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JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

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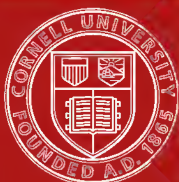

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THE EXECUTOR'S GUIDE:

A

COMPLETE MANUAL

FOR

Executors, Administrators and Guardians,

WITH A

FULL EXPOSITION OF THEIR RIGHTS, PRIVILEGES,
DUTIES AND LIABILITIES, AND OF THE RIGHTS
OF WIDOWS IN THE PERSONAL ESTATE.

THIRD EDITION.

BY

ROBERT H. McCLELLAN,

COUNSELOR, ETC., AND FORMER SURROGATE OF RENSSELAER COUNTY.

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Preface to Third Edition.

A Third Edition of this book having been called for, I have prepared it, endeavoring to bring it up to the present time in its statements as to practice, as well as the duties of executors, etc. The work having been done while I was engaged in active practice, I have been obliged to avail myself of the services of my son, Samuel P. McClellan, in superintending the publication. The book is submitted with the confident hope that it will be of value to persons having the care of estates and of infants.

Robert H. McClellan.

Troy, October 2, 1882.

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EXECUTOR'S

AND

ADMINISTRATOR'S GUIDE.

CHAPTER I.

OF WILLS AND MANNERS OF EXECUTION.

A will is a disposition of an estate by a person called a testator, to take effect upon his death.

All persons of the age of twenty-one years, except idiots and persons of unsound mind, may so dispose of their real estate; and males of the age of eighteen years, and females of the age of sixteen years, may in like manner dispose of their personal property.

Married women, formerly disabled by law from making a valid will, are by the statutes of 1848, 1849, and 1869, expressly empowered to devise and bequeath their property, in the same manner as if unmarried.

But these statutes, before 1860, gave to a married woman no power to dispose by will of property acquired before the passage of the acts, nor of the interest accruing after the acts, upon money previously acquired by her, nor of the proceeds of her own labor. (*Ryder* v. *Hulse*, 24 N. Y., 372; see also *Woodbeck* v. *Havens*, 42 Barb., 66.)

Wills shall be in writing, except in the case of

soldiers in actual military service, or mariners at sea. (2 R. S., 60; 3 R. S. [5th ed.], 141.)

Special forms are not required in drawing a will; it is enough that the intention of the testator is plainly expressed; but it is well to follow certain forms of expression which have been long in use, in the formal parts.

The execution of a will shall be accompanied with certain formalities regulated by statute, to the intent that, as the will is not to be proved until after the death of the testator, it may fully appear that in making it, he was aware of the character of the instrument, and was not imposed upon.

§ 40. (2 R. S., 63; 3 R. S. [5th ed.], 144.) "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.

[Unless the testator declares, or gives the witnesses, in some form, to understand at the time of making or acknowledging his subscription, that the instrument signed is his will, there is no sufficient publication. (*Bagley* v. *Blackman*, 2 Lansing, 41.)]

"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.

[It does not seem to be necessary that the witnesses should sign their names in the presence of the testator. (*Ruddon* v. *McDonald*, 1 Brad., 352.)]

§ 41. "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. Whoever shall neglect to comply with each of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who shall sue for the same.

"Such omission shall not affect the validity of any 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."

It is sufficient that the testator, when executing the will, makes the declaration and request to the witnesses, in answer to a question put to him.

An attestation clause is not absolutely necessary, but it is used to perpetuate the transaction in the minds of the witnesses, and to assist them to recall the facts when they shall come to be sworn. It should always be appended.

(For form of will, see Appendix No. 1 and Codicil No. 2.)

NUNCUPATIVE OR UNWRITTEN WILLS.

To constitute a valid unwritten will, made by a soldier, it must be proved, that he was in actual

service, either of the United States or the State of New York; that, in prospect of battle, exposing his life, or in immediate danger of death from disease or wounds in such service, he declared what disposition he desired to make of his personal property, under such circumstances as to make it appear that he intended such disposition to be his will.

He may make this declaration himself, or in answer to questions put to him by another, and it is not necessary, even, that he request any other to witness the declaration as his will. Two witnesses are required to establish the will before the surrogate of the county where the deceased resided, who will record the testimony proving the declaration made as a will; and if he considers it proved, he will issue letters upon it to the person named as executor by the testator, and it will operate as a valid disposition of personal estate. (Code, § 2618.)

A mariner at sea, whether in the merchant service or the service of the government, may make such a will in the same manner.

The question has arisen as to what constitutes being at sea; and it has been held (8 N. Y. Rep., 196), that a master of a vessel lying at anchor in a bay of the ocean, near the land, where the tide ebbs and flows, was at sea in the meaning intended by the statute, the point of the decision being, apparently, that because he was in tide-water he was at sea.

This rule, if carried out — as it is reasonable to suppose it will be — will include mariners on vessels engaged in the coasting trade, even if they shall die,

leaving such a will, in the Hudson river at any place below Troy.

In one English case, under a similar statute, a mariner being on shore at Monte-Video, in South America, received a wound and died, having first made a nuncupative will, which was held valid.

A will may be revoked by the testator by destroying it, or by executing a new will expressly revoking the former one.

CHAPTER II.

AS TO THE POWERS AND DUTIES OF THE EXECUTORS NAMED BEFORE OFFERING THE WILL FOR PROOF.

On learning the fact of his appointment as an executor and the death of the testator, it becomes the immediate duty of the person so appointed, to decide whether or not he will take upon himself the discharge of the trust to which he is nominated, and to give notice to those interested in the will, of his decision.

There are two ways in which an executor may relieve himself of the trust before the letters are issued to him.

First. By remaining passive, and taking no steps in the matter.

Second. By making and filing a renunciation. (See form and directions, Appendix No. 3.)

In case more than one person is appointed in the will, any of them so appointed may decline to act, or renounce, and the remaining one or ones acting, will have full power to execute the will, as if all appointed assumed the trust.

The duty of the executors, before the will is proved, in relation to the property of the deceased, is regulated by statute.

§ 16. (2 R. S., 71; 3 R. S. [5th ed.], 156.) "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."

From this it follows, that the executor named may sell the effects of the deceased, to the extent necessary to raise money to pay the necessary funeral expenses, and that he shall take charge of the estate to preserve it.

In regard to what are proper funeral expenses, see hereafter. For the purpose of preserving the property, the executor need not take it into his possession, or remove it from the charge of the family of the deceased, unless he has good reason to suppose that it is being wasted or neglected — in which case he has power to take it, and he should do so for his own protection.

He may, doubtless, convert into money perishable articles which could not be kept long enough to be inventoried.

Where the effects are in charge of persons not interested in the preservation of them, the executor ought to care for them and remove them, if necessary, and he will be protected in taking steps for that purpose.

He may take the papers of the deceased and seal them up, awaiting further authority, and deposit them in a place of security.

The will of the deceased should be opened and its contents ascertained as soon as practicable after his death, for the purpose of learning if any directions are contained in it in regard to his funeral, or the immediate care of his family.

There is in some parts of the State, a practice of waiting for six weeks after the death of the testator before opening the will, or taking any steps to prove it. This is founded in a sentiment of respect for the deceased, but is a mistaken exercise of it; for the best way to manifest such respect, is to regard the wishes of the deceased and take immediate steps to carry them into effect, which can only be done by proving his will and caring for the estate which he accumulated for his family.

In this connection, it may be well to state the liabilities of any unauthorized persons taking possession of property of the deceased, as regulated by law. (2 R. S., 81.)

[When an executor *de son tort* afterwards takes letters testamentary, his responsibility relates back to the death of the decedent, or to his own first act of unauthorized interference. (*Estate Ellen Farrell*, 1 Tucker, 110.)]

§ 60. "Every person who shall take into his possession any of the assets of any testator or intestate, without being thereto duly authorized as executor, administrator or collector, or without authority from the executor, administrator or collector, shall be liable to account for the full value of such assets, to every person entitled thereto, and shall not be allowed to retain or deduct from such assets for any debt due to him" from the deceased, personally, in his lifetime. But he may retain any such assets for a sum due to him for care taken of them, or for labor expended on them, and demand payment of a lien so acquired before delivering them up, or he may have such sum

allowed him in accounting for the goods or the value thereof on a trial at law.

§ 17. "No person shall be liable to an 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 general or special administrators of such deceased person, 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."

It may be remarked that any one performing the Christian service of burying a deceased person will be allowed his reasonable funeral expenses out of the estate of the deceased, as a claim, preferred above all other claims.

CHAPTER III.

WHO MAY APPOINT AN EXECUTOR AND WHO MAY SERVE AS SUCH — DISABILITY, HOW REMOVED.

The statutes, as amended by the acts of 1848 and 1849, in respect to the rights and powers of married women, provide that "all persons except idiots, persons of unsound mind and infants, may devise their real estate by last will and testament," and that "every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate by will, in writing." An alien cannot take or give real estate by devise, but his will in regard to personal property will be carried out.

The power to make a will involves the power to appoint executors, but —

§ 3. (2 R. S., 69.) "No person shall be deemed competent to serve as an executor, who at the time the will is proved shall be:

"1. Incapable, in law, of making a contract (except married women).

"2. Under the age of twenty-one years.

"3. An alien, not being an inhabitant of this State. (*McGregor* v. *McGregor*, 1 Keyes, 113.)

"4. Who shall have been convicted of an infamous crime.

"5. Who, upon proof, shall be adjudged incompetent, by the surrogate, to execute the duties of such

trust, by reason of drunkenness, improvidence or want of understanding. (*McGregor* v. *McGregor*, 1 Keyes, 133.)

"Or one whose circumstances are so precarious as not to afford adequate security for the administration of the estate. (2 R. S., 70, § 6, 7.")

Married women are capable of acting as executrices, and of receiving letters testamentary as though they were single women; and their bonds, given upon the granting of such letters, shall have the same force and effect as though they were not married. (Chapter 782, Laws of 1867, § 2.)

Before the passage of the act last quoted, letters could only issue to a married woman upon the consent of her husband in writing, filed with the surrogate, and by giving such consent he became liable for her acts jointly with her.

The disability arising from the minority of the person appointed, is at an end at the arriving of the person appointed at full age; of an alien, on his becoming naturalized, or becoming an inhabitant of this State.

The first subdivision also includes, for example, idiots and lunatics and habitual drunkards in charge of committees; and the disability ceases in case of the lunatics and drunkards when they are discharged from the custody of their committee, and are judicially declared to be of sound mind, or capable of managing their own affairs.

Upon the fourth subdivision it may be remarked that however guilty or base the executor appointed may be, conviction must precede the objection; and in case of contest before the surrogate, the record of

conviction must be produced. (1 Barb. Ch. R., 47; *Harrison* v. *McMahon*, 1 Brad., 289; *McMahon* v. *Harrison*, 6 N. Y., 443; *Emerson* v. *Bowers*, 14 N. Y., 449.)

The incompetency mentioned in the fifth subdivision arises from drunkenness, improvidence, or such a want of care and foresight as renders the person appointed a poor manager of his own affairs; or want of understanding, which, it is supposed, is intended to mean gross ignorance of business, as well as natural incapacity, and probably inability to read and write would ordinarily be a sufficient objection. A professional gambler is presumptively incompetent. (*McMahon* v. *Harrison*, 6 N. Y., 443; 1 Brad., 289.)

"Any surrogate may, in his discretion, refuse the application for letters testamentary, or letters of administration, of any person unable to read and write the English language." (Chap. 782, Laws of 1867, § 5.)

These objections are addressed to the discretion of the surrogate, and may be made at any time before the issuing of letters, but the decision is probably open to review before a superior or appellate tribunal.

CHAPTER IV.

THE DUTY OF AN EXECUTOR IN PROVING THE WILL.

There is no absolute necessity that application for the probate of a will be made by an executor; it may be made by any person interested. Even a creditor may make the application and procure the necessary citation, in case those more immediately interested neglect the duty. But the application should be made, usually, by the one who intends to act as executor. The same provision is incorporated in the Code.

§ 2614. A person designated in a will as executor, devisee or legatee, or any other person interested in the estate, or a creditor of the decedent, 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.

The jurisdiction of the court as to proof of wills is fixed by statute and section 2476 of the Code of Civil Procedure.

§ 2476. 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 administra-

tion, 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.

Preliminary to the application it must be ascertained who are the heirs-at-law and next of kin of the testator, or it must occur that the names and places of residence of the heirs and next of kin, or some of them, cannot be by diligent inquiry ascertained.

The diligent inquiry required, is seeking the requisite information from those who, by reason of relationship to the testator, or intimate acquaintance, may be expected to know of his family.

We would here caution parties not to confound the terms heirs and next of kin in the statute, with legatees and devisees in the will. The terms *heirs* and *next of kin* imply blood connection, while the relation of *legatee* or *devisee* arises from the will, and the testator and the legatee or devisee, may be strangers in blood as well as in fact.

Heirs are distinguished also from next of kin; the first taking the real estate by descent, and the last taking the personal property by distribution. Thus the heirs of a deceased person are — 1. His children lawfully begotten, if he have any, and the children of such as shall have died; 2. His father, if he be living; 3. His mother, if she be living; 4. His collateral relatives. (3 R. S., 41.)

The next of kin are — 1. The children; 2. The father; 3. The mother, and brothers, and sisters, and the legal representatives (that is, the children) of such as shall have died; 4. His collateral relatives, not beyond brothers' and sisters' children. (2 R. S., 96; 3 R. S. [5th ed.], 183.)

The heirs-at-law and next of kin of an illegitimate, if he have no children, are — 1. His mother; 2. His relatives on the part of his mother. (S. L., 1845, chap. 236.) "And illegitimate children born since 1855, in default of lawful issue, are heirs-at-law and next of kin of their mothers." (S. L., 1856, chap. 547.)

Having ascertained these facts they should be embodied in a petition to the surrogate (see form, Appendix No. 5), which, together with the will, should be presented to that officer, who will issue a citation to the proper parties.

If the executor has not the will in his possession, or if he cannot obtain it, the surrogate will issue a subpœna to the person holding it and compel him to produce it.

If there be no executors named in the will, or if he or they be incompetent, have removed to a great distance, or are dead, the duties above specified devolve upon any person interested in the will, who may proceed as above directed.

CHAPTER V.

THE PROCEEDINGS ON PRESENTATION OF THE PETITION FOR PROOF OF THE WILL AND THE SERVICE OF THE CITATION.

The petition having been presented to the surrogate, containing the information required above, he will issue a citation to the proper persons, requiring them, at a time and place therein mentioned, to appear before him and attend the probate of the will.

§ 2615. 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, 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.

§ 2616. 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. (*Gombault* v. *Pub. Admr.*, 4 Bradf., 226.)

The time for the return of the citation necessarily depends on the time required for service, from eight days to six weeks, and is fixed by statute as follows:

§ 2520. 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. A citation must be so 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. But the surrogate may make an order for substituted service in all cases on a non-resident, and in certain cases on a resident.

Where it appears to the surrogate by affidavit that proper and diligent effort has been made to serve a citation on a party named, 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 (§ 436, Code) that the citation be served by affixing it to the outer or other door of the person's residence, and by depositing another copy thereof, properly enclosed in a post-paid wrapper addressed to him, at his place of residence, in the post-office at the place where he resides.

The provisions as to non-residents and unknown parties are as follows:

§ 2522. The surrogate, from whose court a citation is issued, may make an order, directing the service thereof without the State, or by publication, in either of the following cases:

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, being a resident of the State, has been continuously without the United States, for such a length of time, and under such circumstances, that an order for the service upon him without the State, or by publication, of a summons issued from the supreme court, might be made by a judge.

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 appli-

cable 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.

§ 2523. The surrogate may also make an order, directing the service of a citation without the State, or by publication, in either of the 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.

The publication required is for six weeks in two newspapers to be fixed by the surrogate. The order for publication is granted upon an affidavit showing the non-residence or other fact authorizing it. A personal service of the citation may be made thirty days before the return thereof. In all cases the citation must be made returnable upon a day certain, not more than four months after the date thereof. (Code, § 2579.)

Infants under fourteen years of age must be served personally, and a copy must be delivered to its parent, guardian, or to the person in whose charge the infant may be. Service on a lunatic, idiot, habitual drunkard,

by delivering a copy to such person and also to his committee. (Code, § 2526.)

So, also, the surrogate may, upon the presentation of the petition appoint a person upon whom the service may be made in certain cases.

§ 2527. 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 ground 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 affairs, the surrogate may, in his discretion, 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.

A special guardian may be appointed for an infant under the following provision:

§ 2530. 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 special guardian unless his written consent is filed at or before the time of entering the order appointing him.

Notice should usually be given on the service of the citation under the following section, of the application for the appointment of the special guardian.

§ 2531. 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 the citation is duly required by law to be served. But except in the case specified in title fifth of this chapter the surrogate may, by an order to show cause, provide for the service a shorter time, and direct the service of the order to be made in such 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. (For notice, see form in Appendix.)

It appears, therefore, that the order to show cause may be served in every case, except where the proceeding is for the disposition of the real property of the decedent for the payment of his debts and funeral expenses; and, when the persons to be served are in court, the order may be made that they might show cause forthwith, and the order made without delay.

The citation and the notice are usually incorporated in the same paper and may be served by any person; and the proof may be made by affidavit, or where the proof of service is made by the sheriff, by his certificate.

The proof may also be made by admission of service of the party to be served, signed by him, in which case his handwriting may be proved by an affidavit of some person who saw him write or who is acquainted with his handwriting.

Where, however, all the parties, heirs-at-law and next of kin, are of full age, they may waive the formal service, or any service, and by all uniting in

the petition for proof, or by appearing in court and filing a written consent to the course, the surrogate will proceed to take proof of the will and issue letters forthwith. But a special or general guardian may not waive any formality, his duty being, in fact, to see that all the requirements of the law are complied with.

Should it be necessary to travel in making service of the citation, the executor may be allowed his expenses of such travel, or he may employ a person to make the service, and he may be allowed a reasonable payment made to such person.

It will be well to procure from the surrogate, on taking the citation, a subpœna for the witnesses resident in this State, with the necessary tickets; and the fees of such witnesses are the same as in courts of record, to wit, eight cents per mile for going to court only, and fifty cents for each day's attendance.

CHAPTER VI.

PROCEEDINGS ON RETURN OF CITATION AND OF PROVING THE WILL, AND OF NEW TRIAL WITHIN ONE YEAR.

On the day appointed for proof, if the citation shall not have been duly served on all the parties who ought to receive notice, the surrogate may adjourn the proceedings and issue a further citation, and as may sometimes happen, should the name of some proper persons have been omitted in the petition for probate, a supplementary petition may be filed at any time, on discovering the omission, and a new citation issued to bring them into court.

A party of full age, and not judicially declared to be incompetent, may appear in the proceeding in person or by an attorney with the same effect as to jurisdiction, as it he had been served with the citation. (Code, § 2528.)

If the service or appearances are complete, the surrogate will appoint a special guardian for infants, idiots or lunatics on the written consent of the person to be appointed (§ 2530), and the special guardian shall appear in person before any further steps are taken. The witnesses will then be examined.

At this point, the party offering the will for probate, may learn for the first time, that the probate is contested. If this should be so, and the executor or other party offering the will, be but remotely interested in the matter, it is suggested that he turn over the responsi-

bility of the contest to those more nearly interested in proving the will, as legatees or devisees, by immediately notifying them that the probate is contested, that they make the proper appearance before the surrogate and take charge of their interests. They will have leave to appear upon petition. (§ 2617.) As counsel will necessarily be employed, if the probate is contested, it is not necessary to treat further of that branch of the subject here.

At least two of the witnesses, if so many are living in this State, and of sound mind, and are not disabled from age, sickness, or infirmity, from attending, shall be produced and examined; and the death, absence (from the State), insanity, sickness, or infirmity of any of them shall be satisfactorily shown to the surrogate taking such proof. (§ 2619.)

If any such aged, sick or infirm witness resides in the same county with the surrogate, the surrogate will, without making unnecessary delay, proceed to take the examination of such witness, at his dwelling-house or other place of residence. If he reside in any other county of the State, the surrogate will direct that his examination be taken by the surrogate of that county.

If all the witnesses are out of the State, dead, or insane, or incompetent to testify, the surrogate may receive proof of the handwriting of the testator and of the subscribing witnesses, and of such other facts and circumstances as would be proper to prove such will on a trial at law. The will in such a case must remain on file in the surrogate's office. (§ 2620.)

A commission may also issue, as in the supreme

court, to take the testimony of witnesses to the will, and other testimony.

A lost or destroyed will can be admitted to probate in a surrogate's court, when 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. (§§ 1865, 2621.)

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. He may require proof of the circumstances not only of the execution, but the possession thereof, and may call testimony in relation thereto. (§ 2622.)

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 or personal property, or both, as the case may be. (§ 2623.)

If it shall appear that the testator signed his will in the presence of at least two witnesses, publishing the instrument as his last will and testament, in their presence, declaring it to be such; or if, after signing, he acknowledged to such witnesses that he had signed it, publishing and declaring it as above; that he requested them to sign as witnesses; that they did so sign; that at that time the testator was of sound mind and memory, of full age to execute a will, and not under any restraint, the surrogate will enter an

order that the same be admitted to probate and be recorded as a will of personal estate. To entitle it to be recorded as a will of real estate, it must further appear that the testator was a citizen of the United States; or if an alien, that he had taken the proper steps to enable him to take and convey real estate.

The surrogate will record the will and proofs in accordance with the order, and will attach a certificate to the will, that the same had been duly proved before him, as a will of personal estate, or of real and personal estate, as the case may be, and will retain it for one year, and then will on demand deliver it to the person from whom he received it; or, in case of his death, insanity, or removal from the State, to any devisee named in such will, or to the heirs or assigns of such devisee; or if the same relate to personal estate only, to any acting executor of such will, or administrator with the will annexed, or to a legatee named therein. (§ 2635.)

The will so proved and certified, together with the proofs thereof, when it relates to real estate, must be recorded in the offices of the clerks of the counties in which such real estate may lie, who are required to record and index them as they are required to record and index conveyances. This is required to be done by the executor within twenty days after the issue of letters, and to comply with it the executor must take out an exemplified copy. (§ 2633.)

Exemplified copies of wills proved out of the State, devising real estate, may be recorded in the office of the surrogate of the county where such real estate is

situated, and shall be presumptive evidence of the will and of the execution thereof. (§ 2703.)

The probate of the will is conclusive as to personalty on all parties until it is reversed on appeal, or revoked by the surrogate (§ 2626), while it establishes presumptively all matters as to real estate. (§ 2627.)

Probate may be revoked, notwithstanding the will has been once proved and letters issued upon it. Any person interested in the estate of the decedent may present a written petition, duly verified, containing allegations against the validity of the will or the competency of the proof, and praying that the probate may be revoked, and that the persons enumerated who took any interest under the will, may be cited to show cause why it should not be revoked, and the surrogate will issue a citation. (§ 2647.)

The petition must be presented within one year from the probate of the will, except that in case of a minor it may be presented in one year after majority, an insane person upon recovery, or a person in prison upon release, according to section 396. (§ 2648.)

The citation is to be issued to the executor or administrator with the will annexed, and to the devisees and legatees named in the will, and to all other persons who were parties to the proceeding for probate of the will. If the legatee shall have died, his executor or administrator must be cited, if one has been appointed; if none has been appointed then such persons must be appointed as representing him, as the surrogate designates for the purpose. (§ 2649.) Upon the service of the citation the executor or the administrator must suspend all proceedings relating

to the estate, except that he may recover or care for the property and collect it and pay the debts; he may also do such other acts as the surrogate expressly permits. (§ 2550.) Upon the return of the citation the surrogate takes proof of the will, and if any witness who was examined at the probate has died without the State, or has become incompetent, then his testimony which was taken on the previous hearing will be received in evidence. (§ 2551.)

If the surrogate decides the will is not sufficiently proved or is invalid, he will make a decree revoking the probate, if he decides otherwise he will make a decree confirming the probate. (§ 2662.) If he revokes the probate of the will, the surrogate will cause notice of the revocation to be published for three successive weeks.

So, also, a person claiming as heir of one who has died intestate may present to the surrogate's court of the county, where real property is situated, a written petition describing the property, and the death of the intestate, and his interest, and the interest of each other heir of the decedent, and pray for a decree to establish the rights of the several parties in the inheritance, and that all parties may be cited to attend the probate. (§ 2554.)

The surrogate issues a citation to all the parties setting forth the name of the decedent and the petitioner, and the share which the petitioner claims, and a brief description of the property; and at the hearing any heir may appear and make himself a party. (§ 2555.)

The surrogate will hear the allegations and objec-

tions of the parties, and if it appears that there is a contest respecting the heirship of the party, or the share to which he is entitled, the surrogate will dismiss the proceeding; but if there is no contest, 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 as to this property, the heirs entitled to inherit and the interest of each, and the surrogate will make a decree describing the property and declaring that the right of inheritance has been established to his satisfaction in accordance with the facts. (§ 2656.)

The decree may be recorded in the office of the county clerk, or the register of deeds, and is presumptive evidence of the facts declared to be established thereby. (§ 2657.)

Any person who is not a party to the previous hearing may, at any time within ten years, apply to the surrogate that the decree be set aside or modified, and all persons interested will be cited to show cause why it should not be done. (§ 2658.)

CHAPTER VII.

OF GRANTING LETTERS TESTAMENTARY AND RENUNCIATION OF EXECUTORS — ADMINISTRATION WITH THE WILL ANNEXED — HOW EXECUTORS COMPELLED TO GIVE BONDS.

After a will of personal estate shall have been proved the surrogate will issue letters testamentary thereon to any competent person who shall appear and qualify. And they may be granted immediately unless some person interested files an affidavit showing his interest and showing some legal objection to the granting of 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 them. If such an affidavit is filed the surrogate must stay the granting of letters, at least thirty days, unless the matter shall be sooner disposed of. The specification or objection must be verified by the oath of the objector, or his attorney, to the effect that he believes it to be true. (§ 2696.)

The surrogate will take proof in relation to the objection, if the objection is that the executor's circumstances are precarious, or that he is not a resident of the State and he is a citizen of the United States, he may be entitled to letters upon his giving a bond as prescribed by law. But a non-resident is entitled to letters testamentary without giving a bond, if he has within the State an office for the regular transaction of business, and the will directs

that he may act without giving security. (§§ 2637, 2638.)

A person named as executor may renounce the duty by an instrument in writing, signed by him, and acknowledged or proved as a deed is required to be proved or attested by one or more witnesses, and proved to the satisfaction of the surrogate.

He may retract his renunciation at any time before letters are issued to any person, or after they have been so issued, if they had been revoked or the persons to whom they were issued have died or become incompetent. (§ 2639.)

If a person named as executor does not qualify or renounce within thirty days after the probate of the will, the surrogate, on the application of another executor or of any person interested in the estate, may make an order requiring him to qualify within a time therein named, and directing that if he shall not so qualify he will be deemed to have renounced. The order may be served personally or by publication. It would be improper to issue letters until all the executors have qualified or actually or legally renounced. (§ 2644.)

But if there is no person named as executor, or all the persons named renounce or fail to qualify, or are legally incompetent, then letters of administration with the will annexed will be granted, as if no executors had been named in the will — 1. To the residuary legatees, or some one of them; 2. To any principal or specific legatee; 3. To the widow or next of kin; 4. To any creditor of the testator; 5. To any proper person designated by the surrogate —

in the same manner and under the like regulations and restrictions as letters of administration in cases of intestacy; which see hereafter. Letters testamentary upon a will of a testator domiciled without the State, at the time of his death, may also be issued by the surrogate of any county in which there may be any property or effects. (§ 2476.)

So an executor may be appointed under a power given in the will authorizing some person to select an executor. But the selection must be made within thirty days after probate or the power may be waived. (§ 2640.) But the issue of letters must be delayed in such a case until thirty-five days after probate. (Id.) Any person interested may file objections to the issue of letters to the person selected, within five days after the selection is made, by an affidavit showing his interest, and the objections which he makes, which may be the same as against an executor named in the will. In such a case the proceedings for trying the objections are the same as in the cases of objections made to an executor. (§ 2641.)

The official oath required of executors, administrators and guardians may be taken before any officer authorized to take an affidavit to be used in the supreme court, within or without the State. (§ 2594.)

Letters issued to an executor or administrator may be revoked for cause.

§ 2685. 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:

1. 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.

2. 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.

3. Where he has willfully 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.

4. Where the grant of his letters was obtained by a false suggestion of a material fact.

5. 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.

6. 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 non-resident executor would be entitled to letters without giving a bond.

7. In the case of an executor, where, by the terms of the will, his office was to cease upon a contingency, which has happened.

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 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 the State.

The proceeding is upon a petition on which a citation is issued. (§ 2686.)

It is also believed that the surrogate may enjoin an executor or administrator from acting until the determination upon the petition.

An executor should be compelled to give bonds where he has no property except an unliquidated demand, and is about to remove from the State. (2 Barb. Ch., 426; 4 Paige, 299.) He should not be required to do so merely because he does not own property to the full value of the estate. (8 Paige, 475.) The main point is, whether it is doubtful whether the trust fund is safe in his hands. (1 Brad., 148.)

The circumstances of an executor are precarious, within the statute, only when his character and conduct present such evidence of improvidence or recklessness in the management of the trust estate, or of his own, as in the opinions of prudent and discreet men, endangers its security. Though bankruptcy might furnish a reason for superseding an executor, poverty does not. (60 Barb., 56.)

The term improvidence refers to such habits of mind and conduct generally, as render a man generally, and under all circumstances, unfit to serve. (14 N. Y., 449.) It is the want of ordinary care and forecast in the acquisition and preservation of property. (9 Hun, 471.) That a man is a professional gambler is presumptive evidence of improvidence. (6 N. Y., 443.)

Although an executor is illiterate and of small means, and has been guilty of misconduct or mismanagement of the estate, the surrogate cannot supersede him. He might require him to give security. (14 N. Y., 449.)

CHAPTER VIII.

LETTERS OF ADMINISTRATION.

When a person dies, leaving no will, he is said to die intestate, and letters of administration are granted on his estate.

Administrators, in their representative capacity, have no charge over the real estate of their intestate (16 N. Y., 278; 10 Barb., 432), and their authority is local, extending only to assets within the State. (7 Johns. Ch., 45.)

There are four forms of letters of administration: general letters upon the estate of an intestate; special letters of collection, upon the estate of either an intestate or testator, in certain cases; letters of administration with the will annexed; letters of administration upon the estate of an absentee.

Administration upon the estate of a decedent is granted by the surrogate, where he was a resident of the county; where not being a resident he died within the county leaving personal property within the State, or leaving personal property which has, since his death, come into the State and remains unadministered; or where not being a resident of the State he 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; or where the decedent was a non-resident but left real estate subject to be sold for payment of his debts. (§ 2476.)

Under certain circumstances two or more surrogates may have jurisdiction to grant letters, as where the decedent was a non-resident of the State, and his personal property is in or comes into two or more counties; or where he left real estate in two or more counties subject to be disposed of for payment of his debts. Application for letters may be made in either county, but the filing of a petition in one county bars proceedings in any other.

§ 27. (2 R. S., 74; amended, chap. 782, Laws of 1867.) Administration, in case of intestacy, shall be granted to the relatives of the deceased who would be entitled to succeed to his personal estate, if they, or any of them, will accept the same, in the following order:

"First, to the widow; second, to the children; third, to the father; fourth, to the mother; fifth, to the brothers; sixth, to the sisters; seventh, to the grandchildren; eighth, to any other of the next of kin who would be entitled to share in the distribution of the estate. If any of the persons so entitled be minors, administration shall be granted to their guardians; if none of the said relatives or guardians will accept the same, then to the creditors of the deceased, and the first creditors applying will, if otherwise competent, be entitled to the preference.

If no creditor apply, then to any other person or persons legally competent; but in the city of New York the public administrator shall have preference, after the next of kin, over creditors and all other persons; and in the other counties, the county treasurer shall have preference, next after creditors, over

all other persons. And in the case of a married woman dying intestate, her husband shall be entitled to administration in preference to all persons.

This section shall not be construed to authorize the granting of letters to any relative not entitled to succeed to the personal estate of the deceased as his next of kin, at the time of his decease."

Where several persons, of the same degree of kindred, apply for letters, males are preferred to females; relatives of the whole blood, to those of the half blood; unmarried women, to such as are married; and where several persons, in the same degree and equally entitled, apply, the surrogate may appoint such as in his discretion he thinks most fit.

§ 29. (2 R. S., 75.) "A husband, as such, if otherwise competent, according to law, shall be solely entitled to administration on the estate of his wife, and shall give bond as other persons, but shall be liable, as administrator for the debts of his wife, only to the extent of the assets received by him."

And any person entitled to letters, by filing his or her consent in writing, may have a competent person, not otherwise entitled, joined in the administration (2 R. S., 75); as, for example, a widow may have her father, or brother, or another person, joined with her; a son or a daughter may have any competent person joined with him or her. The consent required may be embodied in the petition.

Where a married woman is entitled to letters the same may be granted to her as if she were unmarried. (Chap. 782, Laws of 1867.)

And if any person who would otherwise be entitled,

be a minor, such letters shall be granted to his guardian, the same as they would be to the person so entitled if of full age. (2 R. S., 75.)

§ 32. (Page 75.) "No letters of administration shall be granted to any 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 such person reside within this State), nor to any one who is under twenty-one years of age, nor to any one who shall be judged incompetent, by the surrogate, to execute the duties of such trust, by reason of drunkenness, improvidence, or want of understanding." * *

The surrogate cannot exclude a person otherwise entitled to letters, except for the causes specified in the statute. (1 Barb. Ch. 45.)

As to the degree of drunkenness incapacitating the applicant, see 1 Redfield, 472.

§ 5. (S. L., 1867, chap. 782.) "Any surrogate may, in his discretion, refuse the application for letters testamentary, or letters of administration of any person unable to read and write the English language."

But before the issuing of letters, the applicant must produce and file, with the surrogate, a renunciation, executed in the manner heretofore prescribed in speaking of renunciations by executors (see form, Appendix) of all persons having a prior right to administration; or the surrogate must issue a citation to such persons, requiring them to show cause why administration should not be granted to such applicant.

One who has renounced may revoke his renuncia-

tion at any time before letters are actually granted. (4 Brad., 13.)

The citation must be served on such as reside in the county, or an adjoining county, personally, or by leaving a copy at their residences, at least eight days before the return day thereof; on such as reside in any other county in this State in the same manner, at least fifteen days before the return day; and on such as reside out of the State, or whose residences cannot be ascertained, personally, at least thirty days before its return, or it may be published, as against those out of the State, or whose residences cannot be ascertained, once a week for six weeks, in two papers designated by the surrogate and by service of copies by mail.

A like citation must be served, at least twenty days before its return, on the attorney-general of the State, in all cases where it does not appear in the application, or other written proof, to the surrogate, that the intestate left kindred entitled to his estate, specifying names and residences, as far as can be ascertained. (See petition, order, etc., in Appendix.)

On the application, therefore, if the person applying has the first right, or is one of several equally entitled as a class, or on filing the renunciation of persons having the prior right, or on the return day of the citation to such persons, if they or some of them do not take letters or show cause why the applicant should not have them, letters will issue to the applicant on his taking an oath or affirmation, before any officer authorized to administer oaths, and filing the same with the bond required. (See oath, in Appendix.)

The bond is executed to the people of the State, with two or more sureties, to be approved by the surrogate, and in a penalty of not less than twice the value of the personal estate of which the deceased died possessed.

The surrogate may examine such persons as he may think proper, as to the value of the personal estate, and he may also require the sureties to justify. The execution of the bond must, in all cases, be acknowledged or proved before the surrogate or some person authorized to take acknowledgment of deeds. (See form, Appendix.)

Letters of administration issue upon the estate of an illegitimate in the following order: First, to the widow; second, to the children or other descendants; third, to the mother; fourth, to the relatives on the part of the mother, in the order of their nearness of kindred to him, through the mother. (S. L., 1845, chap. 236.)

Letters of administration upon the estates of non-residents, in cases where letters have been issued at the places of their domicil, are called *ancillary* letters and issue to some person who may have been legally appointed administrator in any other State, who, on producing his letters granted in such other State, shall be entitled in preference to creditors, or to some person appointed by the foreign administrator to receive them. But if none of the persons above specified apply, then creditors or other proper persons may do so, and after the proper citation, may receive letters.

Upon the presentation of a petition for letters in

such a case, the surrogate must ascertain whether any persons claiming to be creditors reside within this State (§ 2698), and may fix the penalty of the bond at twice the amount which appears to be due from the decedent to residents of this State. (§ 2699.)

The duty of the ancillary administrator is to collect and transmit the property to the principal administrator in the other State, but he may pay creditors residing in this State, or distribute among them *pro rata*. (§§ 2700, 2701.)

Special letters of administration may issue in the discretion of the surrogate, when, in case of a contest relative to the proof of a will, or relative to granting letters testamentary or administration with the will annexed, or of administration in cases of intestacy; or where by reason of absence from this State of any executor named in the will, or for any other causes, a delay is necessarily produced in granting such letters; or 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. (§ 2668.)

In the first case of delay in the issue of letters, the

proceeding is by petition, notice of ten days and hearing before the surrogate.

In the case of letters *durante absentia*, on the estate of an absentee, the application for such an appointment * * * must be made by petition, in like manner as where an application is made for administration in a case of intestacy; and the proceedings are the same as prescribed in the case of a decedent. Such an application for the appointment of a temporary administrator may also be made, with like effect, and in like manner, as if it was made by a creditor, by the county treasurer of the 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.

These temporary administrators must qualify as in case of administrators on the estate of a decedent, give a like bond and take a like oath of office.

They may take possession of the personal property to secure and preserve it, and may maintain actions for those purposes. Upon leave obtained from the surrogate, an action may be had against them. The surrogate may, by an order made upon at least ten days' notice, authorize the special administrator to sell, after appraisal, personal property of the decedent or absentee. The surrogate may also authorize payment of funeral expenses or any expenses of the administration. (§ 2672.)

After publication by order of the surrogate to creditors to present claims, the surrogate, after the expiration of one year, may permit payment of the

debts. The temporary administrator may be cited and have settlement. (§§ 2673, 2674.)

Such an administrator may be authorized by the surrogate to lease real estate from year to year. (§§ 2675, 2676.)

The administrator on the estate of an absentee may, under order of the surrogate, make provision for the family of the absentee. (§ 2677.)

They must deposit any money coming to hand in a bank to be designated by the surrogate, or designated by the general rules of practice. If he neglects to deposit, an attachment may issue against him. The deposits can be withdrawn only on the order of the surrogate. (§§ 2679, 2680.)

It has been held that the sureties of a special administrator are liable for moneys received by him before his appointment. (19 N. Y., 150.)

The surrogate may reduce the penalty of the bond in certain cases.

In a case where a bond or new sureties to a bond may be required by a surrogate from an executor, administrator, 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.

Where there are several administrators, the statute requiring the surrogate to take from every administrator a bond with sureties, is complied with by taking one joint and several bond from all the administrators with competent approved sureties. (Hopk., 309.)

In such a case the administrators are sureties for each other. It would doubtless be proper to take from each of several administrators a separate bond with sureties.

CHAPTER IX.

GENERAL PROVISIONS IN REGARD TO LETTERS TESTAMENTARY AND OF ADMINISTRATION — FOR WHAT REASONS LETTERS ARE REVOKED, ETC.

Letters of administration give no power over the real estate of the decedent. Letters testamentary likewise do not, except where the will expressly authorizes the executor to meddle with it. Heirs-at-law or devisees can be evicted only through a sale under the decree of a court for the payment of the debts of the decedent. But if an executor or administrator interfere with the real estate, unless it is wanted to pay debts, those interested may treat him as a trustee and make him account. (3 Edwd., 31.)

Where one of two or more executors or administrators dies, or becomes a lunatic, or is convicted of an infamous offense, 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.)

But where all the executors or all the administrators, to whom letters have been issued, die, or become incapable, as prescribed in the last section, 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 as in a case of intestacy. (§ 2693.)

So, also, 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.

Wills of real estate are to be construed according to the laws of this State, without regard to the residence of the testator.

But personal property is to be distributed according to the law of the domicile of the intestate, and wills of personal property are to take effect according to such law. (§ 2694.)

A new bond may also be required of an executor or administrator.

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 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. (§ 2697.)

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.)

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.)

So, also, the sureties of an executor or administrator may be released, and new sureties required.

Any or all the sureties in a bond of an executor or

administrator may present a petition to the surrogate's court, praying to be released from responsibility on account of the bond, and that the principal in the bond may be cited to show cause why he should not give new sureties. The surrogate must thereupon issue a citation accordingly. (§ 2600.)

It does not seem that the surety, desiring to be released, need give any reason for his application; but that it is the duty of the surrogate to entertain the proceedings upon his arbitrary wish.

Upon the return of the citation, if the executor or administrator files a bond with new sureties to the satisfaction of the surrogate, then, or within such a reasonable time, not exceeding five days, as the surrogate fixes, the surrogate must make a decree releasing the petitioners from liability upon the bond *for any subsequent act or default of the principal;* otherwise he must make a decree revoking the delinquent's letters. (§ 2601.)

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 disagree respecting the custody of money or other property committed to their joint charge, the surrogate may, on the application of either of them, or of any person interested in the estate, 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, if he thinks best, direct that any property of the estate or fund be deposited in a safe place, in the joint custody of the executors, administrators,

guardians or 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, or 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 court. (§ 2602.)

It will hardly be presumed that the surrogate will interfere merely because one executor has deposited the funds of the trust subject to his sole control as executor, for the fund may be in the best possible custody. It would seem that the surrogate will interfere only when, by reason of the disagreement of the executors or administrators, the interests of the estate are in jeopardy, and that he can, by his order, reasonably expect to benefit the estate.

Letters issued to an executor or administrator may be revoked upon the petition of any person interested in the estate of the decedent:

1. 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.

2. 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.

3. Where he has willfully refused or, without good cause, neglected to obey any lawful directions of the surrogate, contained in a decree or order, or any provision of law relating to the discharge of his duty. But if he obeys the direction or law, and makes amend to the person injured, the surrogate may dismiss the petition.

4. Where the grant of his letters was obtained by a false suggestion of a material fact. But if the person with letters is entitled to them, the surrogate may dismiss the petition.

5. 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. But in this case the executor may prevent revocation by giving a bond approved by the surrogate within a reasonable time, not exceeding five days.

6. 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 non-resident executor would be entitled to letters without giving a bond.

7. In the case of an executor, where, by the terms of the will, his office was to cease upon a contingency which has happened.

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 resuming 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.)

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 had.

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 section 2715 of this act.

4. In the case of a temporary administrator, where an order has been made and served, as prescribed in section 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.)

A revocation of letters deprives the executor or

administrator of further power, but does not invalidate any act previously done in good faith. (§ 2603.)

A successor will be appointed in such a case by the surrogate's court, who may complete the trust and continue any proceedings or actions begun by his predecessor. He may also compel his predecessor to account and deliver over the assets of the estate. (§ 2605.) He may also prosecute his predecessor's official bond for any act or omission of the principal. (§ 2608.) Where no successor is appointed, any person aggrieved may prosecute the bond of the person removed. (§ 2609.)

Under the former practice an executor or administrator could not, under any circumstances, resign his trust, but was relieved only by the entire discharge of the trust, by revocation, or by death, but the Code of 1880 gave to the surrogate's court power to accept the resignation of those officers to the same entent that the Supreme Court had formerly exercised in accepting the resignation of trustees.

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 2 of title 4 of the 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.)

There was a similar provision in force in relation to the removal of guardians on their own application. As the petition is addressed to the discretion of the surrogate, the reasons stated why the petition should be granted must appear and must be stated to be of special importance to the estate, rather than to the person who petitions. It is presumed that an executor or administrator who is about to remove to such a distance that his attendance upon his duties would be expensive, or that by reason of age or failing health he cannot longer attend well his duties, would make a case in which the decree removing him would be granted.

If the surrogate entertains the application of the executor or administrator, he will first determine whether sufficient reasons exist for granting the prayer of the petition. If he so determines he will make an order to that effect, allowing the petitioner to account for the purpose of being discharged, and upon his fully 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.)

CHAPTER X.

OF THE POWER OF EXECUTORS AND ADMINISTRATORS IN DISCOVERY AND RECOVERY OF PROPERTY; THEIR DUTIES IN REGARD TO THE INVENTORY, AND THE RIGHTS OF THE HUSBAND, WIDOW AND MINOR CHILDREN.

The Legislature, in 1870, provided a summary process for discovery and recovery of assets belonging to a decedent, and it is continued with important amendments by the Code. (Sec. 2706, etc.)

If the executor or administrator presents a petition with such other proofs as he may have, tending to show that some person has possession of the decedent's property, and withholds it or conceals it so that it cannot be inventoried, the surrogate may cite the person complained of. He may make the citation returnable before a judge, justice of the peace or referee in another county. The person complained of may be examined fully, and a refusal to testify may be punished. Additional evidence may also be introduced.

If it appears to the surrogate that there is reason to suspect that money or other property of the decedent is withheld or concealed by the person cited, he will make a decree requiring the person cited to deliver possession of the property to the petitioner, unless the person cited shall give a bond in a penalty and sureties approved by the surrogate, to deliver property or pay the full value thereof and damages in case judgment shall be recovered against him in a

suit therefor. In case such a bond is given the proceeding will be dismissed.

But if no bond shall be given, a warrant will issue to a sheriff or constable empowering him to search for and deliver the property to the petitioner.

INVENTORY.

The duty of executors and administrators to take an inventory, although too often neglected, is highly important, and imperatively directed by statute.

There are very few cases in which it is consistent with the most common prudence, to neglect taking an inventory. It may not be necessary in all cases to *file* it. (2 Johns. Ch. R., 62.)

The surrogate granting letters, shall, upon the application of any executor or administrator, appoint two disinterested appraisers, as often as occasion may require, to estimate and appraise the property of a deceased person. (2 R. S., 82.) The appointment is made by the surrogate, and he usually consults the desires of the parties as to whom to appoint. The duty of the appraisers being to fix a value to charge the executor or administrator, as between him and the next of kin, legatees, etc., it is a very proper rule to appoint only those who could act as jurors in a trial at law in which any of those parties may be interested.

The fees of an appraiser are, besides actual expenses, a sum to be fixed by the surrogate not exceeding five dollars for each day actually occupied by him.

No clerk or other person employed in any capacity in a surrogate's office shall act as an appraiser.

Two or more inventories may be made if necessary.

§ 3. (2 R. S., 82.) "A notice of such appraisement shall be served five days previous thereto, on the legatees and next of kin, residing in the county where such property shall be, and it shall also be posted, for the same time, in three of the most public places of the town." * * (See form notice, Appendix.)

And it is very proper, although not required by law, to attach proof of such service and posting to the inventory filed with the surrogate.

The appraisers shall, before proceeding to execute their duties, take and subscribe an oath (see form inventory, Appendix), to truly, honestly and impartially appraise the personal property which shall be exhibited to them.

After the first meeting, they may adjourn from time to time, as may be necessary.

It being the duty of the executor or administrator to exhibit the property to the appraisers, he may well spend some time in arranging it in classes before meeting, to facilitate their labor, as well as to learn the extent and details of the property for himself. Thus, he may arrange the notes in one class, bonds and mortgages in another, farming implements, stock on the farm, furniture, etc., in other classes.

§ 5. "The appraisers shall, in the presence of such of the next of kin, legatees or creditors of the testator or intestate as shall attend, proceed to estimate and appraise the property, which shall be exhibited to them, and shall set down each article separately with the value thereof, in dollars and cents distinctly, in figures, opposite to the articles respectively." (See form inventory in Appendix.)

§ 6. The following property shall be deemed assets, and shall go to the executors or administrators, to be applied and distributed as part of the personal estate of their testator or intestate, and shall be included in the inventory thereof:

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 which may remain in the deceased at the time of his death, in a term for 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.

Hop poles used on the land are part of the realty. (11 N. Y., 123.)

Cotton machinery is personal property. (10 Barb., 157.)

Looms in a woolen mill are personal estate. (18 N. Y., 28.)

Water-wheels, mill-stones and bolting apparatus, are part of the realty. (10 Paige, 158.)

Manure, not the produce of lands, *e. g.*, the accumulations of a livery stable, is personal property. (15 Wend., 169; 2 Hill, 142.) On the contrary, manure accumulated on a farm from the produce thereof, is a part of the realty.

5. The crops growing on the land of the deceased

at the time of his death (that is, crops which are annually produced by cultivation, and not crops the spontaneous products of the soil, as grass and fruits).

6. Every kind of produce raised annually by labor and cultivation, excepting grass growing and fruits not gathered.

7. Rent reserved to the deceased, which had accrued at the time of his death.

Rents accrued and collected after the decease of the testator or intestate are not assets. (1 Brad., 241.)

Where a lessor dies before the rent becomes due, the rent goes to the heirs as incident to the reversion, and the executor cannot maintain an action to recover it. (35 Barb., 295.)

Where a lease ended in April, and the tenant had the privilege to gather winter crops, and to pay the rent in wheat in August, and the landlord died in June, *held*, that the rent due in August went to the executors. (6 N. Y., 64.) Where a tenant for life having demised premises, dies on or after the day the rent becomes due, his executors or administrators may recover the rent. But if he dies *before* the rent becomes due, the rent shall be apportioned between the executors or administrators, and the reversioner. (1 R. S., 747, § 22.)

8. Debts secured by mortgage, bonds, notes or bills, accounts, money and bank bills or other circulating medium, things in action and stock in any company, whether incorporated or not.

9. Goods, wares, merchandise, utensils, furniture, cattle, provisions and every other species of personal property and effects, not hereinafter excepted.

Assets of a partnership in the hands of a surviving partner, are not assets to be inventoried by the representative of the deceased partner. He is only entitled to a balance on an accounting, and it is sufficient, as to the partnership interest in the inventory, to state it as an interest in an unascertained balance. (1 Brad., 24.)

§ 7. Things annexed to the freehold, or to any build ing 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 the last section.

There can be no doubt that any claim which the decedent has against the executor or administrator should be also inventoried. The statute provides for this, but there is no statutory provision as to a claim against an administrator. He is accountable for such a claim. (2 Paige, 149.)

§ 8. The right of an heir to any property not enumerated in the preceding sixth section, which by the common law would descend to him, shall not be impaired by the general terms of that section.

§ 9. (Page 83, as amended by chap. 782 of Laws of 1867.) When a man having a family shall die, leaving a widow, or a minor child or children, or a widow shall die leaving a minor child or children, the following articles shall not be deemed assets (for the purpose of distribution, the payment of debts or legacies), but shall be included and stated in the inventory of the estate, without being appraised:

1. All the spinning wheels, weaving looms and stoves put up and kept for use by his family.

2. The family bible, family pictures, and school books used by, or in the family of such deceased person; and books not exceeding in value fifty dollars, which were kept and used as part of the family library, before the decease of such person.

3. All 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.

4. All necessary wearing apparel, beds, bedsteads and bedding, necessary cooking utensils, the clothing of the family, the clothes of a 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.

In addition to the above provisions in favor of the widow and minor children is the following:

§ 2. (S. L., 1842, chap. 157, as amended by chap. 782, Laws of 1867.)

"Where a man having a family shall die, leaving a widow or minor child or children, or a widow shall die leaving a minor child or children, there shall be inventoried by the appraisers and set apart for the use of the widow, or for the use of such widow and child or children, or for the use of such child or children, in the manner now prescribed by the ninth section (above quoted), necessary household furniture, provisions or other personal property, in the discretion of said appraisers, to the value of not exceeding one hundred and fifty dollars, in addition to the personal property now exempt from appraisal by said section." (8 N. Y., 31; 2 Brad., 1.)

By section 13 of chapter 782, of Laws of 1867, it is provided that all articles and property set apart, in accordance with law for the benefit of a widow and a minor or minors, shall be and remain the sole personal property of such widow, after such minor or minors shall have arrived at age.

The appraisers shall use their discretion in this case, as to what articles they shall set apart, not whether they shall set apart any or not; and if they neglect to set apart articles at all; or set apart less than one hundred and fifty dollars in value, the surrogate will, on application of any party aggrieved, direct them to do so, or if necessary, appoint other appraisers to perform the duty, or on the final settlement, he will order that sum or so much as the appraisers neglect to set apart, to be paid to the widow or minors, they having a right to the provisions as against next of kin, legatees or creditors.

Besides the allowances out of the personal property, the widow is entitled to tarry in the chief house of her husband for forty days after his death, and in the meantime is entitled to her reasonable sustenanee out of his estate. This is called the widow's quarantine. (1 R. S., 742.)

In providing this sustenance, the executor or administrator must exercise judgment and diseretion in the same manner as in paying funeral expenses. Thus, if the estate be abundant to pay all debts without doubt, items of mourning clothing for the widow and family may be included in the charges for sustenance; while if the estate be involved, and the question

should arise as against creditors, bare necessaries only could be allowed.

§ 11. (2 R. S., 84.) "The inventory shall contain a particular statement of all bonds, mortgages, notes or other securities for the payment of money, belonging to the deceased, which are known to such executor or administrator, specifying the names 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 may be collectible on each security."

It should also class the claims inventoried as good, doubtful or bad, as they estimate them.

§ 12. "The inventory shall also contain an account of all moneys, whether in specie or bank bills, or other circulating medium, belonging to the deceased, which shall have come into the hands of the executor or administrator; and if none shall have come to his hands, the fact shall be so stated in such inventory."

It may oftentimes occur, that before the appraisal, the executor or administrator may have paid out some of the moneys which came into his hands, for funeral expenses, surrogate's fees, or other necessary charges, but he should state in the inventory the amount which came originally into his possession, and charge in his account what he may have paid out.

Where by the will, a debt or demand of the testator against any executor named, or against any other person, is discharged or bequeathed, the discharge or bequest shall not be valid as against creditors of the deceased, but shall be construed only as a specific bequest of such debt or demand, and the amount

thereof shall be included in the inventory of the credits and effects of the deceased, and shall, if necessary, be applied in the payment of his debts; and if not necessary for that purpose, shall be paid in the same manner and proportion as other specific legacies. (2 R. S., 84.) This is a statutory application of the principle, that no gift is valid as against creditors.

Upon the completion of the inventory, duplicates shall be made and signed by the appraisers; one of which shall be retained by the executor or administrator, and the other shall be returned to the surrogate within three months from the date of the letters, or in such further time, not exceeding four months, as the surrogate shall for reasonable cause allow.

On the return of the inventory, the executor or administrator shall take and subscribe an oath prescribed by law, which shall be indorsed upon, or annexed to the inventory (see form, Appendix), and which may be administered by any officer competent to administer an oath.

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 him 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 may 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. Upon the return of the cita-

tion, 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. (§ 2720.)

The decree, made upon 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, upon a petition presented as prescribed in the last section. (§ 2721.)

CHAPTER XI.

RETURN OF INVENTORY; HOW COMPELLED; AND EFFECT OF NOT RETURNING IT.

If the inventory shall not be returned and filed in the office of the surrogate within three months from the issuing of the letters, or within such further time, not exceeding four months, as the surrogate shall, for reasonable cause, allow, on affidavit of a party interested as legatee, next of kin, or creditor, the surrogate will make an order that the executor or administrator return an inventory, according to law; or show cause why an attachment should not issue against him. (§ 2715.)

A person committed to jail, upon the return of a warrant of attachment, for not returning an inventory, may be discharged by the surrogate, or a justice of the supreme court, upon 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.)

The letters of the person in default may also be revoked under the general provisions giving power to the surrogate to revoke letters.

The costs of the proceedings may, in the discretion of the surrogate, be charged against the executor or administrator, personally. And thereupon the surrogate will grant letters of administration of the goods, chattels and effects of the deceased to the persons

entitled thereto (other than such executor or administrator), in the same manner, as original letters of administration or letters testamentary. Such letters shall supersede all former letters and shall deprive the former executor or administrator of all power, authority and control over the personal estate of the deceased; and shall entitle the person appointed by such letters to take, demand and receive the goods and effects of the deceased, wherever the same may be found. The bond given by the former executor or administrator may be prosecuted, under the direction of the surrogate, by the new executor or administrator, to the full extent of any injury sustained by the estate of the deceased, by the acts or omissions of such executor or administrator, and to the full value of all the property of the deceased received and not duly administered by such executor or administrator.

Any one or more of the executors or administrators, named in the letters, on the neglect of the others, may return an inventory, and those so neglecting shall not thereafter interfere with the administration, or have any power over the personal estate of the deceased; but the executor or administrator, so returning an inventory, shall have the whole administration until the delinquent shall return and verify an inventory according to law.

Whenever personal property, not mentioned in any inventory that shall have been made, afterward come into the possession or knowledge of an executor or administrator, he shall cause the same to be appraised, in the same manner as before directed, and shall file the new inventory within two months after discovery

of the property. (2 R. S., 86.) The making and return of this inventory may be enforced in the same manner as in case of the first one.

The necessity of taking an inventory becomes obvious from the following advantages accruing to the executor or administrator:

The inventory fixes the *prima facie* value of the estate and the items composing it, and parties contesting on final settlement of the accounts, have the burden of proof, in attempting to surcharge it, as to the value of items included therein, or items omitted. Where no inventory is made, however, the burden of proof is upon the executor or administrator to show, if demanded, that the whole estate is accounted for, or if the value of an item is disputed, he must show that he accounts for its full value; and all items must be accounted for at their apparent value, or he must show that they are worthless or bad. As for instance, a book account must be accounted for as it stands, unless the executor or administrator shows that he has been unable to collect it. But if the inventory shows that certain demands are either bad or doubtful, the party contesting must show that they are good, and bring it to the knowledge of the executor or administrator.

CHAPTER XII.

OF THE COLLECTION OF THE ESTATE; COMPROMISING DEBTS DUE THE ESTATE, AND ADVERTISING FOR CLAIMS.

Several co-executors or co-administrators are in law but one person, and the act of one in reference to the sale, delivery, release or gift of the decedent's goods, is deemed the act of all. (19 Johns., 188.) One, without the concurrence of his co-executors or administrators, may release a portion of mortgaged premises from the lien, or give a satisfaction-piece (2 Barb. Ch., 151), and either executor or administrator, as against his associates, may retain possession of the assets. (41 N. Y., 46.)

They should keep the estate funds separate from other funds; if they mingle them with their own, they are liable for losses (4 Paige, 102); and they may be required by the surrogate to deposit the funds of the estate with a savings bank or trust company, so as to be earning interest, while the estate is in process of settlement. (4 Brad., 21.)

The whole personal estate vests in the personal representatives. (4 Hill, 57.)

They may compromise a debt due to the estate, but may not compromise a debt due from one of themselves. (20 Alb. L. Jour., 357.)

A *cestui que trust*, or the person entitled to the income only of the estate, is not entitled to the possession or control of the estate as to which he is

interested. (38 N. Y., 410.) It follows then that the other executors should have exclusive control of the trust fund.

An executor cannot charge the estate of his testator, and one of several executors has no power to charge either the estate or his co-executor by making or indorsing a note in the name of the estate, even if it be given in renewal of one made or indorsed by the testator in his lifetime. (14 Hun, 86.)

Letters testamentary or of administration are local in their character, and the authority given by them is co-extensive only with the limits of the State where issued. (2 Kent Com., 430, note.) But an executor who has obtained probate and letters in another State, can (without action) dispose of his testator's personal property in this State without taking out ancillary letters here. For the title of an executor arises from the will, and not the probate, or letters, and consequently the executor is vested with all the personal estate of his testator wherever situated. (27 How., 474; 29 id., 240.)

It is the duty of an executor, as a prudent man, to keep the assets of the estate insured, and the premiums paid will be allowed on accounting. (2 Redf., 87.)

Having perfected the inventory and learned the extent and details of his trust, the executor or administrator will proceed to convert the property which may not be producing interest, into money, at the same time carefully watching the notes, etc., to protect the estate by collections, when necessary, for if he neglect to call in moneys loaned on personal security by the decedent, and a loss accrue, which might have

been avoided by an early collection, he will be chargeable for the loss. (Williams on Exrs., 15, 43.)

He is amply empowered in making collections, and may bring suit in any court of original jurisdiction in the State.

He may employ an agent if the peculiar circumstances of the estate require it. (48 N. Y., 663.) He may arbitrate disputed claims. (74 N. Y., 38.)

All transfers made by any person in fraud of the rights of creditors, may be treated as void by executors or administrators, and they may, and it is their duty to recover full value of any person who shall have received the property of the deceased. (S. L., 1858, 506.)

§ 3. Administrators shall have actions to demand and recover the debts due to their intestate, and the personal property and effects of their intestate; and shall answer and be accountable to others, to whom the intestate was holden or bound, in the same manner as executors.

§ 4. Executors and administrators shall have actions of trespass against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime. They may also maintain actions for trespass committed on the real estate of the deceased in his lifetime.

§ 5. Any person, or his personal representatives, shall have actions of trespass against the executor or administrator of any testator or intestate, who, in his lifetime, shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods or

chattels of any such person, or committed any trespass on the real estate of any such person.

§ 6. 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.

They are bound to collect or endeavor to collect within a reasonable time, or they become personally responsible. They are bound to use the same diligence which a prudent man would use in his own affairs.

They are liable only for gross or collusive negligence in making collections. (14 Johns., 446.)

They are bound to endeavor to make collections from solvent persons in other States, and if necessary to procure some proper person to be appointed administrator there, and when such a debt is lost by reason of their neglect, they are liable. (11 Wend., 361.)

They may retain a legacy or distributive share in whole or in part, in satisfaction of a debt due from a legatee or distributee, to the estate. The legatee or distributee is not entitled to his share, so long as he retains in his own hands a part of the funds out of which payment is to be made. (2 Barb. Ch., 533.)

But an executor or administrator cannot sue his co-executor or co-administrator, to recover a debt due to the estate; but on the final settlement, the execu-

tor or administrator, debtor to the estate, may be charged with his indebtedness. (2 Paige, 149.) Or his indebtedness may be settled in the surrogate's court, or a court of equity, on the application of his co-executor or co-administrator, and such disposition of the fund as justice and equity may require, may be directed by the court. (11 Paige, 206; 11 Barb., 546.)

The statute gives one year extension of the statute of limitations, in favor of the estate of a deceased person, against debtors, or seven years in all, upon simple contract debts; while the time is extended eighteen months substantially in favor of creditors and against the estate.

As to claims in favor of the executor or administrator against the decedent, if the statute had not run against them when the testator died, they will not be barred if they are presented for allowance at the first accounting. (45 Barb., 517.)

For the purpose of converting the personal estate into money, the executor or administrator may sell at public or private sale, and except in the city of New York, on a credit of not exceeding one year with approved security, and he is not responsible for any loss happening by such sale, when made in good faith and with ordinary prudence.

Where an administrator sold leasehold property on credit, without security, whereby purchase-money was lost, he was held liable to the next of kin. (3 Johns. Ch., 552.)

An executor or administrator cannot be allowed either openly or by means of another person, to

become the purchaser of any part of the assets, but he shall be considered a trustee for the person interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased. (*Williams' Exrs.*, 801; 1 Sand. Ch., 148; 9 Paige, 237; 1 Brad., 34; 4 Kent Com., 438.)

Articles not necessary for the support and subsistence of the family of the deceased, or not specifically bequeathed, shall be first sold; and articles so bequeathed shall not be sold until the residue of the personal estate has been applied to the payment of the debts. Where sales are made at auction, as is quite usual, a public notice should be given, and the time for the vendue should be fixed on such a day as will be most likely to secure a good attendance of bidders, and a good demand for the articles to be sold. Thus, for example, it may be prudent to delay the sale of live stock during winter, expending in the meantime, part of the hay and grain inventoried, for their subsistence; or the sale of the stock of a manufacturer may be in like manner delayed, so as to meet the market. The executor or administrator should use good judgment in the matter.

It has become quite common latterly to insert in wills a provision authorizing the executor to compromise debts due to the estate, and it is a very useful and proper provision; where, however, the will contains no such provision the executor, and in all cases the administrator, to make a compromise of a claim should obtain authority for that purpose from the surrogate. (S. L., 1847, chap. 80; 3 R. S. [5th ed.], 174.)

Before the statute, and now, at common law, an executor or administrator might compromise a claim, but might be held responsible for the consequences of a serious error in judgment. The act enables them to obtain the sanction of the judgment of the surrogate, in addition to their own, and this affords them additional protection, if their conduct is fair and honest. (21 N. Y., 179.)

To obtain this he must present to the surrogate a petition showing the facts which render it for the interest of his trust to make a compromise, as that the debtor has failed and will pay in settlement so much *per cent*; that nothing can be collected by course of law from the debtor, but that he will pay so much to be released, and that he fears he will not be able to make better terms or secure more on the claim, or such other facts as the case may present, and the surrogate may authorize him to compromise, or compound the claim on terms expressed in the order. The settlement so made will protect the executor or administrator, unless on the final settlement it is shown that he acted in the matter fraudulently or negligently.

At the expiration of six months from the granting of letters, unless the executor or administrator is acquainted with the claims against the estate, and is willing to risk the presentation of claims of which he may be ignorant, or unless he is so interested in the estate as residuary legatee or next of kin, that the debts must, in any event, be paid virtually by him personally, he should obtain the direction of the surrogate to advertise for claims. The surrogate directs what paper or papers the advertisement shall be

inserted in, and it shall be published for at least six months. (See form notice, Appendix No. 6.)

There are few cases besides those stated above, in which it will be prudent to omit this, as the compensation of an executor or administrator is too small to warrant any risk, and if he pays out all the estate, acting on his own supposed knowledge, he may be compelled, notwithstanding, to pay claims of which he was before ignorant. But if he shall distribute the whole estate among creditors who shall have presented claims under the notice, he will be protected against those who fail so to present them.

The notice to present claims, must be to present them to the executor or administrator personally, not to an attorney, for the power to accept or reject cannot be delegated. (47 Barb., 413.)

The claims may be presented by letter, or in any way which deals fairly with the executor or administrator, and the estate which he represents, and the claimant need not produce vouchers, or make an affidavit unless requested. (6 Hill, 389.) Where a claim has been virtually presented and acknowledged by the executor or administrator before notice to creditors to present claims, it is not necessary to present it again for allowance under the statute. And where the executor or administrator admits the validity of the claim, by paying interest on it from time to time, it is tantamount to a formal admission of its justice upon presentment under notice. (11 Paige, 265.)

In respect to creditors of the estate, the executor or administrator is a trustee, and not a creditor. And

like all trustees, where the names of the *cestui que trusts* are not given in the deed, he is bound to exercise the utmost care before he accepts a claim as entitled to payment, and the law will afford him all reasonable means for so doing. He cannot be coerced to pay debts short of a year from the time of granting letters. The remedies of the creditor, in the meantime, however, are not absolutely suspended; he may prosecute an action, but he must do so at his own cost and expense, and not at the cost and expense of the estate, unless he can show that the executor or administrator has been guilty of some *laches*, or illegal act in regard to the adjustment of the claim. (16 How., 407.)

The executor or administrator may require by law satisfactory vouchers in support of any claim presented under this notice, such as copies of papers on which it is founded, and also an affidavit (see form, Appendix) of the claimant that the claim is justly due; that no payments have been made thereon, and that there are no assets against the same (unless stated in the account) to the knowledge of the claimant.

If the executor or administrator doubt the justice of any claim so presented, he should expressly reject it, putting his rejection on the ground that the claim, or some part of it, is not legally due. (2 Barb. Ch., 414.)

The rejection must be unequivocal, and must be communicated to the creditor himself. Notice of rejection to the attorney employed to make out the claim is not sufficient. (50 N. Y., 538; 4 Daly, 165.)

And he may enter into an agreement with the claimant to refer the matter in controversy to one or more disinterested persons to be approved by the surrogate (see form of agreement, etc., in Appendix), and upon filing such agreement and approval of the surrogate in the office of the county clerk, the matter will proceed as an action in the supreme court, and the report of the referee may be appealed from as in similar proceedings begun in that court.

If the claim be disputed and rejected by him, and is not referred as above, the claimant will be barred from commencing a suit against the executor or administrator unless he commences the same within six months from such dispute or rejection, or within six months after the same or some part of it became due; and the executor or administrator may prove the facts of such refusal and neglect to commence a suit within six months in bar to an action begun afterwards. (1 Brad., 192; 1 Den., 159; 3 Hill, 36.)

To protect the executor or administrator from costs, he should accompany his rejection of the claim with an offer to refer it. The offer need not be in writing (9 How., 434); and where the parties cannot agree upon the referee, or referees, it seems that the offer should be to refer to one or more to be approved by the surrogate. (16 How., 313.)

Where the executor, when the claim was presented, rejected it, but afterwards entertained negotiations in reference to a settlement, it was held that his previous rejection was waived, and the statutory bar to an action could not be interposed. (47 Barb., 206.)

Only those claims are referable which accrued dur-

ing the decedent's lifetime or which would have accrued against him if he had lived. (17 Abb., 374.)

In case any suit shall be brought upon a claim which shall not have been presented to the executor or administrator within six months from the first publication of the advertisement, he will be protected in having made payment of legacies, or any debts or distribution among the next of kin, before such suit was commenced, on proving such advertisement.

But any creditor who may have neglected to present his claim under the notice may, notwithstanding, collect it of the next of kin or legatees who may have received assets from the estate.

No executor or administrator shall be chargeable upon any special promise to answer in 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 (expressing a consideration), and signed by such executor or administrator, or by some other person by him thereunto specially authorized. (2 R. S., 113.)

LIABILITY OF THE EXECUTOR AS TO OBLIGATIONS CONTRACTED BY HIM.

The question as to who is liable for obligations contracted by the executor or administrator, has been settled in *Ferrin* v. *Myrick* (41 N. Y., 315), which holds that the executor or administrator is liable personally, and not the estate, for contracts made for the funeral expenses of the deceased, and that all causes of actions arising upon contracts made by executors or administrators are against them personally, and

not against the estate, and the judgment must be *de bonis propriis*; that is, against his own goods, and not the goods of the estate. Such causes of action cannot be united with causes of actions arising upon the contracts of the deceased. (47 N. Y., 360.)

An executor cannot bind himself to pay the debts of his testator under the statute of frauds, unless his agreement therefor be in writing and signed by him. (2 R. S., 113.) His promise, unless in writing and signed by him is void. (17 Johns., 301.)

CHAPTER XIII.

OF THE PAYMENT OF DEBTS AND LEGACIES.

At the expiration of one year from the issuing of letters, the executor or administrator is presumed to know not only the assets in hand, but, having advertised for claims, also the liabilities of the estate, and he may proceed to pay debts and legacies, and distribute among the next of kin.

Legacies are directed by law to be paid in one year from the granting of letters, unless by the will, an earlier or different time is fixed; but debts are in all cases to be paid in preference to legacies.

§ 27. (2 R. S., 87.) Every executor and administrator shall proceed with diligence to pay the debts of the deceased, and shall pay the same according to the following order of classes:

1. Debts entitled to a preference under the laws of the United States.

2. Taxes assessed upon the estate of the deceased previous to his death.

Taxes assessed on real estate subsequently to the death of the deceased, are not to be paid by the executor or administrator. (26 Barb., 316; 4 Bradf., 216.)

An assessment confirmed at the time of the testator's decease, although a lien upon the real estate, is also a debt to be paid out of the personal estate. (3 Brad., 207.)

3. Judgments docketed, and decrees enrolled against

the deceased according to the priority thereof respectively.

4. All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts, or in other words, all other debts.

The personal representative cannot be compelled to pay a portion of a judgment against the decedent and another, surviving, until the judgment-creditor has exhausted his remedies against the survivor. (2 Redf. R., 92.)

Mortgages cannot be paid out of the personal estate, unless such payment is provided for in the will. (4 Brad., 114.) But where the real and personal estate are thrown into one fund, in which the same parties are interested equally, the executor may, for the benefit of the estate, apply personal property to pay a mortgage on the realty. (2 Brad., 47.)

In case of unpaid purchase-money of real estate agreed to be paid by the ancestor or testator, the heir or devisee has a right to have the same paid out of the personal estate of the decedent. (32 N. Y., 587.)

Where a creditor has additional security, he should be compelled to exhaust that security and only come in against the personal estate for the deficiency. (9 Paige, 446.) The creditors of an insolvent firm in case of the death of one of them, cannot collect their debts against the separate estate of the decedent until his individual liabilities shall have been paid in full. (3 Paige, 167; 6 id., 19.)

But reasonable funeral expenses are to be paid in preference to any debts, and are charged not as debts, but expenses of administration.

The question often arises, what are reasonable funeral expenses? In answer it may be said, as a digest of the decisions on the subject, that as between the executor or administrator and legatees or next of kin, expenses incurred in burying the deceased according to his station in life, as determined by the custom of the place of his residence, are reasonable charges and will be allowed. And a charge for a monument at the grave is also proper in this case. But where the estate is so involved as that the funeral expenses must necessarily reduce the payments to creditors, a charge only for a plain and inexpensive funeral will be allowed, and that without a monument or tombstone.

And the expense in this case must necessarily vary according to the locality, as it will be greater in a city than in the country.

The executor or administrator should exercise caution in the matter.

When the decedent dies away from home, the necessary expense of notifying his family and removing his body to his late home, are proper funeral expenses. (1 Brad., 248.)

Tombstones were allowed as part of the funeral expenses in Connecticut, even when the estate was insolvent. (Fairman's Appeal, 30 Conn. R., 205.) Moderate expense for mourning for the widow and family may be allowed as part of the funeral expenses. (1 Ashmead, 314.) But this hardly applies in this State.

Funeral expenses comprise the outlay or charge incurred for the interment, and the compensation of the person or undertaker who provides what is neces-

sary, and attends the funeral for hire or reward. All other services for the dead, which are not acts of necessity, are necessarily gratuitous. (5 Daly, 1.) An executor, if he has funds, is liable to a third person who defrays the funeral expenses. (1 Daly, 214; 5 id., 1.) But a distant relative, by marriage, cannot recover a charge for services in looking up the decedent, who died suddenly away from home, for writing funeral notices, nor for the use of his house in which to hold funeral services. (5 Daly, 1, *sup.*)

The law implies a promise, on the part of the executor, to pay one who incurs or pays the funeral expenses. (59 N. Y., 574.)

§ 28. (3 R. S., 84.) No preference shall be given in the payment of any debt over other debts of the same class, except those specified in the third class (which are to be paid according to priority); nor shall a debt due and payable be entitled to preference over debts not due; nor shall the commencement of a suit for the recovery of any debt, or the obtaining a judgment thereon against the executor or administrator, entitle such debt to any preference over others of the same class.

§ 29. Debts not due may be paid by an executor or administrator according to the class to which they may belong, after deducting a rebate of legal interest upon the sum paid for the time unexpired.

§ 30. Preference may be given by the surrogate to rents due or accruing upon leases held by the testator or intestate at the time of his death, over debts of the fourth class, whenever it shall be made to appear

to his satisfaction that such preference will benefit the estate of such testator or intestate. (1 Barb., 372.)

Rent is not, in the absence of proof of peculiar circumstances, a preferred demand. (6 Lans., 485.) Rent on a pew in church is not a preferred debt unless it be due on a lease for years, which is an asset in the hands of the executor or administrator. (11 Paige, 265.)

Judgments are to be paid in the order of their priority. (7 Paige, 439.) A judgment of a justice's or marine court becomes entitled to priority by being docketed.

A bond without consideration, or a note of the testator given in his lifetime, payable at or immediately after his death is a valid debt, has preference over legacies, but is postponed to debts for valuable considerations. (2 Edwd., 341.)

The claim of a son who had acted as agent for his aged mother, presented against her estate, upon a contract with her for board and on her promissory note in his favor, is presumptively invalid on account of the confidential relation, and cannot be claimed unless there is actual proof rebutting the presumption. (57 Barb., 453.)

The executor or administrator will not be protected in paying an outlawed debt, nor will his promise revive such a debt. A provision in the will, for the payment of *all just debts*, does not revive a debt barred by the statute of limitations. (3 Wend., 503.) The statute of limitations may be interposed by the executor or any person interested. (4 Brad., 260; 8 N. Y., 362.)

In regard to leases held by the decedent, it is the duty of the executor to collect the rents on such leases and pay them to the landlord, not to put them with the assets of the estate. The executor is personally liable to the landlord to the extent of the rents received by him, as for money had and received. (48 N. Y., 232.)

In all cases of payments, whether of debts, legacies or expenses, the executor or administrator should take a receipt for such payment, to retain and use on his final settlement. (See form, Appendix, No. 7.)

So it appears, that each of the foregoing classes must be paid in full before any debts of a succeeding class can be paid, and if the estate cannot pay any class in full, the debts of that class will be paid *pro rata*, except in the third class, in which the judgments or decrees are to be paid according to their priority.

§ 31. In any suit against an executor or administrator, the defendant may show under a notice for that purpose, given with his plea, that there are debts of a prior class unsatisfied, or that there are unpaid debts of the same class with that on which the suit is brought, and judgment shall be rendered only for such part of the assets in his hands as shall remain after satisfying the debts of the prior class, and as shall be a just proportion to the other debts of the same class with that on which the suit is brought. But the plaintiff may, as in other cases, take judgment for the whole or part of his debt (so much as he proves), to be levied of future assets.

No execution can issue against an executor or

administrator in his representative capacity until an order permitting it to be issued has been made by the surrogate who issued the letters (§ 1825), and not until after an accounting had. (§ 1826.)

Any creditor who may have neglected to present his claim to the executor or administrator may, nevertheless, collect of the next of kin or legatees to the extent of the assets received by them.

To entitle an executor or administrator to pay himself a claim due from the deceased, he must prove the same and have it allowed by the surrogate, and it is not entitled to any preference over others of the same class. It must be presented at the final (judicial) settlement, and the statute of limitations does not run in the time between the death of the decedent and the first settlement. (§ 2740.)

An executor or administrator who makes a claim against the estate, must support it by a sworn voucher, such as he may require from others, under section 35 of the statute, and it is error for the surrogate to allow it, whatever the force of the proof, unless so verified. (8 Paige, 152; 31 Barb., 519.) If he compounds a claim, or buys it in for less than is due, he cannot take the benefit of it to himself. (5 Johns. Ch., 388.) Nor will he be permitted to buy up claims against creditors of the estate, for the purpose of obtaining a set-off in equity. (2 Brad., 24.) He cannot retain moneys for a debt due to himself barred by the statute of limitations in the lifetime of the testator. (3 Wend., 503.) And on the hearing any person interested may set up the statute. (2 Brad., 116.)

The executor or administrator in making payment

of debts or legacies, when he cannot pay in full, should be careful not to pay even *pro rata*, so much as to leave not enough of the estate to pay his expenses and charges.

The executor may retain out of a legacy a debt due the testator from the legatee. (1 Tucker, 42.)

So much has been written upon the supposition that the estate is so involved as to render caution necessary, but where the estate is manifestly abundant, the executor or administrator may pay all debts and even legacies, and distribute the estate without the delay incident to advertising.

Specific legacies may be delivered as soon as it shall be clear that it will not be necessary to dispose of them to pay debts. If specific articles not necessarily consumed in the using, are bequeathed to a legatee for life, with a limitation over, and without any directions to the executor to hold them in trust for the remainderman, the executor is authorized to deliver the same to the person entitled to a life estate therein; taking from such person an inventory and receipt, specifying that such articles only belong to the first taker for life, and that afterwards they are to be delivered to the legatee who is entitled to them in remainder. (2 Barb. Ch., 212.)

As before remarked, no legacies 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 the same are directed by the will to be sooner paid. (2 R. S., 90.)

§ 44. (Id.) In case a legacy is directed to be sooner paid, the executor or administrator may require a

bond, with two sufficient sureties conditioned, that if any debts against the deceased shall duly appear, and which there shall be no other assets to pay, and there shall be no other assets to pay other legacies, or not sufficient, that then the legatee shall refund the legacy so paid, or such ratable proportion thereof with the other legatees as may be necessary for the payment of said 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 shall be revoked, or the will declared void, then that such legatee shall refund the whole of such legacy, with interest, to the executor or administrator entitled thereto.

§ 45. After the expiration of one year from the granting of any letters testamentary or of administration, the executors or administrators shall discharge the specific legacies bequeated by any will and pay the general legacies, if there be assets, and if there be not sufficient assets, then abatement of the general legacies shall be made in equal proportions.

Specific legacies are not subject to abatement, unless the testator clearly expresses his intention that they shall be so. (1 P. Williams, 540.)

The rule as to abatement of general legacies, applies only to such as are mere gratuities. Where the legacy is given for a debt, owing to the legatee, or for the relinquishment of any right, or interest, as of her dower by a widow, such legacy will be entitled to a preference of payment over the general legacies, which are mere bounties. (1 P. Williams, 127; 6

Paige, 298; 1 Russ' Ch., 543; 1 Edwards' Ch., 411.) A legacy of piety, as for headstones at a parent's grave, will not be subject to abatement. (6 Paige, 278.)

Such payments may be enforced by the surrogate in the same manner as the return of an inventory, as hereinbefore provided, and also by a suit on the bond of such executor or administrator, whenever directed by the surrogate.

The payment may be enforced also by action, but an action is a bar to proceedings in the surrogates' court. (12 Hun, 207.)

After one year from the issue of letters, a creditor or legatee or one of the next of kin may obtain from the surrogate's court by petition a citation that the executor or administrator show cause why he should not pay the petitioner's claims. (§ 2717.)

The statute of limitations may be interposed with success in this proceeding when six years have elapsed from the time the legacy or distributive share was payable by the will or by law. (2 Paige, 574; 1 Barb. Ch., 455; 42 Barb., 75.)

But where a sufficiency of assets is admitted, or if upon the accounting there appears to be sufficient, a decree will be made for payment.

Payment of a legacy or distributive share, or a part thereof, may be obtained in certain cases against any executor or administrator except the public administrator of the city of New York.

In the case of a legacy or distributive share, if upon the petition for payment and the return of the citation, although a year has not elapsed, a decree for

payment may be made if it appears 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 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, upon the filing of a bond, approved by the surrogate, conditioned as prescribed by law, with respect to a bond which an executor, or an administrator with the will annexed, may require from a legatee, upon 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.

LEGACIES TO MINORS.

§ 46. "In case any legatee is a minor, his legacy, if under the value of fifty dollars, may be paid to his father, to the use and for the benefit of such minor.

§ 47. "If the legacy be of the value of fifty dollars or more, the same may, under the direction of the surrogate, be paid to the general guardian of a minor, who shall be required to give security to the minor, to be approved by the surrogate, for the faithful application and accounting for such legacy."

The security required in this section is in addition to the security given on the appointment of the general guardian, obviously, for the reason that a legacy given after the appointment, made no part of the estate of the minor on which the amount of such former security was based.

§ 48. "If there be no such guardian, or the surrogate do not direct such payment, the legacy shall be invested in permanent securities, under the direction of the surrogate, in the name and for the benefit of such minor, upon annual interest; and the interest may be applied, under the direction of the surrogate, to the support and education of such minor.

§ 49. "It shall be the duty of the surrogate, where there is no guardian of such minor, to keep in his office the securities so taken, and to collect, receive and apply the interest; and, when necessary, to collect the principal and reinvest the same, and also to reinvest any interest that may not be necessarily expended as aforesaid.

§ 50. "On such minor coming of age, he shall be entitled to receive the securities so taken, and the interest or other moneys that may have been received; and the surrogate and his sureties shall be liable to account for the same.

§ 51. "In case of the death of such minor before coming of age, the said securities and moneys shall go to his executors or administrators, to be applied and distributed according to law; and the surrogate and his sureties shall, in like manner, be liable to account to such executor or administrator."

OF INVESTMENTS.

An executor or administrator should not suffer the money of the estate to be unproductive for an unreasonable time in his hands, but he should invest them in good securities. When real securities are not to be had, he should obtain the approval of the surrogate as to the investment. He should always exercise the care which a prudent man would use in his own affairs, as to title, when real estate is in question, or as to the security offered by a bank, if a deposit is made of the fund.

In making permanent investments, they can only loan on real estate, or the bonds of the State or the United States. (40 N. Y., 76.) And the rule is established in equity, that if the loan be made on personal security, and a loss accrue, he shall bear it. (4 Edwd. Ch., 422.)

There is no doubt that he should change investments made by the decedent in stocks or bonds other than those above specified, and that if railroad or other stocks should fall in value on his hands, he would be liable for the loss.

CHAPTER XIV.

OF THE ACCOUNTING OF EXECUTORS AND ADMINISTRATORS; THE SETTLEMENT AND DISTRIBUTION OF ESTATES, AND OF COMMISSIONS.

When eighteen months from the granting of letters shall have elapsed, any person interested in the estate of the deceased, as creditor, legatee or next of kin, and who shall not have been paid, may cause the executor or administrator to be cited by the surrogate to render an account of his proceedings, and show cause why he should not be ordered to pay the claim or share of such person.

The surrogate may, in his discretion, require an intermediate accounting at any time preliminary to the issuing of an execution, or when an application has been made for the payment of a legacy, debt or distributive share, or after eighteen months have expired. (§ 2723.)

An executor or administrator may file an intermediate account at any time with vouchers, if he wishes to do so to preserve his vouchers, or give voluntary information to persons interested. (§ 2722.)

The surrogate may compel a temporary administrator to account at any time. (§ 2725.)

It is probably the duty of the surrogate, where infants only are concerned, to call executors or administrators to an account, after a reasonable time has elapsed, beyond the eighteen months allowed by law, without the application of any one, if he has reason

to apprehend that the interests of the infants require his action. (11 Paige, 211.)

JUDICIAL SETTLEMENT.

A petition praying for the judicial settlement of an account, and that the executor or administrator may be cited to show cause why he should not render and settle his account, may be presented * * * 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 representatives of such a surety; but if the petition is presented within less than eighteen months after the letters were issued, may entertain, or decline to entertain, the petition in his discretion. (§ 2726; see form petition, Appendix, No. 8.)

On the return of the order or citation, the executor or administrator may deny the right of the petitioner to call him to an account, and may say he is not a creditor, a legatee, or one of the persons interested in the estate.

When the executor, on being cited to account, alleged that the petitioner had assigned his interest in the estate, it was held that the surrogate could not try the question whether the assignment was valid, and the executor was ordered to account. (3 Brad., 429.)

A mere appearance of interest in the applicant for an order to require an inventory and account, is sufficient to authorize such order. (1 Brad., 24.)

As a general rule, if the creditor swears positively to a debt due to him from the estate, he will be entitled to an order for an inventory and account. (1 Barb. Ch., 485.)

And if the surrogate, on hearing the proofs, is satisfied that the petitioner is not interested, he will dismiss the application with costs; but if he finds that the petitioner is interested, he will order the executor or administrator to render an account within such a time and in such a manner as he shall prescribe, and to attend from time to time, before the surrogate, for that purpose. (§ 2727.) He may be punished for disobedience to the order by attachment. The accounting is to be conducted in the same manner as the accounting in judicial (final) settlement.

The costs of the proceeding may, if the surrogate thinks proper, be charged upon the executor or administrator personally.

The executor or administrator, however, instead of contesting the right of the petitioner to have him cited, or ordered to account, or if after contest he is ordered to render an account, may apply for a judicial settlement. (§ 2728.)

He may make an application for a judicial settlement of his account at any time after the expiration of one year from the date of his appointment. The application for such a settlement is a petition stating the facts (see form, Appendix), and the surrogate issues a citation directed to the creditors, legatees, next of kin, and all persons interested in the estate of the deceased, to appear on a certain day and attend the settlement of his accounts. On making

such application, the accounting on the application of another party will be adjourned so that both proceedings may be consolidated.

If the petition is made by one of several executors or administrators, his co-executors or co-administrators must be cited. (See form, petition, Appendix, No. 9.)

The citation must be made returnable upon a day not more than four months after the date thereof, and must specify whose estate is in question. The names of all 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.)

Service of the citation within the State is to be made by delivering and leaving a copy of the citation with the person to be served, or with a person of suitable age and discretion at the place of his sojourn or residence, under such circumstances that the surrogate will have good reason to believe that the copy came to the knowledge of the person served in time for him to attend on the return day. If the service is made in the county of the surrogate or in an adjoining county, it must be made eight or more days before the return day. If in any other county, fifteen or more days.

The service may be made on parties not within the State, and on unknown persons, either personally, or by publication and service by mail. If served personally, it must be done at least thirty days before the return day. If by publication, service must be made also by mail on persons whose names and resi-

dences are known, on or before the day of the first publication. The publication is in two papers designated by the surrogate.

Service must be made on an infant under the age of fourteen years, and on a lunatic, idiot or drunkard, in charge of a committee, by delivery of a copy to the infant, lunatic, etc., and a like copy to the person having the care of the infant, and to the committee.

The proof of the service of the citation is made by the certificate of the sheriff, or an affidavit, or by the written admission of the person to be served, showing the time and place of the service, with proof by affidavit as to the genuineness of the signature. (§ 2532.) The appearance of a person to be cited is as effectual as actual service. (§ 2528.)

With the citation there should be served on infants, lunatics, etc., a notice of an application for the appointment of a special guardian for them.

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. He may, in like manner, appoint a special guardian when the general guardian or committee appears, if their interest is adverse to the interest of the party cited. The special guardian is appointed on written consent. (§ 2530.)

The executor or administrator then files his account, verified with the vouchers. (See form, Appendix, No. 10.) He must produce a voucher for all sums over twenty dollars, but the items less than twenty dollars

together shall not exceed five hundred dollars, or he must show by his own oath, or another's testimony, that he did not take a voucher when he made the payment; or that the voucher he took is lost or destroyed. Instead of a voucher, he may prove by testimony the actual payment. But the allowance cannot be made unless the surrogate is satisfied that the charge is correct and just. (§ 2734.)

Any person interested may contest the account, and the surrogate may require written objections.

The executor or administrator may be examined on oath, and may be compelled to attend for that purpose. (§ 2735.) The surrogate may refer the accounting to a referee, who has the same power and is entitled to the same compensation as a referee in the supreme court — six dollars *per diem.*

The account charges the executor in the first place with the inventory, but the inventory is not conclusive evidence against the executor of what the assets consist of, and their value, although it is *prima facie* evidence against him on the accounting before the surrogate. He is not precluded from showing that assets inventoried did not belong to the estate, or that the estate was of less value than stated in the inventory. (24 How., 24.) Where the executor or administrator mixes up the trust funds with his own, or neglects to keep regular accounts of investments, and of the interest received on such funds, he is chargeable with interest, as if the trust fund had been kept invested upon interest, payable periodically. (2 Barb. Ch., 211; 11 Paige, 142.)

Executors and administrators cannot charge for their

services by the day or in gross, but can only charge the legal commissions and their just expenses; the commissions being the pay for their services. Thus, he cannot charge for the hire of a horse when he drives his own, although he may charge for such hire when actually paid, or fare paid in a public conveyance. He cannot charge for board when he dines at home or with a friend, although he may charge for board actually paid when from home on the business of the estate.

As has been seen above, any person interested may contest the account. The contestant may allege that the executor or administrator has not accounted for all that has been received by him, specifying the articles not accounted for, or he may allege when the inventory is accounted for, that the inventory was not complete, and specify what was omitted. In these cases the contestant has the burden of proof, and the executor or administrator may introduce counter proofs. (2 Brad., 165.) Or the contestant may allege that certain payments charged in the account were not made, or that not so much was paid as charged, specifying in what instances. The executor or administrator must then produce the vouchers for such payments, which are conclusive evidence of payments unless successfully impeached by the contestant. (1 Brad., 265.)

The contestant may further allege that the property charged as lost, was lost through default of the executor or administrator; or that claims of the deceased, charged as bad and not collectible, were good. The law presumes that an executor or administrator does

his duty, and to charge him for a default, the contestant must prove the default to the satisfaction of the surrogate; and when the claims charged as bad and not collectible were inventoried as doubtful or bad, to charge the administrator, the contestant must show that he knew they were collectible and neglected the collection; but where the claim was inventoried as good, the executor or administrator charging it as bad must prove it to be so.

This proof may be that the debtor had been commonly reputed to be insolvent for a length of time; that he has actually taken the benefit of an insolvent act; or that executions have been returned unsatisfied against him.

Where the affidavit annexed to the account of the executor is full and clear as to payments, and the items of disbursements, under twenty dollars, do not exceed in the aggregate five hundred dollars, and the payment of sums over that amount are supported by vouchers, it is for the party who objects to the account to falsify and sustain it, in the form of distinct and specific allegations, with proof thereof. (1 Brad., 265; 2 id., 220.)

But where there is no inventory, the whole estate is considered good and collectible, and the executor or administrator charging any of the claims as bad, must prove the fact.

In adjusting the accounts of executors and administrators, the surrogate's court is governed by principles of equity as well as of law, and it is at all times competent for them, unimpeded by technical rules, to show the fairness of their dealings, the real nature

of their transactions and the amount for which they should be held liable. (3 Brad., 13.)

The proof being closed, the surrogate decrees the amount of the commissions upon the estate, which are computed upon the aggregate sum received and paid out by all the executors or administrators. (2 Barb. Ch., 430.)

The commissions and the distribution of them are regulated by statute (2 R. S., 93, as amended by chap. 362 of Laws of 1863) as follows:

"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 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 dollars per cent.

For receiving and for paying out any sums exceeding one thousand dollars, and not amounting to ten thousand dollars, at the rate of two dollars and fifty cents per cent.

For all sums above ten thousand dollars, at the rate of one dollar per cent.

And in all cases such allowance shall be made for their actual and necessary expenses, as shall appear just and reasonable."

Where the value of the personal estate of the decedent amounts to one hundred thousand dollars or more over all his debts, each executor or administrator is entitled to the full compensation allowed by law 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 divided equally between them. (§ 2736.)

There shall also be allowed, on each settlement, such sums for counsel fee thereon, and preparing therefor, as to said surrogate shall seem reasonable, not exceeding the sum of ten dollars for each day engaged therein.

The rule as to commissions may be expressed more shortly thus: Five per cent on all sums up to one thousand dollars; two and a-half per cent on sums above one thousand dollars, up to nine thousand, and one per cent on all above ten thousand dollars.

Commissions are not allowed on articles specifically bequeathed (1 Barb. Ch., 77); but when the executor or administrator transfers stocks, notes, or bonds and mortgages, or other property, to a legatee or one of the next of kin, in payment of a general legacy or distributive share, he may be allowed commissions on the amount of them as money. And an executor or administrator with the will annexed, acting as trustee under the will in receiving and paying out the income of an investment, will be entitled only to the per centage ascertained by adding such receipts to the estate as accounted for. (5 N. Y., 430.)

An attorney performing professional services is entitled also to his bill of costs, beyond commissions. (6 Paige, 213.)

An executor cannot receive for his services any more than the statute commissions, however meritorious or extraordinary his services may be. (41 N. Y., 143.) Commissions are not charged upon the

legacies, but are paid out of the general estate. (1 Brad., 198.)

The surrogate will apportion the commissions among the executors, according to the services rendered by each. If he fails to do so, and the estate is less than one hundred thousand dollars above debts, it seems that each is entitled to an equal share, irrespective of the relative services. (4 Abb. Ct. of App. Dec., 578.)

Where the will provides a specific compensation to an executor or administrator, he is not entitled to any allowance for his services unless he files a renunciation of the specific compensation (§ 2737), except it appear that the compensation provided in the will was to be in addition to commissions.

Where successive letters are issued on the same estate to a person, or where he has temporary letters, and afterwards letters testamentary, he can have commissions in only one capacity, but he may have commissions on the whole sum received in either capacity. (§ 2738.)

An executor, also, who does not join in the filing of an inventory cannot receive commissions (2 R. S., 86), notwithstanding his refusal was based on the allegation that the inventory was untruthful. (2 Redf., 247; Id., 255.)

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. 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 of this act. Where the validity of a debt, claim or distributive share, is not disputed, or has been established, 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 upon each party to the special proceeding, who was duly cited or appeared; and upon every person deriving title from such a party. (§ 2743.)

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.)

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 pend-

ing 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 satisfy 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 a 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.)

Where a sum is due to an infant, it may be paid to his general guardian or invested under the surrogate's order. (§ 2746.)

Where a sum is payable to a person unknown, it must be paid to the state treasurer. (§ 2747.)

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 it is payable. The county treasurer can pay it out only on the special direction of the surrogate. (§ 2748.)

If there be enough of the estate, the creditors will be paid in full, and if after paying them there remains a surplus, it will be distributed according to the will, or, if there be no will, among the next of kin.

Interest will be computed on legacies from the time when they became payable, either by the will or by law; but where a bequest is given to a widow in lieu

of dower, and she accepts the same, she will be entitled to interest thereon from the death of the testator. (3 Brad., 193.)

And where a legacy is given to a minor child, and no other provision is made for its support, interest will be allowed from the death of the testator. (2 Johns. Ch., 628.)

Where a sum of money is bequeathed to executors to be put out at interest, and to pay over the income, the person for whom the provision is made is entitled to interest on the same from the death of the testator, provided a sufficient amount remains, after deducting debts and other legacies.

The statute providing that no legacy shall be paid until after the expiration of one year from granting letters testamentary, unless the same is directed, by the will, to be sooner paid, does not stand in the way of this principle. (42 Barb., 533; 2 Barb. Ch., 105.)

The rulings as to the time when interest begins to run, are not uniform.

Interest begins to run on general legacies, from the period of one year from the issue of letters testamentary, unless a particular time is specified for payment. (*Matter of Fink's Estate*, 19 Abb., 209.)

Interest runs on a legacy from the period of one year from the death of the testator, when no time is fixed by the will for payment. *Williamson* v. *Williamson* (6 Paige, 293); *Campbell* v. *Cowdrey* (31 How., 172). *Bradner* v. *Faulkner* (12 N. Y., 472), seems to hold that interest runs on legacies from the time they are legally payable, but the point was not

before the court, and the holding was *obiter dictum.* (See *Campbell* v. *Cowdrey*, *supra.*)

DISTRIBUTON.

The statute of distributions, in case of intestacy, is as follows:

§ 75. (2 R. S., 96.) "Where the deceased shall have died intestate, the surplus of his personal estate remaining after payment of debts; and where the deceased left a will, the surplus remaining after the payment of debts and legacies if not bequeathed, shall be distributed to the widow, children or next of kin of the deceased in the manner following:

1. "One-third part thereof to the widow, and all the residue by equal portions among the children and such persons as legally represent such children, if any of them shall have died before the deceased.

2. "If there be no children nor any legal representatives of them, then one moiety (that is, one-half) of the whole surplus shall be allotted to the widow, and the other moiety shall be distributed to the next of kin of the deceased entitled under the provisions of this section.

3. "If the deceased leave 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 a moiety of the surplus as above provided, and to the whole of the residue where it does not exceed two thousand dollars; if the residue exceed that sum, she shall receive in addition to her moiety two thousand

dollars, and the remainder shall be distributed to the brothers and sisters and their representatives.

4. "If there be no widow, then the whole surplus shall be distributed equally to and among the children and such as legally represent them.

5. "In case there be no widow and 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 the legal representatives.

6. "If the deceased shall leave no children, and no representatives of them, and no father, and shall leave a widow and a mother, the moiety 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 a moiety, 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 representatives of a brother or sister, the mother, if there be a widow, shall take a moiety, and the whole if there be no widow. And if the deceased shall have been illegitimate, and have left 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 in pursuance of the provisions of this chapter. And 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.

9. "Where the descendants of next of kin of the deceased, entitled to share in his estate, shall be all in equal degree to the deceased, their shares shall be equal.

10. "When such descendants, or next of kin shall be 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 shares to which the parent whom they represent, if living, would have been entitled.

11. "No representation shall be admitted among collaterals after brothers' and sisters' children.

12. "Relatives of the half blood shall take equally with those of the whole blood in the same degree, and representatives of such relatives shall take in the same manner as the representatives of the whole blood.

13. "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 lifetime of the deceased, and had survived him."

ADVANCEMENTS.

§ 76. "If any child of such deceased person shall have been advanced by the deceased, by settlement or portion of real or personal estate, the value thereof shall be reckoned with that part of the surplus of the personal estate which shall remain to be distributed

among the children; and if such advancement be equal or superior to the amount which, according to the preceding rules, would be distributed to such child as his share of such surplus and advancement, then such child and his descendants shall be excluded from any share in the distribution of such surplus.

§ 77. "But if such advancement be not equal to such amount, such child, or his descendants, shall be entitled to receive so much only as shall be sufficient to make all the shares of all the children, in said surplus and advancement, to be equal as near as can be estimated."

Under a Massachusetts statute, similar to ours, it has been held in two cases (*Quarles* v. *Quarles*, 4 Mass., 680, and *Kenny* v. *Tucker*, 8 Mass., 143), that a release to the father of claim on distributive share in expectancy, given in consideration of an advancement, operates as a release, and is a bar to claim on final settlement; even when the amount received for such release is less than the distributive share would be.

§ 78. 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 the last two sections; nor shall those sections apply in any case where there shall be any real estate of the intestate to descend to the heirs.

§ 79. The preceding provisions respecting the distribution of estates, shall apply to the personal estates of married women leaving descendants them surviving; and the husband of any such deceased married woman shall be entitled to the same distributive share

in the personal estate of his wife, to which a widow is entitled in the personal estate of her husband by the provisions of this chapter, and no more. (As amended by chap. 782, § 11, of Laws of 1867.)

The above provision in relation to the distribution of the estate of a married woman applies only when she leaves descendants as well as a husband. If there are no descendants, the husband takes the whole personal estate.

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.)

TESTAMENTARY TRUSTEES.

Testamentary trustees may account voluntarily, or be compelled to account in the surrogate's court in the same manner as executors, and the proceedings are the same, so that it will only be necessary to refer to the sections of the Code relating to such accountings. (§ 2803, etc.)

So, also, a testamentary trustee may resign his trust by order of the surrogate, for any good cause (§ 2814), and may be compelled to give security in the same manner as an executor might be, and for the same reasons. (§ 2875.) He may also be removed as an executor might be removed, and for the same reasons. (§ 2817.)

OPENING DECREE.

A decree once entered may be opened and set aside, where the surrogate had no power to make it (9 Paige, 128), or to correct an error. (24 N. Y., 46; 15 Abb., 12.) But the surrogate will not, under ordinary circumstances, open a decree after six years. (2 Redf. Rep., 151; § 2481.)

DECREE, HOW ENFORCED.

A decree made for the payment of money may be enforced:

1. By execution, as on a judgment;
2. By attachment, as for a contempt;
3. By suit on the bond; and
4. By an action on the decree.

First. As to docketing the decree and execution: 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.)

And thereupon the surrogate, or the clerk of his court, issues an execution returnable to the court, which the sheriff executes as if it were issued out of the supreme court. (§ 2554.)

If the execution shall be partially or wholly unsatisfied, an action may be brought by leave of the surrogate upon the bond given by the executor or administrator. The sureties will be held for the sum decreed to be paid, even if it is made up of a debt owing by the executor or administrator to the decedent, and even if their principal is insolvent.

If these fail, an attachment will issue. The proceedings are regulated by law.

§ 2555. 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 willfully neglects to obey it, by punishing him for a contempt of court:

1. Where it cannot be enforced by execution as prescribed.

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. The surrogate may enforce the decree in this manner, either without issuing an execution or after the return of an execution, as he thinks proper.

PUNISHED CRIMINALLY.

But a delinquent executor or administrator may be punished as for a felony under chapter 208, Laws of 1877.

If he shall convert to his own use, or take, make way with, or secrete with intent to convert to his own use, or shall fraudulently withhold any property of his trust, he shall be adjudged guilty of embezzlement, and, on conviction, shall be fined not less than the sum embezzled, with interest and twenty per cent in addition, and he shall be imprisoned in the State

prison until the fine be paid, not exceeding, however, five years. The fine, when collected, shall be paid to the county treasurer and shall be paid to the persons entitled to the fund. But if the party convicted shall pay the amount embezzled and interest, the fine may be remitted but not the additional per centage.

SATISFACTION OF DECREE.

A decree entered in the surrogate's court may be discharged by filing with the surrogate a certificate of the person entitled to the payment, duly acknowledged, that the same has been paid. (See form, Appendix.)

If the decree has been transcripted and docketed in the clerk's office, on filing with him a certificate of the surrogate of the discharge, the clerk shall enter the discharge in his docket.

CHAPTER XV.

OF THE MORTGAGE, LEASE OR SALE OF THE REAL ESTATE OF A DECEASED PERSON FOR THE PAYMENT OF HIS DEBTS.

The real estate of the testator or intestate is also, if necessary, to be applied to the payment of his debts, and the executor or administrator, on discovering that the personal estate is insufficient to pay debts and funeral expenses, becomes a trustee for the creditors as to the real estate.

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, as prescribed by statute; 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 a burying ground properly set apart, or a homestead. But the exemption of the homestead expires at the majority of the youngest surviving child, and on the death of the widow, or when the homestead ceases permanently to be occupied by the family. The expression "funeral expenses," as used in this connection, includes a reasonable charge for a suitable headstone. (§ 2749.)

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 creditor of the decedent, other than a creditor by a judgment or a mortgage, which is a lien upon the decedent's real property, 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; and that the 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.)

A creditor may have an extension of the time within which to petition for the sale beyond the three years, by commencing an action on his claim, and filing in the clerk's office of the county where the real property is situated a notice of the pendency of the action. The notice must specify the names of the parties, the object of the notice, and 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. (§ 2751.)

A sale made upon a petition presented more than three years from the issuing of letters was held void. (4 T. & C., 267; 62 N. Y., 494.)

During the period of three years, purchasers from heirs or devisees take at their peril (1 Barb., 75); and a sale in partition between heirs is no bar to a

sale for the payment of debts in these proceedings. (10 How., 188.) But if an heir or devisee shall have sold some lands, and some remain to him, a sale will be directed first of those which remain. (6 Paige, 521.)

The petition must set forth the following matters, as nearly as the petitioner can, upon diligent inquiry, ascertain them:

1. The unpaid debts of the decedent, and the name of each creditor, or person claiming to be a creditor; and the amount of the unpaid funeral expenses of the deceased, if any, and the name of each person to whom any sum is due by reason 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. Where the petition describes an interest in real property, specified in section 2749 of this act (*contract*), 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 of 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, 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 co-executors or co-administrators, if any; the application thereof, and the amount which may yet be realized therefrom. (§ 2752.)

If the petitioner cannot ascertain some of these matters upon diligent inquiry, he will so state in his petition. If the petition is presented by a creditor, the surrogate may require the executor or administrator to account if he deems it necessary. (§ 2753.)

The fact that the debts are not yet due, is no obstacle to the application if the personal estate shall be found to be insufficient. (6 Johns. Ch., 360.) But the debts must be debts of the decedent, not costs since his death (12 Barb., 392); nor a claim for the support of his infant children (2 Edw., 259); nor expenses of administration (1 Tuck., 250); and it must not be barred by the statute of limitations. (9 Paige, 66; see petition by executor and creditor, Appendix, Nos. 12 and 13.)

The surrogate thereupon issues a citation directed to the known parties, and if there has been no notice to creditors published, to all other unknown creditors. The citation is served as in other cases, but if directed to unknown parties it must be served by publication. (§ 2754.)

Upon the return of it, special guardians will be appointed as in other cases. The surrogate may think it necessary that there should be an accounting, and may order it.

Any person interested may attend and claimants will prove their claims. If a judgment has been

rendered upon any claims against the executor or administrator, it is presumptive evidence of the debt only after a trial upon the merits (§ 2756); and an heir or devisee may succeed in reducing it by a counter-claim. (§ 2756.)

There seems to be no class of claims, legal or equitable, which may not be presented, proved and adjusted in this proceeding. The surrogate may appoint a referee to report evidence upon the facts, or a specific question of fact. (§ 2546.) He may order any questions tried by a jury at a circuit or county court. (§ 2547.)

After hearing, the decree determines and specifies the amount of each debt established and the charge for funeral expenses, and the demands presented which have been rejected. The vouchers presented remain in the surrogate's office. (§ 2758.)

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 debts, for the payment of which the decree is made, are the debts of the decedent, or are just and reasonable charges for his funeral expenses; and are justly due.

3. That they are not secured by a judgment or mortgage, or expressly charged by the will upon the decedent's real property, or interest in real property; or, if a debt is so secured or charged upon a portion of the real property, or interest in real property, that

the remedies of the creditor, by virtue of that charge or security, have been exhausted.

4. That the property directed to be disposed of was not effectually devised, expressly charged with the payment of debts or funeral expenses, and is not subject to a valid power of sale for the payment thereof; or, if so devised or subject, that it is not practicable to enforce the charge, or to execute the power, and that the creditor has effectually relinquished the same.

5. That all the personal property of the decedent, which could have been applied to payment of the decedent's debts and funeral expenses, 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 payment of the same, as established by the decree. (§ 2759.)

If the surrogate determines that the money can be raised best by mortgage or lease, he so decrees, but a lease shall not be made for a longer time than until the youngest person interested in the property leased attains full age. A mortgage or lease is of the same effect as if it had been made by the decedent immediately before his death. (§ 2760.)

But if the surrogate determines that a sale is necessary, he will decree it. He may direct what shall be sold. (§ 2761.)

If a sale is ordered, the entire estate of the decedent passes. (30 Barb., 494.) The surrogate has no jurisdiction to pass upon the title where the lands

were *prima facie* vested in the decedent. (3 Bradf., 265.)

If the title to some of the real estate is in controversy, and cannot be sold without prejudice, the execution of the decree, in respect to such property, may be postponed, but may be afterwards proceeded with by order. (§ 2762.)

Where the decree directs the sale of two or more distinct parcels of real property, of which the decedent died seized; or his interest under two or more contracts for the purchase of distinct parcels of real property; the decree may direct the sale to be made, in the order which the surrogate deems just, unless it appears that one or more distinct parcels, of which the decedent died seized, have been devised by him, or sold by his heirs; in which case, the several distinct parcels must be sold in the following order:

1. Property which descended to the decedent's heirs, and has not been sold by them.

2. Property so descended, which has been sold by them.

3. Property which has been devised, and has not been sold by the devisee.

4. Property so devised, which has been sold by the devisee. (§ 2763.)

The decree directs that it be executed by the executor or administrator upon his giving the bond prescribed by law, or in case of his failure so to do, by a freeholder, to be appointed by the surrogate. (§ 2765.)

Where there are two or more executors or administrators, if either of them fails within a reasonable time to give or join in the bond, the surrogate may

direct those who have given the bond to execute the decree. If the one acting or all fail to give the bond, the surrogate appoints a disinterested freeholder to execute the decree. A person so appointed must give a bond. In making such appointment, the surrogate must give a preference to a competent person nominated by the creditors. (§ 2767.)

The surrogate then makes an order directing the execution of the decree. (§ 2768.)

Notwithstanding an appeal, the appellate court may direct the surrogate's court to cause the decree to be executed, and the proceeds may await the determination of the appeal. (§ 2769.)

The death, removal, or disqualification, before the complete execution of a decree, of all the executors or administrators, who have been directed to execute it, or of a freeholder appointed for the purpose, 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 predecessor might have completed the same; and he must give such security for the due performance of his duties as the surrogate prescribes. (§ 2770.)

The surrogate may allow the sale to be made upon a credit of not exceeding three years for not more than three-fourths of the purchase-money, to be secured by bond and mortgage.

The sale may be made in separate parcels, although the order for sale describes the property as a single parcel. (3 N. Y., 301.)

The surrogate's court has no power to compel a

purchaser to take his deed, and therefore there should be a reasonable per centage of the purchase-money paid on the sale, sufficient, at least, to pay the expenses of a new sale in case the purchaser should fail to fulfill the terms, and a new sale should be necessary.

The sale shall be made between nine o'clock in the morning and sunset, after six weeks' notice. A person taking down or willfully defacing the notice forfeits fifty dollars. But an omission to give the notice, or the taking down or defacing of a notice when put up, does not affect the validity of the sale to a purchaser in good faith and without notice of the omission or offense. (§ 1384, etc.)

Where real property to be sold consists of one or more distinct parcels, the person making the sale must cause each distinct parcel to be separately exposed for sale, unless otherwise directed in the decree, or in the order to execute the same, or in an order subsequently made by the surrogate. (§ 2773.)

An executor or administrator upon the estate, or freeholder appointed to execute a decree, or a general or special guardian of an infant who has an interest in any 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. (5 N. Y., 256; 41 id., 132; 44 id., 237; 26 id., 53.)

If, however, the estate is sold in good faith to a stranger, without collusion between him and the

executor, there is nothing to prevent the executor from buying afterwards. (12 Penn. St., 67.) But if an administrator purchases at his own sale, and afterwards conveys to a third person, the title is defective. (3 Sandf., 592.)

The person making the sale must report with all convenient speed to the surrogate, and the surrogate, upon notice to all the parties who have appeared, will inquire into the proceedings. If the sale was fairly made and legally conducted, and proportionate to the value, he will confirm the sale. But if he is of opinion that a sum exceeding that bid at least ten per centum, exclusive of the expenses of a re-sale, may be obtained on a re-sale, or that the sale was unfair, he will order a re-sale. (§ 2775.)

If it shall appear that the amount of the sale will be sufficient to satisfy in full the costs and expenses of the sale, and pay all the debts proved and the right of dower, and a creditor or creditors have become the purchasers, the order of confirmation will allow the purchaser or purchasers to pay into court only the surplus beyond their claims. (Chap. 231, Laws 1880.)

The deed or deeds will be executed in accordance with the order of the surrogate, and the money will be paid into the county treasury. The purchaser will hold the crops growing on the land when sold, although sown by the heirs or his tenant. (16 Barb., 193.)

The deed so given takes precedence over a prior unrecorded deed given by the sheriff on sale of the interest of the deceased in lands afterwards sold for the payment of decedent's debts. (15 Hun, 11.)

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.)

Except as prescribed above, a conveyance in these proceedings vests in the grantee all the estate, right and interest of the decedent in the real property so conveyed at the time of his death, free from any claim of his widow for dower, which has not been assigned to her; but subject to all subsisting charges thereon by judgment, mortgage or otherwise, which existed at the time of his death. Where dower has been assigned to the widow, the grantee takes the part of the property to which her estate in dower attaches, subject thereto. (§ 2778.)

If the property sold consists of a contract held by decedent for purchase of real estate, and any payment is yet due, the sale will be subject to any such payments, and the purchaser must give a bond to indemnify the estate against the liability for such payments. (§§ 2779–80.)

If the surrogate deems it proper, he may direct a sale of a part only of the contract interest of the decedent. (§ 2781.)

The effect of the sale of the contract is an assignment of the contract to the purchaser in whole or in part.

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 by any of the following omissions, errors, defects or irregularities, 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 in an action:

1. Where a petition was presented, and the proper persons were duly cited, and a decree directing a mortgage or lease, or a decree for a sale, and an order directing the execution thereof were made, as prescribed in this title; and the decree and the order, if any, were duly recorded, as prescribed in article first of title first of this chapter, 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.

2. Where an order confirming a sale and directing a conveyance has been made, upon proof, satisfactory to the surrogate, that all the acts have been done which are required by law to be done, after the order directing the execution of the decree, to authorize the surrogate to make such an order of confirmation, by the actual omission to do such an act, or by any error, defect or irregularity in the same, or by any omission in the recitals of the conveyance. (§ 2784)

The proceeds arising from a mortgage, lease or sale, made as prescribed in this title, must be paid into the surrogate's court by the executor, administrator or freeholder receiving the same. For that purpose he

must pay them to the county treasurer, to the credit of the special proceeding, to be retained by him as prescribed in section 2537 of this act. Upon payment being so made, the heirs and devisees of the decedent, and their assigns, and all the decedent's remaining real property, and interest in real property held under a contract for the purchase thereof, are exonerated from the debts established by the decree, or established as prescribed in the next section but one, as far as the proceeds so paid over are sufficient, after deducting the costs and expenses allowed by the surrogate, to satisfy those debts. (§ 2786.)

Immediately after the payment into court of the proceeds of a mortgage, lease, or sale, as prescribed in the last section, the surrogate must cause notice of the time and place of making the distribution, to be published, at least once in each of the six weeks immediately preceding the same, in a newspaper published in the county of the surrogate. (§ 2787.)

At the time and place designated in the notice, or at the time and place to which the hearing is adjourned, the surrogate must hear the allegations and proofs of the creditors, and of the persons interested in the estate, or in the application of the proceeds, respecting any demands against the decedent, or for his funeral expenses, then presented, which had not been established or rejected, before making the decree. These may be contested and tried as provided for in the first hearing. A debt established on the former hearing may be controverted upon the discovery of new evidence impeaching, and on proper notice to the claimant. (§ 2788.)

If part only of the premises of the decedent were sold, and the proceeds are insufficient to meet the requirements, a further sale will be ordered. (§ 2789.)

Distribution of the proceeds is made by the surrogate as follows, to pay:

1. The charges and expenses of the proceeding.

2. If the interest sold was a contract, all sums not assumed by the purchaser.

3. The claims for dower, by setting apart a third of the gross proceeds for investment, or if she shall file a consent, a sum in gross to the widow to be ascertained by the tables. (See table and rule, Appendix.)

4. The costs awarded to the petitioner.

5. The sum found due to the executor or administrator on a judicial settlement of his account. But no more shall be paid to him as assignee of claims than is paid to other claimants *pro rata.*

6. Funeral expenses in full.

7. Debts established on the first hearing and not rejected on the second hearing, either in full if there be enough balance, or *pro rata* if proceeds are insufficient to pay in full.

8. Debts established on the last hearing in full, or *pro rata* as above.

9. If there be any surplus to the heirs or devisees, or the persons claiming under them, or according to the will of decedent.

The executor or administrator is allowed no commission, but is to be allowed the expenses of sale, and a reasonable sum, not exceeding five dollars, for each day actually and necessarily occupied, and such

further sum as the surrogate thinks reasonable for services of attorney and counsel.

In making the distribution of the surplus, the surrogate may admit claims by lien against the heirs as a valid charge against their interest. (2 Brad., 394; 6 Paige, 521.)

All securities are to be in the name of the county treasurer and approved by the surrogate. He shall apply the moneys under the direction of the surrogate. (§ 2800.)

CHAPTER XVI.

GUARDIANS AND WARDS.

Guardians are persons having, by reason of their relation or by appointment, the care and custody of infants during their minority.

Their relation to their wards is one of trust and confidence; so much so that they cannot, in any beneficial transaction, substitute themselves for their wards.

Guardianship by relation arises under the provisions of the statute.

Where an estate in lands shall become vested in an infant, the guardianship of such infant, with the rights, powers and duties of a guardian in socage shall belong: 1. To the father of the infant; 2. If there be no father to the mother; 3. If there be no father or mother, to the nearest relative of full age, male in preference. (1 R. S., 718, § 5.)

The rights and authority of such a guardian shall be superseded by a testamentary or other appointment, but will continue if there is none. (5 Johns., 65.) He may lease his ward's lands for any period within his minority, subject to the lease being defeated by an appointment of a guardian. (46 N. Y., 594.)

Guardians may be appointed by the father, by the supreme court or by the surrogate.

§ 1. (2 R. S., 150.) "Every father (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 his deed or last will duly executed, or in case such father be dead and shall not have exercised his said right of appointment, then the mother, whether of full age or a minor, of every such child, may, by her 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 in possession or remainder."

§ 2. "Every such disposition, from the time it shall take effect, shall vest in the person or persons to whom it shall be made, all the rights and powers and subject him or them to all the duties and obligations of a guardian of such minor, and shall be valid and effectual against every other person claiming the custody or tuition of such minor, as guardian in socage or otherwise."

The appointment of the father by will or deed is not defeated by a subsequent appointment by the surrogate. (1 Barb., 430.)

§ 3. "Any person to whom the custody of any minor is so disposed of, may take the custody and 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."

The guardians so appointed are liable to be removed

for incompetency, irresponsibility, improvidence or other good cause by the supreme court, which can also compel them to account from time to time, and when advisable, order them to give security. It is optional, however, with the persons appointed by will, or the deed of the father, whether they will accept the trust; but once having accepted it, they must continue until discharged by the supreme court, or the lapse of time. Acceptance may be inferred from the acts of the guardian, as transacting some business relating to the person or estate of the ward, or assuming some control or direction of the ward or his estate.

The supreme court will, upon petition, appoint a guardian for a minor, and control him in the exercise of his duties; will compel him to make suitable provision for his ward, to account when necessary, and remove him for cause, as in case of a testamentary guardian; will audit his final account, and discharge him from his trust.

The guardian appointed by the supreme court continues until the majority of the infant, and is not controlled by the election of the infant when he arrives at the age of fourteen years. (1 Johns. Ch. 25.)

We will consider the proceedings in relation to the appointment by the surrogate.

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.)

AS TO PETITION BY INFANTS OVER FOURTEEN YEARS OF AGE.

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 section 2851 of this act.

2. 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 the petitioner's husband, by the law of the petitioner's residence. (§ 2822.)

The residence of the minor is determined by the residence of the parents; if but one survive, then of that one. (2 Brad., 214; 1 Tuck., 38.) But this must be actual not legal. (12 How., 532.) A guardian can change the residence of the minor after appointment, but a relative, not a guardian, cannot, by mere removal of the minor.

The petition of the infant must state whether or not the father and mother of the petitioner, or either of them, are known to be living, and the circumstances which render the appointment of some other person expedient, if it does not pray for the appointment of the father or mother. It must pray for the citation to the father or mother if living. The citation to the father must be served at least ten days before it is returnable. The former guardian, if any, must also be cited if he be living. The surrogate may also cite any relatives of the minor in the county. (§ 2823.) If the petitioner is a married woman, her husband must also be cited, and the surrogate may omit citing her father or mother. (§ 2824; See form petition of infant, Appendix, No. 14.)

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.)

The guardian is nominated by the infant subject to the approval of the surrogate. (§ 2826.)

In case of an infant under fourteen years of age the application is made by some relative or other person in his behalf. The petition may be made in behalf of a resident of the county, or a non-resident, having real or personal property in the county, and showing the facts, may pray for a decree appointing a guardian. (§ 2827.) The guardian is called a temporary guardian because he is liable to be superseded when the infant arrives at the age of fourteen years. (See petition, etc., in Appendix, No. 15.)

The guardian in any case before letters are issued to him takes an official oath, which may be administered by any officer competent to administer an oath, and files a bond with at least two sureties approved by the surrogate. (§ 2830.) This is the proceeding also where the guardianship is of the person only. (§ 2831.)

His sureties are liable for money in hand at the time of his appointment, as well as that subsequently received. (16 Am. Dec., 635.)

The powers and duties of guardians appointed by will or deed, and by the court are the same.

The guardian is entitled to the custody and control of the person of his ward, to the same extent as a father, under the supervision of the court, and his duty is to attend to the proper care, nurture and education of his ward, in a manner suitable to his condition in life. He shall not permit him to remain in idleness, if able to earn his support by his own industry; if he do so permit him, he will not be allowed for his support in such idleness, but he will be allowed the expenditures necessary to educate him for future usefulness, and his support while so educating him. (8 Paige, 152.)

Though a father is liable for necessaries furnished to his child, without his consent, because he is bound to support him and is entitled to his services, yet a guardian is not so liable. (4 Watts & Serg., 118.)

In case the guardian abuse the power he has over the person of the ward, the court will interfere and remove him if necessary.

In relation to the personal estate, the power of the guardian, and consequently his duty, extends only to

the collection and investment of it in good, permanent securities, and the receipt and expenditure of the income for the necessary care, nurture, education and clothing of his ward; and for the purpose of such collection, he may sell such personal property as he may think perishable, and for the interest of the minor. (7 Johns. Ch., 150.)

His power and duty in regard to the real estate is to lease it and receive the rents and profits thereof, and after paying the taxes and for the necessary repairs, to expend the surplus for his ward as above, when necessary, or invest it and suffer it to accumulate for his benefit. (1 Johns. Ch., 561.)

It is his duty to lease it, if possible, and if he willfully neglect to do so, or occupy it himself, he will be accountable for the fair value of the rents and profits. He can lease only for a period ending with the minority of his ward. (7 Johns. Ch., 154.)

He has no power to mortgage or sell the real estate, but may make, as guardian, an application to the supreme court (the infant if over fourteen years of age joining therein) that a special guardian be appointed to sell the real estate at any time it may become necessary for the support, etc., of his ward, or advisable for the reason that the same is unproductive in proportion to its value, or that it is depreciating in value; and the court, if satisfied of the propriety or necessity of the sale, will allow it, and direct the least price at which it may be sold.

And whenever it shall appear to the supreme court by due proof, or on the report of a referee appointed for the purpose, that any infant holds real estate in

joint tenancy or in common, or in any other manner which would authorize his being made a party to a suit in partition, and that the interest of such infant requires that partition of such estate should be made, such court may direct and authorize the general guardian of such infant to agree to a division thereof, or to a sale thereof, or of such a part of the said estate, as in the opinion of the court shall be incapable of division, or as shall be most for the interest of the infant to be sold.

It is a sufficient ground for this last proceeding that the real estate is held jointly or in common with adults, and that the value of the estate is small in comparison with the expense of a partition suit, to which it must otherwise be subjected.

§ 20. (2 R. S., 152.) "Every guardian in socage, and every general guardian, whether testamentary or appointed, shall safely keep the things that he may have in his custody belonging to his ward and the inheritance (the real estate) of his ward, and shall not make or suffer any waste, sale or destruction of such things, or such inheritance, but shall keep up and sustain 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 hands, and shall deliver the same to his ward when he comes to his full age, in as good order and condition, at least, as such guardian received the same, inevitable decay and injury only excepted; and he shall answer to his ward for the issues and profits of real estate received by him, by a lawful account."

§ 21. "If any guardian shall make or suffer any waste, sale or destruction of the inheritance of his ward, he shall lose the custody of the same, and of such ward, and shall forfeit to the ward thrice the sum at which the damages shall be taxed by the jury."

But the guardian shall not be held to repair from his own moneys, where the income of the estate of his ward is insufficient, although such insufficiency is a good ground for an application to the supreme court for a sale.

The relation of the guardian to his ward is one of confidence, and the guardian cannot in any way derive benefit from the funds or property of the ward, beyond his fees. If he compromises a claim against his ward, or purchase a debt against him at a discount, it will be for the benefit of his ward only. (2 Kent's Com., 229.) He cannot substitute himself for his ward in any beneficial transaction, although if he do so put himself in place of his ward, and a loss accrue, he himself will have to bear it.

If he purchase land in a sale where his ward is interested, and take the conveyance to himself, his ward, on coming of age, may, if he so elect, claim the benefit of the purchase. If he settle a debt due to his ward and take a promissory note, running to himself, he will be held accountable for it, whether it be collected or not; otherwise, if he take the note to himself as guardian.

If the guardian use the moneys of his ward in trade, the ward may elect, on coming of age, to take either the profits of the trade or his money with compound

interest, to meet the profits. If he neglect to invest the money of his ward after a reasonable time (and he is usually allowed six months), he must pay interest, and in case of gross neglect he will be charged compound interest. (40 N. Y., 76; see, also, 2 Wend., 77; 8 Barb., 48.)

He may not employ an agent or attorney, at the expense of his ward, to do those acts which he ought to do himself, such as the collection of rents, etc., his commissions are for such services. If he have his ward in his own family, he will be allowed a reasonable sum for his board, if the ward does not earn enough to remunerate him. (1 Brad., 345.)

A guardian may not expend the capital of his ward, but only the income, except under the direction of the supreme court, which will, upon the petition of the guardian, if considered necessary and advisable for the interest of the minor, authorize the guardian to expend so much as may be directed, in support and education, especially education, wisely considering this in the highest degree important.

A guardian, however, acting within the scope of his powers, like an executor or administrator, is bound only to fidelity and ordinary diligence and prudence in the execution of his trust, and his acts, in the absence of fraud, will be liberally construed. (8 Barb., 48.)

A guardian appointed in another State cannot receive of an executor or administrator in this State a legacy or distributive share to his ward; but, to acquire the right, he must be appointed in this State and give the proper security. And a guardian

appointed in this State has no power over the real estate of his ward situated in another State.

Their rights and powers are strictly local, and cannot be exercised in other States. (1 Johns. Ch., 156; Story Conf. Laws, 414.) Nor have they any authority over the real property of their wards situate in other countries; for such property is governed by the law *rei sitæ*. (Story Ibid., 414, 417.)

But a non-resident guardian may obtain letters here.

Where an infant who resides without the State but in the United States, is entitled to property within this State, or to bring an action in any court, one who has been appointed his general guardian in his own State, and given the same security which would be required in this State in case of a resident, may petition for an appointment here. (§ 2838.)

The surrogate upon proof of the issue of the letters in the other State, and showing his jurisdiction issues letters here. (§ 2839.)

Ancillary letters are issued * * * without security, and without an oath of office. 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. But they do not authorize him 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.)

We have already seen that a legacy to a minor of fifty dollars or under, may be paid to his father for the use and benefit of such minor; but when the legacy exceeds that sum, the same may be paid under the direction of the surrogate, to the general guardian, who must first give security to the minor, to be approved by the surrogate, for the faithful application of such legacy; and this security is additional to that previously given on the appointment, unless that so previously given was estimated especially in view of the legacy.

When a distributive share is to be paid to a minor, the surrogate may direct that it be paid into court, and invested under his orders; or he may direct that it be paid to the general guardian. A general guardian has the same powers in relation to the collection of a legacy or distributive share by actions or proceedings before the surrogate, that his ward would have if of full age.

CHAPTER XVII.

ACCOUNTS OF GUARDIANS — HOW COMPELLED TO ACCOUNT, AND HOW REMOVED OR RELIEVED OF THEIR TRUST.

Guardians appointed by the supreme court are subject to the jurisdiction of that court, and may account personally to their ward, on their coming of age, or the court will compel them so to do.

But guardians appointed by deed or by will, or by the surrogate's court, are subject to the jurisdiction of the latter court.

Guardians appointed by the surrogate must account annually to him, and the surrogate must supervise their accounts.

He must, in the month of January in each year, as long as he has the property of the infant, file in the surrogate's court an inventory containing a full statement and description of the items of the personal property of his ward, received by him since his appointment, or since the filing of his last inventory, the value of each item, a list of the items remaining in hand, and an account of the manner in which he has disposed of each item not in hand, and a full description of the nature and of the amount of each investment.

It shall also contain an account in form of debtor and creditor, of all his receipts and disbursements during the past year.

He must also annex to such inventory an account and affidavit, the terms of which are fixed by the statute. (See inventory, account and affidavit in the Appendix, No. 16.)

It is the duty of the surrogate, in the month of February in each year, to examine or cause to be examined all these inventories or accounts filed during the year, and if it appears to him that any general guardian has omitted to file his inventory or account or the affidavit, or if the interests of the infant require a more full or satisfactory inventory or account, the surrogate must make an order requiring such account, and he may require the guardian to pay the expenses personally of serving the order upon him.

Where he fails to comply with such 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 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. (§ 2844, etc.)

Formerly, surrogates had no authority to authorize a general guardian to expend more than the income of the infant's property, but this power has been extended; now, he may, upon notice to such persons as he thinks proper to notify, 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. (For petition, see Appendix.)

There is no provision of the statute for the judicial settlement and examination of the guardian's account, at the instance of either the ward or the guardian, while the guardianship continues. (37 Barb., 168.)

But a petition may be presented for a judicial settlement of the account of the general guardian of an infant's property:

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.

It is a matter of course to require a guardian to account on his removal and to pay over to his successor. (10 Paige, 316; 11 N. Y., 324.)

The petition last adverted to may be made by the general guardian of the infant's person, if he has received any property of his ward, for which he has not accounted, or which he has not paid to the guardian of the infant's property. (§ 2848.)

A guardian may ask for the judicial settlement of his account when his ward has attained full age, or has died, or his successors have been appointed, and a citation will issue to the proper parties to attend to the petition.

In reference to the service of the citation and an accounting, the proceedings differ so little from the like proceedings in a case of the accounting of an executor, that it seems unnecessary to prepare forms.

His account should give dates and names of parties to whom payments have been made, and should charge the guardian with the whole of the personal property received by him, and with all interest received, or for which he is liable for funds uninvested after six months from the receipt of such funds. It should also contain the reasonable expenses of the guardian, which are regulated by the same rule as the allowances for executors and administrators, and his commissions.

The rigid rule held by the court as to executors and administrators, that however beneficial their services to the estate, however onerous the trust, they could only be allowed commissions, is applied to the accounts of guardians. (49 N. Y., 667.) The commissions for receiving and paying out moneys are similar as allowed to executors, to wit: five per cent on all sums up to one thousand dollars; two and one-half per cent on sums above one thousand dollars, and up to ten thousand dollars; and one per cent on all sums above ten thousand dollars.

He shall also file all vouchers received by him and verify the whole by his oath, and the account will be conducted in all respects like an accounting by executors or administrators, and may be contested in the same manner.

After the settlement, should the decree be against the guardian, a certificate thereof may be filed in the clerk's office, so as to make it a lien against his estate and an execution duly issued thereon.

The payment may likewise be enforced by an

attachment as one against an executor (§ 2553), or by suit upon the bond of the guardian.

The decree may be discharged in the same manner as a decree against an executor or administrator. (See form in Appendix.)

So, also, a guardian may be removed and his letters revoked upon the petition of the infant, or any relative or other person in his behalf, or any surety of the guardian:

1. Where the guardian is disqualified by law, or is, for any reason, incompetent to fulfill his trust.

2. Where, by reason of having wasted or improperly applied the money or property of his ward, or improvidently managed or injured the personal or real 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 order of the surrogate.

4. Where the granting of letters to him was obtained by a false suggestion of a material fact.

5. Where he has removed or is about to remove from the State.

6. In the case of a guardian of the person, where the infant's welfare would be promoted by the appointment of another guardian.

Upon petition the surrogate issues a citation, and upon the hearing testimony is taken.

The insolvency of the guardian, or one of his sureties, is cause for his removal. (2 Paige, 34.)

Gross intemperance of the guardian is also cause. (1 Paige, 488.)

Where the guardian had trusted his ward's money to his brother-in-law, on personal security, it was held cause for his removal. (1 Tucker, 34.) And insanity is also a cause. (2 Redf. Sur. Ct. Rep. 198.)

The surrogate, at the time of issuing the citation, may also, in his discretion, make an order suspending the guardian, wholly or partly, from the exercise of his powers during the pendency of the proceedings.

Any person interested in the estate, or infant, or any relative of the infant, may present a petition setting forth that the surety in any bond taken from a guardian is insufficient, or has removed or is about to remove from the State, or that the bond is inadequate in amount and pray for additional sureties. If the surrogate entertains the petition, he cites the principal in the bond to show cause why the prayer of the petitioner should not be granted, and upon the return of the citation, if on hearing the proofs and allegations of the parties any of the objections are found to be valid, he will require additional security. (§ 2597, etc.)

If the new bond or additional sureties are furnished, the proceedings will be dismissed, but if they are not, the surrogate will make a decree removing the guardian for neglect to furnish the sureties.

RESIGNATION OF GUARDIAN.

A guardian appointed by the surrogate may, at any time, present a petition to him, setting forth the facts upon which the application is founded, and praying that his account may be judicially settled, and that his letters may be revoked and himself discharged. He may show as a reason for his resignation his physical disability arising from age or illness, his removal, actual or contemplated, to a distance from where the property of his ward is situated, or any other cause which would render it for the interest of the infant that he should resign. (See form of petition in Appendix, No. 17.)

If the surrogate entertains the application, he will issue a citation to the infant and such other persons as he deems proper, and upon the return of the citation will appoint a guardian *ad litem* for the ward, and will allow any person to appear and contest the application in the interest of the ward.

If the surrogate determines that it is a case proper for the resignation of the guardian, he will allow 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 over to the court, or in such manner as the surrogate directs, his letters will be revoked and he will be discharged.

The citation should be served on the ward and on such other persons as the surrogate shall direct. If served in the same county or adjoining county it must

be served at least eight days before the return day; if in any other county in the State, fifteen days.

But notwithstanding the discharge of the guardian is made upon his own application, his successor or the ward may compel the judicial settlement of his account, in which the previous account, upon his discharge, is of no value, and his sureties remain liable until his account is judicially settled.

GUARDIANS BY WILL OR DEED.

Guardians appointed by will must take out letters founded upon the will, which must also be previously proved, and it is provided (§ 2851) that a person shall not exercise any powers or authority as guardian of the person or property of the infant by virtue of the appointment in a will, unless the will has been duly admitted to probate and letters have been issued to him, or by virtue of an appointment in a deed, unless the deed has been acknowledged and recorded in the office for recording deeds in the county. And where the deed containing such appointment is not recorded within three months after the death of the grantor, the person appointed is presumed to have renounced the appointment.

The person appointed guardian by will must qualify within thirty days after probate, otherwise he is deemed to have renounced the appointment, but the surrogate may extend the time for not more than three months.

Objection may be made to him as they may be made to an executor, and the proceedings may be tried as in that case. So, also, a person appointed a guardian by

will may renounce the appointment. (§ 2852.) Where the guardian of the infant's person or property has been appointed by will or by deed, the infant, or any person in his behalf, may apply to the surrogate's court, by a written petition, setting forth facts which were then interposed as an objection to granting letters testamentary to the executor, would make it necessary for such person to give a bond, and the surrogate will issue a citation requiring the guardian to show cause why he should not give security. (§ 2853.) The security to be given in such a case must be a bond to the same effect, and in the same form as the bond of the general guardian. (§ 2854.)

The guardian appointed by will or deed is subject to the obligations in regard to filing an inventory and account only after he shall have been ordered to file them. After such order he is liable as a guardian appointed by the surrogate. This order may be made upon the petition of the ward, or any relative or other person in his behalf, requiring the guardian so appointed to render and file an inventory and account in the same manner as a guardian appointed by the surrogate's court. (§ 2855.)

A guardian appointed by will or deed may also be compelled to make a judicial settlement of his account in any case where a like settlement would be compelled of the account of the guardian appointed by the court, and the proceedings to procure such settlement are the same as if the guardian had been so appointed. (§ 2856.)

Such a guardian appointed by will or deed may be removed, and may be allowed to resign in the same

manner as a guardian appointed by the surrogate, and reference is made to what is said upon that subject heretofore.

Where the sole guardian appointed by will or by deed has been, by the decree of the court, removed or allowed to resign, the court may appoint a successor, unless such an appointment would contravene the express terms of the will or deed. (§ 2860.)

APPENDIX.

No. 1.

The last will and testament of A. B., of the town of ...., in the county of .... and State of New York.

I, A. B., make this, my last will and testament, as follows:

First. I direct that my funeral charges, expenses of administering my estate, and my debts, be paid out of my personal estate; and if my personal estate be insufficient for those purposes, I expressly charge the payment thereof, or of any deficiency, upon the real estate whereof I may die seized, and for that purpose, or for the payment of the legacies hereinafter bequeathed, I authorize my executors hereinafter named to sell at public or private sale the whole, or such part of my real estate as may be sufficient for those purposes.

Second. I give and bequeath to my beloved wife, if she shall survive me, the sum of .... dollars, to be paid to her, with interest from the time of my decease, in lieu of her dower, and of her distributive share in my estate.

Third. I give and bequeath to my daughter C. D., wife of ...., one thousand dollars, to be paid to her by my executors, for her separate use.

And I further direct that if she should die during my lifetime, leaving issue, and any of her descendants shall be living at my decease, said sum shall be paid to said descendants in the proportion that the same would be paid to them under the statutes of this State, if the said C. D. had died intestate, leaving said sum for distribution as a part of her personal estate.

Fourth. I give and bequeath unto ...., infant son of ...., of ...., one hundred dollars; and I authorize my executors, if they shall deem it safe and prudent, to pay the said legacy to the father of said infant, and to take his receipt therefor, and his agreement to hold the same in trust for the said infant, to be paid to him when he shall arrive at full age, with interest; or, if they shall think best, the said executors may deposit said legacy in some savings bank to be selected by them, to the credit of said infant, and proof of such deposit shall be a sufficient discharge to my said executors for the same.

Fifth. I give and bequeath to each of my brothers, A. and B., the sum of five hundred dollars, and I direct that in case either of my said brothers should die during my lifetime, his legacy shall not lapse but shall go to the survivor. If both of my said brothers shall die during my lifetime, then the legacies to them shall lapse into the residue of my estate.

Sixth. I give and bequeath my ten shares of one hundred dollars each, of stock in the Union National Bank of Troy, to my friend................

Seventh. I give and devise to my beloved wife, the

dwelling-house and lot in the village of............, where I now live, for and during her natural life; and from and after her death, I give and devise the same to my son, A. R., his heirs and assigns forever.

Eighth. I hereby dispose of the custody and tuition of my infant children during their minority, and while they shall remain unmarried, to my beloved wife, so long as she shall remain my widow; but if she shall die or marry during the single life and infancy of any of said children, then and in that case I dispose of and commit their custody and tuition to my friend, R. F.

Ninth. I give, devise and bequeath all the residue of my estate, real and personal, to my children, share and share alike, as tenants in common.

Lastly. I appoint my son, S. B., and my friend, A. R., executors of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof, I have hereunto subscribed my name, this........day of............, in the year of our Lord one thousand eight hundred and..........

(Signed) A. B.

The foregoing instrument was, at the date thereof, subscribed by the said A. B. in our presence, and he at the same time declared the same to be his last will and testament, and requested us to sign our names as witnesses, which we do in his presence.

C. D.,
Troy, Rensselaer Co., N. Y.
R. M. D.,
Troy, Rensselaer Co., N. Y.

Attestation Clause where the Execution was Acknowledged.

On the day of the date of the foregoing instrument, the above named A. B. acknowledged to us and each of us that he had subscribed the foregoing instrument, and at the same time declared the same to be his last will and testament, and requested us to sign the same as witnesses, which we do in his presence.

C. D.,
Troy, Rensselaer Co., N. Y.
R. M. D.,
Troy, Rensselaer Co., N. Y.

Attestation Clause Showing Execution, and good in any State except Louisiana.

[Three witnesses are required.]

On this.......day of...........1882, the undersigned being present and believing the above named A. B. to be of sound mind and memory, saw the said A. B. subscribe the foregoing will, and at the time of such subscription, the said A. B. stated to each of the undersigned that the paper so subscribed by him was his last will and testament, and requested us and each of us to sign said will as witnesses. Whereupon we do in his presence and in presence of each other, attest and subscribe the same as witnesses, the day and year above written.

C. D.,
Troy, Rensselaer Co., N. Y.
E. F.,
Troy, Rensselaer Co., N. Y.
G. H.,
Albany, N. Y.

CLAUSE IN A WILL, LIMITING CERTAIN PROPERTY TO THE USE OF A MARRIED WOMAN.

I give and bequeath to A. B. and C. D., the survivor of them or their successors, appointed by the supreme court, the sum of two thousand dollars in trust to receive the interest thereof during the joint lives of G. H. and E. H., his wife, and to pay the same to the said E. H. and her assigns, notwithstanding her coverture, for her sole and separate use, from time to time, during the joint lives of the said G. H. and E. H., his wife, so that the said E. H. shall not sell, mortgage, charge or otherwise dispose of the same in the way of anticipation. And if the said E. H. shall survive her said husband, then upon trust to pay the said principal sum to the said E. H.; but in case the said E. H. shall die during the lifetime of her husband, then in trust, after the decease of the said E. H., to assign and transfer the said sum of two thousand dollars to such person or persons, and in such shares and subject to such conditions as the said E. H., by her last will and testament in writing, or by any writing in the nature of, or purporting to be her last will and testament, shall limit or appoint, and in default of such appointment upon trust, to pay, transfer and assign the same to the next of kin of the said E. H., not including therein the said G. H., her husband.

CLAUSE IN A WILL LIMITING REAL ESTATE TO THE SEPARATE USE OF A MARRIED WOMAN.

I give and devise to A. B. and C. D. during the joint lives of E. H. and G. H., her husband, all that parcel of land conveyed to me by R., J., by deed dated November 1, 1882, and recorded in the office of the clerk of the county of............., in book No. ..... of deeds, page ..... etc., upon trust to pay the rents, issues and profits thereof to the said E. H., or to such person or persons as she shall, by writing, appoint to receive the same, during the joint lives of the said E. H. and G. H., for her sole and separate use, so that the said E. H. shall not sell, mortgage or otherwise dispose of the same in the way of anticipation. From and immediately after the decease of the said G. H., then I give and devise said premises to the said E. H., if she shall survive her said husband. But in case the said E. H. shall die in the lifetime of her husband, then I give and devise the same to her heirs-at-law, as tenants in common.

LEGACY TO CHARITABLE OR RELIGIOUS CORPORATIONS.

I give and bequeath to the (American Bible Society, stating the name, if possible, or otherwise clearly describing the society), the sum of one thousand dollars, to be applied to the uses of said society.

No. 2.

CODICIL.

Whereas, I, James Richards, of the town of Schodack, in the county of Rensselaer, have made my last will and testament, bearing date the ....,
1882, in and by which I have given and bequeathed to my daughter Mary, five hundred dollars. Now, therefore, I do, by this instrument, which I hereby declare to be a codicil to my last will and testament, and to be taken as a part thereof, order and direct that only the sum of two hundred dollars be paid to my said daughter Mary, in full of the legacy given and bequeathed to her in my said last will and testament. And it is my desire that this codicil be annexed to and be made a part of my last will and testament.

In witness whereof I have hereunto set my hand and seal, this first day of March, A. D., 1882.

JAMES RICHARDS. [L. S.]

The foregoing instrument was, at the date thereof, subscribed by James Richards in our presence, and he at the same time declared said instrument to be a codicil to his last will and testament, and requested us to sign our names as witnesses, which we do in his presence, and in the presence of each other.

A. B.,
Troy, Rensselaer Co., N. Y.

C. D.,
Troy, Rensselaer Co., N. Y.

No. 3.

RENUNCIATION OF EXECUTOR.

SURROGATE'S COURT.—RENSSELAER COUNTY.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF THOMAS WILLIAMS, DECEASED.

I, Henry Williams, of the town of Brunswick, in said county of Rensselaer, one of the executors appointed in and by the last will and testament of Thomas Williams, late of said town, deceased, do hereby renounce the said appointment, and all right and claim to letters testamentary of the said will, or to act as executor thereof.

HENRY WILLIAMS.

Dated TROY, *February* 20, 1882.

Signed in the presence of

JOHN STILES.

The signing may be proved by an affidavit of one of the witnesses, or by acknowledgment, as in the case of deeds.

No. 4.

SURROGATE'S COURT.

IN THE MATTER OF PROVING THE LAST WILL AND TESTAMENT OF
....
OF ...., DECEASED.

TO MOSES WARREN, Esq., *Surrogate of the County of Rensselaer:*

The petition of.............., named in the last will and testament of............, late of the...... of ...., in the county of Rensselaer and State of New York, deceased, respectfully showeth, on information and belief, that the said............ died on or about the ....day of............ 188.., at the ....of..................in the county of Rensselaer aforesaid, which was the place of h.. residence at the time of h.. death. That the instrument now presented and shown to your petitioner.., purporting to be the last will and testament ....of said deceased, and bearing date upon the .... day of............, 188.., your petitioner.. verily believe.. to be such last will and testament.................., and that the said instrument purporting to be such last will and testament relates to both real and personal estate.

And your petitioner.. further show.. that the deceased left...............................
........................., and who are all and the only heirs-at-law and next of kin of the said deceased.

Your petitioner.. therefore pray.. that the persons above-named may be cited to attend the probate of said will, and that a citation may issue to the...... ....heirs-at law and next of kin to said deceased, requiring them to appear before the said surrogate, at his office in the city of Troy, in the county of Rensselaer aforesaid,............ ....to attend the probate of the last will and testament, according to the form of the statute of the State of New York in such case made and provided.

And your petitioner.., as in duty bound, will ever pray, etc.

Dated TROY,................, 188...

....

STATE OF NEW YORK, } *ss.*:
RENSSELAER COUNTY. }

...................., being duly sworn, say.. that the foregoing petition by....... subscribed is true, except as to the matters which are therein stated to be alleged on information and belief, and as to those matters........believe.. it to be true.

....

Sworn to before me, this }
............188.. }

....

....

No. 5.

SURROGATE'S COURT.

IN THE MATTER OF THE APPLICATION FOR LETTERS OF ADMINISTRATION ON THE ESTATE
OF
...., DECEASED.

To MOSES WARREN, Esq., *Surrogate of the County of Rensselaer:*

The petition of................of the town of ....in said county, respectfully shows upon information and belief,

That............late of the town of............ in said county, died on or about the........day of ...., 188.., at the town of............ aforesaid, without leaving any last will and testament; that said deceased at the time of....death was possessed of certain personal property within the State of New York, the value whereof does not exceed the sum of............dollars, as your petitioner.. is informed and verily believe.. And that your petitioner.. is the............of the said deceased.

Your petitioner.. further show.. that the deceased left....surviving.............................. only next of kin, and that....was at, or immediately previous to....death, an inhabitant of the county of Rensselaer.

Your petitioner.. pray.. that administration upon

the estate of the said deceased, may be granted to your petitioner................

....

Dated TROY,.................188..

STATE OF NEW YORK, } ss.:
RENSSELAER COUNTY. }

..........being duly sworn, say.. that......... the petitioner.. named in the foregoing petition, and that the said petition is true of....own knowledge, except as to the matters which are therein stated to be on information and belief, and as to those matters ....believe.. it to be true.

....

Sworn to before me, this......
day of............, 188.. }

....

....

No. 6.

INVENTORY PAPERS — NOTICE OF APPRAISEMENT.

To the legatees and next of kin of JOHN DOE, *deceased:*

RENSSELAER COUNTY, *ss.:*

Take notice that the subscriber, with the appraisers, duly appointed, will attend at the late dwelling-house of the deceased, in the city of Troy, in the said county, on the 28th day of February, 1862, at ten o'clock in the forenoon of that day, to estimate and appraise the personal property of the said deceased, and, with the aid of the said appraisers, take an inventory thereof.

Dated *February* 22, 1862.

JOHN DOE,
Administrator, etc.

INVENTORY.

We, whose names are hereunto signed, appointed by the surrogate of the county of Rensselaer, having first taken and subscribed the oath required by law, and hereto annexed, do certify that we have estimated and appraised the property in the annexed inventory contained exhibited to us, according to the best of our knowledge and ability, and we sign duplicate inventories thereof.

Dated this 28th day of *February*, 1862.

....
....
Appraisers.

STATE OF NEW YORK, }
RENSSELAER COUNTY. } ss.:

I do solemnly swear that I will truly, honestly and impartially appraise the personal property of (Richard Roe) deceased, which shall be exhibited to me, according to the best of my knowledge and ability.

(Signed) JOHN DOE.

Sworn before me, this 28th }
day of February, 1862. }

JOHN KIRBY,
Justice of the Peace.

STATE OF NEW YORK, }
RENSSELAER COUNTY. } ss.:

I do solemnly swear, etc., (the same as the oath above to be signed by the other appraiser and sworn to in the same manner).

(Signed) RICHARD ROE.

Sworn before me, this 28th }
day of February, 1862. }

HENRY KIRBY,
Justice of the Peace.

A true and perfect inventory of all and singular the goods, chattels and credits of Richard Roe, deceased, made by ...., administrator (or as the case may be) etc., of the said deceased, with the aid of (John Doe) and (Richard Roe) appraisers appointed by the surrogate of Rensselaer county, duly qualified, and after service of notice as the law directs, on the 28th day of February, 1862.

The following articles are stated but not appraised, being set apart, according to law, for the widow (or minor children), to wit:

One spinning wheel.
One weaving loom.
Three stoves kept for the use of the family.
(Continue the list set apart by law.)

The following articles are appraised and set apart for the use of the widow (or the use of the widow and minor children), in addition to those enumerated above, in pursuance of the statute, to wit:

One mahogany bureau	$15 00
One sofa	75 00
One sideboard	3 50
One carpet	5 00
One eight-day clock....	5 00

(And furniture to the amount of $150.)

The following articles are in addition to those above enumerated, to wit:

Forty sheep, 20s......................	$100 00
One sorrel horse	60 00
One black horse......................	75 00

(And thus through the like articles.)

The following accounts and notes are considered good and collectible, to wit:

Note, John Myers, dated February 10, 1860, for $100, indorsed, interest for two years, now worth.	$100 00
Account against James Jones	15 00

(And thus through the good items.)

The following are considered doubtful, to wit:

Note, Thomas Nokes, dated August 1, 1857, no indorsement.......................... $16 00

(And so through the doubtful.)

The following are considered bad, to wit:

(Here state the bad items in detail.)

Dated *February* 28, 1862.

(Signed) ....
....
Appraisers.

The following affidavit is to be indorsed on, or annexed to the inventory when filed:

STATE OF NEW YORK, } *ss.:*
RENSSELAER COUNTY. }

(John Doe), executor, etc. (or administrator, etc.), of Richard Roe, deceased, being duly sworn, does depose and say, that the annexed (or foregoing) inventory is in all respects just and true, that it contains a true statement of all the personal property of the said deceased, which has come to the knowledge of this deponent, 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 this deponent.

(Signed) ....

Sworn before me, this 1st }
day of March, 1862. }

R. C. JENNINGS,
Justice of the Peace.

No. 7.

NOTICE TO THE CREDITORS TO PRESENT CLAIMS.

In pursuance of an order of Moses Warren, Esq., surrogate of the county of Rensselaer, notice is hereby given, according to law, to all persons having claims against (Richard Roe) late of the town of Brunswick in the said county, deceased, that they are required to exhibit the same, with vouchers thereof, to the subscriber, executor of the will of the said deceased, at his residence in the said town of Brunswick, on or before the 1st day of September, 1862.

Dated *February* 28, 1862.

(Signed) ....

Executor.

AFFIDAVIT TO ANNEX TO CLAIM.

RENSSELAER COUNTY, *ss.:*

Edward Murphy of the city of Troy, in the county of Rensselaer aforesaid, being sworn, doth depose and say that the foregoing claim against the estate of Kyran Cleary, deceased, is justly due and owing to this deponent; that no payments have been made thereon, and that there are no offsets against the same (other than those stated in the foregoing account), to the knowledge of this deponent.

(Signed) EDWARD MURPHY.

Sworn to, this 1st day of March, 1862, before me.

GEORGE DAY,
Commissioner of Deeds, Troy, N. Y.

No. 8.

Receipt of Creditor.

Received, Troy, April 10, 1862, of John Jones, executor, etc. (or administrator, etc.), of Henry Jones, deceased (ten dollars and fifty cents), in full of foregoing account (or in payment of all demands due me from the estate of said deceased), (or for taxes assessed in the city of Troy on the estate of said deceased, previous to his death).

(Signed) AMOS S. PERRY.

Receipt for Legacy.

Whereas, James Richards, late of the town of Schodack, in the county of Rensselaer, deceased, lately made his last will and testament, dated the........ day of ...., 1862, in which he gave and bequeathed to me the sum of (five hundred dollars): Now, therefore, I hereby acknowledge the receipt of said sum so bequeathed to me, of John Richards, executor named in said will.

Dated Schodack, *March* 1, 1862.

(Signed) MARY WILLIAMS.

No. 9.

PETITION OF CREDITOR TO COMPEL PAYMENT OF HIS CLAIM.

To the Surrogate of the County of . ...

The petition of ...., of the ....
of ...., respectfully shows:

That your petitioner is a creditor of ....,
late of the .... of ...., in said
county, deceased, upon a claim for ....
dollars, as follows:

That your petitioner sold and delivered to the said
deceased, in his lifetime, goods, wares and merchandise to the value of ....dollars, which sum he
promised to pay at the expiration of ....
months, but he did not pay the same, nor have any
payments been made thereon since, and there are no
offsets against the same, to the knowledge of your
petitioner, and there is due thereon to your petitioner
.... dollars, with interest from the
.... day of .... 1882.

That on or about the .... day of ....,
1882, the last will and testament of the said deceased
was duly proved in this court, and letters testamentary thereon were issued to .... executor
named in said will, who has duly returned an inventory of the personal estate of said deceased. That
said executor advertised for the presentation of claims
against the estate of the said deceased, and your
petitioner duly presented his claim, which was not
disputed, and your petitioner, after the expiration

of six months from the granting of such letters, demanded payment of his said claim from the said executor, who has not paid the same nor any part thereof.

Wherefore your petitioner prays that a decree may be made for the payment of said claim, or for such other order or decree as shall be agreeable to law and equity.

Dated *July* 28, 1882.

(Signed) ....

RENSSELAER COUNTY, *ss.:*

........................, being duly sworn, says that the foregoing petition by him subscribed is true of his own knowledge, except as to those matters which are therein alleged to be stated on information and belief, and as to those matters he believes it to be true.

(Signed) ....

Sworn before me, this ......
day of ...., 1882.

....

....

No. 10.

PETITION FOR JUDICIAL SETTLEMENT.

SURROGATE'S COURT — COUNTY OF RENSSELAER.

To MOSES WARREN, Esq., *Surrogate of the County of Rensselaer :*

The petition of ....of the......... of........ ... in the county of Rensselear aforesaid, respectfully showeth, that your petitioner.. w... duly appointed and qualified by the surrogate of said county of Rensselear, as the.................of the ....late of the............in said county, deceased, and that more than one year has elapsed since letters........... w.... granted and issued to your petitioner.. by the surrogate aforesaid.

That your petitioner.. ha.. returned to the surrogate of said county an inventory of the personal property and estate of the said deceased.

That said deceased left surviving................ ....

And that the following named persons are, or claim to be, creditors of said deceased :

....

Wherefore, your petitioner.. pray.. that........ account may be judicially settled, and that the said ....may be cited to attend such settlement.

And your petitioner.. will ever pray.

(Signed) ....

Dated, ..., 188..

RENSSELEAR COUNTY, *ss.:*

.....................being duly sworn, says that ....the foregoing petition by..... subscribed, and that the same is true of........ own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and as to those matters........believe.. it to be true.

....

Sworn to before me,
...........188..

....

....

No. 11.

ACCOUNT OF EXECUTOR OR ADMINISTRATOR.

[This form may be adapted to any estate or any amounts.]

A. B., executor (or administrator), in account with the estate of C. D., deceased:

1862.		DR.	
		To amount of inventory on file..	$550 00
Jan.	2.	To received, savings' bank deposit not inventoried................	15 50
		To received, interest from E. F., not included in inventory......	6 10
			$571 60

1860.		CONTRA — CR.	
July	1.	By paid surrogate letters, testamentary, etc..................	$15 00
		By expenses to and at Troy to obtain letters.................	3 00
		By paid C. D., witness to will....	2 00
		By paid E. F., witness to will.....	1 50
	9.	By paid J. H. and E. R., appraisers,	6 00
		By paid oath, filing inventory....	50
	20.	By paid funeral charges	40 50
	29.	By paid support of widow and family for forty days..........	10 50
1861.			
Jan.	3.	By paid, surrogate's order to advertise for claims, etc...........	75
		By paid, printing same..........	5 50

1861.			
Jan. 3.	By loss on sale of inventoried articles........	$16 00	
	By expenses to Troy three times...............	4 50	
			$20 50
			$108 75

Showing balance for commissions, debts and distribution of $462 25

The following claims have been presented against the estate of said deceased:

Edward Murphy	$150 00
James Jones...........................	16 00

(Stating them in full.)

The following affidavit is to be included in, or annexed to the account:

RENSSELAER COUNTY, *ss.:*

A. B. of the town of............, in the county of Rensselaer, being duly sworn, says: That he is executor of the last will and testament of (or administrator of all and singular the goods, chattels and credits of) C. D., late of said town of......... ..., deceased, and that the foregoing (or annexed) account is in all respects just and true; that the same according to the best of his knowledge and belief, contains a full and true account of all his receipts and disbursements, on account of the estate of said deceased, and of all sums of money and property belonging to the

estate of the said deceased, which have come into his hands as such administrator, or which have 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 said account, to the prejudice of any creditor of, or person interested in, the estate of the said decedent.

And he further says, that the sums under twenty dollars, charged in said account, for which no vouchers or other evidence of payment are herewith filed, or for which he has not been able to produce vouchers or other evidences of payment, have actually been paid and disbursed by him as charged.

(Signed) A. B.

Sworn before me, this......
day of............, 1882.

....

....

No. 12.

RELEASE FOR DISCHARGE OF DECREE.

SURROGATE'S COURT — COUNTY OF.........

IN THE MATTER OF THE ESTATE
OF
............................., DECEASED.

Whereas, by a decree of the surrogate of the county of.............., in this matter, entered on the......day of............, 1873, ... executor of the will of the above-named deceased, was ordered and directed to pay to the undersigned, a legatee named in said will, the sum of............ dollars, now I do hereby acknowledge the receipt of the said sum from said............, and release him from all claims therefor, and request the surrogate of said county, to enter this as a discharge of said decree.

Witness my hand, this.....day of........, 1873.

(Signed) ....

RENSSELAER COUNTY, *ss.:*

On this .... day of ...., 1873, before me personally came ...., to me known to be the same person described in and who executed the foregoing instrument, and acknowledged that he executed the same for the uses and purposes therein mentioned.

(Signed) ....,
Justice of the Peace.

No. 13.

PETITION FOR MORTGAGE, LEASE OR SALE, BY EXECUTOR OR ADMINISTRATOR.

SURROGATE'S COURT — RENSSELAER COUNTY.

IN THE MATTER OF THE REAL ESTATE OF A. B., DECEASED.

To MOSES WARREN, Esq., *Surrogate of the County of Rensselaer:*

The petition of C. D., executor (or administrator) of the will of (or of the goods, etc., of) A. B., late of the town of Brunswick, in the county of Rensselaer, deceased, shows that your petitioner has made and filed an inventory of the personal property of the said A. B., deceased, according to law, and has discovered the same to be insufficient to pay the debts of the deceased.

That the amount of the personal property which has come to the hands of your petitioner amounts to the sum of $578.

That the outstanding debts of the deceased, which remain unpaid and which are justly due and owing, and which are not secured by judgment or mortgage, or expressly charged on the real estate of the deceased, as near as the same can be ascertained, amount to the sum of $1,005, owing as follows:

To A. B.	$175 00
To C. D.	50 00
To G. F.	200 00
To G. H. for funeral expenses, etc., etc	125 00

And your petitioner verily believes and states the fact to be, that he has proceeded with reasonable diligence in converting the personal property of said deceased into money, and applying the same to the payment of debts.

That the deceased died seized of the following real estate, situated in the county of Rensselaer aforesaid, valued at the sum respectively affixed to each lot or parcel, and occupied or not occupied as stated in respect to each of the several lots or parcels, that is to say, all (stating fully metes and bounds).

Besides the above described real estate, the deceased left no other in the State of New York which may be disposed of for the payment of his debts, and none of the above described real estate is devised by the testator expressly charged with the payment of debts or funeral expenses, or is exempted from levy and sale by virtue of an execution.

And your petitioner further shows that S. B. is the widow, and A. B., C. B. and E. B., of the town of Brunswick, are children and heirs-at-law of the said A. B., deceased, of the age of twenty-one years and upwards, and J. B. and K. B. are infants of the age of fourteen years and upwards, and aged sixteen and nineteen years respectively, and L. B. and M. B. are infants, and are also children and heirs-at-law of the deceased, and under fourteen years of age, and aged ten and twelve years respectively, and none of said infants have any general guardian.

Your petitioner, therefore, prays that authority may be granted to him by the said surrogate (pursuant to the statutes of the State of New York in such case

made and provided), to mortgage, lease or sell so much of the real estate of the deceased as shall be necessary to pay the debts of the deceased.

And your petitioner will ever pray, etc.

(Signed) C. D.

Dated *October* 1, 1882.

STATE OF NEW YORK, } *ss.:*
RENSSELAER COUNTY. }

C. D., being sworn, deposes and says that the above petition, by him subscribed, is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

(Signed) C. D.

Sworn, etc.

No. 14.

PETITION OF CREDITOR FOR SALE.

To Hon.......... ...., *Surrogate of* ....*county:*

The petition of............, of the............ of............, respectfully shows as follows:

Your petitioner is a creditor of............, late of the......of............, deceased, intestate, said intestate having died indebted to your petitioner in the sum of............dollars and interest upon a promissory note, made by him to your petitioner or order, dated the......day............, 1882, and payable ninety days after date. Said claim is justly due to your petitioner, no payments have been made thereon, and there are no offsets against the same to the knowledge of your petitioner, and the same is not secured by judgment, mortgage upon or expressly charged on the real estate of the said deceased.

Letters of administration of the goods, chattels and credits of the said............, deceased, were duly issued by the surrogate of the county of..........., on the......day of..........., 1873, to........... of the........, and the same still remain in full force as your petitioner is informed and believes.

That besides the debt to your petitioner, he is informed and verily believes that there are other debts of the decedent unpaid; but your petitioner after diligent inquiry is unable to ascertain the names of the creditors or the amounts of such debts.

The said intestate died seized of the following described parcels of real estate, valued at the sum

respectively affixed to each parcel, and occupied or not occupied as hereafter stated as to each; that is to say (describe each parcel and names of occupants and value).

Your petitioner has made diligent inquiry as to whether said deceased left any other real estate within the State, but is unable to ascertain whether or not he did so.

.... is the widow, and............ of full age, and................, an infant, of the age of twenty years, and..............., an infant, of the age of thirteen years, neither of whom have a general guardian, are the heirs-at-law of the said deceased.

Your petitioner therefore prays, that the surrogate will grant an order for the said..........., administrator as aforesaid, to show cause why he should not be required to mortgage, lease or sell the real estate of the said deceased, for the payment of his debts, and that such other or further proceedings, according to law, may be thereupon had, as may tend to the relief of your petitioner and the payment of his claim aforesaid.

Dated *December* 1, 1874.

(Signed) ....

.... COUNTY, *ss.:*

..............., being duly sworn, says that the foregoing petition, by him subscribed, is true of his own knowledge; except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

Sworn, etc.

(Signed) ....

No. 15.

ANNUITY TABLE AND RULE.

Age.	No. of years purchase.	Age.	No. of years purchase.
1	11,563	29	13,177
2	13,420	30	13,072
3	14,135	31	12,965
4	14,613	32	12,854
5	14,827	33	12,740
6	15,041	34	12,623
7	15,166	35	12,502
8	15,226	36	12,377
9	15,210	37	12,249
10	15,139	38	12,116
11	15,043	39	11,979
12	14,937	40	11,837
13	14,826	41	11,695
14	14,710	42	11,551
15	14,588	43	11,407
16	14,460	44	11,258
17	14,334	45	11,105
18	14,217	46	10,947
19	14,108	47	10,784
20	14,007	48	10,616
21	13,917	49	10,443
22	13,833	50	10,269
23	13,746	51	10,097
24	13,658	52	9,925
25	13,567	53	9,748
26	13,473	54	9,567
27	13,377	55	9,382
28	13,278	56	9,193

Age.	No. of years purchase.	Age.	No. of years purchase.
57	8,999	77	4,277
58	8,801	78	4,035
59	8,599	79	3,776
60	8,392	80	3,515
61	8,181	81	3,263
62	7,966	82	3,020
63	7,742	83	2,797
64	7,514	84	2,627
65	7,276	85	2,471
66	7,034	86	2,328
67	6,787	87	2,193
68	6,536	88	2,080
69	6,281	89	1,924
70	6,023	90	1,723
71	5,764	91	1,447
72	5,504	92	1,153
73	5,245	93	816
74	4,990	94	524
75	4,744	95	238
76	4,511		

RULE FOR COMPUTATION.

Calculate the interest at five per cent for one year upon the sum to the income of which the person is entitled, and multiply this interest by the number of years purchase set opposite the person's age in the table, and the product is the gross value of the life estate of such person.

EXAMPLE.

Suppose a widow's age is forty, and she is entitled to dower in real estate worth $1,500 ; one-third of this is $500 ; interest on $500, one year, at five per cent, is $25 ; multiply this by 11,837, the number of years purchase set opposite her age, and you have $285.92, as the gross value of her dower right.

No. 16.

PETITION FOR GUARDIAN, INFANT OVER FOURTEEN.

TO MOSES WARREN, Esq., *Surrogate of the County of Rensselaer:*

The petition of ...., of the .... of .... respectfully showeth, that your petitioner is a resident of the county of Rensselaer, and who has no testamentary or other guardian, and is a minor over fourteen years of age, and was .... years of age on the .... day of .... last past. 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 the county of ...., to be such guardian and prays .... appointment accordingly. And your petitioner will ever pray.

Dated the........day of.........., A. D. 188..

....

RENSSELAER COUNTY, *ss.:*

The foregoing petitioner, being duly sworn, says that .... has read the foregoing petition, and knows the contents thereof, and that the same is true of .... own knowledge, except as to the matters which are therein stated to be alleged on information

and belief, and as to those matters .... believes it to be true.

....

Sworn before me, this .... }
day of ...., 188.. }

....

....

CONSENT.

I, ... of the .... of ...., do hereby consent to be appointed the guardian of the person and estate of the above-named minor during .... minority.

Dated this ...... day of ...., A. D. 188..

....

AFFIDAVIT AS TO PROPERTY.

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER. }

......................., of the .... of ...., being duly sworn, doth depose and say that .... 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 said minor does not exceed the sum of six thousand dollars or thereabouts; and that the annual rents and profits of the real estate of said minor do not exceed the sum of one hundred and fifty dollars or thereabouts.

....

Sworn this... ..day of........, }
A. D. 188.., before me. }

....

....

COUNTY OF RENSSELAER, *ss.:*

I, ..., do solemnly swear that I will well, honestly and faithfully discharge the duties of general guardian of the person and estate of ...., a minor, according to law.

....

Subscribed and sworn before me, }
this....day of......, 188.. }

....

....

No. 17.

PETITION FOR GUARDIAN, INFANT UNDER FOURTEEN.

To MOSES WARREN, Esq., *Surrogate of the County of Rensselaer:*

The petition of.. ...., of the............of....... ...., in the county of...............respectfully showeth that your petitioner is the...........of.................... minor.. ; that said minor.. reside.. in the county of Rensselaer, and....under fourteen years of age, and has no testamentary or other guardian, and whose father is deceased; that said .... was..........years of age on the... ....day of ...., last past; that said minor ......entitled to personal property to the value of about ....dollars, as your petitioner is informed and verily believes, and that........also seized of certain real estate, the annual rents and profits do not exceed the sum of................. dollars to each, and to protect and preserve the legal rights of said minor....it is necessary that some proper person should be duly appointed the guardian of ....person and estate.

Your petitioner therefore prays that you will appoint ....of the................ of...............in the county of.............., the guardian of the person and estate of said minor.. until he shall............arrive at the age of fourteen years, and until another guardian shall be appointed. And your petitioner will ever pray.

Dated this........day of.........., A. D. 188..

....

CONSENT.

I,..............................of the........ of......................., do hereby consent to be appointed the guardian of the person..and estate of the above-named minor..during....minority.

Dated this........day of............188..

....

STATE OF NEW YORK, } ss.:
COUNTY OF RENSSELAER. }

........................, of the............of ...., the above-named petitioner, being duly sworn, deposes and says, that the foregoing petition by....subscribed is true of......own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and as to those matters....believes it to be true.

....

Sworn before me, this........ }
day of.............., 188.. }

....

....

COUNTY OF RESSELAER, ss.:

I, ..., do solemnly swear that I will well, honestly and faithfully discharge the duties of general guardian of the person and estate of.................., a minor, according to law.

....

Subscribed and sworn before me, }
this....day of........, 188.. }

....

....

No. 18.

Guardian's Annual Account, etc., and Inventory.

SURROGATE'S COURT — Rensselaer County.

In the Matter of A. B., a Minor.

Inventory.

A just and true inventory of the estate and effects of the above-named minor on the 1st day of April, 1862:

Cash received of C. D., executor, etc., of C. D., deceased	$350 00
1861. Dr.	
John La Fountain, bond and mortgage, $200, interest one year, $14	214 00
R. Thompson, bond and mortgage, $300, interest six months, $10.50	310 50
Ten shares Central Railroad stock par value $1,000, actually worth	830 00
House and lot No. 164 Fulton street, Troy, valued at	800 00
Farm in Sand Lake valued at	2,000 00
	$4,504 50

ACCOUNT.

J. K., guardian, in account with A. B., a minor:

1861.	DR.	
Apr. 1.	To interest on La Fountain mortgage..........................	$14 00
Oct. 1.	To interest on Thompson mortgage	21 00
1862.		
Feb. 1.	To dividend Central Railroad, 3 per cent....................	30 00
	To three quarters' rent, house 164 Fourth street	180 00
Mar. 1.	To 1 year's rent, farm in Sand Lake	200 00
		$445 00

1861.	CONTRA — CR.	
Apr. 10.	By board paid J. H., 26 weeks at $2	$52 00
July 1.	By clothing purchased of J. N.,	10 00
9.	By hats purchased of G. F.....	50
Oct. 1.	By board paid J. H., 26 weeks,	52 00
10.	By clothing of J. N..........	15 00
1.	By repairs No. 164 Fourth street,	8 50
1862.		
Feb. 10.	By taxes No. 164 Fourth street,	12 00
	By taxes farm in Sand Lake....	22 00
Apr. 1.	By interest on $350, uninvested 6 months..................	12 25
	Commission for receiving income, 2½ per cent on $445...	11 12

1862.		
Apr. 1.	Commission on paying out income, $2\frac{1}{2}$ per cent on $195.37,	$3 87
	Balance due estate............	234 64
		$445 00

RENSSELAER COUNTY, *ss.:*

J. K., of the city of Troy, being duly sworn, says that the foregoing inventory and account contains, to the best of his knowledge and belief, a full and true statement of all his receipts and disbursements as guardian, as therein stated; and of all money and other personal property of the ward's which have come into deponent's hands as 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); and of the value of such, 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 said 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), and that he does not know of any error or omission in the inventory or account to the prejudice of said ward.

J. K.

Sworn before me, this 29th day of July, 1882.

A. B.,
Justice of the Peace.

No. 19.

PETITION FOR LEAVE TO EXPEND FOR INFANT.

SURROGATE'S COURT — RENSSELAER COUNTY.

IN THE MATTER OF THE PERSON AND ESTATE
OF
A. B., AN INFANT.

The petition of C. D. respectfully shows to this court:

That your petitioner was heretofore appointed by this court the general guardian of the person and estate of the above-named A. B., an infant, and has faithfully discharged his duty as such general guardian.

That said infant is now of the age of fourteen years and your petitioner deems it desirable to take proper steps for his education, but the income of the estate of said infant is insufficient (if this be the case) to properly educate and maintain said infant while acquiring an education. The income will not exceed the sum of............dollars per annum, and the sum requisite for the aforesaid purposes is at least ....dollars per annum.

Your petitioner therefore prays, that he may be authorized to make application of the income of the estate of said infant to his support and education, and that he may further apply annually............... of the principal of said estate for that purpose.

And your petitioner will ever pray, etc.

Dated *May* 13, 1882. C. D.

RENSSELAER COUNTY, *ss.:*

C. D., being duly sworn, says that the foregoing petition by him subscribed, is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

C. D.

Sworn before me, this...... }
day of November, 1882. }

....
Notary Public.

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