,* 92 N. Y. 40. *Matter of Ward,* 49 Misc. 181, where a successor guardian omitted to account for money lent him by his predecessor out of the fund decreed on the accounting to be in his hands. For the presumption is that it could have been collected, as solvency is presumed until the contrary is shown. Insolvency cannot be presumed. *O'Connor* v. *Gifford,* 117 N. Y. 275, 279. Not of a representative himself indebted to the estate. *Keegan* v. *Smith,* 60 App. Div. 168. It is an affirmative defense. In *Matter of Guldenkirch,* 35 Misc. 123, 124, Thomas, Surr., says, "It is quite plain that culpable neglect to collect a claim, which forms an asset of the estate, can only exist when knowledge, or notice legally equivalent to knowledge, of its existence is also found. This principle is emphasized in all of the cases upon this subject." *Harrington* v. *Keteltas,* 92 N. Y. 40; *Mills* v. *Hoffman,* 26 Hun, 594; *Moore's Estate,* 1 Tuck. 41; *Matter of Hosford,* 27 App. Div. 427; *O'Conner* v. *Gifford,* 117 N. Y. 275; *Matter of Hall,* 16 Misc. Rep. 174.

From this may be deduced the statement that executors, who have not sued upon or collected in a promissory note payable to their decedent, must show on the accounting that the note could not have been collected had an action been commenced thereon. It is not enough to produce evidence from which the court must guess that legal proceedings would have been useless. The testimony must leave no reasonable doubt in that regard. *Matter of Hosford, supra.*

Nor will the advice of an attorney alone relieve an executor from the duty of active vigilance in the collecting in of the assets left by his decedent. *Ibid.*

CHAPTER IV

COMMISSIONS AND COMPENSATION

§ 1092. **Allowance for commissions and expenses in administering the estate.**—Provision is made by law for remunerating and reimbursing those who administer estates as representatives or trustees. These provisions are as follows:

COMMISSIONS OF EXECUTOR OR ADMINISTRATOR

On the settlement of the account of an executor or administrator, the surrogate must allow to him for his services, and if there be more than one, apportion among them according to the services rendered by them respectively, over and above his or their expenses:

For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per centum.

For receiving and paying out any additional sums not amounting to more than ten thousand dollars, at the rate of two and one-half per centum.

For all sums above eleven thousand dollars, at the rate of one per centum.

In all cases such allowance must be made for their necessary expenses actually paid by them as appears just and reasonable.

If the gross value of the personal property of the decedent amounts to one hundred thousand dollars or more,* each executor or administrator is entitled to the full compensation on principal and income allowed herein to a sole executor or administrator, unless there are more than three, in which case the compensation to which three would be entitled must be apportioned among them according to the services rendered by them, respectively, and a like apportionment shall be made in all cases where there shall be more than one executor or administrator.

Where the will provides a specific compensation to an executor or administrator he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, he renounces the specific compensation.

Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters testamentary or letters of general administration, are issued to a person who has been previously appointed a temporary administrator, he is entitled to compensation in one capacity only, at his election, except that where he has received compensation in one capacity he is entitled to the excess, if any, of the compensation allowed by law, above the sum which he has already received in the other capacity. **§ 2730, Code Civil Proc.**

* "Over all his debts," omitted by ch. 328, L. 1905.

COMMISSIONS OF TESTAMENTARY TRUSTEES

Section 2811 of the Code, quoted, *ante* makes applicable to accountings by testamentary trustees §§ 2734 to 2737, both inclusive. As above noted, § 2730 of the Code as it now stands consolidates former §§ 2736, 2737 and 2738. See L. of 1893, ch. 686. This act repealed the sections then numbered 2735 to 2741, but the legislature in so doing omitted to correct and amend § 2811 referring to and making applicable the sections therein enumerated. So far, therefore, as § 2730 re-enacts the provisions of the consolidated sections they might still be deemed applicable to accountings by testamentary trustees, as § 2802 recognized the similarity before the law of testamentary trustees to executors and administrators in respect of the right to commissions. This section, quoted *ante*, expressly provides that, upon the annual accountings which testamentary trustees are by that section authorized to render and have judicially settled, "the Surrogate before whom such accounting may be had shall allow to the trustee or trustees the same compensation for his or their services by way of commission as are allowed by law to executors and administrators, besides their just and reasonable expenses therein, and also the additional allowance provided for in § 2562 of this Act." This is the section providing for the additional allowance for counsel fees and other expenses upon accountings "not exceeding ten dollars for each day occupied in the trial and necessarily occupied in preparing the account for settlement and otherwise preparing for the trial."

The Court of Appeals in *Hurlbut* v. *Durant*, 88 N. Y. 122, 128, had expressly held that the then §§ 2736 and 2811 of the Code contained the statutory provision for the compensation of executors and of testamentary trustees. See also *Laytin* v. *Davidson*, 95 N. Y. 263, expressly recognizing the jurisdiction of the Surrogate to award commissions to testamentary trustees under the Code of Civil Procedure, citing *Johnson* v. *Lawrence*, 95 N. Y. 154, and *In re Roosevelt*, 5 Redf. 601. In the case last cited Surrogate Rollins passed directly upon the authority of the Surrogate to direct the payment of commissions to testamentary trustees and reviewed the statutes dealing therewith. His decision was based upon the applicability of the sections to testamentary trustees, to which reference is made in § 2811 as above quoted. His opinion is concurred in by the Court of Appeals in the case of *Laytin* v. *Davidson*, *supra*.

But, in 1904, by ch. 755, the Legislature amended § 3320 of the Code, entitled "Receivers' commissions," by adding this provision:

> A trustee of an express trust is entitled, and two or more trustees of such a trust are entitled, to be apportioned between or among them according to the services rendered by them respectively, as compensation for services as such, over and above expenses, to commissions as follows: For receiving and paying out all sums of principal not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums of principal not exceeding ten thousand dollars, at the rate of two and one-half per centum.

For receiving and paying out all sums of principal above eleven thousand dollars, at the rate of one per centum. And for receiving and paying out income in each year, at the like rates. In all cases a just and reasonable allowance must be made for the necessary expenses actually paid by such trustee or trustees. If the value of the principal of the trust estate or fund equals or exceeds one hundred thousand dollars, each such trustee is entitled to the full commission on principal, and on income for each year, to which a sole trustee is entitled, unless the trustees are more than three, in which case three full commissions at the rates aforesaid must be apportioned between or among them according to the services rendered by them respectively. If the instrument creating the trust provides specific compensation for the services of the trustee or trustees, no other compensation for such services shall be allowed unless the trustee or trustees shall, before receiving any compensation for such services, by a written instrument duly acknowledged, renounce such specific compensation.

This would have seemed to be a provision applicable not to testamentary trustees, as § 2802 was not changed. But in *Robertson* v. *De Brulatour*, 188 N. Y. 301, aff'g 111 App. Div. 882, it is applied as governing just such trustees, and as changing in their favor the rule still applicable to representatives which is that their commissions are figured on "sums of money" received and paid out, whereas trustees may now be paid on the basis of "principal" which was held to apply to securities in bulk or in kind. See opinion in *Chisolm* v. *Hamersley*, 114 App. Div. 565, discussing same subject as to trust under a deed.

The commissions of "persons appointed to execute a trust left unexecuted by the death" of an original or surviving trustee are fixed by the Supreme Court. They cannot exceed the commissions allowed to executors, etc. This is by virtue of amendments in 1902 to the Real Property and Personal Property Law. See § 20, Pers. Prop. Law and § 111, Real Prop. Law.

COMMISSIONS OF GUARDIANS

Section 2850 quoted, *ante*, expressly provides in respect to all guardians over whom the Surrogate has jurisdiction that they are "entitled to the same compensation as an executor or administrator." *Matter of Decker*, 37 Misc. 527.

EXECUTOR OF DECEASED TRUSTEE

It seems, an executor of a deceased trustee is not entitled to commissions, but may in the Surrogate's discretion be compensated as justice requires. See careful opinion by Ketcham, Surr., in *Matter of Ingraham*, 60 Misc. 44. But in *Matter of Wilcox*, 125 App. Div. 152, full commissions were allowed to "estate" of deceased trustee on principal of which she was life tenant. And *Matter of Heaney*, 125 App. Div. 619.

§ 1093. **The right to remuneration.**—It is the policy of our law that those who administer a trust or estate shall receive compensation there-

for. The language of § 2730, "the Surrogate must allow" expresses this general intent. The section is not mandatory in the sense that no departure from it is ever permissible (*Secor* v. *Sentis*, 5 Redf. 570, 572), for if a testator expressly prohibits his executor from receiving compensation for administering the estate, the Surrogate will be controlled by such direction. *Ibid.; Meacham* v. *Stearnes*, 9 Paige, 403. This has been held in a case when of two executors under such a will one refused to serve, and the other, by reason of the extra labor thereby claimed by him to have been required, sought to have the prohibition disregarded. Surrogate Rollins declined to do so. *Matter of Gerard*, 1 Dem. 244; *Matter of Marshall*, 3 Dem. 173. If, however, the executors named in a will denying any compensation to the executors decline to qualify, the prohibition cannot extend to an administrator with the will annexed.

In the second place, in spite of the statute, the Surrogate may deny commissions to a negligent or wrongdoing executor or trustee. *Matter of Rutledge*, 162 N. Y. 31, aff'g 37 App. Div. 633; *Wheelwright* v. *Rhoades*, 28 Hun, 57; *Matter of Harnett*, 15 N. Y. St. Rep. 725; *Stevens* v. *Melcher*, 152 N. Y. 551; *Cook* v. *Lowry*, 95 N. Y. 103, 114; *Matter of Welling*, 51 App. Div. 355, 358; *Matter of Mathewson*, 8 App. Div. 8, 11, 12. See also *Matter of Hayes*, 40 Misc. 500, case of an administrator who mingled trust with personal funds; and *Matter of Ward*, 49 Misc. 181, case of a guardian. In *Matter of Hunt*, 38 Misc. 613, the court declined to charge one executor with the *devastavit* of his coexecutor. See opinion.

So, also, where a trustee resigns before executing his trust, he loses his *right* to commissions on the *corpus* of the fund. *Matter of Hayden*, 54 Hun, 197. It becomes *discretionary* with the Surrogate, and that discretion is reviewable. *Matter of Gall*, 107 App. Div. 310. And the court may impose as a condition of permitting the resignation of a trust, that the right to commissions be waived, in whole or in part. *Matter of Allen*, 96 N. Y. 327; *Matter of Curtiss*, 9 App. Div. 285, 288. *Matter of Douglas*, 60 App. Div. 64. A *quantum meruit* may be allowed in the exercise of this discretion within the legal limits for full service. *Matter of Fisk*, 45 Misc. 299; *Linsly* v. *Bogert*, 152 N. Y. 646, aff'g 67 N. Y. St. Rep. 653. So also as to an administrator, acting in good faith, but removed on discovery of a will. *Matter of Hurst*, 111 App. Div. 460. See opinion of Jenks, J. If a trustee dies before administering the estate, his executors may receive one-half commissions in a proper case. *Matter of Todd*, 64 App. Div. 435. Where the estate has never been reduced to money, it seems it is not a such proper case. *McAlpine* v. *Potter*, 126 N. Y. 285, 290. It is always improper in such a case to allow the executors of a deceased trustee the one-half commissions for distributing the estate. *Palmer* v. *Dunham*, 6 N. Y. Supp. 262.

Unless the right, however, to commissions is thus divested, the courts will recognize it and in fact cannot deny it. *Matter of Curtiss*, 9 App. Div. 285, 291. Mere discourtesy or refusal to take beneficiary's advice as to litigation is not wrongdoing. *Matter of Ingersoll*, 95 App. Div. 212.

But the right may be lost by remissness of the trustee. For example, if a trustee pays out the whole income annually and fails to reserve enough to cover his commissions, he cannot subsequently be allowed them in lump. *Olcott* v. *Baldwin*, 190 N. Y. 99; *Matter of Harper*, 27 Misc. 471; *Spencer* v. *Spencer*, 38 App. Div. 403; *Matter of Haight*, 51 App. Div. 310, 318; *Matter of Slocum*, 60 App. Div. 438; *Hancox* v. *Meeker*, 95 N. Y. 528. *Matter of Norton*, 58 Misc. 133. The reason is that the income is the only source from which commissions thereon can be paid. *Whitson* v. *Whitson*, 53 N. Y. 479; *Shipman's Estate*, 82 Hun, 108; *Conger* v. *Conger*, 105 App. Div. 589. But see *Matter of Haskins*, 111 App. Div. 754, rev'g 49 Misc. 177, when there was enough balance on income account, at time of judicial settlement, to equalize the deficiencies on annual payments. It is quite competent for an adult beneficiary to assent to the payment of commissions to a trustee whose right thereto may have been lost by his remissness. *Matter of Johnson*, 57 App. Div. 494, 504.

This emphasizes the propriety and necessity of either an annual settlement or of so erecting the accounts as to make annual rests. No sound reason exists why a trustee should wait to the end of his trust for his compensation or why he should not compute and receive on such annual rests his annual commission. *Beard* v. *Beard*, 140 N. Y. 260, 265. In *Conger* v. *Conger*, 105 App. Div. 589, the method of "annual rests" is summarized, compliance with which will bring the trustee within the rule in *Hancox* v. *Meeker*, 95 N. Y. 528, and *Matter of Mason*, 98 N. Y. 527.

The authority given the Surrogates' Courts to allow and to apportion commissions carries with it the power to enforce payment thereof. *Matter of Dunkel*, 5 Dem. 188, 194. On the other hand, as the amount of the commissions, until paid, or rather until the accountant is legally entitled to receive them, remains an asset of the estate, the Surrogate has power to direct the application of such amount, or so much thereof as may be necessary, to liquidate an unpaid debt of the accountant to the estate, whether shown to be uncollectible or not. *Freeman* v. *Freeman*, 4 Redf. 211.

§ 1094. **The basis of remuneration.** The primary basis of commissions is the actual rendition of services in administering the estate. *Matter of Clinton*, 16 Misc. 199, 202. An executor who renders no services can have no commission. *Matter of Manice*, 31 Hun, 119, 121. But, as the statute gives the Surrogate power where there are several executors, to "apportion among them according to the services rendered by them respectively," it follows that any assumption of responsibility, or liability, or services however slight, brings the executor within the category and entitles him to his apportionate share. *Matter of Dunkel*, 5 Dem. 188.

Though one executor voluntarily, or perhaps by design, take possession of all the assets, and transacts substantially all the business of the estate, he does not thereby become entitled to receive all the commissions, to the exclusion of the coexecutor. *Ibid.*

The pecuniary basis of the commissions is defined by § 2730. It is personal property, and the amount is that which is received and paid out.

If the trustee is surcharged with a sum lost by his negligence, he is entitled to the benefit of that amount as a basis of computation. So also as to debts due himself as one of the beneficiaries. *Meacham* v. *Stearnes*, 9 Paige, 398. No commissions allowed on a mortgage taken in part payment on sale of realty under judgment for specific performance of decedent's contract. *Matter of Dill*, 60 Misc. 294. Real property is no basis for the computation of commissions (*Smith* v. *Buchanan*, 5 Dem. 169, and cases cited), excepting only where it has been actually sold under the terms of the will (*Matter of Clinton*, 16 Misc. 199), or where the will works an equitable conversion. *Matter of Hardenbrook*, 23 Misc. 538, 543. *Matter of Wanninger*, 120 App. Div. 273, citing *McAlpine* v. *Potter*, 126 N. Y. 285; *Phœnix* v. *Livingstone*, 101 N. Y. 451; *Robertson* v. *De Brulatour*, 188 N. Y. 301. But it has been held proper to allow executors commissions where on foreclosing an estate mortgage, they had to buy in the land which they divided into lots and sold them at auction to the legatees, and the purchase price was offset against the various legacies to the purchasing legatees. *Matter of Franklin*, 26 Misc. 107; *Matter of De Peyster*, 4 Sandf. Ch. 511; *Matter of Ross*, 33 Misc. 163. The mere holding of title will not be deemed money for the purpose of computing commissions. *Phœnix* v. *Livingstone*, 101 N. Y. 451; *Estate of McLaren*, 6 Misc. 483. Where the executors actually sell, in pursuance of a lawful power, they will be considered as having performed a lawful trust duty, and are as much entitled to commissions upon the amount involved as upon any other sums passing through their hands. *Matter of Prentice*, 25 App. Div. 209, 212. Moreover, they are to be allowed a reasonable time within which to execute the power of sale. *Hancox* v. *Meeker*, 95 N. Y. 528.

Where there is no imperative direction to the executors to sell the real estate, there is no equitable conversion. *Matter of Hardenbrook*, 23 Misc. 538, 540. "To constitute a conversion of real estate into personal in the absence of actual sale, it must be made the duty of and obligatory upon the trustees to sell it in any event. Such conversion rests upon the principle that equity considers that as done which ought to have been done. A mere discretionary power of selling produces no such result." *White* v. *Howard*, 46 N. Y. 144; *Stagg* v. *Jackson*, 1 N. Y. 206; *Hobson* v. *Hale*, 95 N. Y. 598.

The distinction must be clearly kept in mind where the same persons are named as executors and as trustees between their rights to deal with real property as executors and as trustees. If the right to deal with the real estate devolves upon the trustees by the terms of the will and the executors have no right to deal with it except as it may become necessary for them to convert it for the purpose of paying debts or legacies under the will, then commissions can be allowed upon the basis of the real estate to the persons named as executors only in their capacity as trustees; and upon their accounting as executors, the real estate cannot be taken as a basis of computation of their commissions. *Matter of Curtiss*, 9 App. Div. 285; *Matter of Wanninger*, 120 App. Div. 273. See also opinion of

Thomas, Surr. *Matter of McGlynn*, 41 Misc. 156. He points out that if executors are under a mandatory power of sale, so they are under obligation to account for proceeds and hence entitled to use the value as a basis for commissions. But he says: "its value may be considered, not for the purpose of awarding them commissions upon such value *in advance of a sale;* but in order to determine whether the entire estate exceeds $100,000, so as to give to each executor a full commission."

So also as to their commissions, and the basis of computing them. We have already noted the effect of the amendment to § 3220 which operates to distinguish the trustee from the representative. The latter must figure his commissions on "sums of money." The former may deal with "principal" whether turned into money or not. The reason for the distinction is obvious, for the theory of a trust is to keep invested, and of administration is to reduce to cash and pay over. See opinions in both courts in *Robertson* v. *De Brulatour*, 188 N. Y. 301, aff'g 111 App. Div. 882.

Where executors sell incumbered real estate and the purchaser takes subject to the mortgages, the commissions may be computed on the basis of the whole purchase price, and is not to be limited to the value of the equity. *Cox* v. *Schermerhorn*, 18 Hun, 16, 19; *Baucus* v. *Stover*, 24 Hun, 109, 114, rev'd on another point, 89 N. Y. 1.

If a power of sale is conferred on the executor personally and not as executor, he cannot include the proceeds in his account, nor use them as the basis of computing his commissions as executor. *Matter of Brown*, 5 Dem. 223.

§ 1095. **Same subject.**—It is further to be noted that the commissions are to be based on moneys lawfully received or disbursed, or on the proceeds of real property lawfully sold by the accountant as executor, administrator, trustee, or guardian. That is, the commissions are computed upon what are legal assets in the executor's hands for purposes of administration. It was noted above that an executor having a mere personal power of sale, could not include the proceeds of the sale in his account as executor nor compute commissions thereon. *Matter of Brown*, 5 Dem. 223. Commissions may properly be computed on the value of personal assets not actually converted into cash, but delivered to and accepted by legatees as equivalent to so much cash. *Matter of Ross*, 33 Misc. 163, citing *Cairns* v. *Chaubert*, 9 Paige, 160; *Matter of Moffat*, 24 Hun, 325; *Matter of Curtiss*, 15 Misc. 545, 551; *Phœnix* v. *Livingstone*, 101 N. Y. 451; *Cox* v. *Schermerhorn*, 18 Hun, 16; *Matter of De Peyster*, 4 Sandf. Ch. 511; *McAlpine* v. *Potter*, 126 N. Y. 285. So, if an executor die during the administration, his commissions must be apportioned to the degree of completion of the duty. *Matter of Whipple*, 81 App. Div. 589. See *Matter of McCormick*, 46 Misc. 386, where Heaton, Surr., reviews the cases. As to such cases the amount of commissions are determined in the accounting had under § 2606. *Matter of Hallenbeck*, 119 App. Div. 757.

So, also, where executors were empowered to make actual partition of testator's realty which he devised to several persons, it was held that,

while the executors rendered services, appointed commissioners, effected a partition and allotted the several shares, yet they were not entitled to any commissions upon such real estate. *Bruce* v. *Bruce*, 62 Hun, 416; *Matter of Ross*, *supra*.

Again, specific legacies are not a proper basis for computing commissions. All the executor has to do is to deliver the actual thing bequeathed to the legatee named. *Hall* v. *Tryon*, 1 Dem. 296; *Matter of Robinson*, 37 Misc. 336; *Matter of Whipple*, *supra*; *Matter of Fisher*, 93 App. Div. 186. This is so even if the specific article is sold at the legatee's request, and the proceeds paid to him. *Farquharson* v. *Nugent*, 6 Dem. 296. But where an estate consists of securities, and the general legatees accept their distributive shares in the form of these very securities, nevertheless the executors are entitled to treat these securities as money received and paid out, and will be allowed commissions thereon. *Ibid.*; *Matter of Curtiss*, 9 App. Div. 285; *Matter of Fisher*, *supra*.

But, it has been held that a temporary administrator who has received and held and delivered over to the permanent representative property specifically bequeathed by the will, is entitled to commissions thereon. *Estate of Egan*, 7 Misc. 262. The distinction is based on the difference in the functions of the permanent and temporary representative. See *Matter of Hurst*, 111 App. Div. 460. The latter is appointed to insure the safety and preservation of the property, and his right to compensation depends on his doing that. *Green* v. *Sanders*, 18 Hun, 308; *Estate of Egan*, *supra*, and cases cited.

It seems that it is not an executorial duty under the will to pay dower, admeasured by a judgment of the Supreme Court, and hence commissions cannot be allowed on a sum thus paid. *Matter of Lawrence*, 37 Misc. 702.

§ 1096. **Same—Continuing business or stock venture.**— Commissions will not be allowed on the money received and disbursed in *continuing the business* of the testator, even under express direction of the will. *Matter of Hayden*, 54 Hun, 197, 205; *Beard* v. *Beard*, 140 N. Y. 260. This rule is based on the theory that the money is continually being reinvested, and turned over, and that to allow commissions thereon might result in eating up the whole fund involved. See *Matter of Peck*, 79 App. Div. 296. When business is carried on by a trustee, his compensation is not based upon the receipts or disbursements of the business, but only upon the receipts for capital, and the profits of the business. *Ibid.* See *Estate of Munzor*, 4 Misc. 374; *Matter of Peck*, 177 N. Y. 538, aff'g 79 App. Div. 296; *Matter of Suess*, 37 Misc. 459.

The validity of a direction to continue a business is discussed by Gray, J., in *Thorn* v. *De Breteuil*, 179 N. Y. 64, with special reference to its amounting to an unlawful accumulation.

In the absence of a direction in the will, the executors have no power to continue the business, except in order to convert the assets into money. *Matter of McCollum*, 80 App. Div. 362, citing *Willis* v. *Sharp*, 113 N. Y. 586, and cases cited. And the creditors can only look to the business and

not to the estate, for the assets of the estate may not be thus involved as against the beneficiaries. Even, it seems, if they assent to the business being carried on. *Manhattan Oil Co.* v. *Gill*, 118 App. Div. 17.

An executor has no right to continue a speculative account opened by testator nor to pay margins on it. *Matter of Hirsch*, 116 App. Div. 367. Yet it is conceivable that the estate may be so involved as that its preservation might require the advance of money. In such case, however, the sanction of the court, on proper notice, should be applied for.

The law on this subject is admirably reviewed by Gaynor, J., in a concise and consecutive opinion in *Matter of Popp*, 123 App. Div. 2, reviewing the cases as to guardians, committees, receivers, executors, administrators, trustees, as to extra compensation. The opinion is too long to quote but is a brief of the law. The headnote is as follows:

> *Executors and administrators—Extra compensation for carrying on business.*
>
> A surrogate is not authorized to allow an executor directed to continue his testator's business extra compensation for so doing. He cannot be allowed compensation from the estate of the decedent other than that fixed by statute, except for services apart from and entirely outside his office, as an individual, nor is he entitled to extra compensation for services merely because he might employ and compensate another therefor.
>
> An agreement by beneficiaries to allow an executor extra compensation is subject to the general rule governing transactions between trustee and beneficiary: while not void, it is voidable and may be attacked as unfair and inequitable.
>
> When two of several beneficiaries consent in open court to an allowance of extra compensation to an executor, it is not a consent that the same be paid in full out of their shares, but only that their shares be charged with their proportionate part.
>
> Cases collated and distinguished.

§ 1097. **Extra compensation.**—The general rule is that extra compensation is not to be allowed. *Matter of Krisfeldt*, 49 Misc. 26 (adm'x c. t. a.); *Matter of Seigler*, 49 Misc. 169 (adm'r). When, at the request of the heirs, the person named as executor, being a skilled machinist continued the testator's business and paid himself a salary for managing it for eleven years, showing a profit to the estate for that period, and charging himself therewith as executor, Tompkins, Surr., declined to surcharge his account with the sum so paid to himself as salary. *Matter of Braunsdorf*, 13 Misc. 666, 672. In this case the will did not direct the continuation of the business; the services were rendered individually and not as executor; someone must have been employed to render similar services; the heirs were benefited thereby, and assented thereto. So in *Matter of Moriarity*, 27 Misc. 161, compensation was allowed temporary administrator for carrying on intestate's business. In such cases the executor, while he must account to the estate for the profits, need not upon his accounting state the details of the business, or produce vouchers for the disbursements thereof. *Estate of Munzor*, 4 Misc. 374. See also *Lent* v. *Howard*, 89 N. Y.

169; *Matter of Kempf*, 53 Misc. 200. But a trustee should. See cases cited in last section.

But, it is the general rule that extra compensation beyond legal commissions cannot be allowed. *Russell* v. *Hilton*, 37 Misc. 642, 652; *Matter of Dummett*, 38 Misc. 477, 479, citing *Collier* v. *Munn*, 41 N. Y. 143; *Matter of Hayden*, 54 Hun, 197, 125 N. Y. 776; *Matter of Hosford*, 27 App. Div. 427; *Matter of Butler*, 9 N. Y. Supp. 641. Effect of copartnership of executor with decedent. *Ibid.*, citing *Matter of Taft*, 8 N. Y. Supp. 282 (cases above cited, distinguished). Nevertheless, as the court observed in *Russell* v. *Hilton*, *supra*, additional compensation may be allowed for services beneficial to the estate, but not strictly executorial in character. See for such instances, *Lent* v. *Howard*, *supra: Matter of Braunsdorf*, *supra; Matter of McCord*, 2 App. Div. 324; *Matter of Young*, 17 Misc. 680; *Matter of Moriarity*, *supra*. This will not include, e. g., moneys paid himself for "service of citations" or "posting notice of appraisal." *Matter of Wick*, 53 Misc. 211, and cases at p. 212. Or for "painting and repairing" decedent's premises. *Matter of Woods*, 55 Misc. 181.

§ 1098. **Compensation under the will.**—It is perfectly competent for a testator to fix a definite remuneration to his executor or trustees, substituting it for the statutory commissions. *Matter of Sprague*, 46 Misc. 216. But a mere legacy to one named as executor, unless explicitly stated to be in lieu of commissions, does not deprive him of his right to them. *Matter of Mason*, 98 N. Y. 527. But an executor may renounce the remuneration specified in the will, and insist upon his statutory commissions. § 2730, Code Civ. Proc.; *Matter of Arkenburgh*, 13 Misc. 744. But he must do so before the entry of the decree (*Ibid.*), and within a reasonable time. *Arthur* v. *Nelson*, 1 Dem. 337. Nine years is an unreasonable time to delay such renunciation (*Ibid.*), although in *Matter of Weeks*, below, Rollins, Surr., said, "There is no time fixed by law." In *Matter of Arkenburgh*, 38 App. Div. 473, 477, it was held that when no one could be prejudiced, a delay of two and a half years was not unreasonable. His assent to the will when read or probated is immaterial. *Ibid.* If he does renounce this specific compensation he cannot retract his renunciation, except upon consent of the Surrogate, and of all the parties in interest. *Matter of Weeks*, 5 Dem. 194. If the will expressly provides that the executors shall have "a reasonable compensation" for their services as such, the court will enforce the obvious intent that "the compensation should be reasonable with reference to the special circumstances of his estate, and the services which he has required them to perform." *Matter of Schell*, 53 N. Y. 263, 266. It cannot be held that the use of the word "reasonable" means the statutory rate merely because that is presumed to be reasonable. *Ibid.* But where a testamentary guardian was given a bequest for his services as such, and rendered no services it was held he could not take the bequest. *Matter of Brigg*, 39 App. Div. 485.

The acceptance of a legacy "to my executor and trustee" and described as "in full of all commissions, personal expenses, disbursements and charges

of every kind relating to the full and final settlement of my estate" was held, by Heaton, Surr., in *Matter of Rome*, 42 Misc. 172, to be

(*a*) Conclusive against the representative in both capacities.

(*b*) But not to include reasonable and necessary counsel fees.

As to trustees § 3320 provides that the compensation fixed by the will is exclusive unless "before receiving any compensation" he renounce the same by "a written instrument duly acknowledged." See § 1092, *ante*.

§ 1099. **Commissions where estate is $100,000, or over.**—The right to separate full commissions, when there are more than one and not more than three executors, administrators or trustees, is very clearly defined in §§ 2730 and 3320. The difficulty has usually arisen out of the question of how the *quantum* of the estate was to be fixed. What can be taken into consideration in bringing the total up to $100,000?

It must be observed in the first place that the words in § 2730 "if the gross value of the personal property of the decedent amounts to one hundred thousand dollars or more" have been interpreted to mean the value of the estate at the time of the final accounting when the commissions are to be computed, and not the value at the death of the decedent. *Matter of Blakeney*, 1 Connoly, 128, and cases discussed. The rule in that case was summarized as follows: "That all the property of the estate that comes to their hands in money and is paid out by them as well as all personalty upon the inventory is to be regarded, *when presented upon one accounting*, as the basis for determining whether several executors are entitled to full commissions." The test is how much is involved in the particular accounting. Where income of a fund is dealt with the gross income received and paid out is the basis on any but the ultimate accounting, when alone the *corpus* of the fund can be said to be involved in the sense of being the basis upon which to compute the commissions. *McAlpine* v. *Potter*, 126 N. Y. 285. But if an executor is directed to turn over a fund, or the proceeds of specified realty to trustees by whom the income thereof is to be disbursed, the executor's commissions are based upon the *corpus* and not upon the income. *Matter of Gilbert*, 25 Misc. 584.

The funeral expenses and expenses of administration are not to be deducted as decedent's debts in estimating whether the estate amounts to $100,000. *Matter of Franklin*, 26 Misc. 107, 111.

This is made clear by § 2730 as amended to read "if the *gross* value of the personal property," etc., see § 1092, *ante*, and omitting the words "over all his debts."

Where a will creates out of an estate of over $100,000, three separate trusts, none amounting to $100,000, every trust constitutes an estate by itself so far as the trustees thereof are concerned. It is immaterial that the same persons are the trustees of all the trusts. *Matter of Johnson*, 170 N. Y. 139.

When there is an equitable conversion under the will the court may take the value of the real property so converted into account for the purpose of determining whether there is $100,000 or over involved. *Estate of*

McLaren, 6 Misc. 483. See also opinion of Thomas, Surr., in *Matter of McGlynn*, 41 Misc. 156, already discussed (effect of mandatory power carrying obligation to account for proceeds). But there is a distinction to be kept clearly in mind. The question of whether the value of the personal property of the decedent amounts to $100,000 or more merely conditions the right to separate full commissions; it does not entitle the executors to commissions on moneys not received and paid out. *Matter of Clinton*, 16 Misc. 199, 204. In this case Marcus, Surr., observed: "Although the moneys actually received by the executors do not exceed $100,000, yet for the purpose of ascertaining the value of the personal property over all debts, evidence was properly given to show that the remainder of the unadministered estate will exceed $100,000, so that the court can determine whether the allowance should be a full compensation to each executor, or a full compensation to all, but the executors are entitled to no more compensation than for moneys actually received and paid out." The words "over all debts" do not now apply since the amendment striking them out of § 2730. In the *McGlynn* case, *supra*, the same rule is followed, that commissions on the proceeds of the sale would not be paid *in advance of the sale.*

§ 1100. **Mode of computation.**—Where there is more than one executor or trustee, and the value of the personal property of the decedent amounts to $100,000 or over at the time of the final accounting (see *Matter of Blakeney*, 1 Connoly, 128), the commissions are to be computed as follows:

(*a*) If there are two or three executors, each is entitled to a full commission on principal and interest allowed by § 2730 to a sole executor or administrator. *Matter of Franklin*, 26 Misc. 107, citing *Matter of Newland*, 59 N. Y. St. Rep. 526; *Estate of Willing*, 7 Civ. Pro. 92; *Matter of Kenworthy*, 63 Hun, 165.

(*b*) If there are more than three, three full commissions must be apportioned among them according to the services rendered by them respectively; and the same section further provides that a like apportionment shall be made in all cases where there shall be more than one executor or administrator.

The only difficulty in such cases arises where one or more of the executors has been the active administrator or administrators of the estate and claims a right to a substantial part of the two or three full commissions. It has been held that where the value of the personal property of the decedent amounted to $100,000 or over, and only one of the executors named in the will rendered services as such, only one full commission can be allowed to such executor, and the others, having resigned before executing, were not allowed any commissions on the body of the estate. *Matter of Hayden*, 54 Hun, 197. In that case the active executor made a claim for *three full commissions*, and this was denied.

Where, however, of two or three executors all qualify and incur responsibility in the administration, the mere fact that one of two or more, or

that two of three have had the active handling of the funds and the management of the property does not exclude the inactive executor or executors from his or their right to compensation. The Surrogate is given power to apportion the two or three full commissions, as the case may be, among those who have rendered services, *according to such services rendered;* but this does not give him the right to exclude one of such executors from participation in the commissions; such exclusion can only be in one or other of the cases above indicated, such as misconduct or resignation. *Matter of Kenworthy,* 63 Hun, 165–167.

The fact that one of the executors dies before the final accounting does not destroy the right to commissions which would have been payable to him had the accounting taken place at the time of his death, and in such a case, where the estate was over $100,000, the estate of the deceased executor was allowed upon the final accounting one full commission upon all the property actually received, paid out or distributed up to the time of his death, and half commissions (i. e., for receiving), upon the estate then undistributed. *Matter of Newland,* 7 Misc. 728, and cases cited. The surviving executor was allowed one full commission, plus the half commission for paying out the estate undistributed at the time of his coexecutor's death. See also *Welling* v. *Welling,* 3 Dem. 511.

In *Matter of Whipple,* 81 App. Div. 589, the rule was limited to computing the commissions on *actual* sums received and paid, and not on inventory estimates. In *Matter of Holbrook,* 39 Misc. 139, full commissions *on income* were claimed by the trustees because the estate was over $100,000. Held, that unless income itself exceeded $100,000 per annum the trustees must divide one income commission between them. See opinion, citing *Matter of Willets,* 112 N. Y. 289. But in *Matter of Hunt,* 41 Misc. 72, Thomas, Surr., shows, we think conclusively, that the real intent is that if the estate is $100,000 or over then full commissions are allowable on both, regardless of *quantum* of annual income.

In determining whether the property of the decedent is $100,000 or over in value, the inventory is not conclusive; the Surrogate may inquire into the facts and determine the value upon the accounting. *Matter of Blakeney,* 23 Abb. N. C. 32.

As to executors the gross *quantum* of the estate determines the right to such separate full commissions. As to trustees the gross *quantum* of each trust. *Matter of Johnson,* 170 N. Y. 139. An "estate" of $100,000, may be left in four equal and separate trusts. In such a case the executors might get full commissions while the trustees, accounting for each trust could manifestly not.

§ 1101. **Apportioning the full commissions.**—The apportionment between executors who have rendered varying degrees of services in the administration of the estate, necessitates an inquiry on the part of the Surrogate into the facts. *Matter of Arnton,* 106 App. Div. 326. It has been held that in such case "consideration should be given to the amount of time devoted by them respectively to the affairs of the estate, and to

the extent and importance of the labors which they have severally performed" (*Matter of Harris*, 4 Dem. 463, 467), and in that case Rollins, Surr., remarked: "I can easily conceive of an administration conducted by two executors, of whom one should receive and distribute all the assets, and the other should nevertheless be entitled, because of his care and pains in the management of the estate, to a larger share than his associate in the statutory compensation." But where one of two executors, as was the fact in the case just cited, was the surviving partner of the testator, and wound up the business of the firm, it was held that "such services could not be taken into account in determining the comparative value of the services of the two executors, by reason of the fact that this duty was incident to the contract of partnership, and he was entitled to no remuneration as executor for performing it." *Ibid.*, p. 467, and cases cited.

Where there is a controversy between the executors as to the manner of division of the commissions, the Surrogate may direct a reference, and the expenses of such reference may be required to be defrayed out of the aggregate commissions. *Hill* v. *Nelson*, 1 Dem. 357; *Matter of Harris*, *supra*.

§ 1102. **Double commissions.**—Where the same person is executor and trustee under a will, the question as to whether he is entitled to full commissions as executor and subsequently full commissions as trustee, depends upon whether the two functions are separable or blended. *Matter of McAlpine*, 126 N. Y. 285. While executors may have trust powers given them to enable them conveniently, wisely and safely to place the estate upon an income-bearing basis pending the time of distribution, this alone does not give the right to double commissions. *Matter of Slocum*, 169 N. Y. 153, 154. The allowance of double commissions is predicated upon two distinct administrations; the one as executor terminating in an accounting and the delivery over of the trust property to himself, alone or jointly with another, as trustee, and the subsequent administration as trustee under the terms of the will. See *Matter of Rafferty*, 52 Misc. 69, and cases at p. 74. The courts will be guided in passing upon this question of the right to double commissions by the scheme of the will. *Olcott* v. *Baldwin*, 190 N. Y. 99; *Matter of Waterman*, 60 Misc. 292. See also *Matter of Union Trust Co.*, 70 App. Div. 5, 9, where the court observes:

"To determine in what capacity one acts, it is important to keep in view what ordinarily are the duties of an executor. They are similar to those which in the event of intestacy would devolve upon an administrator. That is to say, in either capacity, the duties are to administer upon the estate by collecting and reducing to possession the assets of the estate and, after paying debts, to have the balance in hand for distribution. It is only at this point that a distinction arises, which is that an executor makes distribution under the will and an administrator under the law." See also *Matter of Hunt*, 121 App. Div. 96.

The duties of an executor and those of a trustee are well contrasted in *Drake* v. *Price*, 5 N. Y. 430, as follows: "To take possession of all the goods

and chattels, and other assets of the testator, to collect the outstanding debts and sell the goods and chattels so far as is necessary to the payment of the debts and legacies; to pay the debts and legacies, and under the order of the Surrogate to distribute the surplus to the widow and children, or next of kin of the deceased. These acts embrace all the duties which appropriately belong to the executorial office. If any other duty is imposed upon the executor, or any power conferred, not appertaining to the duties above enumerated, a trust, or trust power, is created, and the executor becomes a trustee, or the donee of a trust power. And such powers are conferred and such duties imposed upon him, not as incidents to his office of executor, but as belonging to an entirely distinct character—that of trustee. And in all such cases the trust and executorship are distinguishable and separate." If the will, either by express terms or fair intendment, permits or practically accomplishes a separation between the functions of executors and those of the trustees in which the two functions cannot be said to be blended for any purpose or to coexist for any period of time, but in which, on the contrary, the duties of the executors are to end before those of the trustees begin, then the persons exercising these two separate and distinct functions are entitled to compensation in both capacities. *Matter of Johnson*, 57 App. Div. 494, 503; *Matter of Leinkauf*, 4 Dem. 1–4; *Matter of Beard*, 77 Hun, 111–113, citing *Johnson* v. *Lawrence*, 95 N. Y. 154; *Laytin* v. *Davidson*, 95 N. Y. 263; *Phœnix* v. *Livingstone*, 101 N. Y. 451; *Matter of McAlpine*, 126 N. Y. 285; *Matter of Crawford*, 113 N. Y. 560. It is therefore important that where double commissions are to be claimed the executors should account as such as soon as their functions as executors have been discharged (*Bacon* v. *Bacon*, 4 Dem. 5), and thereafter they may claim, upon their accounting as trustees, further and full commissions in that capacity. See *Matter of Slocum*, 169 N. Y. 153, 160, and cases cited; *Matter of Johnson, supra; Hulburt* v. *Durant*, 88 N. Y. 122, 127; *Matter of Underhill*, 35 App. Div. 434, 437, aff'd 158 N. Y. 721. The necessity of this appears in *Matter of Martin*, 124 App. Div. 793, differentiating between trust property duly set apart, and a residue still held as by the executor. The mere entry of a decree settling an executor's account does not of itself alone operate to change his executorial functions into those of a trustee. *Matter of Smith*, 66 App. Div. 340, 345. See *Matter of Hitchins*, 39 Misc. 767, where widow was executrix and life beneficiary. Held, she could not be deemed her own trustee and ask or have allowed to her estate double commissions.

In the *McAlpine* case above cited, the will was such as to make in the language of Judge Finch, "the executors either wholly and continuously such, or wholly and continuously trustees. . . . There is no provision requiring any share or trust fund to be severed from the body of the estate, or to be ascertained as a residue of principal to be kept invested for its specific income payable to a beneficiary, but all duties without separation, whether imposed by the law or by the will, run on together mingled and blended to the end."

An examination of the cases in which double commissions have been allowed will show that they were exceptional in their nature and contained provisions distinctly and definitely pointing to a holding by trustees as such after the duties of the executors were completed and ended. *Wildey* v. *Robinson*, 85 Hun, 362–366; *Matter of Curtiss*, 9 App. Div. 285. *Robertson* v. *De Brulatour*, 188 N. Y. 301, presents this situation very plainly. The executors accounted, had a decree, and turned over to themselves as trustees the trust securities. As Gray, J., says (at p. 316), "At that moment they assumed a new office with distinct duties and responsibilities." So on their accounting as trustees they were allowed commissions under § 3320 as amended, computed not as formerly on "sums of money" but on "sums of principal" and for "receiving and paying out income." No double commissions can be based on trust lands still unsold. *Matter of Tucker*, 29 Misc. 728, 730; *Roosevelt* v. *Van Alen*, 31 App. Div. 1, 5; *Matter of Clinton*, 16 Misc. 199. Even where there is equitable conversion, there must be actual conversion before commissions are computable. *Matter of Tucker, supra; Estate of McLaren*, 6 Misc. 483.

The same rule applies to persons occupying double positions of guardians and trustees. If they administer the fund in a double capacity for the same period they are entitled only to single commissions. *Foote* v. *Bruggerhof*, 66 Hun, 406.

The property turned over by executors to themselves as trustees *need not be turned into cash* as a prerequisite to commissions, *if* the will clearly contemplates separate management or administration by the same persons in distinct and separate capacities. *Matter of Freel*, 49 Misc. 386.

§ 1103. **When commissions are payable.**—So far as executors or administrators are concerned, it is well settled that the commissions are not payable until the accounting. The commissions being in the nature of remuneration for a proper administration of the estate and the execution of the trust devolved upon a representative, it is manifest that until he shall have accounted it cannot definitely appear that he has properly administered the fund. The right of the Surrogate to deny commissions to an executor for his misconduct, illustrates this rule, and therefore the retention of commissions prior to the accounting is discountenanced by the courts. *Matter of Robertson*, 2 Misc. 288, 291; *Matter of Furniss*, 86 App. Div. 96, 99.

The rule is stated to be "Commissions cannot be paid or retained until judicially allowed" (*Matter of Butler*, 1 Connoly, 58–70, citing *Wheelwright* v. *Rhoades*, 28 Hun, 57; *U. S. Trust Co.* v. *Bixby*, 2 Dem. 494, and *Freeman* v. *Freeman*, 4 Redf. 211), "and if retained or paid in advance of their allowance by the Surrogate the executor is liable for interest thereon." *Matter of Peyser*, 5 Dem. 244–247; *U. S. Trust Co.* v. *Bixby*, 2 Dem. 494, and cases cited at p. 496; *Whitney* v. *Phœnix*, 4 Redf. 194. An executor, however, will not be charged with interest upon a sum retained as commission where it appears that there was a distribution to the beneficiaries by consent of all parties (being competent) and voluntary disclosure by way

of an accounting was made to such beneficiaries at the time. *Wyckoff* v. *Van Sicklen*, 3 Dem. 75; *Matter of Dunkel*, 10 N. Y. St. Rep. 213; *Matter of Franklin*, 26 Misc. 107, 111; *Matter of Ross*, 33 Misc. 163, 165. The mere fact that executors paid themselves commissions in advance, upon advice of counsel, does not relieve them from the obligation to pay interest thereon. *Meeker* v. *Crawford*, 5 Redf. 450; *Wheelwright* v. *Rhoades*, *supra*. The fact that at the time the accounting is made there is not sufficient property before the court to defray the commissions which have been earned, does not affect the power of the court to fix the amount payable (*Matter of Prentice*, 25 App. Div. 209), and it cannot be held that because executors have failed to retain moneys sufficient to pay their commissions up to the time of their accounting that they have thereby made a gift of the equivalent to the beneficiaries of the estate. *Ibid.* The same rule holds as to trustees. *Beard* v. *Beard*, 51 N. Y. St. Rep. 735; 140 N. Y. 260, 265. This rule may be affected by the fact that the trustee has for a number of years distributed all the income without retaining anything to cover his commissions. In such a case he cannot be allowed to collect them in lump out of one year's income, nor from the principal. He will be deemed to have waived them. *Matter of Harper*, 27 Misc. 471; *Spencer* v. *Spencer*, 38 App. Div. 403. But see § 1093, *ante*, and cases there discussed, especially *Matter of Haskin*, 111 App. Div. 754. He need not pay himself and so incur interest, but he may retain an amount sufficient to cover the commissions. Trustees are entitled under § 2802 to annually render and finally judicially settle their accounts before the Surrogate, and that section provides in terms: "In all such annual accountings of such trustees the Surrogate before whom such accounting may be had shall allow to the trustee or trustees the same compensation for his or their services, by way of commission, as are allowed by law to executors and administrators, besides their just and reasonable expenses therein," etc. But where the duties of the executor continue over a period of years—that is in the case of a continuing trust—executors also may make annual rests and be allowed commissions (*Fisher* v. *Fisher*, 1 Bradf. 335), provided, however, they make an annual accounting. *Betts* v. *Betts*, 4 Abb. N. C. 317; *Vanderheyden* v. *Vanderheyden*, 2 Paige, 287. But an executor cannot charge this annual commission at annual rests unless they are directed to be made for the purpose of compelling him to pay interest upon periodical balances which ought to have been invested by him. *Hosack* v. *Rogers*, 9 Paige, 461.

The rule as to commissions on successive settlements by executors or administrators is stated in *Hawley* v. *Singer*, 3 Dem. 589, 593, as follows: "On the first accounting they are entitled to full commissions on all moneys received and paid out, and half commissions only on moneys received and not paid out. On the second accounting they are allowed the other half on money since paid out and full commissions on the increase received and paid out, or directed by the decree to be paid; taking care, however, that all of such commissions shall not exceed what would have been the

full commissions had the whole estate been settled upon one final accounting."

§ 1104. **Successive letters to same person.**—Section 2730 provides further that "when successive or different letters are issued to *the same person* on the estate of the *same decedent* including a case where letters testamentary or letters of general administration are issued to a person who has been previously appointed a temporary administrator" he will be entitled to commissions in one capacity only. He may elect in which capacity he will take his compensation; but if in one capacity he has already received his commissions this will not be deemed an election; for by the same section he is in such case permitted to receive the excess, if any, of the compensation allowable in the other capacity. For example, if as temporary administrator he has received $250 as commissions, and his general administration is such as to entitle him to $500, he may receive an additional $250. In no case may he receive in both capacities under the successive or different letters more than the maximum commissions allowable in either.

This section does not affect the right to double commissions in proper cases. It deals only with cases of persons who receive successive letters upon the same estate. *Note.* See Thomas on Estates Created by Will, vol. I, pp. 782 *et seq.* for analysis of cases on commissions.

§ 1105. **What fund chargeable with the commissions.**—The question now arises, on what fund to charge the commissions allowed. Manifestly, as appears from the language of the many cases already discussed, commissions on "income" received and paid out are chargeable to income, for if the whole income be paid out without allowing for commissions we have seen that the right thereto is deemed waived. But, if the bequest is of a specific sum per annum, then that sum must be paid full and clear of any deduction for expenses or commissions. *Whitson* v. *Whitson*, 53 N. Y. 479. But if it be "the income" of a fund put in trust, then of course that income must bear the burden of the commissions. *Ibid.*, and *Matter of Dewey*, 153 N. Y. 63, 66; *Matter of Shipman*, 82 Hun, 108.

But the commissions on the *corpus* or principal must be paid out of the fund constituting such basis of computation. This is elementary. Excepting annuities, the fund involved bears its own burden of the commissions which are calculated on the basis of its amount.

§ 1106. **Expenses allowable.**—Section 2730 is the Surrogate's authority for allowing not only the commissions earned, but also the expenses of the executor, administrator, guardian or testamentary trustee. "In all cases such allowance must be made for their necessary expenses *actually paid* by them as appears just and reasonable." (See Thomas on Estates, above cited.)

The first point to note is "actually paid." That is, the Code contemplates reimbursement, or ratification, not approval before payment. *Matter of Woods*, 55 Misc. 181, and cases cited. *Matter of Sayles*, 57 Misc. 524. The only exception is the allowances under §§ 2561–2562. *Matter*

of O'Brien, 25 N. Y. Supp. 704. In other words, the accountant must himself have administered the estate and fund, determining the necessity and reasonableness of his expenditures; subject to being surcharged for unnecessary and unreasonable payments. (See below.)

Counsel fees are one of the most important items under this head. Judge Woerner in his treatise on the American Law of Administration summarizes this rule very clearly. Vol. 2, §§ 384 and 515, and cases cited. He says: "Reasonable fees for such services, paid in good faith, are proper items of credit in the administration account, and will be allowed for legal assistance in resisting claims against the estate which the administrator does not know to be just and lawful (*Young* v. *Brush*, 28 N. Y. 667), or in assisting him in discharging his official duties, ... collecting the assets if a suit be necessary (*Spencer* v. *Strait*, 40 Hun, 463), preparing the account, or defending the settlement." But allowance can be made, as he points out, only for counsel fees actually paid (*Matter of Spooner*, 86 Hun, 9), "and no more than is a reasonable compensation (*Matter of Quinn*, 16 Misc. 651) for the services rendered to the estate, no matter what the administrator has actually paid or contracted to pay; and the onus to prove the necessity and value of such services is on the administrator." *St. John* v. *McKee*, 2 Dem. 236; *Matter of Smith*, 2 Connoly, 418; *Matter of Van Nostrand*, 3 Misc. 396. See also *Matter of Blair*, 67 App. Div. 116, 120; *Douglass* v. *Yost*, 64 Hun, 155; *Gilman* v. *Gilman*, 63 N. Y. 41; *Matter of Hara*, 50 Misc. 495, citing *Matter of Hosford*, 27 App. Div. 427; *Matter of Peck*, 79 App. Div. 296, aff'd 177 N. Y. 538. He cannot be allowed counsel fees incurred by reason of his own neglect or misconduct or "gross ignorance." 2 Woerner on Am. Laws of Adm. § 516; *O'Reilly* v. *Meyer*, 4 Dem. 161.

The Surrogate has power to confirm upon the accounting such reasonable fees as have been paid (*Matter of Arkenburgh*, 13 Misc. 744; *Matter of Spooner*, 86 Hun, 9), but he is limited by the Code to the taxable costs in making allowances direct to the counsel. *Reed* v. *Reed*, 52 N. Y. 651. He cannot award counsel fees. *Seaman* v. *Whitehead*, 78 N. Y. 300, 309, and cases cited. The executor may be allowed on his accounting counsel fees paid for sustaining the will on a contested probate. *Douglass* v. *Yost*, 64 Hun, 155; *Matter of Ogden*, 41 Misc. 156. Also for litigating a proceeding to obtain a construction of the will. *Matter of Washbon*, 38 N. Y. St. Rep. 619; *Matter of Hutchison*, 84 Hun, 563. Even if unsuccessful, provided it was done in good faith. *Matter of Title Guarantee & Trust Co.*, 114 App. Div. 778. But not for litigation in the result of which she alone was interested. *Matter of Pond*, 42 Misc. 165. Where the probate of a will was set aside and the executor was appointed administrator, it was held that counsel fees in the will matter must go into his executor's account, not being proper items in his administrator's account and that if his account as executor had in fact been settled, he could move to open the proceeding. *Matter of Blair*, 67 App. Div. 116. But if the executor unnecessarily brings an action for the construction of the will, he cannot be allowed his

legal expenses therefor, particularly if it appears it was to further his individual interest. *Matter of Thrall,* 30 App. Div. 271. An executor, who has to sue his coexecutor for waste, may also be allowed reasonable sums paid to counsel. *Matter of Stevens,* 25 N. Y. St. Rep. 993. The legal expenses of appeals taken in good faith, and upon reasonable grounds, must be allowed out of the estate. *Matter of Ritch,* 76 Hun, 36. Where proceedings were brought to revoke letters on the ground of irresponsibility and the executors had to give bonds in order to retain their office, the allowance of counsel fees actually paid in such proceeding is discretionary with the Surrogate. If he refuse to allow them, and his exercise of discretion is affirmed by the Appellate Division, the Court of Appeals will not review the matter. *Matter of O'Brien,* 145 N. Y. 379.

A Surrogate should not allow such fees paid to counsel for doing what the executor ought himself to have done. His commissions cover such services. *Matter of Quinn,* 16 Misc. 651. *Matter of Ogden, supra,* citing *Matter of Arkenburgh,* 13 Misc. 744; *Matter of Van Nostrand,* 3 Misc. 396. Nor can he be allowed expenses in renting or managing realty if no duty respecting the same is imposed on him by the will. *Ibid.* Even when there is a power of sale *not* imperative. Nor can an executor be allowed counsel fees when, being himself an attorney, he conducted the legal proceedings. *Matter of Van Wert,* 3 Misc. 563; *Matter of Howard,* 3 Misc. 170, 178, citing *Collier* v. *Munn,* 41 N. Y. 143; *Lent* v. *Howard,* 89 N. Y. 169. As to other expenses, such as bookkeeper's bills and the like, the test is the necessity for the services and the reasonableness of the disbursements. *Merritt* v. *Merritt,* 32 App. Div. 442; *Matter of Harbeck,* 81 Hun, 26. Under a complicated trust, where an office was needed for purposes of administration, office rent and office expenses were allowed the trustee on his accounting. *Matter of Nesmith,* 140 N. Y. 609. Traveling expenses may be allowed if necessary. *Matter of Biggars,* 39 Misc. 426.

§ 1107. **Premium paid on official bond.**—Under § 3320, as now amended, "any . . . . guardian, trustee . . . . executor or administrator, required by law to give a bond as such, may include as a part of his lawful expenses, such reasonable sum, not exceeding one per centum per annum upon the amount of such bond, paid his sureties thereon," as the court by which he is appointed allows. L. 1892, ch. 465. Expenses of actions defended in good faith, arising in the course of administration, may be allowed. *In re Grout,* 15 Hun, 361. See further for full summary of cases, 1 Thomas on Law of Estates, pp. 800 *et seq.*

§ 1108. **Surcharging.**—Improper payments, rejected by the Surrogate in judicially settling the account, are surcharged. That is, the accountant is refused credit for them as payments and is charged with them as money still in his hands. To surcharge an accountant does not necessarily impugn his good faith or integrity.

The cases discussed in the last section involving payments which "will not be allowed," illustrate this subject. The familiar and most common cases are where the persons interested dispute the reasonableness of

funeral expenses, or tombstones, or monuments; or where they complain of delay in selling assets, e. g., keeping horses that "eat their heads off" or of failure to realize timely on notes or accounts, where total or partial loss results; or, sadly often, where legal expenses assume what to them is an undue magnitude. The Surrogate enjoys a wise and wide discretion. And it is wisely exercised. In *Matter of Collyer*, 1 Con. 551, the administrator was surcharged legal fees paid *before* his appointment. In *Matter of Siegler*, 49 Misc. 189, he was surcharged legal fees paid in asserting a *personal* claim against the estate. In *Matter of Marx*, 49 Misc. 280, he was surcharged a Federal inheritance tax paid *after* the Act of Congress was repealed.

CHAPTER V

MISCELLANEOUS PROVISIONS

§ 1109. **"Marked for decree."**—If there are no objections to an account or, when they have been disposed of, the matter is "marked for decree." Before discussing the decree, however, we must note certain further points that may enter into the disposition of the estate, or into the procedure. These are the reference of a disputed account, and the question of "Advancements" and "Hotchpot."

§ 1110. **The reference.**—It is unnecessary to discuss in detail again the procedure upon a reference in this particular proceeding. Contested accounts are usually referred. The reference is generally a reference to hear and determine, and if inadvertently the order of reference limits the referee to hear and report, it may be amended *nunc pro tunc* if it was intended to be an order to hear and determine, and the parties have acted upon it as such. *Matter of May*, 53 Hun, 127. The discussion of § 2546, *ante*, may be referred to in this general connection. The procedure is similar to a Supreme Court reference. The original papers are delivered by the Surrogate's clerk to the referee, who receipts therefor. The issues to be tried are determined by the objections filed. The referee has the same power as the Surrogate possesses to allow amendments (*Estate of Munzor*, 4 Misc. 374; *Matter of Gearns*, 27 Misc. 76), which do not relate to transactions subsequent to the return day of the citation (*Id.*, and *Estate of Odell*, 18 N. Y. St. Rep. 997), and may permit the accountant to file a supplemental account in a proper case. *Matter of Frank*, 1 App. Div. 39. The account is deemed the *prima facie* case of the one accounting. The issues are of two descriptions. One, where the burden rests upon the objector of sustaining his objection, as in the case of a disbursement properly vouched. The other where the accountant must justify the act or neglect to which attention is called.

The form of the report, the filing of exceptions, its confirmation or modification are all discussed in an earlier chapter. See Rules of N. Y. County, 8, 22 and 24.

§ 1111. **Summary statement of account.**—The account of his proceedings, filed by the accounting party, must be the basis of the decree to be made. The Code provides:

> Each decree, whereby an account is judicially settled, must contain, in the body thereof, a summary of the account as settled; or must refer to such a summary, which must be recorded in the same book, and is deemed a part of the decree. **§ 2551, Code Civil Proc.**

But the decree must also provide, as usually prayed for in the petition for the ultimate judicial settlement of the account, for whatever distribution is to be made to the persons entitled to share in the remaining undistributed assets. The decree must therefore define the extent of each distributee's share.

§ 1112. **Advancements.**—First, then, must be considered what advancements may have been made to such distributees, for the Code gives the Surrogate power to adjust them in his decree:

Section 99 of Decedent Estate Law now contains what was formerly part of § 2733. It provides as follows:

> If any child of such deceased person have been advanced by the deceased, by settlement or portion of real or personal property, the value thereof shall be reckoned with that part of the surplus of the personal property, which remains to be distributed among the children; and if such advancement be equal or superior to the amount, which, according to the preceding section, would be distributed to such child, as his share of such surplus and advancement, such child and his descendants shall be excluded from any share in the distribution of such surplus. If such advancement be not equal to such amount, such child, or his descendants, shall be entitled to receive so much only, as is sufficient to make all the shares of all the children, in such surplus and advancement, to be equal, as near as can be estimated.
>
> The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement, within the meaning of this section, nor shall the foregoing provisions of this section apply in any case where there is any real property of the intestate to descend to his heirs.

Section 2733, accordingly, has been amended to read as follows:

> Where there is a surplus of personal property to be distributed, and the advancement as provided in section ninety-nine of the decedent estate law, consisted of personal property, or where a deficiency in the adjustment of an advancement of real property is chargeable on personal property, the decree for distribution, in the surrogate's court, must adjust all the advancements which have not been previously adjusted by the judgment of a court of competent jurisdiction. For that purpose, if any person to be affected by the decree, is not a party to the proceeding, the surrogate must cause him to be brought in by a supplemental citation. **§ 2733, Code Civil Proc.**

The real property law (ch. 46, Gen. Laws, §§ 295, 296), provisions have also been transferred to the Decedent Estate Law, without amendment and provide as follows:

> § 96. *Advancements.*—If a child of an intestate (i. e., one dying leaving no will, *Messman* v. *Egenberger*, 46 App. Div. 46, 50) shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the

real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only, of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal. The value of any real or personal property so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given. Maintaining or educating a child, or giving him money without a view to a portion or settlement in life is not an advancement. An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust with a right of selection is an advancement.

§ 97. *How advancements adjusted.*—When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other.

As to the substantive law and what is and what is not an advancement, see 2 Thomas on Estates Created by Will, pp. 1541 *et seq.;* Redfield on Wills, pp. 428 *et seq.;* Jarman on Wills (6th ed.), 394 *n,* 495 *n;* 1 Am. & Eng. Ency. of Law (2d ed.), 760 *et seq.*

The question from the representative's point of view is whether the heir or legatee received the money from decedent as a gift, a loan or an advancement. See *Cole* v. *Andrews*, 176 N. Y. 374, for interesting agreement examined by court. The question involves the item of interest on the sum involved. In the case cited the executors were held to have the right of electing whether to treat it as a debt or as an advancement, and only entitled to charge interest from the date of such election.

So far as the proof to be taken by the Surrogate or his referee goes, parol evidence will be held inadmissible to contradict a clause in a will to the effect that a child has had an advancement, but is admissible so far as the amount thereof is concerned. 2 Thomas on Estates, p. 1675. Declarations subsequent to the transaction are inadmissible. *Johnson* v. *Cole,* 178 N. Y. 364.

The statute applies only to cases of intestacy. *Matter of Weiss*, 39 Misc. 71, and cases discussed by Thomas, Surr. But where the intent of the will is clearly to "work equality in sharing" the same principle is applied. *Blair* v. *Keese*, 59 Misc. 107. The intention of decedent, if ascertainable, controls. *Matter of Morgan*, 104 N. Y. 74.

If the will refers to decedent's books of account, such books are to be taken into consideration in determining the fact and amount of advancements. *Thorne* v. *Underhill*, 1 Dem. 306, 314, citing *Tonnele* v. *Hall*, 4

N. Y. 140, and *Lawrence* v. *Lindsay*, 68 N. Y. 104. But a mere entry in his books will not alone prove an advancement. *Marsh* v. *Brown*, 18 Hun, 319.

But the child may prove either a discharge or repayment of the amount claimed to be an advancement, or where the advancement was in stock or other securities which were estimated in value and proved worthless that fact may be proved and considered in adjusting the child's share. *Marsh* v. *Gilbert*, 2 Redf. 465.

See *Matter of Merritt*, 86 App. Div. 179, for an excellent illustration of how to adjust advancements.

If the decedent is shown to have taken a note or security for the sum claimed to have been an advancement, it negatives the idea of its being in fact such. *Kintz* v. *Friday*, 4 Dem. 540; *Matter of Robinson*, 45 Misc. 551. This last case holds that it is not to be presumed that an advancement was a gift, in the absence of clear proof of such intent. It tends rather to show it to have been a loan (*Bruce* v. *Griscom*, 9 Hun, 280; *Messmann* v. *Egenberger*, 46 App. Div. 46, 51), for an advancement may be defined as the giving by the decedent in his lifetime, by anticipation of the whole or part of what it is supposed the donee will be entitled to upon the death of the party taking it. 18 Hun, 170. A will providing that moneys given by testator to any of his legatees were absolute gifts and not advancements was held not to cover money given to a legatee who had given notes therefor and repaid part thereof. *Matter of Cramer*, 43 Misc. 494. For the idea of a gift was wholly negatived thereby. *Ibid.*, citing *Rogers* v. *Rogers*, 153 N. Y. 343. So an agreement to treat a fund as an advancement was held annulled by a will made years later making different provision for the contracting beneficiary. *Bowron* v. *Kent*, 190 N. Y. 422, rev'g 120 App. Div. 74. If the security is shown to have been surrendered by the decedent and the donee claims it to have been done with the intent of canceling the debt, an issue is raised which the Surrogate may not try. *Bauer* v. *Kastner*, 1 Dem. 136. See generally *Miller* v. *Coudert*, 36 Misc. 43, and *Adams* v. *Cowen*, 177 U. S. 472. See case under a will where testator paid a son's note and kept it. Held an advancement. *Ebeling* v. *Ebeling*, 61 Misc. 537. (Special Term.)

Should the beneficiary to whom advancements were made prove to be sole legatee or distributee there is no occasion for applying the statute; although, conceivably, a case might arise under a will where the next of kin might claim intestacy as to the amount of such advancements.

§ 1113. **Same subject—"Hotchpot."**—The reckoning in with the distributable surplus of the advancements which may have been made to a child or children is sometimes called bringing the estate into "hotchpot." The purpose is to make the shares of all the children as nearly equal as can be. It operates substantially as follows: If the distributees are, say, three in number, and the distributable estate amounts in value to $100,000, and an advancement of $20,000 is proved to have been made to A, the total to distribute is assumed in such case to be $120,000, and B and C

each receive one-third thereof, or $40,000, A getting only $20,000 in addition to his advancement. This is the correct method of distribution of a hotchpot fund. Grandchildren are entitled to insist upon advancements made to their uncles or aunts being brought into hotchpot in order to equal distribution. *Beebe* v. *Estabrook*, 11 Hun, 523, aff'd 79 N. Y. 246. It has been held that the English rule that only where a *father* dies intestate can the child's advancement be brought into hotchpot, does not apply in this State. *Kintz* v. *Friday*, 4 Dem. 540, 546. Section 2733 expressly says "deceased person," and the policy of our law is to include females as well as males in terms importing the masculine gender. See 1 R. S. (7th ed.) 124.

In *Matter of Meyer*, 95 App. Div. 443, such a scheme is discussed, and the rule as to charging interest is illustrated.

In this connection we repeat that a will made subsequent to advances to children, which will divides the estate equally among them, cancels the advancements and destroys the hotchpot. *Bowron* v. *Kent*, 51 Misc. 136; *Camp* v. *Camp*, 18 Hun, 217; *Arnold* v. *Haronn*, 43 Hun, 278.

CHAPTER VI

DISTRIBUTION AND DESCENT

§ 1114. **Time of distribution.**—A decree finally settling the accounts of a representative will provide for the distribution of the surplus of the personal property to the persons entitled thereto. From what has already been observed as to the time within which an account may be presented and settled, it is very clear that no distribution can be had until a year has elapsed from the issuance of letters testamentary or of administration. The reasons for this are very adequately set out in *Matter of Bonner*, 30 Misc. 31, where Fitzgerald, Surr., points out the effect of allowing an accounting and distribution to be had at any earlier period. For example, a proceeding to revoke the probate of a will can be instituted any time within a year after the probate decree has been recorded, and legacies cannot be paid unless expressly directed by the will before the expiration of a year.

In the second place, it is to be observed that where full distribution might be impossible by reason of contest involving certain items or interests, it is always proper, where it can be done irrespective of the rights so involved, to direct a partial distribution. *Matter of Ockershausen*, 10 N. Y. Supp. 928.

Distribution under a will means to carry into effect its testamentary directions. The questions therein involved will be such as: amount payable, whether interest is to be added, whether beneficiary takes directly, or as one of a class, or his assignee under a transfer of interest, or his issue *per stirpes* or *per capita*.

§ 1115. **Law governing distribution.**—While, as will be observed later, persons entitled to succeed to real property should be determined by the law of the place where the real property is situated, the persons entitled to distributive shares in case of intestacy, entire or partial, are always to be determined by the law of the place of domicile of the decedent at the time of his death. Section 2694 of the Code provides that, except where special provision is otherwise made by law, the ownership and disposition of any property situated within the State other than real property or an interest in real property, where it is not disposed of by will, are regulated by the laws of the State or country of which the decedent was a resident at the time of his death.

If the decedent die domiciled in this State, the surplus of his personal property after the payment of debts, must be distributed according to the Decedent Estate Law now embodying in § 98 thereof what was formerly § 2732 of the Code, which is as follows:

§ 98. *Distribution of personal property of decedent:* [*Note.* See *post,* for discussion of subdivisions.]

If the deceased died intestate, the surplus of his personal property after payment of debts; and if he left a will, such surplus, after the payment of debts and legacies, if not bequeathed, must be distributed to his widow, children, or next of kin, in manner following:

1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased.

2. If there be no children, nor any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section.

3. If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed two thousand dollars; if the residue exceeds that sum, she shall receive in addition to the one-half, two thousand dollars; and the remainder shall be distributed to the brothers and sisters and their representatives.

4. If there be no widow, the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

5. If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives; and if all the brothers and sisters of the intestate be living, the whole surplus shall be distributed to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants in whatever degree of those dead; so that to each living brother or sister shall be distributed such share as would have been distributed to him or her if all the brothers and sisters of the intestate who shall have died leaving issue had been living, and so that there shall be distributed to such descendants in whatever degree, collectively, the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

6. If the deceased leave no children and no representatives of them, and no father, and leave a widow and a mother, the half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters.

7. If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole, if there be no widow.

8. If the deceased leave a mother, and no child, descendant, father, brother, sister, or representative of a brother or sister, the mother, if there be a widow, shall take one-half; and the whole, if there be no widow.

9. If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of

such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

10. Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal.

11. When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

12. No representation shall be admitted among collaterals after brothers' and sisters' descendants.

13. Relatives of the half-blood, shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

14. Descendants and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the life-time of the deceased, and had survived him.

15. If a woman die, leaving illegitimate children and no lawful issue, such children shall inherit her personal property as if legitimate.

16. If there be no husband or wife surviving, and no children, and no representatives of a child, and no next of kin, then the whole surplus shall be distributed equally to and among the next of kin of the husband or wife of the deceased, as the case may be, and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in this article or in chapter eighteenth of the Code of Civil Procedure; but such surplus shall not, and shall not be construed to, embrace any personal property except such as was received by the deceased from such husband or wife, as the case may be, by will or by virtue of the laws relating to the distribution of the personal property of the deceased person.

See below as to estates of married women.

§ 1116. **The statute of descent.**—The statute of descent is embodied in the Decedent Estate Law, art. 3, §§ 80–95. Section 80 contains the rules for interpreting the article. Section 96 deals with advancements and has already been quoted. The other sections read as follows:

§ 81. *General rule of descent.*—The real property of a person who dies without devising the same shall descend:

1. To his lineal descendants.
2. To his father.
3. To his mother; and
4. To his collateral relatives, as prescribed in the following sections of this article.

§ 82. *Lineal descendants of equal degree.*—If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts however remote from him the common degree of consanguinity may be.

§ 83. *Lineal descendants of unequal degree.*—If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the

living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall have died shall respectively take the shares which their ancestors would have received.

§ 84. *When father inherits.*—If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee.

§ 85. *When mother inherits.*—If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided. If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee.

§ 86. *When collateral relatives inherit; collateral relatives of equal degrees.*—If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there be several such relatives, all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be.

§ 87. *Brothers and sisters and their descendants.*—If all the brothers and sisters of the intestate be living, the inheritance shall descend to them; if any of them be living and any be dead, to the brothers and sisters living and the descendants, in whatever degree, of those dead; so that each living brother or sister shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

§ 88. *Brothers and sisters of father and mother and their descendants.*—If there be no heir entitled to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of the father, shall descend:

1. To the brothers and sisters of the father of the intestate in equal shares, if all be living:

2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

3. If all such brothers and sisters shall have died, to their descendants.

4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of such as shall have died, of if all have died, to their descendants. But, if the inheritance shall have come to the intestate on

the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate.

5. If there be no such brothers or sisters of such father or mother, nor any descendants of such brothers or sisters, the inheritance, if it shall have come to the intestate on the part of his father, shall descend to his father's parents, then living, in equal parts, and if they be dead, then to his mother's parents, then living, in equal parts; but if the inheritance shall have come to the intestate on the part of his mother, it shall descend to his mother's parents, then living, in equal parts, and if they be dead, to his father's parents, then living, in equal parts. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to his living grandparents in equal parts.

§ 89. *Illegitimate children.*—If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relatives shall not inherit.

§ 90. *Relatives of the half blood.*—Relatives of the half blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

§ 91. *Relatives of husband or wife.*—When the inheritance shall have come to the intestate from a deceased husband or wife, as the case may be, and there be no person entitled to inherit under any of the preceding sections, then such real property of such intestate shall descend to the heirs of such deceased husband or wife, as the case may be, and the persons entitled, under the provisions of this section, to inherit such real property, shall be deemed to be the heirs of such intestate.

§ 92. *Cases not hereinbefore provided for.*—In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of the common law.

§ 93. *Posthumous children and relatives.*—A descendant or a relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him.

§ 94. *Inheritance, sole or in common.*—When there is but one person entitled to inherit, he shall take and hold the inheritance solely; when an inheritance or a share of an inheritance descends to several persons they shall take as tenants in common, in proportion to their respective rights.

§ 95. *Alienism of ancestor.*—A person capable of inheriting under the pro-

visions of this article shall not be precluded from such inheritance by reason of the alienism of an ancestor.

§ 1117. **The form and provisions of the decree.**—Before discussing these provisions just quoted, the decree needs further attention. The decree finally and judicially settling the account of an executor or administrator not only adjudges the balance with which he is chargeable, but the persons to whom such balance is distributable. The decree should direct payment of specific amounts to persons identified by name. As elsewhere noticed, assignments of interests not attacked as to validity may be recognized by the court and payment in such case may be decreed to A, as assignee of B.

In the case of foreign next of kin it seems the appropriate consul general may intervene and payment made to him officially as representing the citizens of his nation. This right is cognate to his right to letters of administration. See *Matter of Davenport*, 43 Misc. 573, Church, Surr., citing *Matter of Tartaglio*, 12 Misc. 245; *Matter of Fattosini*, 33 Misc. 18; *Matter of Lobrasciano*, 38 Misc. 415. And referring to *Matter of Logiorato*, 34 Misc. 31, when the right of such consul to administer was denied.

The shares are computed under the provisions of the statute of distribution, taking into account any advancements proved, or payments already made on account of any distributive share.

If there be a will, and yet partial intestacy, the part undisposed of goes according to the statute, the balance pursuant to the will. As to the part undisposed of, the heirs or next of kin are to be ascertained as of the date of testator's death. *Grinnell* v. *Howland*, 51 Misc. 132, citing *Hoes* v. *Van Hoesen*, 1 Barb. Ch. 379; *Doane* v. *Mercantile Trust Co.*, 160 N. Y. 494; *Simonson* v. *Waller*, 9 App. Div. 503.

The executor is entitled also to set off against a legacy or distributive share a debt due the decedent from the one entitled thereto. *Matter of Robinson*, 45 Misc. 551. This has been held even where the debt was due from a partnership of which the legatee was sole surviving partner at decedent's death. *Ferris* v. *Burrows*, 34 Hun, 104, aff'd 99 N. Y. 616. (See *ante*, Payment of Legacies.)

The decree may in the Surrogate's discretion contain a direction withholding from distribution a sum equal to the amount of disputed claims on which actions have not yet been brought. *Matter of Rasch*, 28 Civ. Proc. Rep. 98. But see *Downing* v. *Marshall*, 1 Abb. Ct. App. Dec. 525. But distribution will not be deferred merely because an action may be brought by one who has shown no particular diligence in asserting his rights. *Ibid.* There are certain cases where moneys must be directed to be retained. The claims to cover which this provision is made are defined as follows:

> Where an *admitted debt* of the decedent is *not yet due*, and the creditor will not accept present payment, with a rebate of interest; or where *an action is pending* between the executor or administrator, and a person claiming to be a creditor of the decedent; the decree must direct that a sum, sufficient to sat-

> isfy the claim, or the proportion to which it is entitled, together with the probable amount of the interest and costs, be retained in the hands of the accounting party; or be deposited in a safe bank, or trust company, subject to the surrogate's order; or be paid into the surrogate's court, for the purpose of being applied to the payment of the claim, when it is due, recovered, or settled; and that so much thereof, as is not needed, for that purpose, be afterwards distributed according to law. **§ 2745, Code Civil Proc.**

The debts for which money can be thus retained must be debts of the decedent, enforceable against the estate in the hands of the one accounting. Thus where decedent had been a member of a firm it was held that a firm debt was not capable of being deemed an estate debt unless by inability to collect from the surviving partners the decedent's liability should have been duly fixed. *Hoyt* v. *Bonnett*, 50 N. Y. 538.

When a distributee is an infant the Code provides for a direction in the decree that his share be paid to his general guardian or in certain cases to the parents. § 2746, Code Civ. Proc. See *ante*, sub. Guardians.

Where the distributee is a bankrupt, and a trustee has been appointed, the interest of the bankrupt, as it existed anterior to the adjudication, is payable to such trustee. But he cannot receive surplus income from a trust fund, as his rights are not greater than those of the creditors and they cannot reach such income. *McNaboe* v. *Marks*, 51 Misc. 207.

The general scope of the decree is indicated in § 2743 quoted in § 1090, *ante*, *q. v.* In addition to the specific directions already noted which may be incorporated in the decree it may also in certain definite cases order specific property to be delivered.

> *When decree may order specific property to be delivered.*
>
> In either of the following cases, the decree may direct the delivery of an unsold chattel, or the assignment of an uncollected demand, or any other personal property, to a party or parties entitled to payment or distribution, in lieu of the money value of the property:
>
> 1. Where all the parties interested, who have appeared, manifest their consent thereto by a writing filed in the surrogate's office.
>
> 2. Where it appears that a sale thereof, for the purpose of payment or distribution, would cause a loss to the parties entitled thereto.
>
> The value must be ascertained, if the consent does not fix it, by an appraisement under oath, made by one or more persons appointed by the surrogate for the purpose. **§ 2744, Code Civil Proc.**

Where there are securities in the estate directly bequeathed by the will, and they have not been turned over the decree will direct it to be done. Where the securities are merely the form in which the residue consists then § 2744 is applicable. Subdivision 1 covers the case of consent of parties and subd. 2 of judicial discretion. The failure to sell may often be justifiable. The executor or administrator has what is called an "administrative title" "good against all the world except the beneficiaries, but as to them a mere aid and instrument to pass it forward to them in the due

course of administration" as the law or the will may direct. See *Steinway* v. *Steinway*, 163 N. Y. 183, 200; *Lane* v. *Albertson*, 78 App. Div. 607, 614, and cases cited. Also *Martin* v. *Andrews*, 59 Misc. 298, 306.

The parties beneficially interested, if of full age and there is no opposing trust may take their share in specie. So if there be a will directing the sale of securities and the investing of the proceeds in land, the legatees may none the less elect to take the securities directly. *Mellen* v. *Mellen*, 139 N. Y. 210. See also *Cook* v. *Lowry*, 95 N. Y. 103, 111, and cases cited in *Lane* v. *Albertson*, *supra*, at p. 615.

The "administrative title" of the representative is a mere channel of transmission, not a link in a chain of title. *Matter of . . . . Argus Co.*, 138 N. Y. 557; *Chemical Nat. Bank* v. *Colwell*, 132 N. Y. 250.

§ 1118. **Same subject—Where legatee or distributee is unknown or not to be found.**

Where the person entitled to a legacy or distributive share is unknown, the decree must direct the executor or administrator to pay the amount thereof into *the treasury of the state*, for the benefit of the person or persons who may thereafter appear to be entitled thereto.

The surrogate, or the supreme court, upon the petition of a person claiming to be so entitled, and upon at least fourteen days' notice to the attorney-general, accompanied with a copy of the petition, may by a reference, or by directing the trial of an issue by a jury, or otherwise, ascertain the rights of the persons interested, and grant an order directing the payment of any money, which appears to be due to the claimant, but without interest, and deducting all expenses incurred by the state with respect to the decedent's estate.

The comptroller upon the production of a certified copy of the order, must draw his warrant upon the treasury, for the amount therein directed to be paid; which must be paid by the state treasurer, to the person entitled thereto. **§ 2747, Code Civil Proc.**

It will be important to note, in beginning a proceeding under the second paragraph of this section, that the question whether to apply to the Surrogate or to the Supreme Court, will be determined by which court had jurisdiction of the accounting in which the payment to the state treasury was ordered. That court alone has jurisdiction of the new proceeding to "ascertain the rights of the persons interested, and grant an order directing the payment." *Matter of Kinnealy* v. *People*, 98 App. Div. 192.

When legacy, etc., to be paid to county treasurer.

The decree must also direct the executor or administrator to pay to the *county treasurer* a legacy or distributive share, which is not paid to the person entitled thereto, at the expiration of two years from the time when the decree is made, or when the legacy or distributive share is payable by the terms of the decree.

The money, so paid to the county treasurer, can be paid out by him, only by the special direction of the surrogate; or pursuant to the judgment of a court of competent jurisdiction. **§ 2748, Code Civil Proc.**

Executors or administrators must comply with the exact terms of the

statute in making payments of this character. Neither of these sections contemplate what is known as a payment into court. Nor is a payment to the Surrogate personally any protection. *Matter of Te Culver*, 22 Misc. 217.

Payment into court when made must be made strictly as prescribed in § 2537 of the Code, *q. v.*, in the case above cited. See also *Matter of Sackett*, 38 Misc. 463, 465.

§ 1119. **The double character of the decree.**—Before outlining a precedent for the decree it must be noted that there are actually two adjudications made by a Surrogate in the settlement of an estate; one is an adjudication on the settlement of the executors' or administrators' account; another is on the distribution of the funds of the estate. The questions arising on these adjudications are, as is readily seen, different, and the force and effect of the decree as it relates to the settlement of the executors' account, or as it relates to the distribution of the fund among those who are entitled to it, also differ. These adjudications may be made in separate decrees, or they may be made in one decree. *Matter of Whitbeck*, 22 Misc. 494, 499; *Johnson* v. *Richards*, 3 Hun, 454, 457.

Where there is partial intestacy under a will, the Statute of Distribution is not the sole statute applicable and that controls the terms of the decree. For example, there may have been an accumulation of income, or of rents and profits, unlawful under the Personal or Real Property Laws. In such case the provisions of the appropriate statute control. Under the Real Property Law, the rents thus accumulated go to the person entitled to "next eventual estate." *U. S. Trust Co.* v. *Soher*, 178 N. Y. 442; *Matter of Harteau*, 53 Misc. 201; *Reeves* v. *Snook*, 86 App. Div. 303. This law changes the English rule which would give the surplus to the next of kin. 1 Jarman on Wills (5th ed.), 312; *Cochrane* v. *Schell*, 140 N. Y. 516, 539.

The same rule applies to personal property. *Matter of Harwood*, 52 Misc. 82, and case examined. See discussion *ante*, sub. "Continuing Business" as to how the decree will settle an account of such business so continued.

The force and effect of each decree, or of each part of the decree, are specified. Section 2742 provides what the effect is of a judicial settlement of an account.

> A judicial settlement of the account of an executor or administrator, either by the decree of the surrogate's court, or upon an appeal therefrom, is conclusive evidence, against all the parties who were duly cited or appeared, and all persons deriving title from any of them at any time, of the following facts, and no others:
>
> 1. That the items allowed to the accounting party, for money paid to creditors, legatees, and next of kin, for necessary expenses, and for his services, are correct.
>
> 2. That the accounting party has been charged with all the interest for money received by him, and embraced in the account, for which he was legally accountable.

3. That the money charged to the accounting party, as collected, is all that was collectible, at the time of the settlement on the debts stated in the account.

4. That the allowances made to the accounting party, for the decrease, and the charges against him for the increase, in the value of property, were correctly made. **§ 2742, Code Civil Proc.**

And § 2753, quoted *ante*, provides that with respect to all matters enumerated in that section, the decree is conclusive as a judgment upon each party to the special proceeding who was duly cited or appeared, and upon every person deriving title from such party. See *Matter of Underhill*, 27 N. Y. St. Rep. 720. Section 2813 of the Code, quoted *ante*, defines the effect of a decree judicially settling the account of a testamentary trustee. Similar provision as to a decree judicially settling the account of a guardian is made in the following section:

A decree, made upon a judicial settlement of the account of a guardian appointed by will or by deed, as prescribed in this article, or the judgment rendered upon appeal from such decree, has the same force, as a judgment of the supreme court to the same effect. **§ 2857, Code Civil Proc.**

If the account has been judicially settled upon waivers by persons entitled to citation and consents that "the account be judicially settled," decree for distribution should not be made without notice to such persons, if distributees, for the waiver will be deemed limited and confined to the matter it relates to.

§ 1120. **Limits of discharge.**—Though final, and intended so to be, the decree, in discharging the accountant, limits such discharge, as a rule, by the words "as to all matters embraced in this accounting."

As to such matters, on compliance with the directions of the decree, it is final.

But, if later on previously undiscovered or undisclosed assets turn up, the functions of the one "discharged" revive, or are assumed to have continued as to such assets and the obligation to account is the same, as is also the correlative right to require an account. *Rosen* v. *Ward*, 96 App. Div. 262; *Mahoney* v. *Bernard*, 45 App. Div. 499. The discharge is thus said to be *pro tanto*.

The finality of the decree, again, is of course subject to the rights of review in Appellate Courts, as well as to the Surrogate's power to amend or modify. If the decree was made on an erroneous theory, and it has not been acted under, it seems it may be reopened and a new distribution determined upon. Or if partially executed, it may be corrected as to the unexecuted portions. *Matter of Hoes*, 119 App. Div. 288.

§ 1121. **Precedent for a decree.**—The following precedent of a decree settling an executor's account may be readily adapted for use where the accounting party is a guardian or administrator or testamentary trustee:

Surrogate's Court
Caption.

Present:

Hon.

Surrogate.

Decree judicially settling account of executor, with clauses as to distribution and discharge.

In the Matter of the Judicial Settlement of the Account of Execut of the Last Will and Testament of Deceased.

A. B. as Execut of the last Will and Testament of late of the deceased, having heretofore made application to one of the Surrogates of the County of New York, for a judicial settlement of his account as such Execut and a citation having been thereupon issued, pursuant to statute, directed to all persons interested in the estate of said deceased, citing and requiring them and each of them personally to be and appear before the said Surrogate, at his office in the city of New York, on the day of at 10:30 o'clock in the forenoon of that day, then and there to attend such judicial settlement, and the said citation having been returned with proof of the due service thereof on (*recite waivers, if any, and due acknowledgment thereof*) (*also supplemental citations, if any*).

and the said Execut having appeared on the return day of said citation and the said Execut having rendered account under oath before the said Surrogate; and the said account having been filed, together with the vouchers in support thereof, and (*Here state whether objections were filed, and by whom, and recite reference, if one was had, and the filing of the report of the referee; also state if exceptions were filed thereto, and actions of Surrogate thereon with all necessary dates of filing or of entry*) and the said matter having been duly adjourned to this day, the said Surrogate, after having examined the said account and vouchers, now here finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof, made by the said Surrogate as judicially settled and adjusted by him to be recorded with and taken to be a part of the decree in this matter, to wit:

A summary statement of the account of made by the Surrogate as judicially settled and allowed.

The said charged as such executor with the amount of Inventory				$	cts.
Increase as shown by Schedule . . .					
(*Add any other items with which he is found chargeable.*)					
The said credited as such executor with amount of loss on sales as shown by schedule . . .	$	cts.			

	$	cts.	$	cts.
With amount of funeral expenses and expenses of administration, as shown by schedule				
With amount of debts of the deceased as shown by schedule . . .				
(*Here insert legacies paid, or any other payments lawfully made, referring to appropriate schedule.*) . . .				
Leaving a balance in his hands of .				

And it appearing that the said Execut ha thus fully accounted for all the moneys and property of the estate of said deceased which have come into hands as such Execut and account having been adjusted by the said Surrogate, and a summary statement of the same having been made as above and herewith recorded, it is hereby

Ordered, adjudged and decreed, that the said account be and the same is hereby judicially settled and allowed as filed and adjusted.

And it is further ordered, adjudged and decreed, that out of the balance so found, as above, remaining in the hands of the said Execut retain the sum of dollars and cents ($) for the commissions to which he entitled on this accounting; and that retain the sum of dollars and cents ($) for costs, counsel fee and disbursements on this accounting.

If the decree may properly be one of distribution also it may go on to provide:

a. For the payment of any bequests made by the testator, payment of which was deferred until the accounting, reciting briefly any construction of the will necessitated thereupon.

b. For the retention and investment of any funds, of which the executor is directed to pay the income to any particular beneficiary under the will.

c. For the retention of any moneys to meet undetermined claims, or debts not yet due (see § 2745, C. C. P.), prescribing whether it shall be retained by the accounting party, deposited in a bank or trust company, "subject to the Surrogate's order," or be paid into court (*in which case observe directions of* § 2537, C. C. P.); adding provision as to subsequent distribution.

d. For the payment to the state treasurer or county treasurer of a legacy or a distributive share in cases covered by §§ 2747 and 2748, C. C. P.

e. For the regular distribution. (*Under this clause should be separately stated a direction as to each distributee, defining his share, and directing payment to him, noting the provisions of* § 2746, *C. C. P., as to infants' shares.*)

f. If the petition and citation were drawn so as to admit of discharge after the account shall have been settled add:

And it is further ordered, adjudged and decreed that upon complying with all and every the foregoing directions of this decree the said be discharged as executor of the last will and testament of said deceased, and relieved from all further responsibility thereunder and from all liability to any person interested thereunder as such executor as aforesaid as to all matters embraced in this accounting.

Surrogate.

§ 1122. **Representative deals only with personal property.**—Section 98, quoted Dec. Est. Law, *ante*, is known as the Statute of Distributions, and relates to the personal estate of a decedent. Such personalty vests in the representative by whom it must be distributed. This representative has nothing to do with the real property of the decedent, which passes to the heirs in default of a will. Even if there be a will, it may be adjudged invalid in whole or in part. Where such a will has directed in its invalid provisions a conversion of realty into money and such conversion has been had prior to the adjudication of invalidity, the proceeds of such sale of real estate cannot be deemed personalty and therefore subject to distribution through the representative. It passes, so far as there is intestacy, to the heirs without the intermediation of such representative; consequently if, at the time of such adjudication, the proceeds are in his hands he will be deemed to hold them as trustee for the heirs to whom he should account for the same. See *Wood* v. *Keyes*, 8 Paige, 365.

§ 1123. **Estates of married women.**

The provisions of this article respecting the distribution of property of deceased persons apply to the personal property of married women dying, leaving descendants them surviving. The husband of any such deceased married woman shall be entitled to the same distributive share in the personal property of his wife to which a widow is entitled in the personal property of her husband by the provisions of this article and no more. **§ 100, Decedent Estate Law.**

This section, formerly § 2734 of the Code, applies to residents of this State. Where a married woman dies in another State where she is domiciled, the law of the State of domicile controls. So where a married woman died in New Jersey before her husband leaving no will nor children, a chose in action belonging to her became the property of her husband, and he having died subsequently without taking out letters, it was held that such chose in action, which was the proceeds of a policy of insurance, belonged to him and upon his death he and his next of kin are entitled to the ultimate benefit therefrom by virtue of his relation of husband. *Matter of Nones*, 27 Misc. 165, and cases discussed in opinion.

In *Matter of Bushbey*, 59 Misc. 317, the testatrix was wife of a resident of Pennsylvania, whom she separated from and came to this State. Held, under the facts in opinion, she never acquired a separate legal residence.

even assuming her intent to do so. Hence the distribution of her estate must be according to the Pennsylvania law; dist'g *Matter of Walker*, 54 Misc. 177.

§ 1124. **Jure mariti.**—Where a married woman dies intestate leaving no descendants, the husband takes all her estate by virtue of *jus mariti*. *Matter of Bolton*, 159 N. Y. 129, 133; *Robins* v. *McClure*, 100 N. Y. 328. *Gittings* v. *Russel*, 114 App. Div. 405. This case holds that the fund is so entirely his as to be subject to attachment as his, even if he have taken letters of administration. He takes, of course, subject to the payment of her debts; but if he die, his representative is entitled to administer upon her estate so coming to him by virtue of this right. *Ryder* v. *Hulse*, 24 N. Y. 372; *Estate of Warner*, 2 Connoly, 347. This includes choses in action regardless of whether they are payable on the death of the wife or are mere reversionary or contingent interests or mere possibilities. *Olmsted* v. *Keyes*, 85 N. Y. 593.

§ 1125. **Computing degree of kinship.**—If the case arise where the persons surviving do not correspond exactly with one of the cases covered by the subdivisions of § 98, it has been held that the next of kin nearest in degree will be entitled to the surplus, that is to say, the computation of classes of kinship must be decided by the rule of the ecclesiastical law. *Sweezey* v. *Willis*, 1 Bradf. 495, 498. The canon law and the common law reckon consanguinity when it is lineal in precisely the same way, i. e., beginning at the common ancestor and reckoning downwards so that "in whatever degree the two persons or the most remote of them is distant from the common ancestor that is the degree in which they are related to each other." But the civil law starts not from the common ancestor, but from the intestate and counts upwards from either of the persons related to the common stock and then downwards again to the other, reckoning the degree of each person both ascending and descending. The ecclesiastical law adopts the rule of civil law in reckoning the degree of propinquity. Thus by the civil law the grandfather of an intestate is two degrees removed, while an aunt of the intestate is three degrees removed. In the case just cited the learned Surrogate remarked: "The statute of distributions altered in special particulars the mode of distribution consequent upon the computation of the civil law, but whenever the statute directs distribution to the next of kin, the rule of the civil law will prevail, not to the extent of preferring ascendants in all cases excepting that of brothers and sisters of collaterals, but in regard to the manner of computing the degree of kindred."

§ 1126. **Distributing under the statute.**—Where the persons surviving a decedent sustain a direct relationship such as child, or grandchild, parent or grandparent, brother or sister, or any or all of these, the computation for distribution is not attended with difficulty.

Where the persons entitled to share are collaterals the situation is more complex. The statute is explicit in determining the interest of a surviving wife or husband, child or grandchild, parent or grandparent. It is provided as to the next of kin that where they are all in equal degree to the

decedent their shares shall be equal (subd. 10); and where there is no widow and no children and no representative of a child, the whole surplus is distributed to the next of kin in equal degree of kinship to the deceased and their legal representatives (subd. 5). Under this subdivision it has been held (*Hurtin* v. *Proal*, 3 Bradf. 414), where the development of the statute is concisely set forth by the learned Surrogate, that nephews and nieces are in the same degree of kinship as uncles and aunts, and should in that case share equally. The words "legal representatives" are held not to affect this rule. The Surrogate observes: "Before we can find representatives we must designate the person whom they represent; and thus as on one side we would proceed from the nephew to the brother, so on the other side, from the uncle to the grandfather, and each would be in the second degree."

Representation never changes or advances the degree; though where the degrees are unequal, it operates when declared by the statute to give the representatives of a deceased person the share they would have taken if living. *Ibid.*

§ 1127. **The scheme of the statute.**—Probably Mr. Remsen has most satisfactorily covered this subject. It belongs properly to a treatise on substantive law. But some anaylsis of the statutes is proper in order to properly frame a decree.

It seems proper to do this by illustrative diagrams, annotated, exemplifying the rule under each subdivision of the statute.

In the square in these diagrams D will represent the decedent

W=wife	C=child	A=aunt
H=husband	GC=grandchild	U=uncle
F=father	B=brother	N=nephew or niece
M=mother	S=sister	

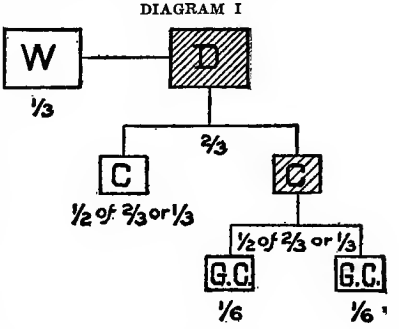
and so on.

Deceased beneficiary squares will be shaded ▨

Subdivision 1.

This is a typical case. The decedent leaves a widow (or husband) and one living child, and two children of a deceased child.

DIAGRAM I



Under subd. 1, the widow gets one-third. This leaves two-thirds as the residue, which goes "in equal portions among the children and such persons" as legally represent predeceased children. This makes subd. 11, applicable, i. e., GC and GC take "according to their respective stocks."

It will be noted that in this situation, i. e., of a wife and descendants surviving, we are not concerned with parents or collaterals, however numerous they may be.

But we are concerned with certain questions as to what is meant by "children."

Is the scheme affected by their being "adopted," or "afterborn" or "illegitimate"? Or what effect has the annulment of a marriage on previously born offspring?

Before answering these inquiries we may note that where a will provides that lapsed legacies shall go to "next of kin" *according to statute of distribution*, a "widow" or "husband" will be excluded. *Matter of Devoe*, 171 N. Y. 281; *Murdock* v. *Ward*, 67 N. Y. 387; *Luce* v. *Dunham*, 69 N. Y. 36; *Platt* v. *Mickle*, 137 N. Y. 106.

We also note that the acceptance of a devise in lieu of dower will not preclude the widow from sharing in *personalty* given to "persons entitled thereto under the statute." *Matter of Mersereau*, 38 Misc. 208.

§ 1128. **Adopted children.**—As is pointed out in part V treating of adoption, a valid adoption gives to the child all the rights of that relation, including the right of inheritance. Reference may be had to ch. I of part V, merely reiterating the rule that as the adoption of children is wholly regulated by statute and the right of inheritance depends upon the regularity of the proceedings in compliance with the statute, a child standing upon this right as an adopted child, must if the issue is raised, affirmatively prove compliance with such statute. See *Dodin* v. *Dodin*, 17 Misc. 35; *Simmons* v. *Burrell*, 8 Misc. 388. In *Matter of Hopkins*, 102 App. Div. 458, a stepchild, adopted *after* the making of a will, was held not within the intent of the testator in using the word "children" in his will. But had there been no will, the child would have shared. In *Theobald* v. *Smith*, 103 App. Div. 200, it was held that a child adopted before the amendment to the statute became operative (Laws, 1887, ch. 703), acquired at the moment it became operative the rights of inheritance, and that her status was determined by the statute as in force at the death of the one from whom she claimed to inherit.

But this right of inheritance, mutual between the child and foster parent, does not extend to give the child inheritance from others *through* the foster parent. *Kettell* v. *Baxter*, 50 Misc. 428.

§ 1129. **Afterborn children.**—(See subd. 14.) A child born after the making of a will by its father or its mother, if the parent shall die leaving such child unprovided for by any settlement or in any way mentioned in said will, is entitled to a distributive share of the personal estate equal to what it would have received had the parent died intestate, and is given a cause of action to recover the same from devisees and legatees in proportion to and out of the parts devised and bequeathed to them by said will. 2 R. S. 65, § 49; *Matter of Huiell*, 6 Dem. 352; *Matter of Murphy*, 144 N. Y. 557, 561. *Stachelberg* v. *Stachelberg*, 124 App. Div. 232. It appears from this case that the settlement referred to in the statute is one outside of the will and that proof is admissible before the Surrogate on the question of whether or not such settlement has in fact been made. It is of course clear that the share which such afterborn child has in the parent's estate is in

the surplus remaining after the payment of debts and administration charges. The court points out in the case last cited, that where a mother makes a will not providing for an afterborn child, the birth of such a child after the making of the will did not operate to revoke it, but merely rendered it ineffective as to that portion of the estate which if the mother had died intestate would have been distributed to her as the next of kin. See also *Tavshanjian* v. *Abbott*, 59 Misc. 642; *Minot* v. *Minot*, 17 App. Div. 520; *Matter of Morgenstern*, 9 Misc. 198. See Revocation of Wills, *ante*.

§ 1130. **Effect of annulling marriage.**—This is covered by § 1749 since the amendment of 1903, ch. 225.

> *Issue; when entitled to succeed, et cetera.*—A child of a marriage, which is annulled on the ground of the idiocy or lunacy of one of its parents, is deemed, for all purposes, the legitimate child *of the parent who is of sound mind.*
>
> A child of a marriage, which is annulled on the ground that one or both of the parties had not attained the age of legal consent, is deemed, for all purposes, the legitimate child of both parents. **§ 1749, Code Civil Proc.**

§ 1131. **Illegitimate children.**—Subdivision 9 provides that the mother of one who is illegitimate, and who dies leaving no child descendant or widow, shall take the whole estate and shall be entitled to letters of administration in exclusion of all other persons, and if the mother be in such contingency dead the relatives of the decedent on the part of the mother shall take in the same manner as if the decedent had been legitimate.

See *Matter of Lutz*, 43 Misc. 230, where sister of the full blood of an illegitimate son took by their deceased mother's right in spite of next of kin of father who claimed a valid adoption of the son. The son might be given rights thereby, but held, the rights given by subd. 9 were not thereby impaired.

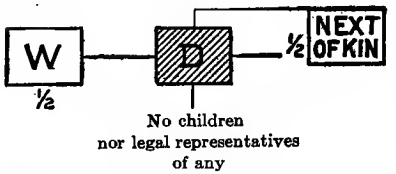
Subdivision 15 provides that if a woman die leaving illegitimate children and no lawful issue, such illegitimate children inherit her personal property as if legitimate. This subdivision was added by Laws 1897, ch. 37.

The burden of establishing illegitimacy rests upon those contesting the right of the one claiming as a child, and in the absence of evidence to the contrary, a child, *eo nomine* is presumed legitimate. *Matter of Matthews*, 153 N. Y. 443, 446. By act of the legislature (Laws of 1895, ch. 531), provision is made legitimizing all illegitimate children whose parents have intermarried. They are considered legitimate for all purposes and are given all the rights and privileges of legitimate children, excepting that the act is not to be deemed to affect vested interests or estates. See *Matter of Schmidt*, 42 Misc. 463.

It will be noted that the language of subd. 15, giving to illegitimate children a right they did not previously have, is not to be extended; therefore, they will not inherit property of an ancestor of the mother. *Matter of Mariclo*, 63 How. Pr. Rep. 62. That is, the same rule applies as governs adopted children. They inherit *from*, but not *through*.

§ 1132. **Subdivisions 2 and 3.**

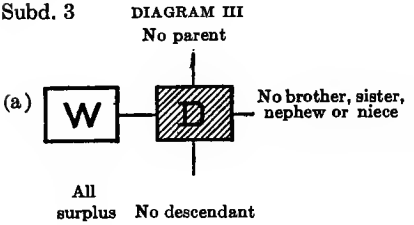
Subd. 2 DIAGRAM II



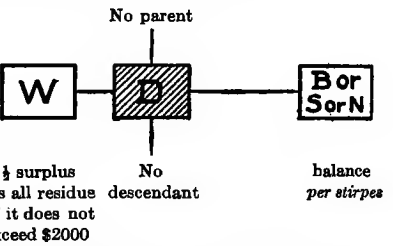
If there be a widow and no descendants she takes one-half and the "next of kin" the other half.

But, this is a general provision, requiring, for the elucidation of "next of kin" who divide with the widow, reference to other subdivisions below.

Subd. 3 DIAGRAM III



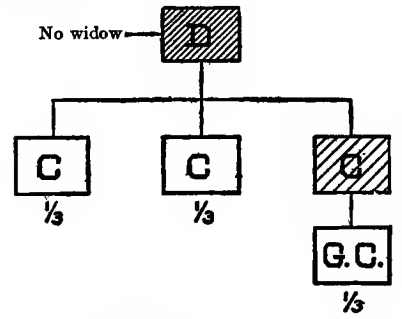
Subd. 3 DIAGRAM IV



Note limiting effect this has on subd. 2. Diagram of subd. 2 showing interest of "next of kin" does not diminish W's right if the situation presented in diagram iv exists. *Matter of Hardin*, 44 Misc. 441.

§ 1133. **Subdivisions 4 and 5—No widow.**

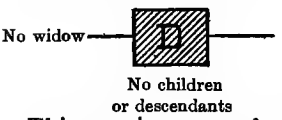
Subd. 4 DIAGRAM V



Here there is no widow but there are "children." They take all, in equal shares, *per stirpes*

DIAGRAM VI

Subd. 5, first paragraph



Then all to next of kin "in equal degree to the deceased, *and* their legal representatives."

This requires some further illustration. And first we refer to subd. 12, which has had a kaleidoscopic career.

(*a*) It read that no representation shall be admitted among collaterals after *brothers' and sisters' children.*

(*b*) In 1898 it read that representation should be admitted among collaterals in the same manner as allowed by law in reference to real estate.

(*c*) Now it reads, "No representative shall be admitted among collaterals after brothers' and sisters' *descendants.* The language of subd. 5 as now amended makes this situation perfectly explicit. That is, under *a*

where property went to brothers or sisters, *representation ceased with their children.*

Grandnephews and grandnieces could not take. *Matter of DeVoe,* 107 App. Div. 245.

But under *b*, this limitation was removed: the statute of descent rule was made applicable and the descendants, in whatever degree, of deceased brothers and sisters took *per stirpes.*

This seemed to open a wide avenue of distributable interest. The Public Administrator of Kings County administered an estate where decedent left no husband, ancestor, descendant, brother or sister. But she was survived by a nephew and niece, two uncles, two aunts, forty-five first cousins, thirty-three second cousins and one third cousin, a grand total of eighty-one next of kin, the cousins being descendants of and representing deceased uncles and aunts. Confronted and confused with this collateral cohort the Surrogate decreed division into eighty-one shares and distribution accordingly. On appeal, *Matter of Davenport,* 67 App. Div. 191, aff'd 172 N. Y. 454, this was reversed, by holding applicable also subds. 5 and 10, namely, 5, "next of kin, in equal degree," 10, equality of shares of those in equality of degree. It was clear, then, that the nephew, the niece, the two uncles and the two aunts were all of equal degree of nearness. Held, there was no power to invoke the rule of representation to bring in those of lesser degree of nearness.

The court said, had there been none of those six surviving, but only their or any of their descendants then the rule of representation would be followed as allowed in reference to real estate.

Judge Cullen's dissenting opinion, 172 N. Y. 459, doubtless had some influence in inducing the repeal of *b*.

c, accordingly, now stands, restoring the rule as before 1898 save that "brothers' and sisters' descendants" makes clearer the word "children" that was formerly in lieu of "descendants."

See *Matter of McMillan,* 126 App. Div. 155, and *Matter of Peck,* 57 Misc. 535, decided under statute as amended in 1898.

See *Matter of Nichols,* 60 Misc. 299, where uncles and aunts took (3d degree) excluding cousins (4th degree).

Returning therefore to subd. 5, we find the "next of kin" limited by subd. 10, the "equal degree" clause, and by subd. 12. "No representation after brothers' and sisters' descendants."

DIAGRAM VII

Subd. 5, last paragraph

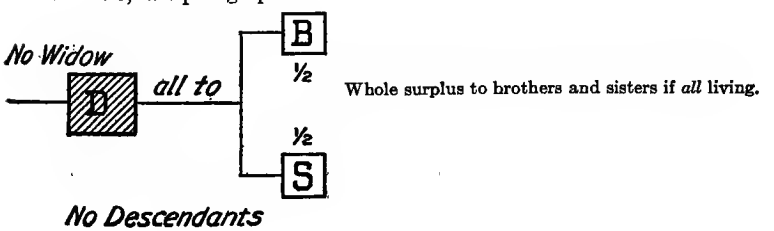
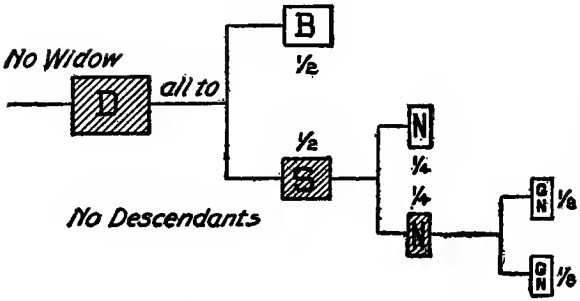


DIAGRAM VIII



Living brother=½
Living nephew=¼
Living grandnephews, each=⅛

"If any (brother or sister) be dead" to the "descendants in *whatever degree* of those dead."

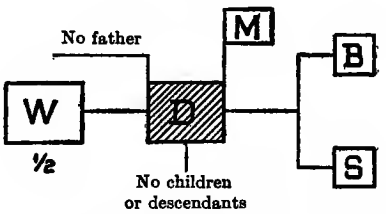
See for illustration, *Matter of Prote*, 54 Misc. 495.

§ 1134. **Subdivision 6.**

In this situation, the widow gets one-half and the other half goes "in equal shares to M, B and S."

And descendants of B or S or both (if deceased) will take "according to their respective stocks."

DIAGRAM IX



If we shade 

which means there is no widow, then the whole surplus goes to M, B and S, and descendants *per stirpes*.

§ 1135. **Subdivisions 7 and 8.**

DIAGRAM X

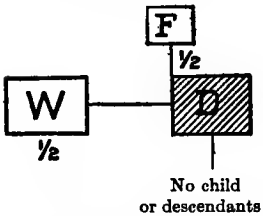
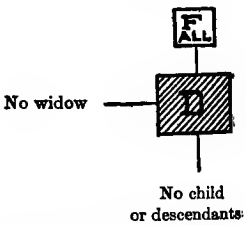


DIAGRAM XI



The decedent, being childless, and a father surviving, that father shares with widow equally, or takes all if there be no widow.

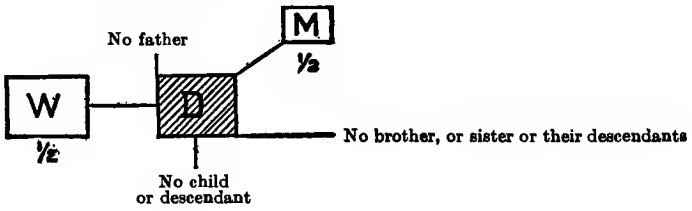
This is regardless of the existence of brothers or sisters.

Thus, subds. 6 and 8 show the *lesser* right of the mother.

We saw under subd. 6 that M shares with B and S, where F under subd. 7 does not.

Under subd. 8 we note

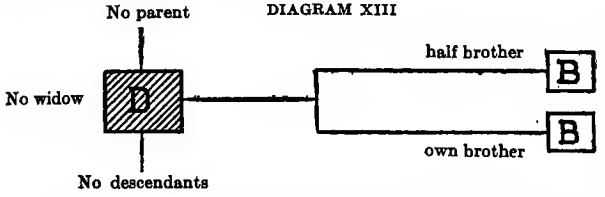
DIAGRAM XII



But if there be no widow then M gets all. See for illustrative case, where the intestacy was partial under a will, *Pomroy* v. *Hincks*, 180 N. Y. 73.

§ 1136. **Subdivisions 9–15.**—These need no special discussion, beyond what has already been given.

DIAGRAM XIII



A diagram will illustrate subd. 13 as to relatives of the half blood.

B and B "take equally" as being in the same degree.

If the half-brother were dead leaving issue, they would take "in the same manner as the representatives of the whole blood.

§ 1137. **Distribution under § 1903.**—The proceeds of an action for negligent killing of the decedent are by § 1904 said to be a "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action is brought."

Section 1902 says the action may be brought by the representative of one who has left a "husband, wife, or next of kin."

Section 1905 says "next of kin" has the meaning specified in § 1870, which in turn reads:

"The term 'next of kin' . . . . includes all those *entitled*, under the provisions of law, relating to the distribution of personal property, *to share in the unbequeathed assets of a decedent* . . . . other than a surviving husband or wife."

Section 1903 says, "The damages . . . . are exclusively for the *benefit of the decedent's husband* or *wife, and next of kin*, and, when they are collected they *must* be distributed by the plaintiff *as if* they were unbequeathed assets left in his hands."

See *Snedeker* v. *Snedeker*, 47 App. Div. 471, as to apparent inconsistency between §§ 1903 and 1904.

In *Austin* v. *Metropolitan St. Ry. Co.*, 108 App. Div. 249, the plaintiff was decedent's father. She had separated from her husband, and was survived by him and by her parents.

Under § 1904 held, the husband was entitled to prove "the fair and just compensation for the pecuniary injuries," for *jure mariti* he was the only person entitled to "unbequeathed assets" under § 1870. Had this been a case of a widow surviving and parents, diagram X or XII would apply.

CHAPTER VII

VARIOUS LIMITATIONS APPLICABLE IN MATTERS AFFECTING DECEDENTS' ESTATES

§ 1138. **Twenty-five years.**—Section 2785 of the Code provides as follows:

> Where the records of the surrogate's court have been heretofore, or are hereafter, removed from one place to another, in either the same or another county, and twenty-five years have elapsed after a sale or other disposition of real property, or of an interest in real property, as prescribed in this title, the due appointment of a guardian for each infant party to the special proceeding must be presumed, and can be disproved only by affirmative record evidence to the contrary.

§ 1139. **Twenty years.**—Satisfaction of a decree for payment of a sum of money is presumed after the expiration of twenty years from the time when the party recovering it was first entitled to a mandate to enforce it. § 376, Code Civ. Proc.; § 382, subd. 7. See *Matter of Warner*, 39 App. Div. 91, as to justice's judgment, docketed in 1880, i. e., before amendment in 1894 of §§ 376, 382, 3017, Code Civ. Proc.

Section 1596 of the Code gives the widow twenty years in which to commence an action for dower, excepting in the case of the existence of disabilities; minority, insanity or imprisonment for a term less than life.

§ 1140. **Ten years.**—All actions not otherwise specifically covered. § 388, Code Civ. Proc.

Any matters over which, before Code, equity held exclusive jurisdiction. *Butler* v. *Johnson*, 111 N. Y. 204. See distinction in *Matter of Rogers*, 153 N. Y. 316, 323, between equitable actions, where ten-year statute applies, and actions at law to recover a demand that is due, where six-year statute applies. *Matter of Latz*, 33 Hun, 618. The *Rogers* case held that the ten-year limit applied to compelling an executor of a deceased representative to account. See also *Matter of Lesser*, 119 App. Div. 507.

E. g., an action, under §§ 1843–1850, against heirs or devisees, to charge lands with decedent's debts. *Mortimer* v. *Chambers*, 63 Hun, 335.

Application by administrator *de bonis non* to compel representative of deceased representative to account under § 2606. *Matter of Rogers*, 153 N. Y. 316.

Application to revoke probate of heirship. § 2658, Code Civ. Proc.

§ 1141. **Six years.**—An action upon a contract obligation, express or implied; except a judgment or sealed instrument. § 382, Code Civ. Proc. subd. 1. See *Matter of Warner, supra*. See as to effect on claim for eleven

years' services, *Matter of Meehan*, 29 Misc. 167. This includes special proceedings, § 414, Code Civ. Proc.

This covers, therefore, the obligation to account. *Garvey* v. *N. Y. Life & Trust Co.*, 27 N. Y. St. Rep. 389; *Matter of Van Dyke*, 44 Hun, 394; *Matter of Miller*, 15 Misc. 556. See also *Matter of Irvin*, 68 App. Div. 158, 161. See also *Matter of Pond*, 40 Misc. 66, citing *Church* v. *Olendorf*, 19 N. Y. St. Rep. 700, and *Matter of Rogers*, *supra*.

In *Matter of Cruikshank*, 40 Misc. 325, a successor trustee sought to compel an accounting by his predecessor's executrix in order to compel payment of a judgment in his favor. Held, the six, and not the ten-year statute controlled.

By guardians also. *Matter of Van Derzee*, 73 Hun, 532.

The time runs from the expiration of one year, for that is the time within which account may be required after granting of letters. *Matter of Bradley*, 25 Misc. 261; *Matter of Perry*, 37 N. Y. St. Rep. 576.

It covers also obligation to account of one who administers an estate as *agent* of an executrix. *Matter of Waite*, 43 App. Div. 296, 301, and cases cited. "The trust arising out of an agency is not such as to prevent the running of the statute. *Ibid.*, citing *Budd* v. *Walker*, 113 N. Y. 637; *Mills* v. *Mills*, 115 N. Y. 80, 86.

Application by next of kin to compel account under § 2606. *Matter of Rogers*, 153 N. Y. 316; *Matter of Boylan*, 25 Misc. 281.

Time to sue for a legacy or distributive share is after expiration of one year from granting of letters. § 1819, Code Civ. Proc. But statute does not run until the representative's account is judicially settled. *Id.*, and *Matter of Irvin*, 68 App. Div. 158, 159; *Matter of Rogers*, *supra; Matter of Watson*, 64 Hun, 369. This does not revive debts or legacies barred before the Code of Civil Procedure went into effect. *Butler* v. *Johnson*, 111 N. Y. 204. See *Matter of Miller*, 15 Misc. 556, holding the six-year statute rather than the ten-year applicable to proceedings to enforce the payment of a legacy or distributive share. See cases cited, pp. 559, 560. In *Matter of Cooper*, 51 Misc. 381, it was held the limitation of § 1819 applies to actions and not to a proceeding in the Surrogate's Court to compel payment. The petitioner was at the time of the accounting an infant, duly cited, but no guardian *ad litem* had been appointed. Held, no statute ran against her until from and after her majority.

Legacy payable on A's majority. See *Smith* v. *Remington*, 42 Barb. 75.

An action to establish a will, § 358, Code Civ. Proc. subd. 6, which also prescribes when statute begins to run.

As to disputed claims, the entry of the order of reference is the date of "the commencement of an action." *Leahy* v. *Campbell*, 70 App. Div. 127.

§ 1142. **Five years.**—Section 392 of the Code provides as follows:

Cause of action accruing between the death of a testator or intestate, and the granting of letters.

For the purpose of computing the time, within which an action must be

commenced in a court of the state, by an executor or administrator, to recover personal property, taken after the death of a testator or intestate, and before the issuing of letters testamentary, or letters of administration; or to recover damages for taking, detaining, or injuring personal property within the same period; the letters are deemed to have been issued, within six years after the death of the testator or intestate. But where an action is barred by this section, any of the next of kin, legatees or creditors, who, at the time of the transaction upon which it might have been founded, was within the age of twenty-one years, or insane, or imprisoned on a criminal charge, may, within *five years* after the cessation of such a disability, maintain an action to recover damages by reason thereof; in which he may recover such sum, or the value of such property, as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator.

§ 1143. **Four years.**—Section 46 Deced. Est. Law, formerly § 2628 of the Code provides as follows:

When purchaser from heir protected, notwithstanding a devise.

The title of a purchaser in good faith and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise of the property made by the latter, unless within *four years* after the testator's death, the will devising the same is either admitted to probate and recorded as a will of real property in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent jurisdiction of the state, in an action brought for that purpose. But if, at the time of the testator's death, the devisee is either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life; or without the state; or, if the will was concealed by one or more of the heirs of the testator, the limitation created by this section does not begin until after the expiration of one year from the removal of such a disability, or the delivery of the will to the devisee or his representative, or to the proper surrogate.

§ 1144. **Three years.**—Proceeding to sell lands to pay decedent's debts. § 2750, Code Civ. Proc. Time runs from granting of letters. *Ibid.* See as to letters granted three years before present Code, *O'Flyn* v. *Powers*, 136 N. Y. 412. What litigation stops running of statute. § 2751, Code Civ. Proc.

Section 2771 of the Code provides that the Surrogate may give three years' credit upon such sale.

An action against a representative brought to recover a chattel, or damages for taking, detaining or injuring personal property, by the defendant, or the person he represents. § **383, Code Civil Proc.** subd. 4.

Section 1380 of the Code provides a three-year period within which execution may not be issued against the decedent's estate and continues the lien of a judgment for three years and six months after his death notwithstanding the previous expiration of three years from the filing of the judgment roll.

Section 2751 of the Code gives an executor or creditor three years in which to obtain a sale of land decreed to have been fraudulently conveyed by the decedent.

§ 1145. **Two years.**—Action under § 2653*a*, Code Civ. Proc.

Section 2748 of the Code directs that, where a person entitled to a legacy or distributive share is unknown, a decree directing distribution must provide for the payment of such legacy to the county treasurer at the expiration of two years from the time the decree is made, or the time when the share is made payable.

Section 1902 of the Code provides that where a person dies leaving next of kin and his death was due to negligence, his executor or administrator must commence an action for damages within two years after his death.

§ 1146. **Eighteen months.**—Section 391 of the Code provides that where a person dies without the State, a period of eighteen months after letters are issued upon his estate are excluded from the running of the statutory time to commence an action against an executor or administrator upon a cause of action existing at the decedent's death.

Section 2725 of the Code provides for a compulsory and intermediate accounting.

> Subd. 4. "Where eighteen months have elapsed since letters were issued, and no special proceeding, on a petition for a judicial settlement of the executor's or administrator's account, is pending.

§ 1147. **One year.**—Revocation of probate on allegations of invalidity. *Katz* v. *Schnaier*, 87 Hun, 343. Time runs from *entry* of decree. *Matter of Ruppaner*, 15 Misc. 654.

Compulsory or voluntary accountings by executors or administrators. §§ 2726, 2729, Code Civ. Proc.

Section 2674 of the Code provides that one year after a temporary administrator has been appointed, he may have an order directing him to pay decedent's debts.

Section 2635 of the Code provides that the Surrogate shall retain in his possession every will filed in his office for one year after it has been probated.

Section 2807 and § 2810 of the Code provides that voluntary or compulsory accountings by testamentary trustees may be had.

§ 1148. **Six months.**—Action on claim against decedent rejected by representative. § 1822, Code Civ. Proc. Effect of nonresidence of representative. *Hayden* v. *Pierce*, 144 N. Y. 512. Time runs from rejection if debt is then due. *Wintermeyer* v. *Sherwood*, 77 Hun, 193. If not then due it runs from first day any part becomes due.

Statute suspended by offer to refer, if acted upon (*Cornes* v. *Wilkin*, 79 N. Y. 129), and throughout the reference. § 411, Code Civ. Proc. Death of either party revokes the agreement. § 411, Code Civ. Proc. Statute cannot be evaded by changing form of claim. *Titus* v. *Poole*, 145

N. Y. 414. This short statement covers claims for funeral expenses paid. *Koons* v. *Wilkin*, 2 App. Div. 13. Section 2722 of the Code provides that a creditor may petition for the payment of his debt after six months expire from the issuance of letters.

Section 2673 of the Code permits the temporary administrator to advertise for creditors when six months have expired from the date of his letters.

Section 2718 of the Code provides for the publication for six months of a notice to persons claiming against the decedent.

§ 1149. **Three months.**—Under new § 2718*a* if the representative petitions for the determination of a creditor's claim by the Surrogate, the return day is "not less than three months" after service of the citation.

> If he (the creditor) shall not have commenced an action against the petitioner upon his claim prior to the return day, the claim shall be deemed forever barred, *unless* on the return day he shall consent to its determination by the surrogate.

Supplemental Notes as to Effect on Statute of Sundry Conditions

Where cause of action accrues between death of testator or intestate and the grant of letters. See § 392, Code Civ. Proc.

Effect of bankruptcy proceedings. *Von Sachs* v. *Kretz*, 72 N. Y. 548.

Disabilities which prevent running of statute. § 396, Code Civ. Proc. E.g., "infancy." *Matter of Pond*, 40 Misc. 66; *Matter of Rogers*, 153 N. Y. 316.

Effect of nonresidence. §§ 390, 401, Code Civ. Proc.

does not cover mere absence. *Hart* v. *Kip*, 148 N. Y. 306.

Effect of death without the State. § 391.

within the State. § 403. *Hall* v. *Brennan*, 140 N. Y. 409.

before limitation runs. § 402.

How to compute periods of limitations. § 415, Code Civ. Proc.

Statute does not begin to run in favor of wrongdoing trustee until he openly, to the beneficiary's knowledge, renounces, disclaims or repudiates the trust. *Lammer* v. *Stoddard*, 103 N. Y. 672; *Merritt* v. *Merritt*, 32 App. Div. 442; *Putnam* v. *Lincoln S. D. Co.*, 49 Misc. 578, and cases cited. But as against a trustee *ex maleficio*, the statute runs from the commission of the wrong. *Ibid.*

Same as to general guardian. *Matter of Camp*, 50 Hun, 388.

Same as to executor. *Matter of Ashheim*, 185 N. Y. 609.

Same as to administrator. *Matter of Williams*, 57 Misc. 537.

Nor does it begin to run in favor of negligent executor, until the occurrence of the negligent or wrongful act complained of. *Harrington* v. *Keteltas*, 92 N. Y. 40.

Statute does not run against representative to whom decedent was indebted during time between death and first judicial settlement. *O'Flyn* v. *Powers*, 136 N. Y. 412; *Matter of Macomber*, 2 Connoly, 278.

This does not include debt due third party but assigned to representative. *Matter of Robbins*, 7 Misc. 264.

Statute does not run in favor of heir or devisee of a debtor during three years after debtor's death. § 1844, Code Civ. Proc. *Adams* v. *Fassett*, 149 N. Y. 61.

Statute does not run in favor of representative into whose hands assets have come for which he has never accounted, and he has not renounced the trust or been discharged. *Matter of Taylor*, 30 App. Div. 213.

Nor against creditor who presents claim which is not disputed, though accounting is delayed nine years. *Matter of Harmon*, 46 Misc. 229.

If a trustee pleads the statute, he must show the lapse of the statutory period since the repudiation of the trust and must so plead specifically. *Matter of Meyer*, 98 App. Div. 7, and cases examined. *Matter of Ashheim*, 111 App. Div. 176, aff'd 185 N. Y. 604; *Matter of Anderson*, 122 App. Div. 453.

It seems no statute of limitations runs against collecting the transfer tax. Laws 1899, ch. 737, retroacts to remove a prior limitation. *Matter of Moench*, 39 Misc. 480.

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GENERAL ANALYTICAL INDEX

Hints as to its use:

I. This index is analytical of the text. The "catchwords" are very numerous, but the cross-references are important in order to reach every page upon which the several subjects are discussed.

II. This work being chiefly a commentary on Chapter XVIII of the Code of Civil Procedure, frequently the readiest method of locating the discussion of a particular subject will be to turn to the Index of Code sections, which shows not only where every section is cited, but also by italics where it is *quoted*. The general discussion usually follows the quoted section.

The author has endeavored to make *every* proposition in the text available by means of this Index.

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