COMPENDIUM

OF THE LAW OF

EXECUTORS, ADMINISTRATORS, GUARDIANS,

AND

DOWER,

IN

FORCE IN ALABAMA.

BY JOHN A. CUTHBERT.

MOBILE:

THOMAS J. CARVER & CO.

1850.
# ORDER OF SUBJECTS.

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PART I.

WILLS.

PERSONS CAPABLE OF MAKING A WILL.

All persons who are of the legal age, and who have sufficient discretion, and free will, are capable of disposing of their estates by will.

Males fourteen years of age, and females twelve years of age, may dispose of their personal estate, by will; but no one under twenty-one years of age, can dispose of real estate by will. The will may be made, in each case, on the day on which the requisite age is completed.

In order to make a will, the person must have sufficient intelligence, to be able to dispose of his property with reason and understanding. An idiot is incapable of making a will; and an insane person, during insanity. There is no precise or certain rule for determining, whether the person was an idiot, or insane: and the decision of this question rests on common sense.

A will is void, if executed under well-founded fear of injury to the person or estate. There is no certain rule for ascertaining, whether the fear was sufficient to impair the free agency of the person making the will. The character, condition, and circumstances, both of the person making the will, and of the person from whom the fear proceeds, are to be considered.

A will is void, if executed under such excessive importunity, as may be understood to have taken away the free will of the testator; an importunity which, it may be believed, he was
unable to resist; and to which he seems to have yielded for the sake of peace.

There may be also a degree of influence over the mind of the testator, equivalent to fear or force, in destroying his free agency. A will made under such influence, is invalid.

A married woman is, in general, incapable of making a will, without the assent of her husband; and he may withdraw his assent, at any time before probate. To give validity to the will of the wife, it is not sufficient, that the husband give a general assent, that his wife may make a will; it is necessary that his assent be given to the particular will in question.

But a married woman may make a will, in pursuance of an agreement before marriage; and she may dispose, by will, of her separate estate.

If a feme sole make a will, it will be revoked by her subsequent marriage; but if she survive her husband, it may be revived by a subsequent publication.

**WILLS OF PERSONAL ESTATE.**

A will extends to personal property subsequently acquired, as well as that held at the time of its execution, if such be the natural import of its language; and it may be written; or it may be oral, or nuncupative.

For a will of personal estate, it is not requisite that there be a subscribing witness, or a witness to its publication. But if there be an attestation-clause not filled up, the will cannot be sustained, unless it appear by extrinsic evidence, either that the testator was prevented by the act of God, from having the instrument finished; or that he intended it to operate in its present form. If he had sealed it up, this intention would appear from that fact.

For proof of any material fact, in establishing a will for personal estate, two witnesses are necessary. 2 Al. R. 218, Johnson v. Glascock and Wife, et al.

The signature of the testator is not necessary to the validity of a will of personalty. Proof that the will is in the handwriting of the testator, or according to his direction, and in writing,
is sufficient, if the instrument be complete in all other respects. 7 Al. R. 519, Couch, et al. v. Couch.

An instrument not in the hand-writing of the testator, and which has not been read over to him, may be valid as his will, if made in pursuance of instructions from him, when the testator has been overtaken by sudden death, or other act of God, preventing the regular execution of the will. But if the instructions be not reduced to writing, during the life of the testator, they will constitute only a nuncupative will.

An instrument not in the hand-writing, nor under the seal of the deceased, even though safely deposited among his papers, will not be sustained as his will, without proof that the deceased had recognized it as his will, or that it was written by his direction.

When a document is unfinished, in the body of it, and on its face it appears to have been in progress only, the presumption of law is strong against it; and to sustain it as a will, it must be proved, on a view of all the facts and circumstances, that the deceased had come to a final resolution, to make the disposition of his property, contained in it; and that he had not abandoned that intention, but was prevented by the act of God, from proceeding to the completion of his will.

No particular form is necessary, to constitute a will. Instruments in various forms, and purporting to be something else, are sustained as wills, when they make a disposition of property, dependent on the death of the party executing them. A deed, if it be testamentary in its import, and its consummation depends on the death of the maker, will be sustained as a will. 2 Al. R. 152, Dunn and Wife, et al. v. Br. Bk. at Mobile.

The language of a will is not closely scrutinized. It is sufficient, that it show the intention of the maker. If the language used, is in the form of a wish or request, it is as operative, as if the direction were in the form of a command.

A will written in pencil, is as valid as if it were in ink, if it sufficiently appear, that the testator intended the paper as a declaration of his mind. It is the general presumption of law, that alterations made in pencil, are deliberative; and that those made in ink, are final and conclusive.

A will which purports to convey both real and personal
estate, but which is not so executed as to be valid for disposing of real estate, may be valid as to the personal estate. 10 Al. R. 977, Hilliard and Wife v. Berford's Heirs and Adm'rs.

NUNCUPATIVE WILLS.

A nuncupative, or oral will (spoken and not written) must have been made in the last sickness; but these words, last sickness, do not import in extremis. Al. Dig. 597, sec. 2. 2 Cl. 218, Johnson et al. v. Glascock and Wife, et al.

A nuncupative will must have been made at the habitation of the deceased, or where he had resided ten days or more, next preceding the making of the will; unless he were taken sick abroad, and died before his return home. Cl. Dig. 597, sec. 2.

If the value disposed of by nuncupative will, exceed one hundred dollars, it must be proved, that the testator called on persons present to witness, that such was his will. Ib.

The statute in relation to nuncupative wills, is to be construed strictly; and the statute in relation to wills does not apply to soldiers in actual military service; or to mariners or seamen, being at sea. Cl. Dig. 597, sec. 5.

WILLS OF REAL ESTATE.

Every person twenty-one years of age, and of sound mind, may dispose, by will in writing, of his lands, tenements, or hereditaments, held in fee simple, or for life. Cl. Dig. 596, sec. 1.

A will to dispose of real estate, must be signed by the testator, or by some other person for him in his presence, and by his direction. Ib.

And it must be attested by three witnesses, signing their names in the presence of the testator. It is not necessary to prove, that the testator actually saw the subscribing witnesses sign their names; it is sufficient, if, from their relative positions, he might have seen them sign. Cl. Dig. 596, sec. 1. 12 Al. R. 687, Hill v. Barge.

A will purporting to dispose of real estate, does not apply to real estate acquired by the testator between the making of the will and the death of the testator.
A will is at all times revocable by the testator. But no will in writing, or bequest therein of goods and chattels, shall be revoked by any subsequent will, codicil, or declaration, except the same be in writing. *Cl. Dig.* 597, sec. 5.

The presumption of law is, that the cancellation or obliteration of a will, by the person who made it, is a revocation: but this presumption may be rebutted by evidence. If a man, by mistake, throw ink instead of sand on his will, the instrument will be defaced; but this will not be a revocation, for that depends on the intention of the testator.

The legal effect of the act of cancellation, or obliteration, depends on the intention. If the maker of the will performs any act of cancellation or destruction, and he does all that he had intended to do, in completing the act, the will is thereby revoked, even though the cancellation or destruction of the paper be not complete. But if the act of cancellation or destruction, intended by the testator, has not been finished by him—as where he has been stopped by a bystander, while performing it; and he proceed no further in cancelling or destroying the instrument; this is not, in law, a revocation.

If the testator tear off his signature at the end of the will, this is deemed a revocation of the whole. But if he obliterate only a particular clause, this is a revocation of no more than is obliterated.

When a testator performs any act, which, standing by itself, would be a revocation of a will made by him—as if he draw lines of cancellation across it, or tear off his signature; and it appear by evidence, that he intended such revocation in order to give effect to a different disposition of his property; and the new instrument intended for this purpose cannot be sustained; then the first will is not revoked.

When a will has been kept by the testator in his possession, and after his death it is found among his repositories, cancelled or obliterated, the law presumes, that the cancellation or obliteration was performed by the testator, with the design to revoke such will; and this will be a revocation.

A will may be revoked by another will, subsequently made,
contrary to, or inconsistent with the first. And for this purpose, it is not necessary that the latter should expressly revoke the former. But if the two wills can stand together, they will both be sustained. And if the last made be inconsistent in part with the first, but do not expressly revoke the first, then the later revokes the earlier, only so far as they are inconsistent with each other.

If the contents of the later will be not known, it does revoke the first.

A will of personalty may be partially revoked by a subsequent unfinished will, which, by the act of God, the testator has been prevented from completing. The two instruments shall stand together, as the will of the deceased, and operation will be given pro tanto, to the latter, on proof, as in other cases of unfinished wills, that it expressed the final intention. It revokes the first, so far as the two are inconsistent.

A codicil, being dependent on the will, the revocation of the will is, in general, a revocation of the codicil. But a codicil may be disconnected with the will, and independent of it; and may remain in force, when the will has been revoked. This depends on the intention of the testator.

An act, which, of itself, would be a revocation, will not have that effect, if it be done under a false impression as to the facts leading to it. As where the testator gave legacies to the grand-children of his sister, and afterwards, by a codicil, revoked those legacies, giving as his reason, that these persons were dead: on proof that the legatees were not dead, it was held, that the legacies were not revoked.

If an earlier will has been revoked by a later will, and the last be itself revoked, the effect as to the revival of the last will, depends on the intention of the testator, to be ascertained by the circumstances that may be proved.

If an earlier will be revoked by a later will, and the testator afterwards republish the first, this republication is a revocation of the will which had been last made.
WILLS LOST OR DESTROYED.

The contents of a will which has been lost or destroyed, either by accident or design, or by the testator, while insane, may be established in the prbate court, on an issue submitted to a jury; and the probate should declare, that the will in this form is established, until a more authentic copy can be brought in.


REPUBLICATION.

If an earlier will be revoked by a later will, and then the first be republished, the first will be revived, and will have the same effect, as if it were then first made, so as to dispose of real estate acquired between its first execution, and its republication. But a republication, to have effect on real estate, must have all the requisites demanded by the statute for wills disposing of real estate.

A will made by a woman before, or during coverture, will be made valid by republication, after the coverture is terminated. And a will made by a girl under twelve, or a boy under fourteen years of age, will be made valid by republication after the attainment of those ages, respectively.

CONSTRUCTION OF WILLS.

The following are the principal rules for the construction of wills.

1st. The intention of the testator is to be ascertained; and a will must not be so construed as to defeat that intention, when known.

2d. Technical words are not necessary, in order to give effect to the intention of the testator. As when the testator used the words, "also my personal estate," and it was clear on the face of the will, that he understood by those words, all the property of any kind, over which he had an absolute power of disposal, it was held, that real estate passed under this description.

3d. If technical words are used in a will, they are to be un-
derstood in their proper legal sense, unless the context clearly shows a different intention. Technical words are to have their legal effect, unless it is clear, from other and inconsistent words, that the testator meant otherwise.

4th. The construction of the will, is to be made upon the entire instrument; and not on its parts, disjointed. And all its parts are to be construed with reference to each other.

5th. The court is to give effect to every word of a will, provided such effect can be given, consistently with the general intent of the whole will, taken together. But when it is impossible to form one consistent whole, the separate parts being irreconcilable, the latter part will be sustained. But the rule is attended with this modification, that the general intent, although first expressed, will overrule the particular intent last expressed.

6th. The will must be so expounded as, if possible, to pursue the intention of the testator. In order to maintain the clear intention, as apparent on the whole will, words and limitations may be transposed, supplied, or rejected. But words are not to be rejected, if they admit of a rational construction as they stand. "Or" may be construed "and," and vice versa. "If" may be construed "when." But a mistake cannot be corrected, nor an omission supplied, unless it clearly appear, by fair inference from the will as a whole. An express bequest cannot be controlled, by the reason assigned for it. The reason assigned, may aid in the construction of doubtful words; but it cannot justify the rejection of words that are clear. And the plain, clear construction is not to be controlled by any consideration of the character of the bequest.

8th. The intention of the testator is not to be set aside, for the reason, that it cannot take effect to the full extent; but it is to be sustained as far as may be practicable.

**Modes of Describing a Legatee.**

*Children.* The term "children" does not, in general, apply to any but the immediate descendants of the person named. It does not, in general, include grand-children. But there are cases in which it is construed to extend to grand-children, as when there is no child in existence at the date of the will; or
when the testator uses the terms "issue" and "children," indiscriminately. As issue includes grand-children, it appears that the testator intended to embrace them, when he used the word "children."

Natural children who have acquired the reputation of being the children of a particular person, prior to the date of the will, may take under the description of "children" of that person. And they may take under that description, in participation with legitimate children, when such intention appears from the will. But *prima facie* "children" means *legitimate children*; and extrinsic evidence is not admitted for the purpose of showing that natural children were intended under that term.

Generally, the term "children" includes all of the class mentioned, who may be in existence at the time of the death of the testator; and among them is included a posthumous child. But when it appears from express declaration in the will, or clear inference from it, that the testator intended those who answered to the description at the date of the will, such construction must be given.

When the distribution of the fund bequeathed, is to be made among the legatees at a particular time subsequent to the death of the testator, the term "children" will include all of the class designated, who may be in existence at such time of distribution. A legacy to "the children of A., when his eldest son shall be twenty-one years of age," will embrace all the children of A. who may be in existence at the time mentioned, though born of a subsequent marriage. But cases may occur, where the whole context will show a different intention; and that intention, when ascertained, must prevail.

When there is a legacy for life or years, with remainder to "the children of A.,” all the children of A. who are in existence at the time of the death of the testator, then take vested interests, transmissible to their representatives, should they die before the termination of the particular estate. And all the "children of A." who may come into being before the particular estate ends, take a vested interest as soon as they come into being, which in like manner, on their death, is transmissible to their representatives.
Grand-children. This term does not, in general, include great-grand-children; but all the distinctions in relation to the enlargement of the term "children," apply to the term "grand-children."

"Nephews and Nieces" do not in general include great-nephews, or great-nieces; and the rules stated for the construction of the term "children," apply to these terms.

Second Cousins have been considered as extending to cousins in the third degree. But this seems to be contrary to the general rules of construction.

Heirs. A devise of real or personal estate to "A. and the heirs of his body," is an unlimited grant of the property to A.

A devise of real estate to A., in which no mention is made of his heirs, conveys to him in fee simple, if a less estate be not limited by express words. Cl. Dig. 156, sec. 33.

When the word "heirs" is used to denote the persons who are to hold in succession, and not the quantity of the estate, it means such persons as would succeed to the property, according to the laws regulating descent and distribution.

Issue. A bequest of real or personal estate to "A. and his issue," conveys the property absolutely to A.

In general, the term "issue" will embrace all who may be descended from the person named, including children, grandchildren, and great-grand-children. But if it appear by just inference from the will itself, that the testator used the term in a more limited sense, as when it was coupled with the word "parent," as its correlative term, the word "issue" is construed to mean children only.

Descendants. This term comprises all the individuals descended from the stock or family referred to, and it includes children, grandchildren, and great-grand-children, who will all take per capita.

Relations. A legacy to "relations," generally, without enumerating any of them; is construed to mean those kindred who would be entitled to distribution under the law, if the deceased had died intestate. A legacy to each of his "relations by blood or marriage," is confined to kindred who would be entitled under the statute of distribution, and to persons married to such
relations. And the same rule applies, when the bequest is to "near relations," or to "poor relations."

A wife cannot, in general, claim under a legacy to "the relations" of her husband; nor can a husband, in general, claim under a legacy to "the relations" of his wife.

The term "nearest relations" is not construed according to the right under the statute of distribution. Where a testator had brothers and sisters living at the time of his death, and also nephews who were the children of a deceased brother, a legacy to be equally distributed among his "nearest surviving relations" will go to the brothers and sisters, as nearest, to the exclusion of the nephews.

A bequest to "my nearest relation," in the singular, if there are several persons nearest of kin, in the same degree, will be divided equally among them.

Next of kin embraces those only who are related to the testator by blood; and equally, whether of the whole, or of the half-blood. A legacy to the next of kin is construed as a legacy to the nearest relations, and not according to the right under the statute of distribution. Under this bequest, a surviving brother will be entitled, to the exclusion of a child of a deceased brother.

Family. This word in a bequest, generally has the same meaning as kindred, or relations. But the construction given to the term may be modified by the context.

MISTAKE IN THE NAME OR DESCRIPTION OF A LEGATEE.

The general rule is that when there is a mistake in the name or description of a legatee, if there is no reasonable doubt as to the person intended, the mistake will not frustrate the bequest.

1st. The intention of the testator may be ascertained from the context, in the will. If the mistake occur in the name of the legatee, it may be corrected by referring to the description; as where the legacy is to "my namesake, Thomas, the second son of my brother;" and the testator's brother has no son named Thomas, but his second son is named William: in this case, there is sufficient certainty in the description, to correct the mistake in the name; and the second son will be entitled to the legacy, although his name is not Thomas.
And an error in the description may be obviated by certainty in the name: as where the legacy was to "Charles Miller Stan-
den, and Caroline Eliz. Standen, legitimate son and daughter of Charles Standen, now residing with the company of players," and it appeared that they were illegitimate children; there was sufficient certainty in the names to identify the legatees, and to correct the mistake in the description. Their claim to the lega-
cy was sustained.

And an omission, by mistake, of the name of a legatee, may be supplied by the context; as when the testator gives his estate, to be divided among his seven children; and in enumer-
ating them, he states only six names; the seventh, not named, will be entitled to a proportional part. Or when he makes a bequest to his six grand-children; and in stating their christian names, he mentions one of them twice over, and altogether omits another; the one whose name has been omitted, will be entitled to his proportional part. In these cases, the context in the will, shows the intention of the testator. The mistake may, in certain cases, be rectified by extrinsic evidence. When an ambiguity as to the name, not apparent on the face of the will, is raised by the introduction of parol evidence, parol evidence may be used to explain the ambiguity. As when the testator devises to his "son Thomas," and it appears by parol evidence, that he has two sons of that name, parol evidence may be ad-
mitted to show which of them the testator intended. When such ambiguity arises, the court may inquire into every material fact relating to the persons who claim under the will, and to the circumstances of the testator, and of his family, and affairs, in order to ascertain the person intended by the testator.

In general, an ambiguity apparent on the face of the will, may not be explained by parol. As where a blank has been left for the name of the devisee, parol evidence is not admissible to show, whose name was intended to be inserted. But where a blank was left for the christian name only, the family name having been inserted, parol evidence was admitted to show the individual intended.
LEGACIES, GENERAL OR SPECIFIC.

A legacy is general, when it is so expressed as not to be a bequest of a particular thing, distinguished from all others of the same kind; and a legacy is specific, when it is so expressed as to be a bequest of a specified part of the testator's estate, which is so distinguished. If the bequest is in these words, "I give a diamond ring," it is a general legacy, which may be satisfied by the delivery of any ring of that kind. But if the words are, "I give the diamond ring presented to me by A." the legacy is specific, and can be satisfied only by the delivery of the particular ring specified.

The distinction between these different kinds of legacy, is very important, as will be more fully seen, in considering the abatement, and the ademption of legacies.

If there be a specific bequest of a thing described as then in existence, and no such thing did exist among the testator's effects, the legacy must fail: as when the legacy is of "my grey horse," and the testator had no horse, the executor is not bound to purchase a grey horse, in order to satisfy the legacy; but the legacy fails. If the legacy is in general terms, of "a horse," the executor is bound to purchase a horse for the legatee, if the assets will admit of it.

A legacy of quantity, is commonly, a general legacy; but there are legacies of quantity, which are said to be in the nature of specific legacies. These are sometimes called demonstrative legacies. It is, for example, a bequest of a certain sum of money, to be paid out of a particular, specified fund. This legacy is so far general, that if the fund specified, be called in, or fail, the legacy will not for that reason fail; but will be payable out of the general assets: and it is so far specific, that it will not be liable to abate, with general legacies, on a deficiency of assets; provided the particular fund be sufficient.

In doubtful cases, the court is inclined to consider the legacy as general, rather than specific.
LEGACIES OF MONEY, STOCK, DEBTS.

Money. There may be a specific legacy of money; as a legacy of a certain sum of money in a certain bag, or in the hands of A. But a legacy of a certain sum of money "to be paid in cash," is a general legacy. A legacy of money for a particular purpose, as to purchase a ring, or to purchase land, is a general legacy.

Stock. A bequest of stock, if there are words specifying what stock, is specific; as a bequest of "my stock" in a particular company; or of a certain part of "my stock." But if the bequest is, in general terms, of so many shares "of stock," it is general, for the testator may have intended that his executor should purchase so much of the stock mentioned, out of the general assets, for this legatee.

Debts. There may be a specific legacy of a debt; as when the bequest is, of "the money owing to me by A.;" or of "the money due to me on the bond of B." But where the legacy is, of a certain sum of money, to be paid out of a debt specified, this is not a specific legacy, but a bequest in the nature of a specific legacy. It has, against all general legatees, a prior claim to payment out of the debt specified, and is so far specific; but in another sense, it is general, for if the debt be not in existence at the death of the testator, or if it be insufficient to pay the legacies charged on it, this legacy will be entitled to satisfaction out of the general assets.

BEQUEST CONNECTED WITH THE REALTY.

Every bequest of land is specific, whether in fee simple, or for life, or for years.

A bequest of a rent out of a term for years, is specific. But if it appear from the will, that the testator intended to give to the legatee, an annuity certain at all events, it is a bequest in the nature of a specific legacy, and if the particular rent should fail, the legacy will be payable out of the general assets.
CONSTRUCTION OF WILLS.

A bequest of all the testator's personal estate, is a general legacy. But if the testator had personal estate at different places, a bequest of all his personal estate at one specified place, is a specific legacy.

DESCRIPTION OF PROPERTY IN LEGACIES.

"Goods," "chattels," "effects," standing alone, without words of qualification or limitation, are general terms, and include all the personal estate of the testator, as slaves, stock, bonds, notes, money, furniture, plate, &c.

But when the bequest is, of "all my goods," or of "all my chattels" at a particular place, bonds and other choses in action do not pass, for they are considered to be title to things out of the place specified, and not things in it.

A bequest of "household goods" will not pass goods in the way of trade, or business, which may be in the house; nor will this bequest include articles, whose use is in their consumption—as supplies of victuals. Nor will it include guns, swords, or pistols.

A bequest of "household furniture" includes all personal chattels, that may contribute to the use, or the convenience of the householder, or the ornament of the house: but it does not extend to goods in the possession of the testator in the way of trade.

A bequest of "stock" on a farm, includes all moveable property on, or appertaining to the farm; and it has been decided to extend to growing crops.

A bequest of all the testator's "money," will pass cash and bank-notes.

A bequest of a debt due on a particular security, will pass the capital only, and not arrears of interest due at the testator's death; and a converso, a bequest of arrears of a debt, will not pass the principle. Sed quere.
LEGACIES, VESTED OR LAPPED.

When money is bequeathed, to be invested in the purchase of an annuity for the life of a legatee, and the legatee dies before the money is laid out, or even before the fund is available—as during the life of the person, after whose death the investment is to be made; yet still it is a legacy vested at the death of the testator.

If the legatee die before the testator, or before the happening of any other condition precedent to the vesting of the legacy, the legacy does not pass to the representative of the legatee, but lapses, and is extinguished; and the property embraced in it, becomes a part of the estate, not disposed of.

1st. Legacies lapsed by the death of the Legatee, before the death of the testator.

It is the general rule, that if the legatee die before the testator, the legacy lapses, or is extinguished.

Not only in bequests of chattels, in possession, but also in a bequest of a debt due by the legatee to the testator; the same rule applies; the legacy is extinguished by the death of the legatee before the death of the testator; and the debt will remain in force against the estate of the legatee, unless it appears from the language of the will, that the testator intended otherwise. Where the words were, "I devise to my brother, £2000; I also return him his bond for £400, with interest thereon, which he owes me;" it was decided, that this was not a release of the bond; but was a legacy, which lapsed by the death of the legatee in the life-time of the testator.

A legacy to A, his executors, administrators, and assigns, is subject to the same rule, and will lapse by the death of the legatee in the life-time of the testator. For the words, "executors, administrators, and assigns," are surplussage, and do not alter the nature of the gift.

But if the legacy is so expressed, as to be payable at the testator's death, and the words are, "to A, or his personal representatives," it will not lapse by the death of the legatee, in the life-time of the testator. For the language implies, that the testator looked to the alternative, and intended, that if the lega-
tee should die before him, the representatives of the legatee should take the legacy.

The general rule, as above stated, may be controlled, by the intention of the testator, that the legacy shall not lapse, appearing on the face of the will; and by his substitution of the executors or administrators of the legatee. But a declaration in the will that the legacy shall not lapse by the death of the legatee, will not prevent its lapse on the death of the legatee before that of the testator, unless the executor, or administrator, or some other legatee, be named in the will, to receive it.

If a legacy be given to two persons jointly, and one of them die before the testator, the interest of the deceased legatee does not lapse, but survives to the other legatee. This case is not within the statute abolishing the right of survivorship in estates held jointly.

But when legacies are to several legatees, as tenants in common,—as where an aggregate fund is to be divided in equal shares among them, by name; if any of them die before the testator, the share intended for such deceased legatee will lapse into the residue of the estate.

The law is the same, as to survivorship in case of joint-tenants, and lapse in case of tenants in common, when the testator revokes the interest originally given to one of them.

But where a legacy is, to a class of persons, in general terms—as to the children of A, the death of one of them before the testator, will not cause a lapse of any part of the fund; but it will go to the survivors.

When a legacy is to one for life, with remainder to another—if the legatee of the life estate die before the testator, the legacy of the remainder over will not lapse, but will take effect on the death of the testator.

And if a legacy be to one, with a limitation over to another, provided the first should die before arriving at twenty-one years of age, or before the happening of any other event—if the first legatee die in the life-time of the testator, under the age limited, or before the happening of such other event, the legacy of the remainder over will not lapse, but will take effect on the death of the testator.

3*
2nd. **Legacies lapsed, by the death of the legatee, after the death of the testator.**

If a legacy be made, without specifying the time at which it is to be paid, it is due on the day of the death of the testator.

But when a future time is appointed in the will, for the payment of the legacy, a question arises, whether it was the intention of the testator, that the property bequeathed should vest at the time of his death, or at the day appointed for its payment.

In ascertaining the intention of the testator in this regard, two rules are observed.

1st. A bequest to a person, "payable," or, "to be paid," when he shall become twenty-one years of age, or at any other determinate time, creates in him an interest vested immediately on the death of the testator, transmissible on the death of the legatee, to his executor or administrator. For the words, "payable," or, "to be paid," refer to the time of payment, as different from the time of the gift; leaving the gift, one thing; and the time of its payment, a different thing.

2nd. If the testator does not use the words, "payable," or, "to be paid," or words of like import; and the legacy is given "at twenty-one years of age," or, "if," or, "in case of," or, "when," or, "provided the legatee shall arrive at twenty-one years of age;" or at any other future, definite time—then the legacy will not vest until that time arrives; and although the legatee survive the testator, if the death of the legatee happens before the arrival of the time or period fixed, the legacy will not pass to the executor or administrator of the legatee, but will lapse.

But these rules will always yield to the intention of the testator, whenever, on examination of the whole will, that intention appears to have been different.—As when a testator bequeaths a legacy to a person at a future time, in general terms; and either gives him the intermediate interest, or directs that it shall be applied for his benefit; this disposition of the interest shows the intention of the testator, that the legatee should at all events have the principal. And such a legacy vests at the death of the testator. But if the gift for maintenance is not coextensive with the whole amount of interest, or if it is drawn from a different fund, there is no ground for the infer-
ence, that the testator intended the property at all events to go to the legatee; and if, before the arrival of the time, the legatee die, the legacy will lapse.

When the interest or dividends are the subject of the bequest, and such language is used as will show, that the principal itself was to be given at the future designated time—the legacy will not create a vested interest in the principal, before the arrival of the time designated. As where the testatrix gave to A, the dividends on certain stock, which should become due after her death, until he should arrive at the full age of thirty-two years; and that, at that age, her executors should transfer the principal sum to him, for his own use. A died under that age; and it was decided, that the legacy lapsed.

**Lapse of Legacies Payable Out of Real Estate.**

In the English courts, the rule of law, that when the gift, and the time of payment, are distinct, the legacy does not lapse, and which is applicable to legacies of personal property, is not applied to legacies payable out of real estate. In such cases, the legacy is held not to vest before the time fixed for its payment; and if the legatee die before that time, the legacy is held to lapse. To this last rule, there is an exception, when each estate is bequeathed to one for life, and is charged, after his death, with a legacy for another. If the last legatee die during the continuance of the first estate or interest, the legacy to the last legatee, will not lapse, but will pass to his executor or administrator.

The rule above mentioned, as applicable to legacies of personal property, is established by the ecclesiastical courts, whose jurisdiction did not extend to devises of real estate. These being under the cognizance of courts of equity, these courts have established the rule as applicable to legacies payable out of real estate, being influenced by partiality for the owner of the inheritance. As the orphans court has cognizance of wills of real, as well as of personal estate, it ought to apply to legacies of both kinds, the rule of the ecclesiastical courts.

But in all of these cases, the rule of construction will yield to a direction in the will, showing what is the intention of the testator.
LAPSE OF LEGACIES CHARGED ON REAL AND PERSONAL ESTATE.

If a legacy is charged on a mixed fund, consisting both of real and of personal estate, the personal estate is considered as the primary fund, and is the first to be applied to the payment of the legacy; and the real estate is auxiliary. In relation to the personal property, the legacy is controlled by the same rules, as if it were payable out of personal property alone; and so far as the real estate is to be resorted to, it is to be governed by the same rules, as if it were payable out of real estate alone.

LEGACIES ON CONDITION.

A conditional legacy is one, the operation of which depends on the happening, or not happening of some uncertain event, by which it is to be confirmed or defeated. No precise words are necessary to create such a condition; but whenever the language used, shows the intention of the testator to make a condition, that intention will be sustained.

Conditions are precedent or subsequent. In a legacy subject to a condition precedent, no interest is vested in the legatee, until the condition is performed. But when the condition is subsequent, the interest is vested in the legatee, in the first instance, subject to be divested, on the non-performance, or breach of the condition.

In a legacy of personal estate, if the condition precedent is impossible, the bequest is discharged of the obligation, and is absolute. But if the condition precedent is rendered impossible by an event not known to the testator, and contrary to his belief or expectation, the impracticability of performance will defeat the legacy. As when the legacy is given, on the condition that the legatee marry the testator's daughter, and she happens to be dead at the date of the will, or if she were living at that time, but dies before the nuptials can be solemnized—the legacy is void.

In a bequest of real estate, with a condition precedent that is impossible, the devise is void.

If the condition precedent requires the performance of an act wicked in its own nature, (malum in se,) the bequest is
void, whether of real, or of personal estate. But if the condition precedent require the performance of an act that is illegal, merely because it is against a rule, or the policy of the civil law, the legacy of personal property will be discharged of the illegal condition, and be valid. But a legacy of real estate, with such illegal condition precedent, will itself be void.

When the performance of a condition subsequent, is illegal, the bequest, whether of real, or of personal property, is valid, and free from the condition.

If the condition precedent be performed cy pres, that is, as far as may be practicable; or at least, so as substantially to fulfill the testator's intention—it is sufficient. The following is an example of such performance. A bequeathed a legacy to B, on condition that B erect a monument to A within three days after the death of A. If B failing literally to comply with the condition, erect a monument within a reasonable time after the death of A; this will be such a performance of the condition, as will entitle B to the legacy. Or if the condition precedent require the legatee to execute a certain release within a time specified; and the legatee, failing to execute the release within the time specified, should execute it within a reasonable time; on this performance, he will be entitled to the legacy.

But there are cases, in which the observance of the time mentioned in the condition, is material to the performance of it, and then, the condition must be performed within the time limited, to entitle the legatee to the legacy.

It is a general rule, that a condition subsequent must be performed with strictness; because its effect is, to divest an estate already vested.

A condition, that the legatee shall not dispute the will, is, in general, considered to be in terrorem merely; and it does not operate as a forfeiture of the legacy, on the legatee's disputing the will. But when this condition is connected with a clause giving the legacy to another person, on breach of the condition; then, if the legatee contest the will, his interest in the legacy will thereby be defeated; and the legacy will vest in the substituted legatee. However, if the executor is the substituted legatee, this is regarded to be in terrorem, and is not enforced; but if the will directs, that on breach of this condi-
tion, the legacy shall fall into the residue, the residuary legatee will be entitled to it.

*Conditions in restraint of marriage*, are subject to the following rules.

Conditions in restraint of marriage, which do not, directly or indirectly, import an absolute injunction to celibacy, are valid. In this view, conditions restraining marriage under twenty-one, or other reasonable age; or without the consent of the executor, or the guardian, or other person; or requiring, or prohibiting marriage with particular persons; and others of similar character—are legal and valid.

A condition in restraint of marriage without the consent of the person designated, no limitation as to age being connected with it; is, in general, considered to be *in terrorem*; and is not enforced, if there be no disposition over, of the legacy. But if the will directs, that, on breach of this condition, the legacy shall pass to another legatee; then the condition will be enforced in favor of the substituted legatee.

When, in conditions precedent, the consent of guardian, executor, or trustee, to the marriage of the legatee, is required in order to give effect to the legacy, that consent must be obtained, before, or at the marriage. Consent given after the marriage, will not be a fulfillment of the condition.

When there are several executors, guardians, or trustees, and the consent of all of them is required; if a part of them be dead, the consent of the survivors is sufficient.

If there are several executors, or other persons, whose consent is necessary, and the condition is subsequent, so that marriage without the consent of those several persons, would divest the legacy, the death of one or more of them, will discharge the condition: for its fulfillment has become impossible.

A general consent, given after the legatee has attained to majority, is sufficient; and an unconditional consent, once given, cannot be retracted, unless for good reasons, moral or pecuniary, afterwards discovered. But the consent may be conditional; and it must then be considered in connection with the condition, whether fulfilled or not. And consent may be implied; as when the executor is cognizant of the addresses for marriage, and intimates no disapprobation. For then, his
silence implies consent. *Qui tacet, satis loquitur.* Or if the legatee married in the life-time of the testator, with his consent, or his subsequent approbation, this will supersede the necessity for the consent of the executor, and will sustain the legacy.

A first marriage with consent, is a sufficient fulfillment of the condition; and a second marriage without consent, will not cause a forfeiture of the legacy.

When a bequest is made to one at twenty-one years of age, or on marriage with consent, with a clause of forfeiture on marriage without consent—on the legatee's attaining the age of twenty-one, he is entitled to the legacy, discharged of the condition in relation to marriage.

If the executor or trustee, whose consent to the marriage is a condition of the legacy, should refuse to give his consent, chancery will enquire into the proposed marriage, and determine on its propriety.

When the testator bequeaths property to his wife "so long as she continue his widow," if the will provides no subsequent disposition of the property included in the legacy, the condition will be considered as *in terrorem.* But if the will direct that the legacy shall pass to another, in the event that the widow marry, then the condition will be enforced in favor of the substituted legatee.

*A repugnant condition,* that is, a condition inconsistent with the gift, is void; and leaves the legacy unimpaired. A condition restraining the legatee from spending, or disposing of the property, is repugnant and void. But a condition restraining him from disposing of it to a particular person, or before a specified time, is not repugnant.

*In legacies to executors,* given to them in that character, and not merely as marks of personal regard, there is an implied condition, that such persons shall perform the duties of executor. And in such cases, two questions arise: 1st, when is the legacy given to the legatee, in the character of executor? and 2d, what is a sufficient performance of the duties of executor?

The general presumption is, that a legacy to one who is appointed executor, is given to him in that character; and in order to repel this presumption, it is incumbent on him to show
something in the nature of the legacy, or other circumstances arising in the will, leading to the opposite conclusion—and that the bequest for the person named as executor, is designed for him, independently of that character. If this conclusion be established, he will be entitled to the legacy, whether he act as executor or not.

If the executor procure probate of the will, with intention to act under it, that will be a sufficient performance of the condition; or if he unequivocally manifest an intention to act in the executorship, by performing some of its first duties, and is prevented by death from further entering on the office, this also will be a performance sufficient to give effect to the legacy.

But if, in other respects the conduct of the executor shows, that it was not, bona fide, his intention to execute the will, the mere act of procuring probate, will not entitle him to the legacy.

**Cumulative Legacies.**

Legacies are said to be cumulative, in contradistinction to such as are merely repeated in the will. When a testator has twice bequeathed a legacy to the same person, it becomes important to determine, whether the latter clause is merely a repetition of the first; or is in addition to the first, and cumulative on it. The intention of the testator, when ascertained, is to be followed.

Sometimes the will contains internal evidence, that but one gift is intended; as when, in the two different clauses containing the legacy, the same motive is expressed, and the same sum is given. This double coincidence leads to the conclusion, that but a single gift was intended by the testator, the latter clause being only a repetition of the former. But a coincidence on one only of these points will not raise the inference of the intention of but one gift.

Or the will may contain internal evidence, that two gifts were intended by the testator, the latter being cumulative on the former; as where one is given, generally, and the other for a purpose expressed; or where one reason is assigned for the former, and another reason for the latter; or where the legacies are not of the same kind, the one being an annuity, and
the other, a sum of money; or where there are other differences between the two clauses.

When there is no internal evidence of the intention of the testator, the following rules are observed, for the purpose of ascertaining that intention.

1st. If the same specific thing is bequeathed twice to the same legatee, in the same will,—or in the will and a codicil,—then there is but one legacy.

2d. When the same amount is bequeathed to the same individual, in one instrument, (whether will or codicil,) there is but one legacy.

3d. When, in two clauses, unequal amounts are given to the same person, in the same instrument, there are two legacies, the latter being cumulative on the former.

4th. When two legacies are given, one in the will, and the other in a codicil, or in two different codicils without expression of motive, or other explanation, whether the amounts be the same, or not, the latter is cumulative on the former.

In relation to cumulative legacies, parol evidence is sometimes admissible, to explain the intention of the testator. When there are two clauses, each containing a legacy to the same individual; and one of the rules above stated, raises the presumption, that but one legacy was intended; parol evidence is admitted, to repel this presumption; and to show, that the testator intended the double gift which he has expressed. Such evidence does not contradict the written instrument; it sustains that instrument, against the presumption of law.

LEGACY BY A DEBTOR TO HIS CREDITOR.

In courts of equity, it is a general rule, that when a debtor bequeaths to his creditor, a legacy equal to, or exceeding the amount of the debt, it shall be presumed to be intended as a discharge of the debt; and that, if the creditor accept it, he thereby releases the debt. But this rule seems not to be well supported by reason; and it is subject to many exceptions; as when the debt was not contracted, until after the will was made; or when the debt is due on account current; or when it was due on a negotiable security; or when the legacy is con-
tingent, or uncertain; or when the legacy is not payable immediately after the death of the testator; or when the legacy is different in kind, from the debt; or when it is a legacy of a specific chattel.

And the presumption, that the legacy was intended to be a satisfaction of the debt, may be counteracted by a clause in the will, showing a different intention.

The rule above stated, that the legacy is a discharge of the debt, when applicable, extends to a legacy given by a parent to a child, and to a legacy from a husband to his wife.

Whether parol evidence may be received, to repel the presumption raised by the rule, is a question left doubtful, by contradictory decisions.

LEGACY BY A CREDITOR TO HIS DEBTOR.

When a legatee was indebted to the testator, the executor may retain the legacy, in part, or in full, in satisfaction of the debt.

When a legacy is to a wife, whose husband was indebted to the testator, in an action at law, by husband and wife, for the legacy, the executor would be permitted to retain, to the amount of the debt. But in a court of equity, he would be compelled to pay over one-half; or other large part, to be settled on the wife, as a provision for her support.

But if the wife die before payment or settlement of the legacy, the executor may retain it, in discharge of an equal amount due by the husband to the testator. (But see the act of 1847.)

When a creditor makes a legacy to his debtor, and does not use such language as will evince an intention to release the debt; and the securities of the debt remain uncancelled, at the death of the testator, no inference arises, that the legacy is a release, or extinguishment of the debt. If such intention is not clearly expressed in the will, or plainly implied from it, it may be established by parol evidence.
APPOINTMENT OF A DEBTOR, EXECUTOR.

The appointment of a debtor to be executor, does not, of itself, extinguish the debt. *Cl. Dig.* 228. *sec.* 35.

APPOINTMENT OF A CREDITOR, EXECUTOR.

On the appointment of a creditor, to be executor of a solvent estate, he may retain money from the assets, sufficient to satisfy his debt. And in this view, if he have assets sufficient, his appointment is, *sub modo*, an extinguishment of his debt. And the law is the same, when one of several joint-debtors makes the creditor, his executor. The assets in his hands so far extinguish the debt, that the creditor executor cannot maintain an action against the other joint-debtors. And the same law is applicable, when the debtor appoints his creditor to be one of several executors; provided, the creditor accept the appointment.

ADEMPTION OF SPECIFIC LEGACIES.

If a specific legacy is not remaining *in specie*, at the death of the testator, but has been converted, or disposed of by him, it is considered as revoked by ademption. If the legacy be of a piece of cloth, and the testator either sell it, or have it made into a garment; the legacy is adeemed, and the legatee takes nothing. If a debt be bequeathed, and then payment of it be received by the testator; this is an ademption of the legacy; and a part payment of the debt, to the testator, is an ademption *pro tanto*. And the legacy is adeemed, whether the creditor pay the debt, without demand, or on the acquisition of the testator.

But a legacy of stock is not adeemed, by its being transferred to a different fund, by operation of law; nor when the stock is transferred, with the testator's consent, from the name of a trustee, to his own; nor from the name of one trustee, to that of another trustee; nor from the specified fund to a fresh security.

The ademption of a specific legacy will be effected, by the testator's removing it from the place mentioned in the will,
when the locality is deemed essential to the bequest: as where the bequest is, of all the testator's household goods, in his house at A, at the time of his death; and he afterward remove them to another place.

A mere republication of a will does not revive a legacy, which has been extinguished by ademption. But if, between the ademption, and the republication, the testator has acquired other property of the same description with that bequeathed, it appears reasonable that this substituted property should pass under the legacy; as the republication is a present declaration of the present intention of the testator.

The doctrine of the ademption of legacies does not apply to what are called, demonstrative legacies, that is, legacies of so much money, payable out of a fund designated. In these cases, if the fund designated should not be in existence at the death of the testator, the legacy remains, to be paid out of the general assets.

**ADEMPTION OF LEGACIES, BY PORTIONS TO CHILDREN.**

It is the doctrine of courts of equity, that, if a father makes a legacy to a child, and afterwards advance a portion for that child, this will be an ademption of the legacy. And this doctrine applies, even though the sum advanced, be less than the sum bequeathed. 10 *Al. R. 72*. *Roberts and wife v. Weathertford*.

But this presumption of ademption is repelled, when the property bequeathed, is not of the same character with the property advanced as a portion; or when the testamentary provision was certain, and the subsequent advancement depends on a contingency; or when the legacy, or the advancement is expressed to be made in lieu of, or in compensation for an interest to which the child was entitled; or where the bequest to the child is of a residue, or part of a residue.

The presumption of ademption may be confirmed or destroyed, by parol evidence, showing what was the intention of the parent.

The doctrine of presumed ademption, by portions subsequently advanced, applies only when the testator is the paren
or stands *in loco parentis.* When the testator is not in the natural, or the assumed relation of parent to the legatee, the legacy will not be deemed by a subsequent advancement, unless it be given for a particular purpose, and the advancement be made for the same purpose; or unless it otherwise legally appear, that the advancement was intended as a substitution for the legacy.

All of these rules yield to clear indications of a different intention, had by the testator.

**ABATEMENT OF LEGACIES.**

When the assets are not sufficient to pay the debts, and satisfy the specific legacies; or when, the debts being paid, the general assets, (that is, the property not specifically bequeathed,) are not sufficient to satisfy all the general legacies,—then the general legacies all abate proportionally. And a general legacy to the executor, has no preference.

The residuary legatee has no right to call on the other general legatees, for abatement; even though there was, at first, a residue, which has been consumed by the *devastavit* of the executor.

If a general legacy is provided for one, in consideration of a debt due by the testator to, or the relinquishment of any right by, such person; this general legacy will not abate with the other general legacies; but will have a preference over them, in payment. And this preference will be maintained, even though the legacy exceed in value, the debt released, or the right or interest relinquished by the legatee, in consideration of the legacy.

A legacy which is general in its nature, will not be exempted from abatement with the other general legacies, by reason of its being applied to a particular purpose—as a legacy of a certain sum to executors, for their care and trouble; or of a sum of money, for mourning rings.

An annuity charged on the personal estate, is a general legacy, and subject to abatement.

There may be features in the will, giving to one general legacy, a preference over others—as where the testator, in his will,
directs such a preference. Or where the testator, after making some general legacies, in his will expressed a belief that there would be considerable surplus from his personal estate, beyond the legacies already made; and he then made several additional general legacies: but it happened, that there was no surplus. In this case, the first class of general legacies was preferred; and they were not subjected to abatement for the benefit of the last class, which was excluded. This seemed most consonant with the intention of the testator.

When there is a deficiency in the assets, a general legacy does not acquire a preference over other general legacies, by a direction in the will, “that it shall be paid immediately after the death of the testator, out of the first moneys received by the executor.” Nor will a preference be due to a general legacy expressed in this way, “imprimis,” or, “in the first place, I give one thousand dollars to A.”

What has been called a demonstrative legacy, that is, a legacy of a certain sum of money, with reference to a particular fund for payment, being in the nature of a specific legacy, preserves its lien on the fund designated; and until the failure of that fund, it is not subject to abatement with the general legacies.

While any part of the general assets remain, property specifically bequeathed, is not liable to be applied to the payment of debts. But when the assets not specifically bequeathed, are insufficient for the payment of all the debts, then the specific legacies must abate, in due proportion among themselves, to supply the deficiency for the payment of debts. And a legacy in the nature of a general legacy, is embraced in this rule; and also a specific devise of real estate.

**APPOINTMENT OF EXECUTORS.**

An executor derives his office from appointment in the will. His appointment may be express; or it may be constructive; when, by words of circumlocution, the testator designates the person who is to execute the will—as if he say, that he commits
his goods to A., to pay his debts, and otherwise dispose of them.

An execution may be appointed by implication—as if the testator say, "I will that A be my executor, if B will not." In this case B is appointed by implication.

If the testator in the will direct, that the legatees shall appoint the person who is to execute his testamentary bequests, their nominee is the executor.

A testator may appoint several persons, his executors, contingently; as if he appoints his wife executrix; but if she will not, or cannot be executrix, then he appoints his son, executor; and if he will not, or cannot be executor, then he appoints his brother executor. In this case, the wife is instituted executrix, in the first degree; the son is substituted, in the second degree; and the brother is substituted in the third degree.

When a testator appoints an executor, and also appoints another, in case of the death of the first—on the death of the original executor, the person appointed to succeed, becomes the executor.

The appointment of an executor, may be absolute; or it may be qualified by limitations, as to the time or place wherein, or the subject-matter whereon, the office is to be exercised—as if the testator appoint A to be his executor, at the expiration of five years after his death; or during five years next after his death; or during the minority of his son. And in these cases, if the testator do not appoint a person to act, before the time limited for the commencement of the office, on the one hand; or after the period limited for its duration, on the other; the probate court may grant a limited administration, cum testamento annexo.

When the property of the testator lies in different countries, he may appoint executors for each different country.

A testator may appoint one person to be executor for one portion of his estate, and a different person to be executor for another part, or for the residue of his estate. But creditors are not affected by this division of the office; and such executors may all be sued as one executor.

If there has been a sole executor, who has acted, his executor is the executor of the first testator; and if there have been sev-
eral executors, the executor of the last who has acted, becomes the executor of the first testator. But the office is not transmitted to the executor of an executor who has not qualified.

The person appointed executor, may refuse to accept the office. If there be a sole executor appointed, and he renounce; or if there be several executors appointed, and they all renounce; and administration be granted; none of them have a right afterwards to be admitted to the executorship. And where several executors were appointed, and one only accepted and acted, after his death, administration ought not to be granted to a different person, before the survivor, who had refused in the first instance, now again refuses or declines to act.

**FOREIGN EXECUTOR.**

A foreign executor, or administrator with the will annexed, of a testator, who, at the time of his death, had no known residence in the state, and for whom no personal representative has been appointed in the state, may demand and receive a debt due to the testator, and maintain an action in his representative character; and he will have all the rights and privileges of one duly appointed and qualified in the state, subject to the following restrictions. Before judgment shall be rendered at the suit of such foreign executor, or administrator with the will annexed, he must produce in the court, a copy of his letters testamentary, probate, or letters of administration, duly authenticated according to the laws of the U. States; and the certificate of the judge of probate of some county in the state, that the letters have been duly recorded in his county. And he is not to receive any money recovered by judgment, or any money otherwise due to him in such representative character, until a copy of his letters testamentary, probate, or letters of administration shall have been recorded in the office of the judge of probate of some county in this state; and he shall have deposited, in the office of the judge of probate of the county in which the judgment may have been rendered, or in which the debtor may reside, a bond with security, for the faithful administration of all money and other effects received by him in this state. *Cl. Dig. 227, sec. 31.*
If such foreign executor or administrator is not authorized to sue in this state, the grounds of disability should be pleaded in abatement. 5 Al. R. 654, Cloud v. Golightly, adm'r.

EXECUTOR DE SON TORT.

A person who is neither executor nor administrator, makes himself executor de son tort, (of his own wrong,) by an improper intermeddling with the goods of the deceased.

But there are many things, which one who is neither executor nor administrator, may perform in relation to the estate of the deceased, without becoming an executor de son tort; as if he lock up the goods of the deceased, for preservation; if he direct the funeral in a manner suitable to the estate of the deceased, and defray the expenses with the funds of the deceased; if he make an inventory of the property; if he feed the cattle; if he repair the houses; or if he provide necessaries for the family; or any like acts of kindness or humanity.

A widow may live at her husband's last residence, and take care of the estate; and she will not thereby make herself liable as executrix de son tort. 10 Al. R. 197, Ward v. Bevil and Wife, exrs.

When one takes possession of goods left by a deceased person, under a claim which is colourable, he will not be chargeable as executor de son tort. 5 Al. R. 31, Denslee, ex'r, v. Edwards, use, &c. 10 Al. R. 197, Ward v. Bevil and Wife, exrs.

Whether the act performed, makes a man executor de son tort, is a question of law for the court: the bona fide of the transaction presents a question for a jury. Ib.

After letters testamentary, or of administration, have been granted, intermeddling with the goods of the deceased will not make a man executor de son tort.

An executor de son tort is liable to an action by the rightful executor or administrator; and he is also liable to be sued by a creditor of the deceased, and by a legatee. If there be a lawful executor, he may be joined as defendant in the action against the executor de son tort; or they may be sued separately. But an administrator cannot be joined with the executor de son tort.
In an action against him, he is styled simply, executor.

If he be sued by a creditor, and plead *ne unques executor*, and issue be joined thereon; and it be found against him, on proof of some act making him executor *de son tort*, the judgment will be, that the plaintiff recover the debt and costs, to be levied out of the assets of the testator, if the defendant have so much; but if not, then out of the defendant's own goods.

But it is a good defence, that he has delivered the goods, before action brought, to the rightful executor or administrator.

An executor *de son tort*, has no right to retain assets, in payment of a debt due to himself.

In an action of trespass or trover, by the rightful executor or administrator, the executor *de son tort* cannot plead in bar, payment of the debts of the deceased. Such matter may be given in evidence, under the general issue, in mitigation of damages; but although the debts proved to have been paid, amount to the full value of the goods sought to be recovered, yet the plaintiff will be entitled to a verdict for nominal damages, if the estate be solvent; and if the estate be insolvent, he will recover at least as much as has been paid on those debts, beyond a legal *pro rata* distribution.

Such executor cannot make a valid transfer of the goods of the estate.

**ACTS BEFORE PROBATE.**

Before probate, an executor may lawfully do many acts in relation to the estate of the deceased. He may take possession of the testator's effects; and for that purpose he may enter, peaceably, into the house of the heir. He may commence a suit, by causing a writ to be issued; but he cannot declare, before he has obtained letters testamentary.

**PROBATE.**

Wills must be proved in the probate court of the county of the mansion-house or residence of the testator. But if he had no known place of residence in the state, and land be devised, the will must be proved in the probate court of the county,
where the land, or some part of it lies. If he had no known place of residence in the state, and no land be devised, the will must be proved, either in the county in which the testator died, or in that in which his estate, or some part thereof, or his creditors, or some of them, may be. *Cl. Dig.* 303, *sec.* 33. *Ib.* 598, *sec.* 10.

The practice of proving wills in common form, is at variance with the statute requiring citation to the parties in interest, when a will is to be offered for probate; and also with the statute permitting an appeal to the court of chancery, within five years; and it does not exist in Alabama.

In general, on application for probate, the probate judge must issue citation to the widow, or next of kin, to show cause, on the day specified in the process, or at the next stated session of the probate court, why the instrument offered, should not be established as the will of the deceased, and be recorded. And subpœnas must issue for such witnesses as the applicant may name, on the return of the process. *Cl. Dig.* 303, *sec.* 34.

The statute is carelessly drawn. There is no reasonable doubt, that the citation ought to issue both to the widow, and the next of kin; and that subpœnas ought to issue for the witnesses desired by parties opposing the will, as well as for those desired by the applicant for probate.

The court, at any stated session, (or on any return-day,) may hear and determine on an application for probate, although no citations may have been issued or served, on proof of reasonable notice thereof, or that the deceased had no widow, or kindred resident in the state.

If there are minor heirs resident in the state, citation for them must be served on the persons, under whose care they may be; and then they must be represented by guardians *ad litem.* *4 Al. R.* 253, *Shields, et al.* v. *Alston*.

Of a nuncupative will, probate must not be taken, until fourteen days after the decease of the testator. No evidence can be received, to establish a nuncupative will, after six months from the speaking of the words, unless the words, or their substance, have been reduced to writing within six days after the speaking. *Cl. Dig.* 597, *sec.* 3, 4.

Probate is not to be taken of a nuncupative will, until citation
has issued to the widow, and other persons principally concerned, if resident in the state.

Authenticated copies of wills, which have been proved according to the laws of any other of the United States, or of any foreign country, concerning estates in this state, may be admitted to probate, in the probate court of the county in which the property disposed of by the will, or a part of it, may be; but such will shall be liable to be contested, in the same manner as the original might have been. *Cl. Dig.* 598, *sec.* 12.

The validity of a will being questioned in the probate court, a jury may be summoned and impanneled, to try such issue, or to enquire into such facts, as, under the direction of the court, shall be submitted to their decision. *Cl. Dig.* 304, *sec.* 35. *12 Al. R.* 687, *Hill v. Barge.*

A will may be in part established, and admitted to record; and in part rejected: as when a part of the instrument has been inserted fraudulently in the life of the testator, or by forgery after his death—in which case, it may be established, with the exception of that clause. Or if there be sufficient proof to establish a will for the disposal of personal estate; but it is not attested by three witnesses, it may be established with the exception of the clauses devising real estate.

The probate of a will, although not in conformity to law, if made before a court having jurisdiction of it, cannot be impeached, except in a direct proceeding to set it aside. *10 Al. R.* 977, *Hilliard and Wife v. Binford's heirs and adm'rs.*

After probate, the original will must remain in the probate office, subject to inspection, except while it may be in the supreme court, by *certiorari* or otherwise. But after a year from probate, the probate court may permit it to be withdrawn, in order to be proved in some other state. *Cl. Dig.* 302, *sec.* 27. *Ib.* 598, *sec.* 13. *Ib.* 599, *sec.* 16.

Any person having a will in his possession, may be compelled by the orphan's court, to produce it, in order to probate. *Cl. Dig.* 598, *sec.* 13.

Within five years after probate of a will, any person interested in it, may contest its validity, by bill in chancery; and the court of chancery may direct issues in fact to be tried by a jury. In the trial of such cases, the certificate of the oath of
the witnesses, taken on the original hearing for probate, shall be admitted as evidence to the jury, to have such weight as they may think it deserves. After the expiration of said five years, the original probate will be conclusive and binding on all parties; saving to infants, married women, persons non compos mentis, and persons absent from the state, the like period of five years after the removal of their respective disabilities. *Cl. Dig. 598, sec. 15.*


For proof of a will bequeathing real estate, all the subscribing witnesses should be examined, if within reach of the process of the court. If one of the subscribing witnesses is dead, or reside out of the state, the deficiency may be supplied by proof from the other subscribing witnesses, that he signed the will at the request, and in the presence, of the testator. And the testimony of a non-resident subscribing witness, may be taken by deposition. *8 Al. R. 538, Bowling v. Bowling, ex'rs. Cl. Dig. 598, sec. 11.*

In general, when there is proof that the signature is in the hand-writing of the testator, every thing else in support of the will, is implied, until the contrary be proved. But when the will offered for probate, is in the hand-writing of a legatee, it must be proved, that the testator knew its contents. And the same proof is required, when the testator is blind, or from any other cause, unable to read; or when there is any other circumstance raising a suspicion that the testator may have been imposed on. *12 Al. R. 687, Hill v. Barge.*

It is not necessary to prove, in support of a will disposing of real estate, that the testator actually saw the witnesses subscribe their names; it is sufficient, if it be shown, that, from the relative position of the witnesses and the testator, he might have seen them sign. *Ib.*

The opinion of a witness, that the testator was insane, he stating, that he does not know any facts on which his opinion rests, is incompetent evidence. *8 Al. R. 538, Bowling v. Bowling, ex'rs.*

According to the ecclesiastical law, which for the most part
regulates the proceedings of the orphans’ court, the child of a legatee is an incompetent witness in support of the will, by reason of the interest of the parent.

When a legatee is a subscribing witness, he may be compelled to testify, if the will cannot be otherwise proved; and the devise or bequest to him will be void. But if he would be entitled to a distributive share of the estate, were there no will, then so much of said share shall be saved to him, as shall not exceed in value, the devise or bequest made to him. *Cl. Dig. 597, sec. 8.*

If a debt to a subscribing witness be charged by the will, on the lands, tenements, or hereditaments of the testator, he will nevertheless be competent, in proof of the will. *Cl. Dig. 598, sec. 9.*

The evidence of a subscribing witness may be excepted to, by the party who produces him; and a will may be established, or set aside, in opposition to the testimony of the subscribing witnesses.

In addition to the evidence of persons who have seen the testator write, or who have corresponded with him, persons skilled in the examination of hand-writing, are competent to testify, as to their opinion of the genuineness of the writing offered for probate, by comparing it with other documents admitted or proved to be in the hand-writing of the testator.

If, on the face of the paper offered as a will of personal estate, there be ambiguity, not as to the construction of a particular part of it; but as to the foundation of the instrument itself, or any part of it—as whether the testator meant a particular clause to be part of the instrument, or it was inserted without his knowledge; whether a codicil was intended to republish a former, or a subsequent will; whether the residuary clause, or any other part, was omitted contrary to the intention of the testator; whether the instrument was subscribed in order to authenticate it, as a memorandum for a will to be made at a future time, or to operate as a final disposition—on these, and the like questions, parol evidence is admitted, to show the intention of the testator. In these cases, there is some absurdity or ambiguity on the face of the will, ascribable to something improperly omitted or inserted; and there must be clear and satisfactory
proof, that the omission or insertion was contrary to the intention of the testator.

EFFECT OF PROBATE.

The sentence of the probate court, in deciding on the validity of a will, is conclusive evidence of the matter directly determined. While such sentence remains unrepealed, it is not competent, in any court, to give evidence that another person was appointed executor; or that the testator was insane; or that the will was forged.

The probate is conclusive of every part of a will admitted to record; and after probate without any reservation, objection cannot be made to any particular clause of it, as interlined by forgery.

Although a court of chancery has not jurisdiction to set aside a will admitted to probate, except by proceeding in the nature of appeal, under the statute; yet it may charge with a trust, a legacy which has been obtained by fraud, as if the drawer of a will should fraudulently insert his own name, as legatee, instead of the name of the person intended by the testator.

When the probate has been obtained by fraud on the next of kin, a court of equity may hold the fraudulent legatee as a trustee for the next of kin, or compel him to consent to a repeal of the probate, in the court in which it was granted.

Although no evidence can be received to impeach the probate, when it is the judicial act of a court having jurisdiction; yet, under the plea of ne unques executor, it may be shown, that the particular court granting it, had no jurisdiction, as it regards the residence, or the place of the estate, of the deceased. This does not falsify—it confesses and avoids the seal of the probate court.

If probate be granted of a will in a foreign language, and in the same probate, the will is translated into English, the probate does not cover any error in the translation; and such error may be corrected in another court, acting on the will.
Revocation of Probate.

Probate may be revoked, either on suit by citation, in the probate court; or by bill, in the nature of appeal, in the court of chancery.

Custody of Wills.

Wills ought to be lodged, before probate, in the office of the probate court; and the expenses necessary to getting a will out of the hands of any party withholding, ought to fall on that party. Original wills, after probate, must be recorded; and the original must remain in the office of the probate court, (except as provided by law,) subject to inspection. Cl. Dig. 302, sec. 27. Ib. 598, sec. 13.

Estate of the Executor.

As the right of an executor to the estate of the testator, is derived from the will, it vests in him from the moment of the death of the testator; and the letters testamentary, when issued, relate back to that time.

Several executors are considered as constituting but one person. They have a joint and entire interest in the effects of the testator, which cannot be divided. On the death of one, the whole interest vests in the survivors, or survivor, without any new action of the orphans' court.

All moveable goods vest in the executor, in possession, although in different and distant places, immediately on the testator's death; but he is not deemed to be in possession of things immoveable, as leases for years of lands or houses, before entry.

As the executor is bound to pay the debts, before he satisfies the legacies, the right of the legatee is not perfect without the assent of the executor; and until that assent be given, the property bequeathed remains vested in the executor.

Power of an Executor of an Executor.

In all cases, except of special trust and authority beyond the office of an executor, the executor of an executor has the same authority as the first executor.
POWER OF A FEME COVERT EXECUTRIX.

As a wife cannot take on herself the office of executrix, without the assent of her husband, so she cannot in the course of her executorship, without the concurrence of her husband, do an act which may make him liable. She cannot, by herself, release a debt, or assent to a legacy.

The husband of the executrix may exercise all the powers incident to the office.

DEBTS TO BE PAID IN PREFERENCE TO LEGACIES.

The whole estate of the testator is liable for the payment of his debts. If the executor pay any legacy, or permit a legatee to retain a specific legacy, or to take possession of the property bequeathed; and the assets remaining prove insufficient to pay all the debts; the executor will be personally liable to creditors, to the amount paid to the legatee, or retained by him.

A difficult question arises, when there is a contingent debt; that is, when there is an outstanding covenant of the testator, or bond with a condition which has not been broken; but which is still open, and which is liable to be broken hereafter. No decree of a court in favor of a legatee, could protect the executor against a liability for a breach which may hereafter occur; and the practice seems to be, to require the executor to satisfy the legacy, on the legatee's giving him a sufficient bond to indemnify against such liability.

A creditor, whose claim is not contingent, may, by laches, lose his hold on the executor. When there is a suit in chancery against an executor, for the administration of the assets, it is the practice of the court, so long as there is a residuary fund in court, to permit a creditor to come in, and prove his debt, for payment out of that fund. If the creditor fail to come in before the executor has paid away the residue, under the order of the court, he will no longer have a claim on the executor. But, by suit, he may compel the legatee to bring back the fund.

If a creditor come in after some of the legatees have been paid in full, under the sanction of the court; and while certain funds remain in court, which have been directed to be paid to
certain other legatees; this tardy creditor is not to be paid in full, out of the funds of a part of the legatees so remaining in court. He is to receive from those funds, a rateable payment, bearing the same proportion to the whole of his debt, as the legacies given to those legatees, bear to the whole amount of the legacies in the will.

**ASSENT TO LEGACIES.**

It is the duty of the executor, to pay the debts of the deceased; and he is responsible to creditors to the whole amount of the estate, whatever disposition the testator may have sought to make in his will. For his protection under this responsibility, the title of the legatee cannot be complete, without the assent of the executor. The legatee has no right to take possession of the property bequeathed, without that assent; even though the testator in his will expressly direct that he shall do so. 12 Al. R. 532, *Upchurch v. Nosworthy.* 8 Port. 529, *Mordecai v. Beal.* See the general doctrine.

But before the assent of the executor, the legatee has, after the death of the testator, an inchoate right to the thing bequeathed; which right, on the death of the legatee, is transmissible to his personal representative.

The assent of the executor is necessary to give effect to a clause in the will, discharging a debt due to the testator; for this clause is in the nature of a legacy; the debt being a part of the assets of the testator, and liable for the payment of debts due by him.

If the legatee, without the assent of the executor, obtain possession of the thing bequeathed, it may be recovered in an action by the executor. But if the executor withhold his assent without sufficient cause, he may be compelled to deliver the property, by a proceeding in chancery.

No certain form of words is necessary, to constitute the assent of the executor; and it may be either expressed or implied. Assent may be implied from indirect expressions, or from some acts; as when a horse is bequeathed, and the executor requests the legatee to dispose of it; or if the executor directs a third person to purchase it from the legatee. If the will directs, that
the rents or interests of the property bequeathed, be applied to the maintenance of the legatee during minority, and the executor begin to apply them to this purpose, his assent to the principal bequest will be implied.

But the responsibility of assent should not be fastened on him, by ambiguous expressions which may fall from him.

If property be bequeathed to A for life, with remainder to B, the assent of the executor, given to either legatee, will enure, by implication, to the other. And an assent to a lease for years, carries, by implication, assent to any condition or contingency attached to the lease; and the same principle extends to other cases of like character.

In certain cases, the assent of the executor may be presumed, on the principle that, in the absence of evidence, a man shall be presumed to have done, what duty required him to do: as when the executor dies after the debts are paid, and before the legacies have been satisfied. And the same presumption arises, when the legatee has kept possession of the thing bequeathed, for a long time, without objection from the executor.

The assent may be conditional. If it be given on the performance of a condition precedent, then, on the performance of the condition, the assent will be absolute. If the condition be such as the executor had no right to impose, as if he should declare his assent, provided, the legatee shall first perform some act for the personal benefit of the executor, the condition will be set aside; and the assent will be considered as if it had been absolute. If the assent be, on a condition subsequent, requiring from the legatee, something beneficial to the executor, the legatee will not be held to the performance of the condition.

An executor's assent is valid, when given before probate, if he afterwards obtain letters testamentary, but not otherwise.

When there are several executors, the assent of one of them is sufficient; and when property is bequeathed to one of several executors, he may take it, of his own assent.

When an infant has been appointed executor, the assent of the administrator durante minore aetate is necessary and sufficient.

The assent of a feme covert executrix is not sufficient, without the concurrence of her husband.
It is generally true, that the assent of the executor, when given, cannot be retracted; and that, after such assent, the specific legatee has a right to take and keep the thing bequeathed, notwithstanding the subsequent dissent of the executor. And after the assent, the legatee may maintain an action against the executor, for the property specifically bequeathed.

But when the assent has not been consummated, by payment in case of a general legacy, or by delivery in case of a specific legacy, and the title has not passed from the legatee to a bona fide purchaser, and the assent has been given on reasonable grounds for believing that the general assets were sufficient for the payment of the debts, but they afterwards prove to be insufficient, in these circumstances it seems reasonable to permit the executor to correct his error, by withdrawing his assent.

The assent of the executor relates back to the death of the testator. As in case of a devise of land, if rent become due after the death of the testator, and before the assent of the executor, the assent when given, establishes the right of the legatee to such rent.

A subsequent assent of the executor will confirm a previous grant of the legacy, by the legatee.

Assent of the executor is necessary, in order to vest in himself, the title to property bequeathed to him; and before he gives this assent, he ought to be satisfied that this property will not be needed for payment of the debts. His assent to his own legacy may be either express, or implied. To constitute an implied assent, it is not sufficient that his act from which assent is implied, is equally applicable to his character of legatee, as to his character of executor. It must be an act showing that he has assented to the legacy, as if he take the rents to his individual use, or repair the buildings at his individual expense. If a term be bequeathed for life to the executor, and the remainder to B, and the executor say, that B, will have the term after him, this implies an intention, and consequent assent, to hold his life-estate, as legatee.

But if the executor merely say, that the testator left the property to him, assent to hold as legatee, cannot be implied from these words.

When an entire term is bequeathed to an executor, his entry
TIME OF PAYMENT.

will amount to an election to take as legatee. But if only a partial interest in the property is bequeathed to him, and an estate over is bequeathed to another person, something more than his entry is necessary to show his assent, this being an act which would confirm the legacy of the remainder, when it might be wanted for payment of the debts. But there may be attendant circumstances showing that his entry, when only a partial interest in a term was bequeathed to him, amounted to an election to hold as legatee, as when he explains his act, by stating that he holds as devisee for life.

If one of several executors be a legatee, his single assent to his own legacy, will be sufficient; and if an undivided piece of property be bequeathed to several executors, the assent of any one of them to his own proportion will confirm the whole legacy.

If an executor renounce, his assent to a legacy will be inoperative.

TIME OF PAYMENT OF LEGACIES.

An executor may be compelled, when the assets are sufficient to pay a general, or to deliver a specific legacy, after eighteen months from the grant of letters testamentary. Cl. Dig. 197, sec. 23, 24.

The statute is general in its terms, but it cannot intend, that the executor shall satisfy the legacies, when the assets bequeathed are needed for the payment of debts within his knowledge.

The time is allowed for the convenience and safety of the executor, and he may satisfy the legacies before the expiration of eighteen months, if he is assured that they will not be needed for the payment of debts.

When a legacy is given generally, subject to a limitation over to another person, on the happening of a future, contingent event, the first legatee may claim his legacy, after the lapse of the eighteen months; and he will not be required to give security to refund on the happening of the contingency.

If a fund bearing interest is bequeathed, the interest accruing after the death of the testator, will be due to the legatee, although not payable to him until after the expiration of the eighteen
months. But if a legacy of money is given generally, no interest accrues on it, until it is payable, after the expiration of eighteen months.

It appears to be the doctrine of the later decisions, that where there is a bequest of the residue of personal estate, for life, with remainder over, the legatee taking the residue for life, is entitled to the proceeds, from the death of the testator.

TO WHOM LEGACIES ARE TO BE PAID.

A legacy must be paid to some person legally authorized to receive it.

If a legacy be to a minor, it can lawfully be paid, during the minority of the legatee, only to his trustee or guardian. A payment to the father, as natural guardian, will not be sustained; nor to the minor, during his minority. But if the will direct, that the legacy be paid to the father, for the minor, the father is thereby made the trustee, and a payment to him will be proper.

A legacy to a married woman is to be paid to her husband. But the executor may refuse to pay it to the husband, unless he will settle a reasonable part of it on the wife, and her children. And a court of equity will entertain a bill in favor of the wife, against the executor and her husband, for a settlement to her separate use, out of a legacy bequeathed to her. If, however, the wife be living in adultery, apart from her husband, a court of equity will not make this provision for her; nor will it then order the legacy to be paid to the husband; but it will secure the property for her children.

When a bequest is made to the separate use of a married woman, the husband has no right to it, and the wife may sue for it, by her next friend.

If a legacy be to A, to be divided between himself and his family, a payment to A, will be proper.

INTEREST ON LEGACIES.

Specific legacies are considered as set apart from the general estate, and appropriated at the time of the testator's death. Whatever accrues on them, and nothing more, belongs to the
legatee. And in relation to this accrual, the assent of the executor, when given, relates back to the time of the death of the testator.

General legacies carry interest, which is to be computed from the time at which they become due and payable.

When no time is appointed in the will, for payment of a legacy, it is in general payable at the end of eighteen months after the grant of letters testamentary. The law allows this time to the executor, that he may have an opportunity of ascertaining the condition of the estate, and of being prepared for its settlement. Interest, in general, accrues from that time; and it will not be payable from an earlier day, even though the will may have directed that the legacy be paid as soon as possible. From that time, the legatee is entitled to interest, whenever the assets furnish a fund from which assets may be made.

When the time is designated in a will, for the payment of a legacy, the general rule is, that the legacy will not bear interest before the arrival of that time. But the rule is subject to the following qualification. If the testator be parent, or in loco parentis, and the legatee be a minor, interest on the legacy will be allowed from the death of the testator, for the maintenance of the minor, provided, no other provision has been made for that purpose.

When the will directs that the legacy shall be paid at a future, designated time, as, when the legatee shall arrive at the age of twenty-one years, and that it be then paid with interest, the interest must be computed from the end of the eighteen months.

In addition to the general rules of law, our statute has made the following provision. When any executor shall apply any of the funds of the estate to his own private use, he shall pay interest for the same. And in making his returns to the probate court, he must state the sum so used, and the time during which it was used; or he must deny, expressly, under oath, that he has used any of the funds of the testator. And if any legatee having an interest, shall controvert the statement so made, the question shall be decided by the court, or by a jury impaneled for the purpose, if either party desire it. Cl. Dig. 198, sec. 28.

If the decision be against the executor, he will be personally bound to pay interest, in accordance with the judgment of the
court, or the verdict of the jury. And the interest thus charged against the executor, is not to be paid out of the assets of the estate.

Interest on legacies is, in general, to be computed on the principal only, and not on the interest accrued. But the court will allow compound interest, under circumstances of gross neglect, or breach of trust, as where there is an express direction in the will, that the executor lay out the fund, to accumulate; and he neglect to do so.

In the settlement of the accounts of an executor, interest is to be computed on the debits, and on the credits.

INCREASE OR DIMINUTION OF SPECIFIC LEGACIES.

A question may arise, whether the legatee of a specific legacy is entitled to such increase as may happen to the property bequeathed, between the date of the will, and the death of the testator. The general rule is, that in order to limit the bequest to the property as it stood at the date of the will, the language of the testator must be clear in expressing this intention. If the language used be general, as "all the testator's goods in a particular house," it will include all the goods of the testator, which may be in that house at his death; although they may not have been there at the date of the will. And the same rule will apply, if goods there at the date of the will, were not there at the death of the testator.

ELECTION TO TAKE THE LEGACY.

It is a general principle of equity, that a party who accepts a benefit under any instrument, must assent to the whole of it, and give effect to its provisions; and that he must renounce every right inconsistent with it. On this principle, if a testator devises to another person, property which belongs to A, and also makes a legacy to A, he will not be permitted, at the same time to hold his own property which has been bequeathed to another, and to take the property which has been bequeathed to himself. He is driven to his election, and must choose whether he will relinquish his own property, and accept the devise, or will retain his own property, and renounce the devise. And
in giving effect to this principle, it is not material to inquire, whether the testator was aware that the property so bequeathed to the other legatee, was not the property of the testator.

But this rule does not preclude a party claiming a legacy under a will, from maintaining a derivative interest, to which he is entitled at law, under a legal estate in opposition to the will. A man may be tenant by the curtesy of an estate held by his wife in opposition to the will, and at the same time claim a legacy under the will.

This doctrine does not apply to creditors taking the benefit of one clause in the will, appropriating certain property to the payment of debts, and at the same time subjecting other property, disposed of in other clauses of the will. Nor does it apply to the heir, claiming a legacy of personal property, under the will, and at the same time objecting to a bequest of real estate, in the same will, on the ground that the will is not so executed as to convey real estate.

If a testator in his will make provision for his widow, she cannot have both the legacy and her dower, unless it appear plainly in the will, that the testator intended the legacy to be in addition to her dower. *Cl. Dig. 172, sec. 1.*

At any term of the orphan's court, (having jurisdiction of the will,) or of the circuit or county court, of the county in which she resides, a widow dissatisfied with the provision made for her in the will of her husband, may, within a year after probate, make her election to take her dower, relinquishing her legacy. Her dissent from the will must be entered on the minutes of the court; and she must then have her dower, as provided by law. *Cl. Dig. 172, sec. 183. IB. 300, sec. 20.*

If the widow do not dissent from the will, in the manner prescribed by law, she will be considered as having made her election to take the legacy, and to relinquish her dower.

**REFUNDING OF LEGACIES.**

The executor is not bound to pay a legacy, until the legatee has given bond with security, to refund a due proportion for any debts or demands which may afterwards appear against the estate of the testator, and the costs attendant on their recovery.
Independently of the statute, the legatee is under a legal obligation to refund proportionally, whenever, after payment of his legacy, the executor is compelled, by legal proceedings, to pay a demand against the estate, and there is a deficiency. If the assets were not originally sufficient to pay all the legacies, and one of the legatees has obtained payment in full, those whose legacies have not been paid, may compel the former to refund, rateably, if the executor and his securities are insolvent.

If a legacy has been erroneously paid to a legatee who has no further property in the estate, and he be compelled to refund, he will not be liable for interest on the money erroneously paid to him. But if such legatee be entitled to another fund in the estate, bearing interest, the court will do justice by retaining interest on the money improperly paid to him, out of what is due to him.

RESIDUARY LEGATEE.

When the executor has paid all the debts, and all the legacies heretofore mentioned, he must then pay the surplus, or residue, to the residuary legatee, if there be such an appointment in the will. And if the residuary legatee die before the payment of the debts, and before the amount of the surplus is ascertained, the right to the residue will devolve on his executor or administrator.

The testator may, in his will, define or limit what he intends for the residuary legatee, and his intention, when ascertained, is the law of the will.

If the residuary legatee is nominated in general terms, he is entitled in that character, to whatever personal estate may fall into the residue after the making of the will, whether by lapse, invalid disposition, or any other accident, or by acquisition subsequent to the making of the will. But he takes no real estate beyond what was designed for him when the will was made.

When the residuary estate has been bequeathed to several in joint-tenancy, if one of them die in the life-time of the testator, his right will survive to the others. But if the residue be given to several, as tenants in common, and one of them die before the testator, the share to which he would have been entitled, will not devolve on the survivors, but will lapse.
The residue does not, in any case, belong to the executor, unless it be so expressly ordered in the will. All estate, real and personal, not disposed of by the will, must be administered and distributed, as the estate of a person dying intestate. *Cl. Dig. 597, sec. 7.*

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**PART II.**

**ADMINISTRATION.**

When a person dies intestate, authority to grant administration on his estate, is vested in the probate court of the county in which the intestate, at the time of his death, had a mansion-house, or known place of residence. If he had none such, authority to grant the administration is vested in the probate court of the county in which he died, or of that in which his estate, or the greater part thereof, or any part of his personal estate, or of his debtors, may be. *Cl. Dig. 301, sec. 22. Ib. 303, sec. 33.*

Administration in chief should not be granted until fourteen days after the death of the intestate, unless for special cause the court should think proper to grant it sooner.

The appointment of a guardian or administrator may not be collaterally impeached. *11 Al. R. 461, Speight v. Knight.*

Administration is to be granted to the widow, or the next of kin, or some of them. If they refuse, it is then to be granted to one or more of the principal creditors of the deceased. If they also refuse, administration may be granted to such other (trustworthy) person as will accept. *Cl. Dig. 220, sec. 1.*

On application for administration, the judge of probate of the proper county, must issue citation to the widow, or (and) next of kin of the deceased, to appear at a term of the court therein specified, to contest such application, and subpoenas must issue for such witnesses as the applicant, (or any of the parties contesting the application,) may direct; and the application must
then be heard and determined on. And on proof of reasonable notice, or that there is no widow or kindred in the state, the court may, without citation, hear and determine on such application, at any of its sessions. *Cl. Dig. 303, sec. 34.*

Under ordinary circumstances, in granting administration, the court prefers the widow to the next of kin, but there may be considerations to induce it to prefer some of the next of kin.

In determining who are the next of kin, the rule is observed, which has been established for the descent of estates. A child is in the first degree, a brother or sister is in the second, the father is in the third, the mother is in the fourth, and then follow the other next of kin, computing according to the rules of the civil law. But the supreme court has decided, that the father should be preferred to the brother or sister. *1 St. & Port. 102. Brown v. Hay & Germany.*

On the death of a party who would have been entitled, the right of administration descends, according to the rule of representation in descents.

There is no distinction between the whole-blood and the half-blood, except that kindred of the whole-blood are preferred to kindred of the half-blood in the same degree. *Cl. Dig. 168, sec. 2.*

The supreme court has decided that children of a deceased brother of the whole-blood, are to be preferred to a brother of the half-blood. *3 St. & Port. 29, Hitchcock v. Smith. Quere.*

If there are several of the kindred in the same degree, the court may in its discretion, select from them the one whom it may deem the best qualified to take care of the estate; or it will choose the one to whom a majority of the distributees are desirous of entrusting the estate. And it prefers a sole to a joint administration.

Under the statute, the right to administer is in those who are next of kin at the time of the death of the intestate. When one of the next of kin has been appointed administrator, other kindred in the same degree have not, during the life of him appointed, a right to the same grant.

When a creditor has been duly appointed administrator, during his life the grant will not be revoked in favor of the next of kin, unless for causes pointed out by the statute.
When no one shall have been admitted and qualified as executor or administrator, within three months after the death, or when the office of executor or administrator shall have become vacant by death, resignation or removal, the probate court may commit the administration to the sheriff, or to the coroner of the county. The sheriff or coroner so appointed, and his securities, will be liable, on his official bond, for any defalcation as administrator; and no additional bond, or oath of office will be required of him, unless the judge shall otherwise order. And on this bond, suit may be instituted, as on the bonds of executors and administrators. The administration attaches to the office, and not to the person of the sheriff or coroner, and will pass to the succeeding sheriff or coroner. Cl. Dig. 222, sec. 10.

It is the duty of the judge of probate to appoint a suitable person in his county, to take charge of the estates of deceased persons, in those cases where no other persons will administer. The person so appointed must discharge all the duties of administrator, and may be required to renew his bond from time to time, and will be subject to removal for neglect of duty, or malpractice. Cl. Dig. 228, sec. 36.

The judge of probate may, in his discretion, require the person applying that administration be cast on the sheriff, coroner, or general administrator, to give bonds with security, to such officer, to indemnify him against costs. Acts of 1847, p. 9.

The judge of probate may appoint an administrator ad colligendum, for an estate requiring it, whose powers and duties are limited to collecting and taking care of the personal estate. For this purpose, he may institute actions at law; and suits commenced by him will not abate on the appointment of an administrator in chief, but may progress in the name of the latter. Cl. Dig. 222, sec. 8.
An administrator ad col. may be removed at any time by the appointment of an administrator in chief. 12 Al. R. 836, Flora v. Menice.

SPECIAL LIMITED ADMINISTRATOR.

During any contest about the validity of a will, or during the infancy, or the absence of the executor or administrator, or in any other emergency not provided for, the judge of probate may appoint an administrator, with such limited authority as the case may require. And when the necessity of the case may require it, such administration may be granted, or revoked, without delay. Cl Dig. 223, sec. 10.

There is a variety of circumstances which require an administration, limited as to time, or as to the part of the assets to be administered, as when it is known that there is a will in a foreign country, and time is required to procure it; when a will is known to have been in existence after the death of the testator, but it is lost or secreted. In these instances, the applicant cannot swear that the deceased died intestate, and a special administration will be granted for the purpose of preserving the estate until the will shall be exhibited, or its contents established.

If the party entitled to administration shall not be able to give a satisfactory bond for the administration of the whole estate, the court may, in its discretion, grant him administration of some specified part of the estate, requiring from him a bond in double the value of such part. Sometimes an administration may be needed for carrying on a particular suit, and the grant may be limited accordingly.

ADMINISTRATION CETERORUM.

In instances like the two foregoing, administration ceterorum, (of the residue of the estate,) may be granted to a different party.

ADMINISTRATOR DURANTE MINORE ÅETATE.

If a person appointed sole executor, or he to whom in case of intestacy the right of administration appertains, be within the
age of seventeen years in the one case, or of twenty-one years in the other case, the probate court may appoint an administrator *durante minore aetate*. It is the general practice of the court to grant this administration to the guardian of the minor, or to the husband of a minor, *feme covert*. In the case of an infant executor, this administration terminates, when he becomes seventeen years of age; but in the case of an infant entitled to the administration, it continues until he arrives at twenty-one years of age. If the administration be during the minority of several infants, it terminates when the eldest of them becomes of the lawful age.

If an administrator *durante minore aetate* bring an action, he must aver in his declaration, that the infant is still under age. But in an action against such administrator, this averment is unnecessary.

If a suit in chancery be instituted by this administrator, and during its pendency the minor become of age, it may be continued in the name of the latter, by a supplemental bill. But if an action at law be commenced by him, and the minor arrive at mature age during its pendency, according to the practice of the English courts, such action would abate. But this practice is contrary to the spirit of the laws of Alabama, and to the analogies which they furnish. The proper executor or administrator would be made a party, and the suit would progress in his name.

After the minor becomes of age, the administrator *durante minore aetate* is responsible to him, but after the maturity of the minor, such administrator is not in general responsible to the creditors of the testator or intestate. If however he has not accounted to the administrator in chief, but has fraudulently, and by collusion, detained a part of the assets, a creditor, by a bill charging these facts, may hold him responsible in chancery.

**ADMINISTRATOR PENDENTE LITE.**

If there be a contest as to the validity of a will, or the right to administration, the court may appoint a person presumed to be indifferent between the contending parties, to hold the office during the litigation.
An administrator *pendente lite* may institute suits for the recovery of debts due to the estate, and of property belonging to it. But his authority is limited to collecting and preserving the assets. At the termination of the litigation on the validity of the will, or the right to administration, he must deliver all that he held under the appointment, to the person whom the court shall declare to be entitled.

**ADMINISTRATOR DE BONIS NON.**

On the death of a sole, or of a surviving administrator, the probate court appoints an administrator for that part of the estate which remains unadministered. The statutes regulating the grant of administration, apply equally to original administrations, and to administrations *de bonis non*.

If any executor or administrator, residing out of the state at the time of taking the trust, or afterwards removing out of the state, shall refuse or neglect, after due notice from the probate court, to render his account, and to make settlement of the estate in that court, or if any executor or administrator shall become insane, or shall become incapable, or evidently unsuitable to discharge the trust reposed in him, that court may grant letters of administration with the will annexed, or general letters of administration, to the person next entitled to administer under the statute. In either case, it is an administration *de bonis non*, and the powers and duties of such administrator *de bonis non* are the same as if the original executor or administrator were dead, and he is entitled to all monies due to his predecessor, in his representative character. *Cl. Dig. 222, sec. 6. Ib. 227, sec. 30.*

When the original debt has been altered by the predecessor, if he might have maintained an action on it as altered, in his representative character, the right to such action devolves on the administrator *de bonis non*. Where a bill of exchange is indorsed generally, and delivered to the administrator, for a debt due to the intestate, and the administrator dies, or resigns, or is removed before the maturity of the bill, the administrator *de bonis non* may maintain an action on it.

When there have been several administrators, on the death
of any of them, the administration survives to the others. If there be but one survivor, he is the sole administrator. In these cases, there can be no administration de bonis non.

The person who would have been entitled to original administration, has the right to the administration de bonis non.

When those are dead who were next of kin at the time of the death of the intestate, the court has authority independently of the statute, to appoint an administrator selected on its discretion, and according to its own rules. And it will generally prefer him who has the greatest interest in the estate.

When a suit has been commenced by or against an executor or administrator, it may be prosecuted by or against the administrator de bonis non, who may be the successor, and the administrator de bonis non may at any time, on motion, be made party to the suit. And when any executor or administrator shall be displaced, all money due to him in his representative character, shall be paid to the administrator de bonis non, who may have succeeded. Cl. Dig. 227, sec. 30.

An administrator de bonis non may maintain an action against one who has been removed from the administration, for money received after, on a judgment rendered before the removal. 7 Al. R. 478, Salter v. Cain.

An administrator de bonis non, cannot maintain an action against a former administrator, or his representative, for money received by the former, in the course of administration, and not paid over. 2 Port. 550, Chamberlain adm’r. v. Bates, adm’r.

ADMINISTRATOR CUM TESTAMENTO ANNEXO.

If the testator appointed in any will, renounce the executorship, or refuse or neglect, for the space of forty days after the death of the testator, to exhibit his will for probate, the probate court may grant administration with the will annexed, to such person as would be entitled in case of intestacy, under the statute regulating the grant of administration. Cl. Dig. 220, sec. 1.

When the person appointed executor, dies before the testator, or before the will has been proved, or before he has been qualified, or when, from any cause, he is incapable of acting, or when, after having qualified as executor, he dies, or resigns,
or is removed before he has administered all the estate, the probate court appoints an administrator with the will annexed, and it is his duty to carry the will into effect, and to perform all the duties of executor.

In these cases, if there is a residuary legatee, it is the general practice of the court to appoint him administrator cum testamento annexo. This appointment is not within the statute regulating the grant of administration, and it is the inclination of the court, that the right of administration should follow the right of property. On the death of the residuary legatee, his representative has the same claim to administration cum testamento annexo, but the claim is not, in either case, an absolute right, and cannot be enforced by mandamus.

When a sole executor, or a surviving executor dies intestate after having qualified, no administration on the estate of his testator is transmitted to his administrator, but an administration de bonis non, cum testamento annexo, is granted; that is, an administration in obedience to the will, on the estate of the testator, so far as it has been left unadministered by the executor.

If several executors have been appointed in the will, and one alone qualifies and acts; on his death, the others who had renounced, may assume the executorship; but if they still refuse, administration, de bonis non, cum testamento annexo, is granted.

The two last cases are not within the statute regulating priority in the right to administer, and the court generally grants such administration to the person having the greatest interest in the estate.

WHEN NEXT OF KIN AND INTESTATE ARE FOREIGNERS.

It may be inferred from the statute, that if the person who, on the rule of kindred, would be entitled to administration, reside out of the state, the court may grant administration to another person, without notice to such non-resident.

In case of a foreigner dying intestate, who had only a temporary residence in the state, administration should be granted to the person entitled to the effects of the deceased, according to the laws of his country.
If the widow and all the next of kin refuse, the administration may be granted to a principal creditor, or creditors of the deceased. *Cl. Dig.* 220, sec. 1.

On general principles it is best that the grant be made to a single creditor.

When a creditor has been duly appointed administrator, the administration will not be taken from him to be granted to the next of kin.

**FEME COVERT, ADMINISTRATRIX.**

Coverture is not a disqualification for administration. When the wife is entitled, and the grant is made to her, the husband becomes joint-administrator, and the wife cannot control the assets, or the acts of her husband in disposing of them, and citation to him alone is sufficient. 5 *Port.* 64, *Pistole v. Street*, admr. 6 *Port.* 184, *Williamson, et al. v. Hill*. 16 *Al. R.* 817, *Kavanaugh and wife v. McGehee and Armstrong*.

**TIME WHEN ADMINISTRATION COMMENCES.**

By a decision of the supreme court, in the case of *Eslava v. Elliott, admr.*, the administration commences with the order granting it; and in order to conform to this decision, without giving authority to any one to act, unless under due responsibility, the judge ought to delay to make an entry of the order granting administration, until the securities have been approved by him, and the bond has been executed, and the oath has been sworn.

**THE ESTATE VESTED IN THE ADMINISTRATOR.**

An administrator derives his estate wholly from the probate court, and the property of the deceased vests in him only from the time of the grant of administration.

All movable property vests in the administrator in possession, although in different and distant places, immediately on his being qualified, but he is not deemed to be in possession of
things immovable, as leases for years of lands or houses, before entry.

An administrator duly appointed by the proper court, has control of the property throughout the state. *Cl. Dig.* 301, *sec. 22.*

But for certain purposes, the letters of administration relate back to the time of the death of the intestate. An administrator may maintain an action of trespass, or of trover, for the goods of the intestate, taken before the grant of administration. Leasehold property of the intestate, by relation, vests in the administrator, so as to enable him to institute actions in respect of that property, for all matters affecting it, and for rents accrued subsequent to the decease of the intestate. But the grant will not relate back so as to divest any right legally vested in another, between the death of the intestate and the grant.

**ESTATE OF THE ADMINISTRATOR IN THE REAL ESTATE OF THE INTESTATE.**

If the personal estate be insufficient for payment of the debts of the intestate, it is the duty of the administrator to sell the real estate for that purpose, under the authority of the orphan’s court. And the same duty devolves on him if the real estate cannot be equally, fairly and beneficially divided among the heirs.

The administrator may rent the real estate, at public outcry, until final settlement.

Leases, and terms of lands, tenements, and hereditaments for life, are real estate. Other interests in such property, for an indefinite term, are real estate, as if one grant an estate to a woman, so long as she shall continue sole, or during her widowhood, or to a woman and man during their coverture, this is real estate.

**ESTATE OF THE ADMINISTRATOR IN THE PERSONAL ESTATE.**

All goods and chattels, real and personal, vest in the administrator. A term in lands, tenements, or hereditaments, for any definite time, measured by years, months, or days, even though it be for ten thousand years, is a chattel, and vests in the admin-
And this is equally true of an equitable interest, and the legal right.

**Right of the Administrator to Chattels Real, with Relation to Husband and Wife.**

Before the act of 1837, the law gave to the husband a qualified interest in the chattels real of the wife. If he dispose of them, by a complete act during his life, her right by survivorship will be defeated; but he cannot dispose of them by will.

If the husband and wife be ejected from a term of the wife, and he recover it in an ejectment in his own name, the term will become his, by the recovery.

If the wife at the time of her marriage were a lessee for years, and her husband purchases the land, or takes a lease of it, this will be a surrender of the wife's term. In this and the preceding case, on the death of the husband, the term will pass to his administrator.

If the husband have possession, during coverture, of the chattels real of the wife, and he survive her, they will be his by the marital right, without administration on the estate of his wife. On his death they will pass to his administrator.

But the chattel real of the wife, not reduced to possession by the husband, during coverture, on the death of the wife, pass to her administrator.

**Estate of the Administrator in the Chattels Personal.**

Chattels personal are divided into animate, vegetable, and inanimate.

Whenever animals are held as property, on the death of the owner, intestate, they pass to his administrator.

Trees, and their fruit, when not severed, are considered as appurtenant to the soil. When the owner of the land dies, they do not pass to his administrator; they descend to the heir.

This is true of oranges, apples, and other fruits, hanging on the trees at the time of the death, and of whatever constitutes a part of the natural and permanent profit of the earth.

When the occupier of land, whether the owner of the inher-
itance, or of an estate terminating with his life, has planted
grain, cotton, or any thing else, with the intention of raising a
crop, and he dies before harvest, the crop (emblements) passes
to the administrator. This rule extends to every thing produ-
ced by labor and tillage, yielding an annual profit, and to nurse-
ries of trees and shrubs planted for sale.

If the husband sows the land, and dies before harvest, and the
heir assigns the land sown, to the widow for her dower, she
shall have the crop, by especial privilege, as dower. If tenant
in dower sows the land, and then marries, and her husband dies
before harvest, the crop will not vest in the husband's adminis-
trator. But it would be otherwise, if the land had been sown
by this last husband of the dowress.

When the administrator has a right to the crop or emblements,
the law gives him free entry, egress, and regress, to cultivate,
gather, and carry away the crop.

The personal chattels inanimate, of the intestate, vest in the
administrator. But there are three exceptions, in which the
right of the executor or administrator to the personal chattels
inanimate of the testator or intestate, is barred to some extent,
in favor of certain claimants, heir-looms, fixtures, and parapher-
nalia.

An heir-loom is, in general, a piece of household property,
which, by custom, has descended with the house, to the heir. It
cannot be disposed of by will, but may be applied to the pay-
ment of debts of the deceased, when the other personal property
is not sufficient.

The sword of an ancestor, monuments, and ensigns of honor,
set up in memory of those who are deceased, are heir-looms.

Whatever in law is considered as a fixture, is made parcel of
the freehold, and does not pass to the administrator, but descends
to the heir.

The paraphernalia of the wife consist of the apparel and
ornaments suitable to her station in society, whether worn
usually by the wife, or only on public occasions. What is to be
so considered, is a question to be decided by the court. The
husband may sell them, or give them away in his life-time, but
he cannot dispose of them by will, and they do not pass to his
administrator, unless this becomes necessary for the payment of debts, on a deficiency of assets.

BONDS.

Before the grant of letters testamentary, or of administration, every executor and administrator must enter into bond, with at least two sufficient securities, to be approved by the judge of probate, payable to him and his successors in office, in an amount at least double the estimated value of the property of the estate, including its land, well and truly to perform the duties required of him by law, as such executor or administrator. Bond is not in general required of the executor, when the testator has, in his will, directed that it shall not be required. But when, after grant of letters testamentary, any creditor, legatee, distributee, or heir, shall make affidavit setting forth the amount of his claim, and that he believes it to be endangered by such grant, if the court shall believe that the estate will probably be wasted, it may require the executor to give bond with security. Cl. Dig. 221, sec. 3. Cl. Dig. 229, 44. Act of 1847, p. 106. Cl. Dig. 301, 25.

Executors and administrators authorized to hold estates together, must enter into bond, with sufficient security, for the faithful performance of the duties prescribed to them by law. Cl. Dig. 198, sec. 33.

Before giving bond, (and taking the oath prescribed,) an executor has no authority, except to collect, and take care of the estate. 3 St. R. 489, Cleveland et al. exrs. v. Chandler.

An executor or administrator authorized by the court to sell real estate, before he receives the order of sale from the clerk's office, must enter into bond, with sufficient securities, to conduct the sale according to law, and to account for the proceeds of the sale, and dispose of them agreeably to law. The amount of the bond to be fixed, and the securities to be approved by the judge of probate. Cl. Dig. 225, sec. 23.

Foreign executors, before receiving money in this state, must enter into bond, in a sum to be determined by the judge of probate, and with securities to be approved by him, to be deposited in the office of the judge of probate of the county in which he
may obtain a judgment, or in which the debtor of the estate may reside, faithfully to administer all money, and other effects received by him in such representative character, in this state. *Cl. Dig. 227, sec. 31.*

The judge of probate may require further security to be given by executors and administrators, when it shall appear that letters have been granted to them on insufficient security, or that their security has subsequently become insufficient, or on complaint of any of their securities, or when there shall be sufficient ground for believing that the executor or administrator is about to misapply or embezzle the property of the estate, or to remove it from the state, or on proof of gross neglect in his duties. *Cl. Dig. 221, sec. 4, 5.*

**Oaths.**

Before the issuing of letters testamentary, or of administration with the will annexed, the executor or administrator must take an oath before the judge of probate, to the purport that the will ordered to probate, is the last will of the deceased, so far as he knows or believes, and that he will execute it according to law, and the directions thereof, and that he will return a true inventory, and true account of sales. *Cl. Dig. 220, sec. 20.*

Before the issuing of letters of administration, the administrator must take an oath before the judge of probate, that the deceased died without a will, so far as he knows or believes, and that he will faithfully administer the estate, and return a correct inventory and account of sales, and of his administration. *Cl. Dig. 221, sec. 2.*

When in the opinion of the judge, the circumstances of the case require a modification of the oath, it shall be administered in such form as he may consider to be proper. *Ib.*
PART III.

There are many points on which the law in relation to the two officers of executor and administrator is nearly, if not entirely the same. In relation to these points, the two offices will be considered together.

REVOCATION OF PROBATE, OR OF ADMINISTRATION.

Probate and grant of administration may be revoked in two ways: 1st, on suit by citation, in the probate court; 2d, by appeal to the court of chancery.

Administration may be revoked in the probate court when it has been irregularly granted; as when it has been granted within fourteen days after the death, or without citation to a party entitled. In these cases, the administration is not void, but voidable.

The orphans' court may revoke an administration when it shall appear on examination, that the administrator has embezzled, wasted, or misapplied any part of the estate committed to his care; or when he shall refuse or neglect to give such bond with additional security, as may be required by the court. Cl. Dig. 221, sec. 4.

If a non-resident executor or administrator shall refuse or neglect, after due notice from the probate court, to render his account, and to make settlement of the estate, or if any executor or administrator shall become insane, or if any administrator (or executor) shall become otherwise incapable of, or evidently unsuitable for discharging the trust reposed in him, his appointment may be revoked by the probate court. Cl. Dig. 222, sec. 6.
The reasons of the whole of the section 4, on p. 221, *Cl. Dig.* , and of the clause, "or if any administrator shall become otherwise incapable, or evidently unsuitable to discharge the trust reposed in him," apply with as much force to executors as to administrators, and they are equally within the intention of the law.

If administration has been granted to a younger brother, it will not be revoked, unless it has been so granted as to be a surprise to the elder brother. If it has been granted to a creditor, and afterwards a creditor to a larger amount appear, it will not be revoked at the instance of the latter, unless he has been surprised by the grant to the former.

When administration has been regularly obtained, in a proceeding to revoke it, the party in possession is not required to propound his interest, until the party seeking revocation, has exhibited his own.

**EFFECT OF REVOCATION ON THE PRIOR ACTS.**

Whenever a court competent to take probate, or to grant letters testamentary, or of administration, has in fact taken probate, or made the grant, the acts of the executor or administrator, performed in pursuance of this authority, up to the time of revocation, have legal validity, should the grant be revoked.

But if, from the order establishing the will, or granting letters testamentary, or of administration, there has been an appeal, this appeal suspends the order appealed from; and the executor or administrator derives no authority from such order. Their acts performed during the pendency of the appeal, are unauthorized and void.

Suits instituted by or against an executor or administrator, do not abate on the revocation of his appointment, but the successor may be made a party, on motion, and the suit may be prosecuted by or against him. *Cl. Dig.* 227, sec. 30. 3 *Al. R.* 568, *Elliott*, adm'r. v. *Eslava*.

**CAVEAT.**

It is usual to enter a caveat, when there is a question in the probate court as to the validity of a will, or the right to admin-
istration. It is a caution filed in the probate court, to prevent probate, or grant of administration, until the party filing it can be heard. It is merely a cautionary act, to prevent the probate court granting a wrongful order, and it has no binding authority. Administration is not to be revoked because of its having been granted, without regard to the caveat.

PROHIBITION.

When the probate court is about to transgress the bounds prescribed by law, in granting, or in repealing probate, or administration, it may be restrained by prohibition from the circuit court. This process is used, not to control or supersede the judgment of the probate court, on a matter within its jurisdiction, but to prevent its making an order on illegal grounds.

There are cases of trust in which a prohibition will issue from the chancery court to the probate court, as where a sum of money is bequeathed to a legatee in trust for another, and the trustee is endeavoring, by a proceeding in the orphans' court, to get the money into his own hands, a court of chancery may restrain the orphans' court, in order to enforce the trust.

ACTIONS WHICH SURVIVE TO THE EXECUTOR OR ADMINISTRATOR.

With respect to such personal actions as are founded on any obligation, contract, debt, covenant, or other duty, the right of action, on which the testator or intestate might have sued in his life-time, survives to his executor or administrator.

If the goods of the deceased, taken away in his life-time, continue in specie in the hands of the wrong-doer, detinue may be maintained by the executor or administrator, to recover them back. If they have been sold, he may maintain an action for money had and received, to recover the price.

A suit depending, will not abate by the death of the plaintiff or defendant; but may be prosecuted or defended, by the executor or administrator, to final judgment; and sci. fa. may issue to the representative of the deceased party. Cl. Dig. 313, sec. 1. Ib. 337, sec. 36.

As the plaintiff, and after his death, his representative, is the
actor in the cause, it seems more than idle, that he should cause a *sci. fa.* to issue to himself.

The action of trover survives for and against executors and administrators. *Cl. Dig.* 313, sec. 2.

All actions of trespass *quare clausum*, and actions of trespass to recover damages for injury to personal property, may, on the death of the plaintiff, be revived by the executor or administrator, in the same manner as actions on contract; and proceedings on the writ of *ad quod damnum* may be revived in like manner, on motion. But an action of trespass for an injury done to the person or property of the deceased, in his life-time, cannot be commenced *de novo* by the executor or administrator. *Cl. Dig.* 314, sec. 5 and 6. 6 *Port.* 109, Blakeney v. Blakeney.

Actions on covenants real will, in many cases, not enure to the executor or administrator; but will descend to the heir. On a warrantee of lands to the grantee, on breach, the right of action descends to his heirs, even though the breach were in the life-time of the ancestor.

But if the ultimate damage has been sustained in the life-time of the ancestor—as where he has been evicted, and consequently the land has not descended to the heir, the covenant does not descend to the heir; and the executor or administrator may maintain an action for the breach.

Whenever the reversion is for years, the executor or administrator is the only party capable of maintaining an action on a covenant with the lessor, whether it run with the lands, or be in grass.

When there is a sole plaintiff, and he dies after final judgment, and before execution; his executor or administrator may have execution, by *sci. fa.* against the defendant. If the executrix or administratrix be a feme covert, her husband must be made a party to the *sci. fa.* And the same practice prevails in chancery.

If the plaintiff die after execution has issued, his executor or administrator may proceed without *sci. fa.*

When one of several plaintiffs in a personal action, dies after judgment, and before execution, the survivors may, within a year after the judgment, have execution without *sci. fa.;* and
the execution must be in the name of all the parties, so as to correspond with the judgment.

In personal actions, a right to writ of error, passes to the personal representatives.

APPRENTICES.

Executors and administrators have no interest in apprentices bound to the testator or intestate. The contract of apprenticeship is founded on a personal trust; and it cannot be transferred, except by the master in his life-time, with the consent of the judge of the orphans' court. The contract does not pass to the executor or administrator.

RIGHT OF THE EXECUTOR OR ADMINISTRATOR, TO CHOSES IN ACTION, AS IT REGARDS HUSBAND AND WIFE.

Choses in action of the wife consist of debts due to her on bond or otherwise, arrears of rent, legacies, trust funds, and other property recoverable by action at law. By virtue of the marriage, these become the property of the husband, only by his reducing them to possession. If he die before his wife, without having reduced them to possession, they do not pass to his executor or administrator, but survive to the wife.

If an obligation be made during coverture, to husband and wife, and the husband die first, it does not pass to his administrator, but survives to the wife. And the same rule applies, when a bond or note is given to the wife alone, during coverture.

If rent is in arrear, which had been reserved to husband and wife, jointly, on a lease of the wife's property; and the husband die first; a right to the rent in arrear will not pass to his executor or administrator; but belongs to the wife.

In order to defeat the wife's right of survivorship in her choses in action, the possession of the husband must be real, such as to divest the wife of the right, and to vest it in himself, absolutely—as in case of a judgment recovered in an action commenced by him alone; or of award of execution on judgment recovered by husband and wife; or of a decree in equity, for
payment of money to him; or of a receipt of the money; or if the money be received by a person authorized by husband and wife to receive it. In these and the like cases, the possession of the husband defeats the right of survivorship of the wife; and the right to the money will pass, after the death of the husband, to his executor or administrator.

The husband's receiving interest on a debt due to the wife, without getting in the principal, is not such a possession, as will defeat the right of survivorship of the wife.

The possession of the husband, in a representative character as trustee, executor, or administrator, will not defeat the right of survivorship of the wife. For this purpose, the possession must be as husband.

In an action on the chose in action of the wife; if she be a party with her husband, and he die after judgment, and before execution sued out, his executor or administrator will have no right in it. The judgment will survive to the wife; and she may have sci. fa. on it. But if the action had been brought in the name of the husband alone, the right to the judgment would be in his executor or administrator.

As a joint judgment will survive to the wife, if the husband die before execution has issued; so will a joint decree in chancery, if execution has not issued on it, nor an order been made for payment, or declaring the money to belong to the husband.

An award in favor of the husband, in a controversy with a third person, on the chose in action of the wife, alters the property, and vests the right in him. And on his death, it would be vested in his executor or administrator.

Whenever the husband has reduced to possession, the choses in action of the wife, if he survive her, he may bring an action in his own name, and not as her administrator, for what relates to such choses in action; as where on a bond to the wife, dum sola, the husband gives to a third person, authority to receive the money due, and that person receives it; and then the wife dies; the husband may bring an action to recover it from the receiver, individually; and not as administrator.

If previously to marriage, the wife had obtained a judgment; and after marriage she and her husband sue out a sci. fa. on which execution is awarded; on this possession, the husband
may sue out a new sci. fu., in his individual character; and on
the death of the husband, the right will pass to his executor and
administrator.

RIGHT TO CONTINGENT INTERESTS.

Contingent and executory interests pass to the executor or
administrator, when the testator or intestate dies before the
happening of the contingency, on which they depend.

POWER OF THE EXECUTOR AND ADMINISTRATOR, GENERALLY.

Within a convenient time after the death of the testator, or
the grant of administration, the executor or administrator has
a right to enter the house which may have descended to the
heirs, in order to remove the goods of the deceased; but he
must do this without force—as, if the door be open; or being
locked, if the key be in the door. If he have access to the hall
or parlor without force, this will not justify his breaking open a
room that is locked, to take possession of the goods in it. He
has a right to take deeds and other writings relative to the per-
sonal estate, out of a chest in the house, if the chest be open, or
if he have its key. But he has no right to break open the
chest. If he cannot obtain possession of the effects of the de-
ceased, without force, he must resort to an action at law.

The judge of the probate court may authorize an executor or
administrator, on application made, and good cause shown, to
keep the personal estate together, exempt from sale, for such
time as he may deem advisable, not exceeding ten years. But
this provision must not conflict with the disposition of property
contained in a will; nor with the right of creditors; nor with
the claim of any legatee, or distributed to their respective
shares, when twenty-one years of age. Cl. Dig. 198, sec. 30,
34, 35.

When an executor or administrator shall be authorized by
the judge of the probate court, to keep together the personal
estate for ten years—for good cause shown, he may in like
manner be authorized to retain the real estate in his possession,
and to cultivate it, reserving to the widow her dower. Cl.
Dig. 199, sec. 37.
The executor or administrator may rent the real estate, at public outcry, until final settlement; and the rents shall be assets. *Cl. Dig.* 199, sec. 36.

When the real estate is rented by the administrator, the right of entry of the heir is suspended. 1 *Al. R.* 493, *Harkins et al.* v. *Pope et al.*

The administrator may recover rents due either before, or after the death of the intestate. But the heir may sue for, and recover rent accruing after the death of the intestate, until the administrator assert his authority over the rents, by notice to the tenant, or by suit. 10 *Al. R.* 60, *Masterson v. Gerard’s Heirs.*

The real estate may be sold by the executor or administrator, under an order of the probate court, obtained in the mode prescribed by law: but he must reserve forty acres, not to exceed in value four hundred dollars, for the use and benefit of permanent, settled families, for cultivation. *Cl. Dig.* 224, sec. 16. *Ib.* 210, sec. 48.

And under an order of the probate court, he may sell the personal estate; except the dead victuals and liquors, which, at the death of the testator or intestate, shall have been laid up for consumption in his family; and which shall remain for the use of the family, not to be accounted for, as assets: and except also all such property as shall be exempt from execution. The following articles are exempt from execution, under existing laws; and retained for the use of the family: two beds and their furniture; two cows and calves; two spinning wheels; two axes; two hoes; five hundred pounds of meat; one hundred bushels of corn; all the meal that may be at any time on hand; two ploughs; one table; one pot; one oven; two water-vessels; two pair of cotton cards; all books; one churn; three chairs; one work-horse, mule, or pair of oxen; one horse-cart or ox-cart; one gun; all tools or implements of trade; twenty head of hogs; one thousand pounds of fodder; one loom; one man’s saddle; and one lady’s saddle; the ungathered crop, and twenty-five bushels of wheat. *Cl. Dig.* 223, sec. 13. *Ib.* 224, sec. 15. *Ib.* 196, sec. 20, 21. *Ib.* 210, sec. 46, 47. 13 *Al. R.* 529, *Carter v. Hinkle.*

A promissory note made payable to the deceased, cannot be
indorsed by the executor or administrator, so as to transfer the property, unless by directions in the will, or under an order of sale, of the orphans' court.

The executor or administrator may hire the slaves of the estate, by private contract. Act of 1850.

**POWER OF ONE OF SEVERAL EXECUTORS OR ADMINISTRATORS.**

Executors and administrators on any one estate, however numerous, are regarded in law, as an individual person; and they have a joint, and each of them has an entire, authority over the whole estate. The act of any one of them, in the administration of the effects, is deemed the act of all. A release of a debt by one of them, is valid, and binds the others; and the assent of one executor, to a legacy, confirms the right of the legatee.

If one of several executors or administrators dies, the whole office will survive to the others who may be in life.

The ordinary functions incident to the office of executor, may be exercised by one, when several have been appointed executors, and the others renounce.

When there are several executors, and a power is given to them, it has been made a question, whether, when one of them dies, the power can be exercised by the survivor, or survivors. It seems to be the better opinion, that as the office survives, the power connected with the office also survives.

If the power should be extinguished, equity will interpose, to prevent a failure in the will of the testator; and will appoint a trustee: or, considering the property as bound by the trust, will compel the executor to fulfill the trust.

**RIGHT TO RETAIN.**

An executor or administrator cannot sue himself; and he may therefore appropriate a sufficient part of the assets, for a debt due to himself, when the estate is solvent. He may retain, not only for debts which he claims beneficially; but also for those due to him as trustee. And he may retain for debts due to another, as trustee for him.
If a married woman be executrix or administratrix, she and her husband may retain, for a debt due to her, or to the husband, before or during marriage.

An executor or administrator may not retain for damages; of which he has no right to determine the amount—as damages for a tort.

**GENERAL DUTIES OF AN EXECUTOR OR ADMINISTRATOR.**

**INVENTORY.**

Executors and administrators shall file, in the probate office, within three months after their appointment, a sworn inventory, showing all the goods and chattels, rights of, and debts due or accruing to, the testator or intestate at the time of his death, which have come to their possession or knowledge; setting forth the times at which the debts are due, and whether due by open account, note, or bond. *Cl. Dig. 225, sec. 26.*

The inventory ought to distinguish between those debts which are sperate, and those which are doubtful, or desperate.

If the appraisement which may be returned by the appraisers, be sworn to by the executor or administrator, it will be received as his inventory. *Cl. Dig. 223, sec. 11.*

The statute requiring that an inventory be returned, is equally binding on all executors and administrators, whatever be the order for their appointment, or limit of their authority. And the omission to return an inventory, is a breach of the bond of an executor or administrator.

The ecclesiastical courts of England will receive an allegation in objection to the inventory; and will compel the executor or administrator to answer it under oath. And if the answer admit more assets than are included in the inventory, they will require the inventory to be amended so far. But those courts will not permit witnesses to be examined to falsify the inventory, in order to its being amended; because the inventory is an admission under oath, of the executor or administrator; and he cannot be required to admit, or to swear to that, which he denies.

The supreme court of Alabama has decided, that the probate court has authority to try the correctness of an inventory; and
to determine, whether certain property not included, ought not to be embraced in it. 2 Port. 328, Dobbs et al. v. Dist's of Cockerhern.

Inventories must remain in the probate office, subject to inspection. Cl. Dig. 302. sec, 27.

An inventory is prima facie evidence against the administrator; but he may show error in it. 16 Al. R 41. Craig and wife v. McGehee and Armstrong.

APPRaiseMENT.

It is the duty of the executor or administrator, without delay, to apply to the probate court, to appoint appraisers. And the court ought to appoint three discreet persons as appraisers: and it must designate the time, within which the appraisers shall make their return. They must appraise all the personal estate of the deceased, to them shown, and make return of their appraisement, within the time limited by the court. This appraisement may be given in evidence, in any suit for or against the administrator, by either party; and shall be prima facie, but not conclusive, evidence of the value of the property appraised. Cl. Dig. 223, sec. 11. 10 Al. R. 608, Steele v. Knox.

COllectING THE EFFECTS.

It is the duty of the executor or administrator, diligently to collect the goods and chattels of the deceased; and for this purpose, the law has clothed him with ample powers. When he cannot otherwise collect them, he must bring suit for them. If by unduly delaying to bring an action, he has enabled a debtor of the estate to defeat a claim, by a plea of the statute of limitations, the executor or administrator will be personally responsible for the loss.

PAYMENT OF DEBTS.

Within two months after their appointment, executors and administrators must publish, in a newspaper printed in the state, a notice to persons having claims against the estate, to exhibit them within the time limited by law, or they will be barred.
The notice must state the time at which letters testamentary, or of administration were granted; and the publication must be continued once a week for six weeks.

If the executor or administrator shall fail to give the notice within the time limited, claimants may exhibit or file their claims at any time within eighteen months after the notice shall have been given. *Act of 1850.*

Debts are entitled to payment, before legacies. If the assets are not sufficient to pay both the debts and the legacies, the debts must be paid *in toto,* or as far as the assets will extend.

The debts incurred on account of the last sickness, and the funeral expenses, have the first claim to payment. If the assets are sufficient for that purpose, they must be paid in full. If the assets are not sufficient to pay them in full, they must be paid *pro rata,* in exclusion of all other debts.

Funeral expenses should be suitable to the position of the deceased, in society. The executor or administrator is not justified in incurring such as are extravagant, when the estate is solvent. When the estate is insolvent, a strict economy must be observed, and the court will be scrupulous to allow beyond what is necessary; but in determining what is necessary, regard must be had to the station of the deceased in the community. And as the funeral expenses are generally incurred, before the executor or administrator can know the condition of the estate of the deceased, the court will be inclined to be indulgent to him.

Lands of deceased persons shall be assessed to their estates, for taxes; and the personal property of the estate may be distrained for taxes. *Acts of 1847,* p. 14.

**SALES, GENERALLY.**

An executor or administrator is not authorized to sell the dead victuals and liquors, which, at the death of the testator or intestate, may have been laid up for consumption in his family; nor such articles as may by law be exempted from execution. *Cl. Dig. 223,* sec. 13. *Ib. 224,* sec. 15. *Ib. 196,* sec. 20, 21. *Ib. 210,* sec. 46, 47. 13 *Al. R.* 529., *Carter v. Hinkle.*

The property of estates shall not be sold at private sale,
unless so directed by the will; except that the crop may be sold, by order of the probate court, in such manner as shall seem reasonable, and the situation of the estate may require. And in this case, the court must require the executor or administrator to make a return of his proceedings under such order of sale, to the next probate court. And as another exception, the executor or administrator of an estate held together, may ship its crops of cotton, for sale. Cl. Dig. 223, sec. 13. Ib. 224, sec. 15. Acts of 1847, p. 140.

Sales by executors and administrators must not commence before the hour of twelve, M.; nor continue later than five, P. M.; and must be on the day set apart, by legal notice, for such sale. But if this time shall not be sufficient to complete the sale, the executor or administrator may continue the sale from day to day, by giving public notice thereof to the attending company, at the conclusion of the sale of each day. All sales commenced and (or) held in any other manner, shall be void. Cl. Dig. 224, sec. 14.

An executor or administrator having an interest in the estate, may purchase at his own sale; and his purchase will be sustained, unless shown to have been accompanied with circumstances of unfairness. 8 Al. R. 680, Julian et al v. Reynolds et al. 2 St. 331, Wiley and Gayle v. White and Leslie.

SALE OF PERSONAL PROPERTY.

On the application of the executor or administrator, the probate court may order a sale of personal property. On such order being made, the executor or administrator must advertise the time and place of sale, in three or more public places in the county, at least thirty days previous to the day of sale. And he must then and there sell the same, at public outcry, to the highest bidder. And he must give at least six months credit, the purchaser giving bond with security—unless it shall appear to the court, on proof, that a sale for cash is necessary for the interests of the estate: and then the sale may be made for cash, under the order of the court. Cl. Dig. 223, sec. 13. Acts of 1847, p. 124.

An account of sale, sworn to and subscribed by the executor
or administrator, must be rendered to the probate court. Cl. Dig. 226, sec. 26.

An administrator who obtains an order of sale, and without justifiable cause delays to sell for a long time, during which the property deteriorates in value, is responsible for what was the value of the property, at the time at which it should have been sold. 10 Al. R. 608, Steele v. Knox.

SALE OF REAL ESTATE.

Sale of lands, in pursuance of a will, must be made by the acting executor, if no other person be therein appointed for that purpose; or if a person appointed in a will to sell, refuse to act, or die without completing the sale. Cl. Dig. 598, sec. 14.

An administrator cum testamento annexo, cannot execute a power to sell land, conferred in the will, on the executor. 4 Al. R. 679, Lucus v. Doe, ex dem. Price. 10 Al. R. 811, Posey et al. v. Conway et al.

On the petition of the executor or administrator, real estate may be sold by order of the probate court; and the equitable title may be sold, as well as the legal title. The petition must state the ground on which a sale is necessary, viz.; either that the personal estate is not sufficient for the payment of the debts; or that the real estate of the testator or intestate cannot be equally, fairly, and beneficially divided, among the devisees, or the heirs, without such sale of real estate; it must describe, with particularity, the real estate proposed to be sold; and it must state the names of the devisees, or heirs, and which of them are infants, or married women. Cl. Dig. 224, sec. 16. 7 Al. R. 855, Perkins, ex'r. et al. v. Winter’s adm’r. 8 Al. R. 100, Evans, adm’r. v. Matthews. 9 Al. R. 285, Jennings and Graham v. adm’r. of Jennings et al. 10 Al. R. 636, Duval’s Heirs v. Pl. and Mer. Bank, et al.

On the filing the petition in open court, the court must order citations to all the devisees or heirs, who are of full age, and to the husbands of such as are feme covert, calling on them to appear on a particular day therein designated, at a regular or adjourned term of the court, not less than forty days from the issuing of the citation; and answer the petition. The
court must also forthwith appoint guardians, \((ad \ litem,)\) for such of the heirs or devisees as are minors, to answer, and defend against the petition—and the petitioner, or his heir, shall not be appointed such guardian. The guardians should be served with citation; but this is not mentioned in the statute. And it is erroneous to decree a sale of the land, without the previous appointment of a guardian \(ad \ litem\) for the minor heirs: and the record must show the acceptance, as well as the appointment, of the guardian \(ad \ litem\). 16 Al. R. 41, Craig and Wife v. McGehee and Armstrong. Ib. 693, Jenkins’ dist’s. v. Jenkins’ adm’rs. Cl. Dig. 224, sec. 17.

The minor heirs or devisees must have notice of the petition for the sale of real estate, through the persons having the care of them. 4 Al. R. 253, Shilds et al. v. Alston.

When heirs or devisees reside out of the state, or their residence is unknown to the executor or administrator, on his making oath to that effect, a notice of the petition may be given, by publication in one or more newspapers, for such length of time as the judge may order.  Cl. Dig. 225, sec. 25.

It is the duty of the guardian \(ad \ litem\), to deny all the allegations of the petition, in an answer not under oath; and, if necessary, to employ counsel for his ward. Cl. Dig. 224, sec. 18.

When the allegations of the petition are denied, it is incumbent on the petitioner, to satisfy the court, that the sale ought to be made, by proof by deposition, as in chancery. If payment of debts is the ground of the deposition, the heir or devisee may show, in opposition to it, that such debts are barred by the statute of limitations. Cl. Dig. 225, sec. 19. 2 Al. R. 660, Heirs of Bond v. Smith, adm’r. 12 Al. R. 268, McKin v. Bobo, adm’r.

When the court is satisfied by the depositions, that the sale ought to be made; or when the heirs or devisees are of mature age, and being cited, fail to answer, the court will order a sale of such real estate; and it will direct the sale to be for cash, or on credit, or for cash as to part, and credit for the balance, as it should deem best. The sale must then be made by the executor or administrator, on the terms and in the manner set forth in the order of sale; and he must give notice of the time and place of sale, by advertisements put up at three or more pub-
lic places in the county in which the land is situated, at least forty days before the time of sale; and by publication in a newspaper in the state, for three weeks successively, before the day of sale. *Cl. Dig.* 225, *sec. 19*. *Ib.* 229, *sec. 45*. *Ib.* 225, *sec. 24*. 3 *Al. R.* 623, *Heirs of Griffin v. Griffin, ex'or.*

When it shall be made to appear to the probate court, that the heirs to any estate will be less injured by a sale of its land, or of a part thereof, for the payment of debts, than by a sale of slaves, the court may, on the petition of a party interested, order citations to all other parties in interest, to be served on them, if (resident) in the country; if not, to be published in a newspaper, calling on them to appear at the next probate court, and show cause against such sale of land being ordered. At the next term of the probate court, on proof of service or publication, if no sufficient cause be shown to the contrary, the court must order a sale of the land, or of such part as may be necessary for payment of the debts. *Cl. Dig.* 196, *sec. 18*.

Every executor or administrator authorized by the probate court to sell real estate, must, before he obtains the order of sale from the register's office, enter into bond with sufficient security, to the judge of probate, for observing the rules and directions of law, for the sale of real estate; and for well and truly accounting for the proceeds of sale, and disposing of them agreeably to law. *Cl. Dig.* 225, *sec. 23*.

When real estate is sold under an order of the probate court, the title remains in the heirs, until the conveyance is executed to the purchaser. 5 *Al. R.* 324, *Cummings and Cooper v. McCullough, adm'or*.

On such sale being made, if, with the consent of the purchaser, another be substituted for him, and the sale be confirmed by the probate court; the sale to the substituted purchaser will be valid. 9 *Al. R.* 285, *Jennings and Graham v. adm'or. of Jennings, et al*.

Sales made under the order of the probate court, are judicial sales; and the rule of *caveat emptor* applies. In such sales, the purchaser has no right to indemnity, for any incumbrance resting on the title. 9 *Al. R.* 297, *Worthington, adm'or. v. McRoberts, et al*. 7 *Al. R.* 855, *Perkins, ex'or., et al. v. Winter's adm'or. and heirs, et al.*
On a sale of real estate, under an order of the probate court, the purchaser cannot abandon his purchase, on the ground of irregularity in the sale, unless the irregularity has been such as to render the sale void; and then, he may resist the demand for the payment of the purchase-money, even though he may have gone into possession. 9 Al. R. 297, Worthington, adm'r. v. McRoberts, et al., 3 St. and P. 355, Wylie and Gayle v. Leslie and White.

The omission of the executor or administrator to perform any act required of him by the order of sale, or by the law, will render the sale void; but the sale will not be invalidated by his omission to give the bond required by law, before the sale; nor by his omission to perform any act required of him, after the sale. 6 Port. 219, Wyman, et al. v. Campbell, et al. 4 Al. R. 442, Wier and Davies v. Humphries. Ib. 521, Dearman v. Dearman and Coffman. 12 Al. R. 298, Fambro v. Gautt.

Proceedings in the probate court, in relation to the sale of real estate, are in rem, and not in personam; and a sale may be ordered, although the parties in interest have not been notified. 6 Port. 219, Wyman, et al. v. Campbell, et al.

On sale of real estate, by the authority of the probate court, if the jurisdiction of the court be established, the purchaser's title will not be divested by a reversal of the decree of sale. Restitution of the purchase-money will be made; but the purchaser will hold the property. 8 Al. R. 99 Evans, adm'r. v. Matthews. 6 Port. 219, Wyman, et al. v. Campbell, et al.

**DISTRIBUTION.**

**Right of the Husband in the Estate of the deceased Wife.**

The English statute of distribution did not give to the husband, any right to the whole of, or to a distributive part in, the estate of his deceased wife; but the 29th Car. 2d, reserves the rights of husbands from the operation of that statute. In England, by the force of previous laws, the husband has a right to the whole estate of his deceased wife, intestate.

The statute of distribution of Alabama, in like manner excludes the husband from distribution in the estate of his de-
ceased wife; and, except the act of 1847, we have no statute, saving him from the operation of the statute of distribution. Before the act of 1847, the husband was not entitled to any part of the estate of his deceased wife, intestate.

By the act of 1847, if a married woman, having separate estate, die intestate, the husband will be entitled, absolutely, to one-half of her personal estate; and to one-half of her real estate, for life. *Acts of 1847, p. 79.*

*Rights of the Wife in the Estate of her deceased Husband.*

The wife is entitled to dower; and this will be considered under a separate head.

The act of 1847 has made a great change in the rights of the wife; but this statute applies to those only who have entered into marriage since its passage.

The rights of parties married prior to the passage of the act of 1847, are governed by the law, as it existed at the time of their marriage. It has therefore been necessary, wherever these rights have been considered in this treatise, to explain the law in force before the act of 1847.

When a husband married before the passage of the act of 1847, dies intestate; or, having made a will, had not made therein satisfactory provision for his wife, under former laws, she will be entitled, out of the personal estate of her deceased husband, after his debts have been paid, to a share as follows: if there be no child, or but one child, she shall have one-half; if there be more than one child, and not more than four, the estate shall be divided equally between her and the several children; and if there be more than four children, she shall have one-fifth part—in absolute right. *Cl. Dig. 173, sec. 4.*

Under the act of 1847, if the widow hold separate estate, equal in amount to what would be her dower, or distributive part, according to the foregoing scale, she will not be entitled to dower, or distributive part. But if her separate estate be less than her dower, or distributive part, there must be allotted to her, a share sufficient, with her separate estate, to be equal to dower, or distributive part. *Acts of 1847, p. 79.*

The language of this statute expresses very imperfectly, the
intention of the legislature. This appears to be the principle of the law. The separate estate of the wife is to be computed with the estate of the husband, as forming one estate. If the separate estate of the wife shall be equal to what would have been her distributive share of such aggregate estate, under the previous laws; or if her separate estate shall be more than such distributive share; then she is not to have any part of her husband's estate. But if her separate estate shall be less than what would be her distributive share of such aggregate estate, then she is to receive, from the husband's estate, an amount sufficient, when added to her separate estate, to make it equal to what would be her distributive share of such aggregate estate. Still there is ambiguity in the statute, in the use of the terms, "dower," and "distributive share," as synonymous.

In the descent of the estate of an intestate, there is no difference between real and personal property. An interest in an estate held jointly, on the death of a joint owner, intestate, descends to, and is vested in his heirs, or other legal representatives. *Cl. Dig.* 191, *sec.* 1. *Ib.* 169, *sec.* 6.

The estates of intestates descend to their next of kin, in the following order.

1st. To a child, or to children in equal parts.
2d. To brothers, and sisters, in equal parts.
3d. To the father.
4th. To the mother.
5th. To the other next of kin, computing according to the civil law.

A posthumous child, not provided for in a will, must have such share of the estate, as would have been his distributive share, in case of intestacy, to be assigned to him proportionally, from the shares of the legatees and devisees. *Cl. Dig.* 597, *sec.* 6. In case of intestacy, a posthumous child has the same rights as other children.

There is no distinction between kindred of the whole-blood and those of the half-blood, except that kindred of the whole-blood are preferred to kindred of the half-blood in the same degree. *Cl. Dig.* 162, *sec.* 2.
Children of a deceased brother of the whole-blood, are preferred to a brother of the half-blood. 3 St. and Port. 29, Hitchcock v. Smith. (Quere.)

Bastards inherit and transmit inheritance on the part of their mother, as if they were legitimate from her, and they are entitled to a distributive share of the personal estate of her kindred, as if they were legitimate from her. And the kindred of a bastard, on the part of his mother, are entitled to distribution of his personal estate, as if he were legitimate from her. Cl. Dig. 168, sec. 169, sec. 5.

Children born before marriage, of parents who afterwards intermarry, if recognized by the father, are deemed legitimate. They will consequently take by descent. Cl. Dig. 168, sec. 3.

OF CHILDREN AND THEIR REPRESENTATIVES.

The statute directs that the estate shall descend to the children of the intestate and their descendants. The descendants of children here mentioned, are their lineal descendants, in any degree. When a child of the intestate is dead, the lineal descendants of such child take the part to which he would have been entitled if in life.

Three classes of cases are to be considered; 1st, when none of the intestate's children are dead; 2d, when the intestate's children are all dead, each of them having left children; 3d, when some of the intestate's children are dead, and some of them are living, and such as are dead having left children. In the first class, as each takes in his own right, the estate subject to descent is to be equally divided among them. In the second class of cases, the descendants of each deceased child of the intestate will take what would have been the share of their deceased parent, if he were in life, to be equally divided among them. In the third class of cases, each living child is entitled to one share, and the descendants of each deceased child are entitled to one share, to be equally divided among them; each living child taking in his own right, and the descendants of each deceased child together representing their parent.

The same rules apply to brothers and sisters of the intestate, and their descendants.
HOTCHPOT.

When any of the children of a person dying intestate, shall have received from such intestate, in his life-time, any real or personal estate, by way of advancement, and shall choose to come into partition of the estate with the other parcers, the property so advanced, or the value thereof, shall be brought back, (into hotchpot,) and be computed as a part of the estate. And then the child bringing in such advancement will be entitled to an equal share in the whole estate. *Cl. Dig.* 197, *sec.* 25.

When property advanced shall be brought into hotchpot, and the parcers cannot agree as to its value, the value must be determined by the judge of probate, testimony being heard. For this purpose he may, in his discretion, have a jury impanneled, and a jury shall be impanneled, if required by either party. The value of the property as it stood at the time of the advancement, is to be ascertained, and to be computed as a part of such child's share. *Cl. Dig.* 197, *sec.* 26.

A child who has received an advancement, and brings it back into hotchpot, in order to have an equal distributive share, must bring the advancement into that portion of the estate which is to be divided among the children. It is not to affect the share of the widow, which is computed out of the estate, exclusive of the advancement.

If a child who has received an advancement, shall die in the life-time of his parent, leaving children, the same rule applies to them; and to be entitled to a distributive share in right of his deceased parent, they must bring the advancement into hotchpot.

ADVANCEMENT.

A provision made for a child, by a settlement, whether voluntary, or for a good consideration, as marriage, is an advancement.

To constitute an advancement, it is not requisite that the provision for the child shall take effect in the father's life-time. If by deed, executed by the father, he settle an annuity on one
of his children, to commence after his death, this is an advancement.

A portion which was at first contingent, will be deemed an advancement, when the contingency has happened. And while contingent, if the contingency be so limited as to arise within a reasonable time, as a portion secured to a daughter, on her attaining the age of eighteen, or on her marriage, it will be an advancement, and must be surrendered into the estate, before the child so provided for, will be entitled to an equal distributive share.

Money or property given by a parent to a child, is prima facie an advancement, but evidence may be adduced to show that it was intended as a gift, and not an advancement. Trifling presents to a child, as a gold-watch, or wedding-clothes, are not an advancement, nor is money expended on his education. 8 Al. R. 414, Distributees of Mitchell v. Mitchell, adm’r.

OTHER NEXT OF KIN.

When there are no children of the intestate, nor descendants of children, then his estate is to be divided in equal parts among the brothers and sisters of the intestate, and their descendants; the descendants of a deceased brother or sister of the intestate, to have, in equal parts among them, what would have been the share of their deceased parent, or ancestor.

When there are no children, nor descendants of children of the intestate, and no brothers or sisters, nor descendants of brothers and sisters of the intestate, the estate will pass to the father of the intestate, if he be living; if he be dead, it will pass to the mother of the intestate.

If there be no children of the intestate, nor descendants of them, nor brothers or sisters of the intestate, nor descendants of them, nor father nor mother, then the estate will descend, in equal parts, to the next of kin, in equal degree, of the intestate, computing the degrees of kindred by the rules of the civil law.

In tracing descent, there is no legal distinction between kindred of the whole-blood, and kindred of the half-blood, except that kindred of the whole-blood are preferred to kindred of the half-blood in the same degree.
According to the rules of the civil law, the degrees of kindred are computed in the following manner. Count from either of the parties, whose degree of consanguinity is to be traced; (that is, either from the intestate, or from the party claiming,) upwards, to the common stock, and then down to the other of those parties, calculating a degree for each person, both ascending and descending. For example, to ascertain the degree in which a cousin stands to the deceased, begin counting from the deceased. Up to the father of the deceased, is one degree; from him to the grandfather, who is the common ancestor, makes two degrees; from him down to the uncle, makes three degrees; from him to the cousin makes four degrees. The cousin of the intestate is in the fourth degree from him.

There is no representation among collaterals, except as to the descendants of the brothers and sisters of the intestate. If the kindred of the deceased should be an uncle, and the son of another uncle, who is deceased, the latter will not be entitled to a distributive share. And the same rule applies to the descendants of all other collateral kindred. Among collaterals, except the descendants of brothers and sisters, the right by descent depends on the proximity of blood of the individual claimant.

**DOMICIL ABROAD.**

The general rule of law is, that the personal estate of the intestate must be distributed according to the law of the country, of which he was a domiciled inhabitant, at the time of his death.

The place where a man resides is, *prima facie*, his domicil. But this inference may be rebutted, by evidence showing that his residence there is either constrained by the temporary necessity of his affairs, or that it is in itself transitory.

To ascertain the domicil, the following rules have been observed.

The domicil, whether original or acquired, is not lost by mere abandonment; nor is it lost by the intention to remove. A man's domicil continues unchanged, until the intention and the act concur, in acquiring a different domicil. But there is an exception to this rule, when the party dies *in itinere*, on his journey to an intended domicil.
A new domicil cannot be acquired by the party's own act during minority.

After the death of the father, children remaining under the care of their mother, follow any new domicil which she may acquire during their minority, unless it appear that such new domicil was acquired for the fraudulent purpose of altering the rule of succession.

**ASSETS.**

Assets are those goods and chattels, and rights of every kind, in possession or in action, which belonged to the deceased at the time of his death; and which, after his death, come to the hands or power of the executor or administrator, as belonging to him in right of his office; and also whatever may come to the hands or power of the executor or administrator, in lieu, or by reason of the goods, chattels, and rights above-mentioned, or as their product or increase. All profits which in any way accrue on the estate in the hands of the executor or administrator, are assets.

Money in the hands of the deceased, belonging to others, so mingled with his own as not to be distinguishable, in the hands of the administrator or executor is deemed assets, subject to the claims of his creditors, generally. 8 Port. 211, Maury's adm'r. v. Mason's adm'r.

As there is no priority among debts, but all of every grade, excepting debts for the last sickness, and for the funeral, have equal claim to payment; it is not essential to consider the distinction between legal and equitable assets.

**DIFFERENT LIABILITIES OF THE PERSONAL AND OF THE REAL ESTATE FOR DEBTS.**

The personal estate of any deceased person, whether testator or intestate, stands chargeable with all the debts due by the deceased, and with the funeral expenses, and with the proper expenses of settling the estate; and the lands, tenements, and hereditaments of the testator or intestate, stand chargeable with all the debts of the deceased, over and above what the personal estate may be sufficient to pay. Cl. Dig. 191, sec. 1.
It is a consequence of the foregoing statute, and of the statute enabling an executor or administrator to procure the sale of real estate for the payment of debts, that an action at law cannot be sustained against the heir, on the debt of his ancestor; and that the real estate may be subjected in equity, after the personal estate has been exhausted, whatever be the nature of the debts.

When a judgment shall have been obtained against any person, in his life-time, and shall remain unsatisfied, at his death, and the executor or administrator shall fail to apply to the orphans' court, for authority for the sale of the real estate, in order to pay the debts, the judgment-creditor may, on filing in the office of the clerk of the court rendering the judgment, a suggestion that real estate has descended to the heirs, and that the sale of said real estate, or of some part thereof, is necessary for the satisfaction of said judgment, and that the executor or the administrator has failed to apply to the probate court for an order of sale thereof, at the same time setting out the names of the executor or administrator, and of the heirs, sue out a scire facias against said executor or administrator, and heirs, returnable to the next term of said court, calling on them to show cause why said plaintiff should not have execution against said real estate. And if sufficient cause be not shown to the contrary, execution shall be awarded against said real estate. 

Cl. Dig. 197, sec. 27. 5 Al. R. 499, Fitzpatrick and others v. Edgars.

In answer to the scire facias mentioned in the preceding paragraph, and to prevent execution being awarded against the real estate, it will be sufficient to show that the personal estate has not been exhausted.

In judgment against an administrator, lands descended cannot, by scire facias against the heirs, be made liable to execution. 1 Stew. 193.

EXONERATION OF THE REAL BY THE PERSONAL ESTATE.

It is at the option of the mortgagee of lands descended or devised, to proceed against the land for foreclosure, or in an action at law, against the executor or administrator, for the debt.
If the land was purchased by the ancestor, subject to the mortgage, it descends *cum onere*. But when it was charged with the proper debt of the ancestor, then, if it shall be made liable in the hands of the devisee, he has a right to be reimbursed out of the personal estate, provided that, by so doing, he will not defeat the claim of any creditor.

Specific legatees will be made to contribute proportionably with the land, but will not exonerate it, except *pro rata*.

But although the debt charged on the land, was not the proper debt of the ancestor, he may choose to exonerate the real, and to charge the personal estate. But for this purpose, the intention of the testator must be clearly expressed in the will. If the testator in his will, charge that his debts be paid out of his real and personal estate, the onus will not thereby be removed from land which came to him already mortgaged.

The personal estate is the first fund to be resorted to for the payment of debts, and of legacies, and if the testator charge his real estate with the payment of his debts, or of his debts and legacies, and add nothing in exoneration of his personal estate, this amounts to no more than a declaration, that the real estate shall be so applied, to the extent to which the personal estate shall be insufficient for the payment. The real estate alone will be charged, only when, from the whole testamentary disposition taken together, a judicial mind may be convinced, that it was the intention of the testator, so to charge the real estate as to exempt the personal. To ascertain this intention, no definite rule can be laid down, but it must clearly appear in the will.

**MARSHALLING THE ASSETS.**

As the whole estate, both real and personal, is in this state subject for the payment of all the debts, we perhaps have no occasion for marshalling assets, as between creditors.

If a creditor have a specific lien on real estate, as a mortgage, and he resort to the personal, the assets will be marshalled in favor of legatees, against real assets, either devised or descended, and the legatee of the personalty will stand in the place of the mortgagee. And the same principle requires, that when a creditor having a general lien on real estate, is satisfied out of
the personal estate, a legatee of the personalty, who cannot be otherwise satisfied, may avail himself of the general lien of the creditor, and in the use of this remedy, he will stand in the place of the creditor.

When the legacy of one legatee is charged on the real, but is satisfied out of the personal estate; another legatee, whose legacy is not so charged, will stand in the place of the first legatee, and be satisfied out of the real estate.

The probate court has no authority to marshall the assets. Lands not devised, cannot be sold by its authority, for the payment of debts, in order to secure a pecuniary legacy. 10 Al. R. 172, Price, guard’n v. Wilkinson’s ex’rs.

In determining on the liability of executors and administrators, courts keep two principles in view; 1st, in order not to deter the rightful parties from undertaking these offices, the court is very liberal in making allowances, and cautious not to hold executors and administrators personally liable on slight grounds; 2d, it is vigilant in guarding against abuse of the trust, by them.

Executors and administrators may be guilty of devastavit, by a direct abuse, as by spending or consuming the assets, or converting them to their own use.

They may also commit a devastavit, by such acts of negligence, and wrong administration, as will disappoint those who have claims on the assets.

The expenditure of an unreasonable sum, in funeral expenses, is a devastavit.

The payment in full, of a legacy or of a debt, when there are not sufficient assets to pay all the debts exhibited within eighteen months after the first grant of letters testamentary, or of administration, is a devastavit.

If an administrator releases a debt due to the testator, or cancels, or delivers up a bond which was part of the assets, this is a devastavit so far, as to charge the executor or administrator personally with the amount, whether he received the money or not.
An executor or administrator is guilty of a *devastavit*, if he apply the assets in payment of a claim, which he was not bound to discharge—as if he apply them in paying for the schooling, feeding, and clothing of the children of the deceased, subsequent to his death.

It is a *devastavit*, to pay usurious interest, or a debt *ex turpi causa*.

Acts of negligence or carelessness in an executor or administrator, by which loss accrues to the estate, amount to a *devastavit*—as if he delays so long to commence an action, as to enable the debtor to protect himself by the statute of limitations; or when, after a long delay to collect, the debtor becomes insolvent.

In the case of *Crosse v. Smith*, 7 East 258, it is said, that if assets have come to the hands of an executor or administrator, and are afterwards lost without fault on his part, in favor of creditors, in a court of law this will be considered a *devastavit*. But this seems contrary to established principles, and an opposite doctrine certainly prevails in the chancery courts, and orphans' courts. When the executor or administrator exercises a reasonable degree of discretion and diligence, they will not hold him guilty of a *devastavit*, even though loss accrue to the estate.

He is not justifiable, in keeping the money of the estate unproductive in his hands; and if he fail to invest it in such manner as may be deemed safe, he is guilty of a *devastavit*, to the extent of the interest which ought to have been made.

He ought not to permit the money to remain on personal security, longer than is absolutely necessary; and his failure to do so, is a *devastavit*, if loss accrue.

If an executor or administrator, without necessity, confide the interests of the estate to an agent, he will be responsible for the acts of such agent. If, out of the established course of business, he authorize another to receive the money of the estate; and that agent receive it, and refuse to pay it over, this will be a *devastavit*.

But if loss be sustained by the failure of a bank, in which the testator or intestate had deposited his money; or in which, from necessity, or in conformity with common usage, the executor or administrator had made a deposit, this is not a *devasta-
vit. And if the money of the estate pass into the hands of an agent, according to the established course of business, and is lost—as in the case of money collected by an attorney at law, or the proceeds of a crop sold by a commission-merchant—the loss does not constitute a devastavit, unless there be peculiar circumstances, showing default or negligence on the part of the executor or administrator.

But if he deposit the money in bank, not in a separate account as executor or administrator, but on his general account, mixing it with his own money, he will be personally responsible; and any loss accruing, will be a devastavit.

The omission of an executor or administrator to apply to the probate court, for authority to sell the real estate, within three months after reporting the estate insolvent, is a devastavit; for which he may be sued, with his securities, on his bond. It is not clear, what liability is fastened on the executor or administrator, by this devastavit. Does it make him personally responsible, for the whole of the debts of the estate? Or, for debts to the amount of the value of the real estate not sold? This is the most reasonable construction. Can he then reimburse himself, by the sale of such real estate? *Cl. Dig. 193, sec. 27.*

To make settlement and distribution, in the probate court, before the debts are paid, is a devastavit. *5 Al. R. 13, Thrash v. Sumwalt.*

A devastavit by one executor, will not charge his co-executor, unless the latter have in some way contributed to it. Under ordinary circumstances, one executor is not responsible for assets which went into the hands of his co-executor. But if an executor, having assets, hand them over to his co-executor, and they be by him misapplied, the first will be chargeable with the devastavit, unless he show a good reason for having so acted.

In general, when by the act of one executor, any part of the estate come into the hands of the co-executor, the former will be answerable for the latter, to the extent to which he would be for a stranger, whom he had entrusted to receive it.

It is now the settled doctrine of the courts, that when a joint-receipt is given by executors or administrators, and one only receive the money, and the other join in signing the receipt
merely for form; the latter is not chargeable with a *devastavit*, on the misapplication of the money by him who received it. But if the joint-receipt be given under circumstances showing that, though the money was not actually received by both executors, yet it was under the control of both, each will be held responsible for the money.

**DEVASTAVIT, IN CASE OF A MARRIED WOMAN.**

If a feme sole executrix or administratrix waste the goods of the estate, and then marry, her husband will be liable for the *devastavit*, so long as the coverture may continue. But on her death, his liability ceases. And the rule is the same, if she waste the goods during coverture.

The general rule is, that the liability of the husband for the *devastavit* of the wife, ceases on the death of the wife. And therefore no proceeding can be had, either by action of debt on a *devastavit*, or by *sci. fa.*, against the husband of an executrix or administratrix, if she die after judgment *de bonis testatoris* against herself and her husband.*

But in equity, the husband, surviving, is liable for all the assets which had come to the hands of his wife during coverture.

If waste be committed during coverture, by the husband who has married a feme sole executrix or administratrix, and she survive him, she will be responsible for his *devastavit*. And the wife will in like manner be responsible for the *devastavit* of her husband, if, during coverture, her husband obtain letters testamentary, or of administration, on her right, with her consent. But if the husband, without her consent, obtain letters in her name; and she do not intermeddle in the estate; after his death she may renounce, and thereby escape responsibility for his *devastavit*.  

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LIABILITY OF EXECUTORS AND ADMINISTRATORS, ON THE ACTS OF THE DECEASED.

The executor or administrator is liable, so far as he has received assets, for all the debts of the deceased, of whatever kind they may be. Every bond, covenant, or other contract extends to executors and administrators, although not mentioned in it.

The executor or administrator is liable, not only on a promise of the deceased to pay a debt certain; but also on his promise to do an act, the breach of which rests in uncertain damages. Whenever, on such promise, the testator or intestate is liable, the executor or administrator, also is liable.

In many cases, a liability on the contract of the testator or intestate may accrue after his death; and this liability will rest on the executor or administrator.

But some personal contracts do not come under this rule; as when an author engages to compose a work, and dies before its completion. On this failure, the executor or administrator is not liable.

By the common law, an executor or administrator was not held liable for the tortious act of the deceased. The rule, actio personalis moritur cum persona, applies, when the action is founded on malfeasance, or misfeasance; when it arises ex delicto, such as trespass for taking goods, false imprisonment, assault and livery, slander, deceit, diverting a water-course, obstructing lights, and many other cases of similar character. In these cases, on the death of the person charged with the wrong, his executor or administrator is not liable for the damage.

But the action of trover, on the death of the plaintiff or defendant, may be revived for or against his executor or administrator. Cl. Dig. 313, sec. 2.

If goods taken wrongfully by the deceased, remain in specie in the hands of his administrator or executor, he is liable for them; and he is liable for their value, if they have been sold.

If a tort be committed by a common carrier, his executor or administrator is liable for the breach of contract; but not as for a tort.

After recovery in an action of ejectment against the de-
ceased, his executor or administrator is liable for the use and occupation of the land, for the time previous to the day of the demise laid in the declaration; but not for any time subsequent to that day. For the plaintiff, having chosen to consider the holding as founded in tort, (trespass,) cannot afterwards treat it as founded in contract.

The executor or administrator is not liable for the waste of the testator or intestate; but he is responsible for any benefit derived by the testator or intestate, from the value or sale of trees taken from the land.

In a court of chancery, the executor or administrator will be held liable for the consequences of a breach of trust by the executor or administrator.

The executor or administrator is bound, so far as he has assets, by all judgments against the testator or intestate, and all recognizances entered into by him.

When a joint obligor dies, his executor or administrator is liable on the joint-debt or contract. *Cl. Dig. 323, sec. 60.*

If a partner die, his executor or administrator will be liable in chancery, for the partnership debts.

On the covenant of the deceased, the executor or administrator is liable for a breach occurring during his administration; as in case of a covenant for quiet enjoyment, and ouster after the death.

For rent accrued after the death of the lessee, his executor or administrator is liable, even though the term may have been assigned by the lessee.

If the purchaser of real estate die without having paid the purchase-money, a devisee of the land may require the executor to pay for the land, out of the assets. And if the devisee himself, pay the debt, the executor will be bound to reimburse him. And if, by reason of the delay of the executor, the contract be rescinded by the vendor, the executor will be bound to lay out the same amount in the purchase of other land for the devisee.

If the legacy be, of a jewel, or of a piece of plate, and it be in pledge at the testator's death, the executor will be bound to redeem it for the legatee.

In the case of an apprentice, the master's covenant for instruction is strictly personal, and does not bind the executor or ad-
ministrator. But the covenant for maintenance of the apprentice remains in force, and is binding on the executor or administrator.

For debts contracted by the wife, when single, the husband is liable only during coverture; and if he die before the wife, leaving these debts unpaid, his executor or administrator will not be liable for them.

LIABILITY OF THE EXECUTOR OR ADMINISTRATOR ON HIS OWN CONTRACTS.

A promise by an executor or administrator, to pay a debt of the deceased, will not make him personally liable, unless there be a sufficient consideration to support the promise; and unless the promise be in writing, agreeably to the statute of frauds. *Cl. Dig.* 254, sec. 1.

An oral promise made before grant of administration, by one who afterwards becomes administrator, is not within the statute. If a man promise the widow of the intestate, that if she will permit him to be joined in the administration, he will make good all deficiency in the assets to discharge the debts, he will be bound by his engagement; and it may be enforced against him in chancery, by the creditors of the intestate.

If a creditor, at the request of the executor or administrator, forbear to sue him, this is a consideration sufficient to support a promise to pay *de bonis propriis*.

Two executors made a promissory note in the following words: "As executors to the late T. T. we severally and jointly promise to pay N. C. the sum of £200 on demand, with lawful interest for the same:"

on which it was held, that they were personally liable—because, interest being added, necessarily imported forbearance, and payment at a future day.

If an executor or administrator promise in writing, that in consideration of having assets, he will pay a particular legacy or debt, this will bind him *de bonis propriis*.

The words of our statute are, "unless the promise or agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged." The English statute in relation to the same matter requires, that the agreement shall
be in writing, and says nothing of the promise. Under our statute, it appears to be sufficient, for the purpose of binding the executor or administrator, that the promise be in writing; and that the consideration may be proved aliunde.

If, on arbitration, the executor or administrator submit, in general terms, in writing, to pay whatever shall be awarded; and the award be, that he shall pay a certain sum, nothing having been said of assets either in the submission or the award; he will be bound de bonis propriis. For the submission was, in effect, an admission of assets.

But a submission to arbitration may be so expressed, as not to subject the executor or administrator to personal liability.

Executors and administrators carrying on the trade of the deceased, are personally liable on its contracts. But as our statute sanctions a direction in a will, that the estate devised, be kept together for distribution, at a future day, it is proper that the executor should not be held personally liable on contracts made by him as executor, in the proper business of the estate so kept together.

And there are many instances, in which the executor or administrator is bound to carry on the business of the testator or intestate, so far as to complete the execution of his contracts, and to make a saving use of his materials. If a man undertake, for himself and his executors, to build a house, and die before it is finished; his executor will be bound to complete the work. If a bookseller undertake to publish a work, in parts, and die during the publication, the subscriber has a claim to be furnished with all the parts; and the executor or administrator will be bound to complete the publication. If a man makes the half of a wheel-barrow, and dies, the executor or administrator may finish it. In these, and the like cases, if the executor or administrator contract, as executor, or, as administrator, it is unreasonable that he should be bound de bonis propriis.

It is the general law, however, that an administrator cannot make a contract that will bind the estate; and that he will be personally bound, on his contracts in relation to the estate. 2 Port. 33 McElderly v. Chapman. 3 Port. 21, Harding v. Evans.

But the estate of a deceased person stands chargeable with
the expenses of settling it. This will include the proper costs of court, the publications required by law, and in a proper case, fees for professional aid of counsel. In these cases, the executor or administrator, not acting on his own discretion, but obeying the directions of the law, is not personally liable. *Cl. Dig. 191, sec. 1.* 11 *Al. R. 1023, Reynolds' adm'r. v. Reynolds' dist'r.*

FUNERAL EXPENSES AND LAST ILLNESS.

The estates of deceased persons, stand chargeable with their funeral expenses; and they are a proper charge on executors and administrators, in that character. *Cl. Dig. 191, sec. 1.*

If the executor or administrator have assets, he is personally liable for the expenses of the last illness; and of the funeral, in a style suited to the condition and estate of the deceased; although he may not have directed them.

TAXES.

The administrator or executor is bound to pay the taxes of the intestate or testator, and of the estate, out of the assets.

Lands of deceased persons are to be assessed to the estate, for their taxes; and the personal property of the estate may be distrained for taxes. *Acts of 1847, p. 14.*

RESIGNATION.

An executor or administrator may resign, by writing to that effect, subscribed (signed,) and delivered into the probate office. *Cl. Dig. 222, sec. 9.*

An executor or administrator cannot, after his resignation, exonerate himself from his obligation to take care of the estate, until he show its delivery to his successor, and that he has left the property at the proper place. After his resignation, and before delivery of the property to his successor, the clandestine removal of it by a third person, will not absolve him from his obligation to account for it, unless he show further, that after his resignation, he took such care of the property, as a prudent
man would take of his own estate. 10 Al. R. 264, Gayle, adm’r. v. Elliott.

ABATEMENT OF SUITS.

Suits do not abate by the death of the plaintiff, or of the defendant, when the cause of action survives for or against the legal representative. Cl. Dig. 313, sec. 1.

The writ of ad quod damnum, may, on the death of the plaintiff, be revived on motion, by the executor or administrator. Cl. Dig. 314, sec. 5.

Suits commenced by an administrator ad col., do not abate on the appointment of an administrator in chief; but may be carried on by the latter. And the rule is general, that suits commenced by, or against an executor or administrator, do not abate on his death, resignation, or removal; but may be carried on, by or against his successor. Cl. Dig. 222, sec. 8. Ib. 227, sec. 30. 3 Al. R. 568, Elliott, adm’x. v. Eslava.

If either party to a suit shall die before judgment, and the executor or administrator shall be duly served with a sci. fa., or citation, fifteen days before the term of the court, and shall refuse or neglect to become a party to the suit; the court may render judgment against the estate of the deceased, as if the executor or administrator had voluntarily made himself a party to the suit. Cl. Dig. 313, sec. 1.
PART IV.

REMEDIES AT LAW FOR EXECUTORS AND ADMINISTRATORS.

There are some cases, in which the executor or administrator has an interest in the chose in action, but cannot bring suit on it. If one of two partners die, the executor or administrator of the deceased, cannot bring an action on a partnership debt. The surviving partner alone may sue; and he is accountable to the executor or administrator, for the interest of the deceased partner.

If the plaintiff sue as executor or administrator, it is not necessary, that the process state, that he sues in that character; but it should appear in the cause of action indorsed on the writ.

If there are several executors or administrators, they must all be joined in bringing an action; even though some of the executors are infants, or have refused the appointment. But if one of several sue alone, the defendant can avail himself of the omission, only by plea in abatement, either in an action ex contractu, or one ex delicto.

If goods be taken out of the possession of one of several executors or administrators, he may sue alone, to recover them.

When the assets of the estate are the consideration of a contract, the executor or administrator may sue in his representative character.

When the cause of action accrued before the death of the testator or intestate, suit can be brought by the executor or administrator, only in the representative character. But when
the cause of action has accrued subsequent to the death of the testator or intestate, the executor or administrator may sue, either in his representative, or in his individual character. 8 Port. 346, Evans v. Gordon, (as to the first point.)

A plaintiff cannot join in one action, a demand as executor or administrator, with a demand in his individual right. Such a misjoinder is a defect in substance; and is ground for general demurrer, or for arrest of judgment, or reversal on writ of error. But if the money recovered on each demand will be assets, there is no misjoinder. A count on promises to the testator or intestate, may be joined with a count on an account stated with the plaintiff, as executor or administrator, concerning money due to the deceased, or concerning money due to the plaintiff, as executor or administrator; or a count for money loaned by the plaintiff, as executor or administrator; or a count for money had and received by the defendant, to the use of the plaintiff, as executor or administrator; or a count for money paid by the plaintiff, as executor or administrator, to the use of the defendant; or a count for goods sold and delivered by the plaintiff, as executor or administrator; or a count for materials furnished, and for work and labor done, by the plaintiff, as executor or administrator; or a count on a bill of exchange, indorsed to the plaintiff, as executor or administrator; or a count on a promissory note, made to him as executor or administrator. But it must be avowed in the declaration, that the right sued on in said last mentioned counts, accrued to the plaintiff in his representative character.

When the plaintiff declares, as executor or administrator, on a cause of action which accrued in the life-time of the testator or intestate, and makes profert of his letters, the defendant cannot, at the trial, deny that the plaintiff is such executor or administrator, unless there be a plea of ne unques executor, or administrator. And without such plea, the plaintiff is not required to show that he is executor or administrator. But if the plaintiff, executor or administrator, declare on a cause of action arising after the death of the testator or intestate, making profert of his letters, the plea of the general issue does not admit the plaintiff's right to sue as executor or administrator; and it must be proved.
If the plaintiff declare, in trespass, or trover, or detinue, on his constructive possession as executor or administrator, the general issue being pleaded, he must, on the trial, show his title as executor or administrator. But if he has had actual possession of the chattel sued for, it will not be necessary for him to prove his title as executor or administrator. And in this case, his calling himself executor, or administrator, in his declaration, may be regarded as surplussage.

In an action by a plaintiff, as executor, when it becomes necessary to prove his title as executor, he must exhibit a certified copy of the probate, with his letters testamentary; or a certified copy of the order appointing him. Or he may exhibit the record-book itself, containing an entry of the probate, and of his appointment.

A certified copy of a will with the probate, is evidence of the validity of the will, and of the correctness of the probate. 3 Port. 9, Darrington et al. v. Borland.

The title of several plaintiffs, to sue as executors, is proved by the probate of the will appointing them all, and a grant of letters to one only.

The title of the plaintiff, as administrator, may be proved, by exhibiting his letters of administration, or a certified copy of the order of appointment, or the original book containing the grant.

The title of an administrator de bonis non to sue in that character, is sufficiently proved, by showing his appointment as administrator de bonis non; without showing the grant to an executor, or to a prior administrator.

When his letters testamentary, or of administration, have been exhibited by the plaintiff, this evidence cannot be opposed, by showing, that another person was appointed executor; or that the testator was insane; or that the will, of which probate had been granted, was forged. These matters being within the jurisdiction, (exclusive,) of the orphans' court, cannot be collaterally impeached.

But under the plea of ne unguies executor, or administrator, the defendant may show, that the orphans' court of the particular county, under whose appointment the plaintiff acted, had no jurisdiction; that county not being the place of the
residence of the testator or intestate, or the place of his property, as required by the statute. And under the same plea, it may be proved, that the supposed testator or intestate is alive; or that the seal to the probate is forged; or that the letters have been revoked.

And the defendant may prove, that he has paid the debt sued for, to a supposed executor, who had gotten possession of a forged will, on which he held a grant of letters testamentary, unrepealed at the time of payment. And this will be a good defence. But payment of the debt, under probate of a supposed will of a living person, will not be a good defence. In such case, the orphans' court has no jurisdiction; and the probate is a nullity.

In a suit by the executor, against a legatee, for money due by the latter to the testator—the legatee cannot plead his legacy, as a set-off, before it has been assented to. 5 Al. R. 245, Sorrelle's ex'rs. v. Sorrelle.

**ACTIONS AT LAW BETWEEN ADMINISTRATORS.**

When administration has been granted to two or more persons, on an intestate estate; and one or more of them take all or the greater part of the estate, and refuse to pay the debts, or the funeral expenses, or refuse to account with the other administrator, the administrator so aggrieved, may have an action of account against the administrator so wrongfully acting, and recover his proportionable part of the estate, as administrator. And an executor, being a residuary legatee, may have an action of account against his co-executor, to recover his part of the estate in the hands of the co-executor. Cl. Dig. 226, sec. 29.

An administrator *de bonis non* cannot maintain an action at law, against a former administrator, to recover money received by him during his administration, and not paid over. But he may maintain assumpsit against the former administrator, for money received by him after the termination of his administration, and not paid over. 2 Port. 550, Chamberlain, adm'r. v. Bates, adm'r. 7 Al. R. 478, Salter v. Cain. 11 al. R. 872, Nolly v. Wilkinson, adm'r. *de bonis non*.

An administrator *de bonis non* may maintain an action of
trover, or detinue, or account, or on the case, against a former administrator, whose administration has been revoked, for such goods or chattels of the estate, as came to his possession, and have been withheld, wasted, detained, embezzled or misapplied by him. *Cl. Dig.* 221, sec. 4.

This statute does not, in terms, embrace executors or administrators who may resign; but the reason of the law extends equally to them.

**Costs.**

It was the general rule of law, that in an action by an executor or administrator, on a contract made with the testator or intestate, or on a wrong suffered in his time, the executor or administrator was not personally liable for costs: but that when the executor or administrator sues on a contract made with himself, or for a wrong done after the death of the testator or intestate, there might be a judgment against him for costs, *de bonis propriis*. Perhaps the supreme court of Alabama has established a different rule. In the case of *Chandler et al. v. Shehan*, 7 *Al. R.* 251, and in the case of *Hutchinson, adm'r. v. Gamble*, 12 *Al. R.* 36, it decided, that in a suit by an executor, the proper rule for ascertaining, that there shall be a judgment for costs *de bonis testatoris*, is, that the money, if recovered, will be assets.

**Remedies at Law Against Executors and Administrators.**

No action at law can be commenced, or carried on, against an executor or administrator, and he is not subject to garnishment, until after six months from the time of proving the will, or the first grant of administration. *Cl. Dig.* 192, sec. 2. *Aik Dig.* 3 *Port.* 105, *Presnall v. Mabry*.

Executors and administrators may be sued as such, in the courts of the county in which their letters were granted; and service of process in such suit, made in any county, will be sufficient. *Cl. Dig.* 228, sec. 40.

An action of debt will not lie against an executor or administrator, on the simple contract of the deceased. Assumpsit
is the proper remedy. If the action of debt be brought, the objection can be raised only by demurrer; and the error is cured by verdict.

There are cases, in which the legatee cannot coerce the payment of his legacy, immediately after the lapse of eighteen months from the grant of letters testamentary. 8 Port. 380, Leavens v. Butler, et ux.

A legatee may recover his legacy, by an action at law. Cl. Dig. 227, sec. 29.

But the assent of the executor is necessary, to perfect his title. The executor has eighteen months to ascertain the indebtedness of the estate; and he is not bound to give his assent before the lapse of that time.

The legatee may maintain an action at law, for his legacy, without a previous demand, when there has been an express promise to pay it. 9 Port. 552. Gauze and wife v. Hughes, by guardian.

In an action against executors or administrators, all must be joined, who have administered; but it is not necessary to notice those who are not included in the letters.

If a married woman be executrix or administratrix, in an action against her, the husband must be joined.

If one of two executors or administrators die, any action to which they had been liable, will remain against the survivor. And the executor of the deceased executor cannot be joined, unless he has in fact administered on the will of the first testator.

An action against a resident-administrator or executor, and one who is non-resident, may be discontinued as to the latter. And the non-residence of one of several executors or administrators, is a sufficient reason for not joining him as a defendant. Process must be served on all who reside in the state. 9 Al. R. 504, English & English v. Brown. 8 Port. 579, Williams & Ivey v. Sims et al.

A plaintiff cannot, in one action, charge the defendant as executor or administrator, and also on his own liability; and the objection to such misjoinder will be good on general demurrer, or on arrest of judgment. A count for money had and received by the defendant, as executor, for the plaintiff's use, charges the defendant on his individual liability, and leads to a judgment
de bonis propriis, and it cannot be joined to a count on a promise by the testator.

If a testator make his creditor and another, his executors, and the creditor does not accept the appointment, and does not act as executor, he may maintain an action against the executor who accepts and acts.

An executor or administrator is not required to plead specially, but may give special matter in evidence, under the general issue. *Cl. Dig. 227 sec. 32.*

The securities of an executor or administrator are not rendered liable beyond the amount of the assets, by the omission to plead, or mistake in pleading, of the executor or administrator. *Cl. Dig. 228, sec. 34.*

In an action against an executor or administrator, he may plead any matter, which the testator or intestate may have pleaded, and he may plead *ne unques executor,* or *ne unques administrator,* or that no assets have come to his hands.

When the estate has been declared insolvent, the executor or administrator, sued at law, in addition to his other pleas, may plead the decree of insolveney. And if any of the other issues made by the parties, be found for the plaintiff, and on this last plea the issue be found for the defendant, a judgment shall be rendered to the effect that the plaintiff is entitled to the sum of money found to be due to him, but that it appearing that the estate has been declared insolvent, no execution shall issue therefor. And this judgment ought to be certified to the orphans' court, and be filed by the plaintiff, with the clerk of the orphans' court, with the oath required by the statute regulating the settlement of insolvent estates. *Cl. Dig. 195, sec. 13.*

In a suit in which there is an ancillary attachment, if, after the death of the defendant, his executor or administrator sustain a plea of the declaration of the insolveney of the estate, the attachment lien will be lost. *3 Al. R. 398, Hale adm'r. v. Cummings & Spyker.*

In an action by an executor or administrator, and a plea of set-off, of an amount larger than the debt sued for, a replication that the estate has been declared insolvent, is not good, and if a verdict for a balance be found for defendant, on proof that the estate has been declared insolvent, the judgment ought to be
certified to the orphan’s court, as a claim against the estate. 7 Al. R. 662, Godbold v. Andress.

In an action by an executor or administrator, a demand due by the testator or intestate, at the time of his death, will be allowed as a set-off, even though the estate has been declared insolvent. 3 St. 151, Perrine v. Warren, adm'r. (Quere.)

The plea of ne unques executor, or ne unques administrator, denies only that the defendant is the legal representative of the deceased. When, in assumpsit against two executors, there was a plea by both, of ne unques executor, and it appeared in evidence that one of the defendants was executor, and that the other was not, it was held, that in counts on promises by the testator, the plaintiff might take a verdict against the former defendant alone, the latter being discharged, but that on the counts which laid the promises by the defendants, as executors, the plaintiff must fail. And in an action against several, as executors, on promises by the testator, one of the defendants pleading separately, ne unques executor, the plaintiff may enter a nolle prosequi as to him, and proceed against the others.

In an action against the executor or administrator, for rent, if the whole rent accrued in the life of the testator or intestate, the action in the form of debt, must be in the detinet only, and the judgment will be, de bonis testatoris, or intestatis. But for rent accrued after the death, if the executor or administrator have entered, he may be sued in his representative character, or in his individual character, in respect of his reception of the profits of the land; in the latter case it being stated in general terms, that the estate of the lessee in the premises, lawfully came to the defendant.

In general, the executor or administrator may be sued on all contracts made by himself, although they be in relation to the business of the estate, and for its benefit. But there are cases in which he may be sued in his representative character, on promises made by him in that character, and on which he will be liable no further than on promises by the testator.

A declaration averring an account stated between the plaintiff and the defendant as executor, and that in consideration thereof the defendant, as executor, promised to pay the balance, will lead to a judgment de bonis testatoris.
If the declaration aver that the defendant, as executor, was indebted to the plaintiff in a certain sum, for so much money paid by the plaintiff to the use of the defendant, as executor, and that in consideration thereof, the defendant, as executor, promised to pay, the judgment should be *de bonis testatoris*.

For the proper costs incurred in the settlement of the estate, and for the expenses of the publications required by law, the executor or administrator can be sued only in the representative character. These do not rest on contracts within the discretion of the executor or administrator. They are the contracts of the law, prescribed for the benefit of those interested in the estate, and they must be satisfied out of the assets.

If the defendant pleads, that before the issuance of the writ, he had resigned, or that he had been removed, he ought further to allege in his plea, that he had fully administered all the goods that had come to his hands, or that he had delivered to his successor, all that he had not administered. 8 *Port.* 343, *Driver* v. *Riddle*.

Under a plea of *plene administravit*, the executor or administrator may show, that he has exhausted all the assets, in the expenses of the last sickness, and of the funeral, and in the reasonable charges for collecting the debts due to the deceased. And under this plea nothing else can be proved in Alabama, except when this plea is connected with the plea of resignation or removal, as before stated.

On the plea of *plene administravit*, if the issue be found against the defendant, the judgment will be, *de bonis testatoris, et si non*, &c., and for the costs, *de bonis propriis*. But the judgment *de bonis propriis*, should not be for more than the assets remaining in his hands, over and above what he has properly accounted for.

When several executors or administrators plead *plene administravit*, severally, and the jury find that one only has assets, the judgment should be rendered against him only, and the other defendants are to be discharged.

If the executor or administrator plead *non assumpsit*, or other general issue, and no other plea, and it be found against him, he will be liable for costs *de bonis propriis*, although he may not
have known the plea to be false. He is charged with the expense of the litigation, which his plea has caused. But if, in addition to the plea of the general issue, he plead any other matter which covers the whole cause of action, as *ne unques executor*, and such plea be sustained by the verdict, he will be entitled to a general judgment, and the general costs of the action, even though the general issue may have been found against him.

On the plea of *plene administravit*, the plaintiff may confess the plea, and take judgment *quando acciderint*; a judgment to be satisfied out of any assets that might thereafter come to the hands of the executor or administrator. But if the plaintiff take issue on this plea, and it be found against him, he cannot have judgment *quando acciderint*.

The executor or administrator may, when the estate is solvent, plead that he has retained a certain sum in payment of a debt due to himself, or he may give it in evidence under the general issue. But in an action at law against him, he cannot avail himself of his right to retain, as his defence, for an equitable demand, which cannot be submitted to a jury, and which the plaintiff cannot controvert.

When the action can be maintained against the executor or administrator, in his representative character only, and he pleads any plea (except a release to himself,) admitting his representative character, the judgment against him will be, that the plaintiff recover the debt and costs, to be levied out of the assets of the testator or intestate, if the defendant have so much; but if not, then the costs to be levied *de bonis propriis*.

But where the defendant pleads *ne unques executor*, or *ne unques administrator*, or a release to himself, and it be found against him, the judgment is, that the plaintiff recover the debt and costs, in the first place, *de bonis testatoris*, or *intestatis*, and *si non*, *de bonis propriis*. There does not appear to be a sufficient reason for the difference between this judgment and that in the preceding case, and the ultimate responsibility of the executor or administrator is the same in both cases.

When the judgment ought to be, *de bonis testatoris*, or *de bonis intestatis*, and it is entered *de bonis propriis*, this is a cler-
ical misprision, amendable on motion, or on error, at plaintiff's costs. 5 Al. R. 221, Yarborough's ex'rs. v. Scott's ex'rs.

In an action by a creditor, it is no defence on the part of the executor or administrator, that settlement and distribution have been made, under an order of the orphans' court. 5 Al. R. 13, Thrash v. Sumwalt. 11 Al. R. 104, Dear et al. v. Portis, Judge, &c.

SCIRE FIERI INQUIRY AND DEBT SUGGESTING A DEVASTAVIT.

A judgment de bonis testatoris, may be enforced by the scire fieri inquiry. In this writ, the plaintiff recites the judgment, the fieri facias, and the return of nulla bona, and suggests a devastavit, and notice is given to the defendant to show cause why the plaintiff should not have execution de bonis propriis.

But the usual proceeding is, an action of debt on the judgment, suggesting a devastavit. A fi. fa. is issued on the judgment already obtained, on which the sheriff returns, no property, and on these the action is brought. On the trial, the record of the judgment, and the fi. fa. with the return on it, will make out the case.

In an action suggesting a devastavit, on a judgment rendered against an administrator within eighteen months after grant of administration, with execution returned “no property,” it is a good defence that after rendition of the judgment, the estate has been declared insolvent. 16 Al. R. 339, Powe & Smith v. Sterrett, Judge, &c.

ACTIONS ON THE BONDS OF EXECUTORS AND ADMINISTRATORS.

An action on the bond of an executor or administrator must be in the name and at the cost of the party injured by the breach. And the bond does not become inoperative on a recovery, but may be prosecuted from time to time, against any or all of the obligors, by any party who has been injured. Cl. Dig. 221, sec. 3.

In an action on the bond, it may be assigned as a breach, that the executor or administrator has not made a true and perfect inventory, or that he has not rendered a just and true account, or that he has not paid the debts, or that he has not paid the legacies.
The statute which permits the plaintiff to testify in an action on an account, for a sum not exceeding one hundred dollars, does not apply to executors or administrators. *Cl. Dig.* 342, sec. 161.

The exemption of executors or administrators from suit until six months after probate, or grant of administration, does not apply to the action of detinue; and in detinue, it is no defence that the detention is by the defendant, as executor or administrator.

One sued in detinue, may defend on his title as executor or administrator. 11 *Al. R.* 966, *Gamble v. Gamble's adm'r.*

In an action of detinue revived against the administrator, after the death of the original defendant, judgment cannot be rendered against the defendant, unless it appear that the thing sued for was in the possession of the original defendant, at the commencement of the suit, and that it has since come to the hands of the administrator, as assets. 12 *Al. R.* 684, *Easly, adm'r. v. Boyd.*

**BILLS OF EXCHANGE AND NEGOTIABLE NOTES.**

If, when a bill of exchange, or a negotiable note becomes due, and is dishonored, the drawer or indorser is dead, notice ought to be given to his executor or administrator. When the drawee or acceptor of the bill, or the maker of the note is dead, the bill or note ought to be presented to the executor or administrator. If there is no representative, the holder should present it at the place of residence of the deceased.

**GENERAL STATUTE OF LIMITATIONS.**

In an action against an executor or administrator, the period of six months immediately following the probate, or grant of administration, is not computed, under the statute of limitations. 2 *Port.* 44, *Hutchinson ex'r. v. Tolls.* 3 *Port.* 247, *Houpt v. adm'rs. of Shields.* 12 *Al. R.* 802, *Posey & Coffee, ex'rs. v. The Decatur Bank.*

When the statute of limitations commences running, it is not suspended by the death of either party. 3 *St.* 172, *Johnson, adm'r. v. Wren.*
A promise by a sole executor or administrator, will take the case out of the statute of limitations; or if one alone, of several, be sued, his promise will have the same effect, but in general the promise of one of several executors or administrators, will not remove the bar of the statute. 9 Al. R. 502, Hall, Wicks & Co. v. Darrington. 3 Al. R. 599, Carruthers & Hinkle v. adm'r. of Mardis.

An administrator or executor may, in general, retain money from the assets, in payment of a debt due to himself, although time may have elapsed sufficient to raise the bar of the statute. But when he petitions for leave to sell the real estate, in order to pay debts, the heir may resist the application, by showing that such debts are barred by the statute of limitations. 7 Al. R. 304, distr's. of Knight v. Godbold. 2 Al. R. 660, Heirs of Bond v. Smith, adm'r.

When suit is brought by the executor, on promises to the testator, and the defendant pleads the statute of limitations, the plaintiff cannot reply, a promise to himself; nor can he give such promise in evidence.

STATUTE OF NON-CLAIM.

Claims against an estate must be presented to the executor or administrator, or be filed in the probate office, within eighteen months after grant of letters testamentary, or of administration, or within eighteen months after their accrual, and all claims not presented or filed within that time, are forever barred from recovery. Cl. Dig. 195, sec. 17. 6 Port. 32, McBroom et al. v. The Governor. 12 Al. R. 755, Branch Bank v. Hawkins, adm'r. Act of 1850.

This statute of non-claim does not apply to debts contracted out of the state, nor to claims of heirs or legateses, claiming as such, nor to claimants who may be under age, or femes covert, nor to persons insane, or non compos mentis. Cl. Dig. 195, sec. 17.

It is not necessary that a claim be presented to an administrator ad. col., and the presentation of a claim to such administration, will not satisfy the requisition of the law. 14 Al. R. Erwin, adm'tx. v. Branch Bank at Mobile.
If an administrator or executor shall fail to give to creditors the notice required by law, to present their claims, the time to present or file their claims is extended to eighteen months after such notice shall have been given. *Act of 1850.*

Presentment of a claim to one executor or administrator, is sufficient. *3 St. 288, Acre v. Ross, adm'r.*

It is sufficient to present the claim, without exhibiting any proof of its justness. *3 Al. R. 283, Jones v. Pharr.*

The commencement and continued prosecution of a suit, within the eighteen months, is a sufficient presentation of the claim, under the statute. But service of a writ on the administrator, afterwards abandoned, is not a sufficient presentation of a claim. *11 Al. R. 203, Hunly's ex'r. v. Shufford.* *2 St. 448, Bigger, adm'r. v. Hutchings & Smith.* *10 Al. R. 970, Boggs' adm'rs. v. Branch Bank at Mobile.*

If the defendant die during the pendency of a suit, and the suit is not revived within eighteen months after the grant of letters testamentary or of administration, and the claim is not in the mean time presented to the executor or administrator, it is barred. *8 Al. R. 574, S. & E. Travis v. Tartt.* *10 Al. R. 17, Jones' ex'rs. v. Lightfoot.*

Presentment of a note does not suffice for presentment of an account sued on in the same action with the note, the suit having failed. *10 Al. R. 944, Badger & Steele v. Kelly, adm'r.*

The statute begins to run from the accrual of the claim, and not from the accrual of the cause of action. *5 Al. R. 610, King & Barnes, adm'rs. v. Mosely.*

Judgments are claims subject to the statute of non-claim. *4 St. & Port. 52, Ready adm'r. v. Thompson, adm'r.* *5 Al. R. 490, Gray's adm'r. v. White.*

To a plea of the statute of non-claim, the plaintiff may reply that the debt was contracted at some place out of the state. *3 Al. R. 369, Sanford, adm'r. v. Wicks.*

A creditor, or any other person interested in the distribution, may insist on the statute of non-claim. *6 Port. 32, McBroom et al. v. Governor.*

Knowledge of the claim by the executor or administrator, is no excuse for not presenting it within the eighteen months. *10 Al. R. 17, Jones' ex'rs. v. Lightfoot.*
The absence of the administrator from the state, will not prevent the bar of the statute of non-claim, after it has commenced running. 12 Al. R. 741, Branch Bank at Decatur v. Donelson, adm'x.

Notice of the dishonor of a note, given to an administrator before he has qualified as such, is not a sufficient presentment to the administrator. 12 Al. R. 671, Branch Bank at Mobile v. Hallett & Walker.

A replication that the executor or administrator did not give due notice, by publication, to creditors to present their claims, is not sufficient. 5 Al. R. 13, Thrash v. Sumwalt. (The case of Evans, adm'r. v. Norris, 1 Al. R. 511, overruled.)

On a plea of non-claim, under the statute, the burthen of proof is on the plaintiff, to show a presentment within eighteen months. 5 Al. R. 13, Thrash v. Sumwalt.

A promise by an administrator to pay a debt which had not been presented within the eighteen months, does not bind him. 12 Al. R. 753, Br. Bank v. Hawkins, adm'r.

After an estate has been declared insolvent, claims are not to be presented to the executor or administrator; but are to be filed in the clerk's office. Cl. Dig. 195, sec. 15.

When the principal debtor is dead, and the claim has not been presented to his executor or administrator within the eighteen months, this omission is no defence to one who is surety on the debt. 8 Al. R. 580, Hooks and Wright v. Br. Bank at Mobile.

The omission of a creditor to present his claim within the eighteen months, is no defence to the principal debtor, against a surety who has paid the debt. Ib.

A mortgagee does not lose his lien, by failing to present his claim within the eighteen months. 1 Al. R. 708, Doe, ex dem. Duval's heirs v. McLoskey. 2 Al. R. 331, Inge et al. v. Boardman.

A written acknowledgment, by an executor, that a claim has been presented, made during the administration of one who afterwards resigned, is evidence after the resignation, against the successor.
REMEDIES IN CHANCERY, FOR EXECUTORS AND ADMINISTRATORS.

An executor or administrator succeeds to all the equitable rights of the testator or intestate; and he may enforce them by the usual remedies in equity.

If a suit in chancery survives in favor of the personal representative of a deceased complainant, the executor or administrator, instead of resorting to a bill of revivor, may carry it on, by _sci. fa._; which being served on the defendant, the register may enter an order of revival, unless cause be shown to the contrary, by plea filed with the register, within thirty days after service of the subpoena. _Cl. Dig. 613, sec. 15._

An executor or administrator may file a bill before grant of letters testamentary, or of administration; and a subsequent grant of letters, made before the hearing, will sustain the bill. But the bill must aver, that the complainant has obtained letters testamentary, or of administration.

It is said, that when there are several executors, (or administrators,) they must all of them join in the bill, though one of them be an infant. But where there are several executors appointed in the will, of whom only a part have taken out letters testamentary, these alone may file the bill, without noticing the others.

It has been held, that in a suit by A, as administrator of B, the letters of administration are not _prima facie_ evidence of the death of B; but that the fact must be proved by interrogatories. (_Quere._)

REMEDIES IN CHANCERY, AGAINST EXECUTORS AND ADMINISTRATORS.

An executor or administrator is liable to all equitable demands, in relation to the personal property, which existed against the deceased, at the time of his death.

In a court of chancery, an executor or administrator is, in general, considered as a trustee; and that court compels him to discharge the trust, in conformity with the will, or with the provisions of the law.

A court of equity will entertain a bill against the executor,
by a legatee, for his legacy; and against the administrator, by a distributee, for his distributive share: and it will compel the executor or administrator to set forth an account of the assets, and of his disposal of them. 8 Port. 380, Leavens v. Butler et ux.

A legatee may sue in chancery, either for himself alone, or in behalf of himself and other legatees. But in a suit by a single legatee for his own legacy, unless the executor admit assets for the payment of the legacy; and thereby give sufficient grounds for a decree in favor of this particular legatee,—the court will direct a general account of all the legacies; and payment of the particular legacy, rateably with the other legacies, if there be a deficiency of assets.

In a proper case, an executor or administrator, and the sureties, may be sued in chancery, without a judgment having been rendered on the demand, at law. 9 Port. 967, Moore, et al. v. Armstrong, et al.

The executor or administrator of a former one, can be sued only in chancery, for the devastavit of him whom he represents. 3 Al. R. 670, Taliaferro, adm'r. v. Bassett and Wife.

Chancery will not, on a devastavit, decree a sale of land in possession of heirs or devisees, unless the executor or administrator, and his sureties, are insolvent; and all remedy against them at law, has been exhausted. 3 Port. 10, Darrington, et al. v. Borland.

And chancery will not subject such personal property as cannot be reached by execution, until there has been a judgment, and a return of nulla bona. 3 Port. 470, Morgan, ex'r. v. Crabb.

When the defendant in chancery dies, during the pendency of the suit, and it survives against his representative, it is not necessary to use a bill of revivor. On application to the register, the complainant may obtain a sci. fa., directed to the executor or administrator; on service of which, the register must enter an order of revival; unless sufficient cause to the contrary be shown, by plea filed with the register, within thirty days after service of the sci. fa. Cl. Dig. 613, sec. 15.

When a defendant pleads to a bill, and dies before decision on the plea, his executor or administrator may plead de novo.
All of the executors who have acted, must be joined in a suit against the estate, even though some of them are infants; and all the administrators must be joined as defendants. But the absence of any of them from the state, is a sufficient reason for omitting him.

In a bill against a married woman, executrix or administratrix, her husband must be joined with her.

A writ of ne exeat may be obtained against an executor or administrator, under such circumstances as would authorize the issuance of this writ against other defendants.

In a strong case of misconduct, waste, or improper disposition of the assets, by the executor or administrator, a court of chancery will appoint a receiver, and coerce the delivery of all the assets to him.

When an administrator appointed in another state, removes to this, bringing with him the property of the estate, a court of chancery may, on the bill of a distributee, prevent a wrongful sale; and if no settlement has been made by the foreign probate court, the court of chancery may ascertain the amount of assets subject to distribution, and make a decree in favor of the distributee, for his share. 5 Al. R. 523, Calhoun per proch. am. v. King, et al.

An admission of assets by an executor or administrator, cannot be retracted, unless the admission be founded in mistake clearly established.

In chancery, costs are awarded, in the discretion of the court, as may appear reasonable and just.

It is a general rule, that executors and administrators who conduct themselves fairly, are not to be made personally liable for costs. But when the suit is occasioned by the negligence or delinquency of the executor or administrator, he is not allowed to pay the costs out of the assets; and they are made a personal charge on him.

In relation to the payment of money into the court of chancery, by the executor or administrator, the general rule is, that if the executor or administrator admit that he has a balance in his hands, and the complainant alone is entitled to it, or the complainant has such an interest with others, as will give him a fair claim to have the money secured; then the executor or
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administrator will be ordered to pay it forthwith, into court. And he may be required to deposit papers and writings of the estate, in the office of the register, for the benefit of parties interested.

JURIES.

A jury may be forthwith summoned and impaneled, to try any matter depending before the probate court, on any return-day, whenever it shall be necessary to have such trial. Cl. Dig. 303, sec. 32.

Except in case of a contested will, or where there is a real doubt in relation to a fact, requiring cross-examination of witnesses to elicit the truth, and except in issues specially provided for by law, the probate court has no authority to impanel a jury; and the testimony on an issue submitted to a jury, if not in writing, should be spread on the record, to enable the appellate court to judge of the propriety of the issue having been submitted to a jury. Except in the cases above enumerated, the judge of probate may refuse to impanel a jury; and his refusal to call in a jury, under the act of 1821, (Cl. Dig. 302, sec. 2,) is not error. 9 A. R. 330, Willis, adm'r. v. Heirs of Willis. Ib. 499, Brazeale's adm'r. v. Brazeale's distr's. Ib. 895, Harris v. Martin. 11 Al. R. 1023, Reynold's adm'r. v. Reynolds's distr'. 9 Al. R. 615, Cunningham and Wife v. Pool. 16 Al. R. 257, Savage, guardian v. Dickson.

The question, whether the executor or administrator has used the funds of the estate, for his individual purposes, so as to subject him to the payment of interest, may be tried by a jury impaneled for that purpose, if the judge shall deem it necessary; and this question must be tried by a jury, if either party request it. Cl. Dig. 198, sec. 28.

The validity of a will being questioned in the probate court, a jury may be summoned and impaneled, to try such issues, or enquire into such facts, as may be submitted to them. Cl. Dig. 304, sec. 35.

Evidence of a will, lost or destroyed, may be submitted to a jury. 3 Port. 51, Apperson v. Cottrell.

Evidence of a will, made and duly executed, and which has
been destroyed by the testator, in a fit of insanity, may be sub-
mitted to a jury. *Ib.*

The allegation of the insolvency of an estate, may be sub-
mitted to a jury. *Cl. Dig.* 192, *sec. 4.*

The validity of the claim of a creditor against an insolvent
estate, may be tried by a jury. *Cl. Dig.* 194, *sec. 11.*

A jury of bystanders may be summoned to carry into effect

The probate court may set aside the verdict of a jury, at
the term at which it was rendered, but not afterwards. *8 Al.

When an issue has been submitted to a jury, in the probate
court, an appellate court has no authority to enquire into the
legality of any evidence which may have been exhibited to the
jury, or of any charge which may have been given by the court

**RETURN OF ACCOUNT AND INVENTORY.**

From the statute, (*Cl. Dig.* 229, *sec. 41.*) which directs the
course of proceeding, "when it shall be necessary for any ex-
ecutor, administrator, or guardian, to make annual or final set-
tlements," it might be inferred, that executors or administrators
may be required to make annual, as well as final settlements.

On final settlement, partial settlements previously made shall
be considered only as *prima facie* correct, and subject to cor-
rection, either in law or fact. It is not required that notice of
partial or annual settlements be given by publication, unless
some of the heirs or legatees reside out of the state. *Act of
1850, sec. 28.*

If an executor or administrator has failed to file an inventory,
within three months after grant of letters, as required by law,
on the application of a legatee, or of one of the next of kin, or
of a creditor, the probate court will cite him, and compel him to
perform this duty.

At the instance of a creditor, an executor or administrator
may be required to exhibit his account in the probate court;
and a citation will issue for this purpose. But the creditor is
not permitted to contest the items; and he cannot obtain a de-
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cree. The proceeding serves only as a bill for discovery in chancery.

DISTRIBUTION.

The administrator is, in general, bound to make distribution, after the lapse of eighteen months, from the grant of administration; but before he can be compelled to make distribution, the distributee must give bond with security, conditioned to refund a due proportion, for the payment of any debts or demands which may afterwards appear against the estate, and of the acts attendant on the recovery of such debts or demands. But no distributee can be required to give the refunding bond, for his distributive share, after a final settlement by the administrator. *Cl. Dig. 196, sec. 23. 9 Al. R. 470, Taylor and Wife v. Reese, adm'r.*

There is some obscurity in the law, as stated in the preceding paragraph. Is the refunding bond to be required of the distributee, in those cases only, in which the administrator pays to the distributee, his distributive share, before the lapse of the eighteen months?

Property not bequeathed, there being a will, is to be distributed, as in case of intestacy. *Cl. Dig. 597, sec. 7.*

Within three months after an estate has been represented to be solvent, the judge of probate ought to appoint five commissioners; who, or a majority of whom, shall, within six months after their appointment, under oath, make division and distribution of such estate, among the legatees or distributees of the estate; in all cases reserving to the widow, her dower. This division and distribution must be reduced to writing, and be signed by the commissioners, and be certified by the magistrate before whom the commissioners shall have been sworn; and be returned to the office of the probate court; and be recorded. But if the division and distribution cannot be effected equitably, and without manifest injury to the legatees or distributees, the estate must be disposed of at public sale, in order to make distribution of the money arising from such sale. *Cl. Dig. 196, sec. 22.*

If property be omitted from the inventory, under an honest claim of right by the administrator; but it is found to be a part
of the estate; the administrator is not to be charged with its value; but such property must be brought into distribution. 11 Al. R. 1023, Reynold's adm'r. v. Reynold's distr.

Notes belonging to the estate, ought not to be included in a distribution, except by consent, and when all the parties are of mature age. In general, they ought to remain in the hands of the administrator, for collection. Ib.

The statute above-mentioned, (Cl. Dig. 196, sec. 22,) requiring the judge to appoint commissioners to make distribution, is not imperative on him; and he is to appoint commissioners for distribution, only when he believes the estate to be in a condition to be distributed. 11 Al. R. 1023, Reynold's adm'r. v. Reynold's distr.

It may be inferred from the same statute, that if the estate appear to be solvent, the executor or administrator is bound to report it, as solvent, to the probate court, immediately after the lapse of the eighteen months from the grant of administration.

All business in relation to the settlement and distribution of estates, may be heard and determined at any of the terms of the probate court. Cl. Dig. 300, sec. 19.

A previous order of the probate court, for the sale of personal property, is no bar, on an application for distribution. 9 Al. R. 470, Harrison v. Harrison et al.

In making distribution, when an equal distribution cannot be made, of the property itself; and the distributees, or a part of them, will not consent, or are incapable of consenting to a sale; the administrator should obtain an order from the probate court, for making sale of so much of the property, as may be necessary for an equal distribution. 8 Port. 507, Teat v. Lee, adm'r.

The report of distribution, made by the commissioners appointed to make distribution, is subject to exception and revision; and until its confirmation by the court, the final order for delivery of the property to the distributees, should not be made. 9 Al. R. 470, Harrison v. Harrison, et al.
SETTLEMENT, ON SOLVENT ESTATES.

A legatee, or one of the next of kin, desirous of bringing an executor or administrator to settlement in the probate court, may, after the lapse of eighteen months from grant of letters testamentary, or of administration, present his petition for this purpose, to the judge of probate. The petition should be in writing, and should propound the interest of the petitioner, as legatee, or next of kin, to the deceased. When the executor or administrator appears, if he contests the right of the applicant, the latter must prove, that he is a legatee, or one of the next of kin.

The interest of a distributee of an estate, may be assigned; and the assignee may proceed in his own name, to procure a settlement in the probate court. 8 Al. R. 552, Graham, et al. v. Abercrombie, et al.

On this application, a citation must issue to the executor or administrator, requiring him, on or before a given day therein appointed, to file in the probate office, an account between himself and the estate of which he has charge; or show cause to the contrary thereof. In the account, he must charge himself with all, wherewith he is by law chargeable; and credit himself with all, to which he is of right entitled as credits. And he must file with his account, such vouchers and written evidence as he may rely on, to sustain his credit. Cl. Dig. 229, sec. 41.

The executor or administrator, on filing his account and vouchers, must file also, a statement under oath, showing who are the legatees or distributees; specifying therein, which of them are infants, femmes covert, or non compos mentis. He and his sureties on his official bond will be held liable for all damage arising from the omission of this duty. Cl. Dig. 229, sec. 23.

A resident executor or administrator, having been cited to file his accounts and vouchers for settlement, and failing to do so, the judge may state an account against him, charging him with what shall appear to have come to his hands; and must cause notice to be given to him, that unless he appear at the next term of the probate court, thereafter, and file his accounts
and vouchers for settlement, the account so stated as aforesaid, will be reported for allowance, and settled as required by law. If the executor or administrator fail to file his account and vouchers in conformity with the notice, a settlement is to be made, on the account stated by the judge. But if at any time before the final decree shall have been made, the executor or administrator shall appear, and file his account and vouchers for settlement, and shall pay such costs as may have accrued on the case, the court must set aside the proceedings ex parte; and make a settlement of his account, in the ordinary manner.

When an executor or administrator shall remove beyond the jurisdiction of the court from which he holds his authority, (out of the state,) without having settled his account; on the application of any person interested, the judge must cause notice to be given, by publication in a newspaper in the state, to be continued for such length of time as he may deem reasonable, requiring such executor or administrator to file his accounts and vouchers for settlement, at a regular term of the court, to be held not less than three months after the date of the notice. If he fail to file his account and vouchers at the time designated, a settlement shall be made in the same manner, as in the case of a resident executor or administrator, failing to file his account and voucher, after citation and notice. Cl. Dig. 230, sec. 47, 48.

On settlement ex parte, of the account of an administrator, his sureties may file an account for him, and represent him; and they will be allowed the compensation, to which the administrator might be entitled. 7 Al. R. 615, Carroll et al. v. Moore, adm'r.

When an executor or administrator, having been cited to appear and settle his account, shall fail to obey the citation, the probate court has power to attach, in the same manner as the circuit court may attach any person disobeying its order, judgment or decree. And it shall have power to summon a jury of bye-standers, to ascertain the fact of disobedience, and to apportion the fine or imprisonment. Cl. Dig. 226, sec. 28.

The executor or administrator having filed his account and vouchers, the judge must order publication to be made, for at least forty days, either by posting up written notices at the
door of the court-house, and three or more other public places in the county, or by advertisement in a newspaper, for three consecutive weeks, as the judge may direct; calling on all persons having an interest in the estate, to appear and contest the account. When the heirs or legatees are of age, and waive publication in a newspaper, it must not be made. None but legatees or distributees, and their assignees, have such an interest, as will give them a right to contest the account. Cl. Dig. 229, sec. 41. Act of 1850, sec. 27.

Publication having been made, on the appointed day, for good cause shown, the settlement may be continued, under the rules established for the continuance of cases in other courts. Ib.

In making the settlement, the legatees or distributees should be present; and settlement and distribution should not be made before the executor or administrator has had an opportunity of citing the necessary parties. Those of them who are minors, should be represented by guardians; and the husbands of those who are fames covert, ought to be cited. When a person entitled to distribution, dies before settlement, even though he be an infant, his personal representative must be made a party to the proceedings; and must be cited. The entries ought to show, at whose instance the settlement is made; the representatives who appeared; the persons who claimed distributive shares; and that the pre-requisites of the law have been complied with. 9 Al. R. 470, Harrison v. Harrison et al. 2 Al. R. 192, Merril v. Jones. 4 Al. R. 121, Taylor and wife v. Reese, adm'r. 6 Al. R. 607, Saukey's ex'r's. v. Saukey's distr. 4 Port. 332, Portis v. Creugh's ex'r. 5 Al. R. 473, Robinson and wife. et al. v. Steele, adm'r. 11 Al. R. 1023, Reynolds' adm'r. v. Reynolds' distr.

In a proceeding for final settlement, any person who had not been made party, but who had an interest in the estate, as legatee, or distributee, or assignee, may file a petition, propounding his interest, and praying to be made party. After citation if no sufficient objection appear, such petitioner will be made a party; and will have a right to a writ of error. 8 Al. R. 177, Watson and wife v. May.

In auditing the account, it is not necessary that the charges
should be sustained by vouchers of written evidence. 9 Al. R. 615, Cunningham and wife v. Pool.

At the time appointed, the judge will examine the account and vouchers. A party having an adverse interest, may contest the account, and it is not necessary that his exceptions be in writing; or that they be filed previous to the day of settlement. But this is a convenient practice; and if the executor or administrator be surprised, the court will give him further time to meet exceptions. The judge will then state the account, and render a decree thereon. And the decree will, in all respects, have the force and effect of a judgment at law. But the court cannot, in its decree, go further in favor of the executor or administrator, than to discharge him. CI. Dig. 229, sec. 42. 10 Al. R. 608, Steele v. Knox. 16 Al. R. 730, Brazier and Co. v. King.

In this proceeding, a sworn account against the deceased, is prima facie evidence of the claim, to justify the executor or administrator in paying it. But if this item be contested, the executor or administrator must furnish better proof of the validity of the claim, in order to be allowed the payment. 6 Al. R. 907, Askey v. Weissenger.

The executor or administrator must account for all profits which have accrued from the estate in his hands. If he compound the debts, the benefit must accrue to the estate. If he lay out the funds in private securities, he will be accountable for all the profits, and at the same time answerable for all the losses.

In the settlement of his account, interest is to be calculated on the debits, and on the credits. 9 Al. R. 615, Cunningham and wife v. Pool.

In making the settlement, the executor or administrator must state under oath, the sum belonging to the estate, which he has used on his individual account, and the time at (during) which, it was so used; or he shall expressly deny, under oath, that he has used any of the funds of the estate. Any party interested may controvert the statement; and the question is to be decided by the judge, on the evidence adduced; or, if the judge deem it necessary, or either party request it, a jury must be impanneled to try the issue. Cl. Dig. 198, sec. 28.
If the executor or administrator keep the money of the estate dead, in his hands, without sufficient reason for it, this is gross negligence, or breach of trust; and he is chargeable with interest on the sum so kept idle.

An executor or administrator, authorized by the probate court to keep the personal estate together, must make an annual return to that court, of the manner in which the estate has been managed; of the crops made; of the expenses incurred; and of the disposition of the money received from the estate. On his failure to do so, it is the duty of the judge, forthwith to issue an attachment, to compel him to make such return. Cl. Dig. 131, sec. 31.

The returns mentioned in the preceding paragraph may be used against the executor or administrator, on the final settlement; but are no evidence in his favor.

An executor or administrator, without authority from the will, or an order from the probate court, has no authority to keep the estate together, and to work the slaves on the plantation, beyond making and taking care of the crop planted, or growing at the death of the testator or intestate. And if he do so without such authority, the distributees may elect, either to take the profits which he has made, or to charge him with the rent of the land, and the hire of the negroes, and plantation appurtenances. And he will be charged accordingly, on his final settlement. 10 Al. R. Steele v. Knox.

When there has been a gross breach of trust by the executor or administrator, in the use of the money of the estate, he may be charged with compound interest.

The executor or administrator is not to be charged with the unpaid notes of third persons, as cash, unless they have been lost by his neglect or mismanagement. 1 Al. R. 594, Dough-tit's adm'r. v. Doughtit. 8 Al. R. 27, Duffee, adm'r. v. Buchanan and wife. 10 Al. R. 154, Key v. Boyd, ex'r.

An executor or administrator ought to be allowed a reasonable compensation for his services, and proper charges for all reasonable expenses incurred by him in the management of the estate; but not for any which have arisen from his own default. And he is entitled to compensation for his services—except in cases of wilfull default, or gross negligence. Com-
pensation should then be refused to him. 9 Port. 664, Phillips, adm’r. v. Thompson and wife, ex’r. and ex’x. 10 Al. R. 900, Powell et al. v. Powell.

An administrator who is an attorney, may be allowed compensation for his professional services; but the ordinary rate of fees, is not the rule, as to the amount to be allowed him. 9 Al. R. 895, Harris v. Martin.

A claim for money expended for the maintenance of an infant, is properly presented to the probate court, for allowance. 6 Port., Gregg et al. v. Bethea.

After such claim has been allowed by the probate court, it may be embraced in the account of the executor or administrator.

When, in pursuance of a will, an estate is kept together, for distribution at a future time, the probate court may allow to the executor, or the administrator with the will annexed, an annual salary, in lieu of commissions. From this order fixing the salary, either party may appeal to the chancery court, by petition filed within one year.

The executor or administrator, who has defended an action for the benefit of an estate, is entitled to be reimbursed his damages, out of the assets. 8 Al. R. 564, Presnal v. Mabry. 9 Al. R. 734, Oneil v. Donnell.

Services for taking an inventory, selling the goods, and keeping the account, are not entitled to extraordinary compensation. Ib.

In making the settlement, the executor or administrator is to be charged with any amount due by himself to the deceased, as money in his hands. And he will not be allowed, as a set-off, a claim against a distributee, due to the estate, or to himself individually. He will not be allowed a credit, for boarding furnished to distributees; nor for advances to the widow and children of the deceased, (unless sanctioned by the previous order of the orphans’ court.) 8 Al. R. 27, Duffee, adm’r. v. Buchanan. 9 Port. 664, Philips, adm’r. v. Thompson and wife, ex’r. and ex’x. 9 Al. R. 330, Willis, adm’r. v. heirs of Willis. Ib. 491, Brazeale’s adm’r. v. Brazeale’s distr. 11 Al. R. 521, Parker and wife v. McGaha, adm’r. 15 Al. R. 202, Bondurant, adm’r. v. Thompson’s dist’s.
An executor or administrator with the will annexed, managing a plantation in pursuance of a will, is required to show, that the articles and services charged for, came to the use of the estate; but he is not required to show, that the articles or services were necessary, or that the prices were reasonable, unless there be reason to suspect want of good faith. And on payment of a judgment, proof must be made of the judgment, as well as of the payment. 11 Al. R. 49, Savage v. Benham, adm’r. But see Ib. 872, Nolly v. Wilkins, adm’r. de bonis non.

On settlement of the accounts of an executor or administrator, written memoranda made by a former one, are not evidence. 9 Al. R. 925, McLaughlin, adm’r. v. creditors of Nelms.

The sheriff, and the coroner, ex officio administrator, and the general administrator, are subject to citation, and the other proceedings for the settlement of the accounts of administrators. 9 Al. R. 925, McLaughlin, adm’r. v. creditors of Nelms.

When the judge of the probate court has been employed as counsel, in a matter affecting the settlement of an estate, or is otherwise interested in it; or shall be related to either of the parties by consanguinity or affinity, he shall not take jurisdiction thereof, or decide thereon, unless by consent of the parties. Such causes shall be commenced in, or transferred to, (as the case may be,) the circuit court; and the circuit court shall proceed therein, as the probate court should have done. Act of 1850, sec. 40.

Annual settlements are prima facie, to be considered as correct; provided, the distributees had an opportunity of contesting them; but they may be impeached by evidence showing them to be incorrect. 9 Al. R. 330, Willis, adm’r. v. heirs of Willis. Ib. 491. Brazeale’s adm’r. v. Brazeale’s distr. 13 Al. R. 329, Smith’s heirs v. Smith’s adm’r. 16 Al. R. 652, Willis’ adm’r. v. Willis’ dist’s.

All decrees of the judge of probate, on final settlement of the accounts of executors and administrators, and on legacies, have the force and effect of judgments at law; and execution may issue thereon, against the executor or administrator, for the collection of the several legacies, or distributive amounts. Under the decree, each distributee, heir or devisee, may have
a writ of execution, or attachment, or both, in case of personal estate; and in case of real estate, a writ of *habere facias possessionem*. *Cl. Dig.* 304, sec. 42. 3 *Al. R.* 752, *Childress v. Childress*. *Cl. Dig.* 305, sec. 43.

The court should insert in the decree, the amount of each legacy, or distributive share, with the name of the legatee, or distributee, to whom it shall have been awarded. A decree in general terms, in favor of the legal representatives, or in favor of the legatees jointly, or in favor of the distributees jointly, is erroneous. It should be in favor of each legatee, or distributee, specifically as to amount, and by name. *Cl. Dig.* 305, sec. 44. 2 *St. and Port.* 373, *Betts, adm'r. v. Blackwell's heirs*. 5 *Al. R.* 280, *Joseph, admir. v. legatees of Joseph*. 8 *Al. R.* 601, *Saukey's ex'rs. v. Saukey's distr*. 15 *Al. R.* 652, *Croft v. Terrell et al*.


When the citation to the executor, to account, is in the name of the husband alone, in right of his wife, she being entitled to a distributive share; but the decree is erroneously made in the name of husband and wife; and no exception be taken to the irregularity, in the orphans' court; the irregularity is no ground for error. If the name of the wife is not to be found in the record, the error of instituting the proceeding in the name of the husband, cannot be corrected. 10 *Al. R.* 455, *Saukey's ex'rs. v. Elsberry*. 11 *Al. R.* 143, *Petty v. Wafford*.

A decree in favor of an infant distributee, without the intervention of a trustee, is not erroneous; but execution thereon, without a guardian's being made party, is erroneous. 15 *Al. R.* 335, *Green, admir. v. dist's. of Fagan*:

The documents and evidence of all settlements made with executors and administrators, in the probate court, must be preserved by the judge; and the settlements shall be entered of record. And the evidence, documents, vouchers and settlement aforesaid, will be good evidence in any suit for or against
such executor or administrator, and must not be impeached, except for fraud in obtaining them. *Cl. Dig.* 304, sec. 37.

Under a literal construction of the statute referred to in the preceding paragraph, the record and documents may be used as evidence of particular facts, for or against persons who were neither parties nor privies, in the settlement made. It cannot be supposed, that the law intends such flagrant violation of established principles. A document cannot be competent evidence against a party, who has not, by himself, or his privy, had an opportunity of objecting to it: and a decree (not in *rem*) cannot be binding on one, who has not, by himself or his privy, had an opportunity of resisting it.

**SETTLEMENT OF INSOLVENT ESTATES.**

In case of the insolvency of the estate of a deceased person, the whole estate, both real and personal, must be distributed among the creditors, *pro rata*; except debts for the last sickness, and for the funeral expenses: which must be paid in full. *Cl. Dig.* 192, sec. 2.

When the defendant in any action dies after judgment, but before execution, the estate being declared insolvent, such judgment creditor will not have a preference over any other creditor. 4 *Al. R.* 668, *Blount & Stanly v. Traylor*.

In a suit commenced by attachment, if the defendant die before judgment, and his representatives sustain a plea that the estate has been declared insolvent, the attachment will not create a preference. 3 *Al. R.* 398, *Hale, adm'r. v. Cumming & Spyker*.

An executor or administrator, ascertaining that the estate of which he has charge, is insolvent, must file in the office of the probate court, an allegation in writing setting forth that the estate is insolvent, and praying that it may be declared insolvent. And to this allegation, he must attach, as parts thereof, three several schedules, viz.

1st. A schedule which shall contain a full and true statement of all the goods and chattels, and choses in action, and all other personal effects belonging to the estate, with the estimated value of each item.
2d. A schedule which shall contain a full statement of all the real estate of which the deceased was possessed, or in or to which he had any right, title, claim, or interest, at the time of his death, with a statement of the local situation of the same, the nature of the title, or interest of the deceased, and the estimated value.

3d. A schedule which shall contain a statement of all the claims existing against the estate, the nature and amount of each claim, and the name and residence of each creditor.

The allegation of insolvency, and the schedules aforesaid, must be verified by the written affidavit of the executor or administrator, that the same are true and correct, to the best of his knowledge, information, and belief. *Cl. Dig.* 192, sec. 2.

When the allegation of insolvency has been filed, the judge must make an order appointing a day not less than thirty, nor more than sixty days from the filing thereof, for considering the allegation, and determining whether the estate be insolvent. And he must give notice to the creditors of the estate, of the filing of the allegation, and of the day appointed for determining on it, by publication in a newspaper published nearest the court-house, and by putting up a copy of the notice at the court-house door,—the publication to be continued for such time as may be directed in the order for publication. And he must issue similar notices, to be served by the sheriff on each creditor residing in the county; and he must send like notice by mail, to each creditor residing out of the county. But the omission of service of notice on any creditor, will not be sufficient cause for delaying to hear and determine the allegation of insolvency. *Cl. Dig.* 192, sec. 3.

If no opposition be made by any creditor, the estate will be declared insolvent. But any creditor or creditors may, by answer in writing, deny that the estate is insolvent, and thereupon an issue will be made up, under the direction of the court, to try whether the estate is or is not insolvent. If either party desire it, this issue must be tried by a jury, at such time as the court may direct. If jury-trial be not requested by either of the parties, the question of insolvency will be decided by the court. If the issue be decided against the executor or administrator, the proceeding will be dismissed at his costs. If the
issue be decided in support of the allegation, the estate will be declared insolvent, and the costs of the proceeding must be paid, either by the contesting creditor or creditors, or out of the funds of the estate, at the discretion of the court. Any creditor not a party at the making the issue, may, at any time before its trial, on motion, be admitted to join in it, and not more than one issue may be made upon the allegation of insolvency. *Cl. Dig.* 192, sec. 4.

When the estate shall be so declared insolvent, the court must at the same time make an order requiring the executor or administrator to make a settlement of his account, on a day appointed in the order, not less than thirty nor more than sixty days from the day of making the order. And the court must at the same time order, that notice thereof, and to attend the court, be given to the creditors, in the manner prescribed for the previous notice to creditors. *Cl. Dig.* 193, sec. 5.

As the executor or administrator of an insolvent estate is required to make a settlement of his account, not less than nine nor more than twelve months after an estate has been declared insolvent, it is a convenient practice to postpone the settlement mentioned in the preceding paragraph, until the lapse of the nine months, when the old executor or administrator is continued in the management of the estate. It cannot be thought that the law requires two settlements from the same executor or administrator, within the one year; and the settlement first mentioned, seems to have been intended, only when the old executor or administrator has been superseded by the election or appointment of a successor.

On the settlement of the account of an executor or administrator on an insolvent estate, whenever made, all the rules of law are applicable which have been stated for the settlement of the account of an executor or administrator on a solvent estate.

On the day appointed for settlement as aforesaid, and for attendance of creditors, they are to hold a meeting, in the presence and under the direction of the court; and then and there elect a suitable person, being a resident citizen of the state, as administrator *de bonis non*. And when the person so elected shall take the oath and enter into bond with security, as required
by law on the appointment of administrators, the court must grant him letters of administration de bonis non. In making this election, each creditor is entitled, personally or by agent or attorney, to give a number of votes proportioned to the amount of his claim, according to the following scale. Each creditor having claims not exceeding one thousand dollars, will be entitled to one vote for every hundred dollars; and each creditor having claims exceeding one thousand dollars, will be entitled to ten votes for the first thousand dollars, and one additional vote for every five hundred dollars over and above the first thousand dollars; and every creditor, however small his claim, will be entitled to at least one vote, and no creditor, however large his claim, can have more than twenty votes. In this election, the person having a plurality of votes, is elected administrator. *Cl. Dig.* 193, sec. 6.

The meeting of creditors for the election of the administrator de bonis non, may be continued from time to time, with the assent of the court. And whenever a vacancy occurs in said office, from any cause, the court, on the motion of any creditor, must order another meeting of the creditors to fill such vacancy, in the manner herein-before directed. *Cl. Dig.* 193, sec. 7.

If none of the creditors shall attend at the time appointed for the election of an administrator de bonis non, or if from any other cause, the election be not held, the judge may, in his discretion, continue the old executor or administrator in office, or he may cast the administration on the administrator general, or if there be no administrator general, he may cast the administration on the sheriff. *Cl. Dig.* 193, sec. 8.

On the election or appointment of an administrator de bonis non, as herein-before prescribed, the previous grant of letters testamentary, or of administration, is thereby revoked. And such administrator de bonis non is entitled to demand and receive, from the old executor or administrator, all money due from him to the estate, and all the goods and chattels, choses in action, and other personal effects, and deeds, and other evidences of title to the lands of the estate; and he may recover them by any proper proceedings or actions, either in the orphans' court, or any court of common law, or of equity. *Cl. Dig.* 194, sec. 9.
After an estate has been declared insolvent, it is not required that claims against the estate be presented to the executor or administrator; but every person having a claim against such insolvent estate, must file it in the probate office, within six months after the estate has been declared insolvent. Cl. Dig. 195, sec. 15. Ib. 194, sec. 10.

A claim is sufficiently filed to preserve it, if it be presented to the judge for that purpose, even though he omit to file it. And it is not necessary to file the note, or other evidence of claim. A copy, or substantial statement of the claim is sufficient. 14 Al. R. 92, Rutherford’s adm’rs. v. Branch Bank at Mobile.

Claims filed as above, must be verified by the affidavit of some person having a legal or equitable interest in the claim, or of the agent of such person. Cl. Dig. 194, sec. 10. 12 Al. R. 551, Cock v. Davis. 14 Al. R. 416, Pl. & Mer. Bank v. Smith.

Whatever be the nature of the claim, even if it be a preferred debt, or a judgment, it must be filed within six months after the estate has been declared insolvent, or it will be barred, even though it be embraced in the schedule filed by the administrator, or be due to the administrator. 8 Al. R. 454, Hollinger et al. v. Holly et al. 11 Al. R. 730, Campbell’s adm’r. v. Campbell’s creditors.

The omission to verify a claim by affidavit, is no ground for rejecting the claim, unless objection on this ground be filed in writing, within nine months after the estate has been declared insolvent, as directed by the statute. The necessity for an affidavit does not exist, until the exception is duly taken to its omission; and even after the exception has been taken, the affidavit may be supplied at any time before the hearing; and in the discretion of the court, after the hearing, and before the decree. 8 Al. R. 454, Hollinger et al. v. Holly et al. 10 Al. R. 520, Shortridge v. Easly, adm’r. Ib. 564, Brown & Co. v. Easly, adm’r. 12 Al. R. 191, Gilbert v. Brashear & Gooch. 9 Al. R. 73, Norris & Lapsley, adm’rs. v. Golsby. 14 Al. R. 92, Rutherford’s adm’rs. v. Branch Bank at Mobile.

The affidavit may be made before a justice of the peace. 14 Al. R., Bloodgood v. Smith, adm’r.

The judge must give to the claimant, his agent or attorney, a receipt for the claim filed, and must endorse on the claim the
day when filed. And he must keep a docket or list of the claims filed, which must at all times be subject to the inspection of the administrator, (or executor,) and of the creditors. *Cl. Dig.* 194, sec. 10.

If within nine months after an estate has been declared insolvent, no objection be made in the mode prescribed, to a claim which has been filed according to law, such claim must be allowed without proof, as a valid demand against the estate. And when a claim has been allowed, no exception having been taken, it will be presumed on error, that all requisite proof was made. *Cl. Dig.* 194, sec. 10. 12 *Al. R.* 494, *Boggs' adm’r.* v. *Branch Bank at Mobile.*

At any time within nine months after an estate has been declared insolvent, the administrator (or executor,) or any creditor or creditors, in the name of the administrator (or executor,) may object to the allowance of any claim filed against the estate, and the objection must be in writing, and be filed in the probate office. On the objection being filed, it is not the duty of the court, of its own volition, to make up an issue, but on the application of either party, it must cause an issue to be made up, between the claimant as plaintiff, and the administrator, or the contesting creditor, in the name of the administrator (or executor,) as defendant; the pleadings being such as would be used, if the claimant had sued the administrator at common law. If the issue be found against the claimant, his claim is thereby rejected, and he must pay all costs of such issue and trial. If the issue be found for the claimant, for the whole amount of his claim, it must be allowed as a valid demand against the estate, and he will recover all his costs, to be paid by the contesting creditor, or out of the funds of the estate, as the court may direct. And if a part only of the claim be found due, it will be allowed to the amount so found; and the court, in its discretion, will direct by which party the costs shall be paid, or that the costs shall be paid by each party, in such proportion as it shall deem just. *Cl. Dig.* 194, sec. 11. 12 *Al. R.* 551, *Cook v. Davis.*

The executor or administrator of an insolvent estate, must make a settlement of his account, on a day to be appointed by the court, not less than nine nor more than twelve months after
the estate has been declared insolvent. At this settlement the court must decree to each creditor, his rateable proportion for the debt found due to him; reserving however, in the hands of the executor or administrator, a rateable proportion of the funds of the estate, for such claims as may be then under contestation. And a similar rateable distribution must be made at least once in every six months, at such times as the court may appoint, until final settlement and distribution. Cl. Dig. 194, sec. 12.

The day appointed for the settlements above mentioned, must be at the regular terms of the court, or return-days; and the account is to be adjusted on the principles before stated for the settlement of accounts on solvent estates.

In the settlement of an insolvent estate, the executor or administrator has no right to retain in full, for a debt due to himself. He is entitled only to a pro rata payment on the same scale with other creditors. 10 Al. R. 520, Shortridge v. Easley adm'r.

When in an action at law against the executor or administrator, he has sustained a plea that the estate has been declared insolvent, but the plaintiff has obtained a judgment on another plea, a duly certified transcript of such judgment must be certified to the orphans' court, and be filed as a claim against the estate, in the manner prescribed for filing claims. And such judgment, with the costs of suit, will be allowed a rateable payment, like other claims.

The supreme court has decided that the plea that the estate has been declared insolvent, must state further that the report of insolvency was made by the defendant, and that he is still the administrator. 11 Al. R. 259, Cameron, ex'r. v. Clark Smith & Co. (Sed quere.)

On the trial of any issue, under the act for the settlement of insolvent estates, any party dissatisfied with a decision or charge of the judge presiding, may except and have a bill of exceptions, as at common law; and may, within twelve months thereafter, appeal from, or sue out a writ of error to the judgment, as at common law. But the appeal, or writ of error, cannot be prosecuted by or against a single creditor, when there are several creditors. Cl. Dig. 195, sec. 14. 7 Al. R.
Execution from the probate court, against an executor or administrator, must be made returnable to some succeeding term of that court, not less than three nor more than six months from the date of the execution; otherwise it will be void. 11 Al. R. 127, Westmoreland v. Hall. 12 Al. R. 829, Graham & Abercrombie v. Chandler. 15 Al. R. 576, Little et al. v. Knox, adm'r. Act of 1850, sec. 21.

Whenever execution shall have issued against an executor or administrator, on the final settlement of his account, and decree thereon in the probate court, and it be returned by the sheriff, "no property," generally, or as to a part thereof, execution must forthwith issue against his securities.

Under the construction given to the statute by the supreme court, this return on the execution is not conclusive. The parties have a right to test the sufficiency of the bond, but the manner of doing so is not settled. It is erroneous to enter up judgment on such return of "no property found." Cl. Dig. 305, sec. 45. 5 Al. R. 117, Clarke v. West.

Bond for title to real estate.

When bond for title to land has been given, and the obligor dies before the title has been executed, the obligee may petition the probate court to compel the executor or administrator of the obligor, to make title in conformity with the bond, and the court must give notice of the petition, by publication in a newspaper published in the state, once a month for at least three months. And if the court then find, that the contract has been fairly made, it must order the executor or administrator to make title, for the lands sold by the testator or intestate, and it may coerce obedience, by attachment, should the executor or administrator refuse to comply. From this order there may be an appeal, as in other cases in the probate court. Cl. Dig. 157, sec. 38.

On the proceeding to compel the executor or administrator
to make title, on the bond of the testator or intestate, it was de-
cided at an early day, that the order to make title should not be
granted, if the obligor did not own the land at the time of the
contract, or if the agreement to convey, was not under seal.
And the petition must aver, that the deceased was the owner
of the land, at the time of his death. 16 Al. R. 348, Driver,

In this proceeding, the petition must alledge, that letters tes-
tamentary, or of administration, have been granted by the court,
to which the application is made. The jurisdiction of the court
attaches, on the making the order for citation, or publication;
and the decree, even though erroneous, cannot be collaterally
impeached. 6 Port. 262, Couch v. Robinson. 7 Al. R. 635,
Samuels v. Findley. 9 Al. R. 403, Carns' adm'r. v. Townsend.

RESIGNATION.

A proceeding against an executor or administrator, in the
orphans' court, will not abate, on his resignation; but may still
be carried on against him. 5 St. and Port. 181, Thomason and
Hayne's ex'rs. v. Blackwell.

COURT OF PROBATE.

There shall be established, in each county in the state, a
court of record, to be styled, "The Court of Probate." It shall
be composed of one judge, who shall be styled, "The Judge of
Probate" of the proper county. He is to be elected by the
qualified voters of the county, and to be commissioned by the
governor; and will hold the office for the term of six years, and
until a successor shall be qualified, unless sooner removed from
office. The election is to be governed by the rules provided
for the election of members of the general assembly. He must
be a citizen of the State of Alabama; and must have resided in
the county for which he shall be elected, one year immediately
preceding his election. Act of 1850, sec. 1 and 2.

The judge of probate, before entering on the duties of his
office, must take and subscribe before a justice of the peace of
his county, an oath or affirmation to the following effect—"I do solemnly swear, (or affirm,) that I will impartially and diligently, and without being influenced by fear, favor, or affection, faithfully execute the duties of judge of probate of ——— county, according to law, to the best of my skill and ability, as long as I may continue in said office." And he must also enter into bond with good and sufficient securities, to be approved by the judge of the circuit court, in such penalty as shall be fixed by him, not less than five thousand dollars, payable to the governor for the time being, and his successors in office; conditioned for the faithful performance of the duties of his office. This bond must be recorded by the clerk of the circuit court; and be filed in the office of the secretary of state. If the judge of probate shall fail to execute and file his bond for forty days next after his election or appointment, it is the duty of the secretary of state, within five days after the expiration of the time limited, to certify such failure to the governor; and it is then the duty of the governor to fill the office, as in other cases of vacancy. In action on the bond, a certified copy from the secretary of state, or a certified copy of the record, from the clerk of the circuit, will be competent evidence; except in cases where there is a plea of non est factum—when the original must be produced. The oath taken as above prescribed, must be filed by the justice administering it, in the office of the clerk of the circuit court.

On the representation of the grand-jury impaneled at the circuit court, or of three members of the commissioner's court in vacation, that the bond of the judge of probate is insufficient, the judge of the circuit court must require him to enter into new and sufficient bond. On failure for forty days, to comply with this requisition, the judge of the circuit must declare the office vacant, and certify the same to the governor; and the governor must then fill the office, as in other cases of vacancy. Act of 1850, sec. 3, 4, 5, 6.

Vacancies in the office of judge of probate, must be filled by the governor; the appointee to hold the office until the 1st Monday in May next after his appointment, and until his successor shall be elected and qualified. Act of 1850, sec. 7.

The judge of probate has original jurisdiction in relation to
probate of wills, granting letters testamentary, or of administration, and revoking the same, appointing and removing guardians, binding apprentices, and controversies affecting them, and in general in all matters pertaining to a court of probate. *Act of 1850, sec. 8, 9.*

The judge of probate must have a seal of office, with suitable emblems. He is required to keep his office at the courthouse of the county; and to keep it open for the transaction of business at least on Monday, Tuesday, and Saturday, from nine o'Clock, A. M., until four o'Clock, P. M., except one hour at noon. He must hold a regular term on the second Monday in each month; and he may hold special or adjourned terms, when business shall require. His court is always open, except on Sunday, for the purpose of making such orders as are grantable of course. *Act of 1850, sec. 11, 12, 13.*

The judge of probate is required to perform all the duties heretofore incumbent on the clerk of the orphans' court: but he may employ a deputy for acts not judicial. *Act of 1850, sec. 16, 18.*

The judge of probate must keep records of all his official acts and proceedings, and of all wills and codicils, and probate thereof, of all bonds of executors and administrators, their annual and final settlements, inventories, appraisements, accounts of sale, all accounts of executors, administrators, and guardians; and must arrange them under proper heads for easy reference; and preserve the originals on file in his office; and must perform all the duties of register of his court. *Act of 1850, sec. 9, 16.*

The judge of probate is not entitled to any fee, from an executor or administrator, or his agent, on the examination of books and papers in his office. *Cl. Dig.*

The sheriff, when required, must attend the sittings of the judge of probate. When the sheriff is incapable, from interest, or other cause, the coroner must perform this duty. *Act of 1850, sec. 22.*
A party aggrieved by any interlocutory or final order or decree of the judge of probate, may, within three years from the rendition thereof, appeal to the same court, or have a writ of error to that court. And he may stay the judgment of the probate court, by giving bond with sufficient securities, in double the amount of the judgment, to be approved by the judge of probate, with condition to prosecute the appeal or writ of error to effect, and to satisfy the judgment which may be rendered by the supreme court. Act of 1850, sec. 29.

In all cases of appeal or writ of error, the judge of probate must deliver to the appellant or plaintiff in error, a full transcript of the record and proceedings in relation to the item or opinion appealed from, or complained of as erroneous. When the error complained of is not apparent on the record, it must be presented in a written statement in the nature of a bill of exceptions, signed by the judge of probate. Act of 1850, sec. 30.

At any time within three years after any final decision in the probate court, the chancery court will, on bill filed, correct any errors in law or fact therein. But in this proceeding, the chancery court will not correct any error of law or fact, not appearing of record, except on such allegations and proofs, as will show that such error occurred without any fraud, accident, or neglect of the complainant or his attorney. These proceedings in chancery may be revised, like other proceedings in courts of chancery. Act of 1850, sec. 31.

The rights of infants, married women, and persons of unsound mind, are reserved for three years after the removal of their disability. Ib.

In personal actions, a right to the writ of error passes to the personal representative.

Any party dissatisfied with any decision, or charge of the court, in the proceedings for the settlement of insolvent estates, may have a bill of exceptions, and writ of error. Cl. Dig. 195, sec. 14.

On a writ of error, on the settlement of an insolvent estate,
all the creditors must be parties. 7 Al. R. 577, Br. Bank at Mobile, v. adm’rs. of Murphy.

On the trial of an issue, under the act of 1843, for the settlement of insolvent estates, taking an appeal, or suing out a writ of error, is limited to twelve months after the decision in the orphans’ court. Cl. Dig. 195, sec. 14. 8 Al. R. 454, Hollinger et al. v. Holly et al.

On annual settlements made in obedience to law, there may be a writ of error. 11 Al. R. 49, Savage v. Benham, adm’r.

On a settlement by an administrator, his omission to file a list of the distributees, is no ground for error. 10 Al. R. 203, Eddings et al. v. Long et al.

Refusal of the orphans’ court, to entertain a petition, for a share in the distribution of an estate, cannot be revised on error. The remedy is, by certiorari. 10 Al. R. 622, Fowler v. Trehitt, adm’r.

NEW TRIAL.

A new trial may be granted by the probate court, at the term at which the decree was rendered; but not after the close of the term. 9 Al. R. 783, Fitzpatrick’s adm’r. v. Hill.
PART V.

APPOINTMENT OF GUARDIAN.

A court of chancery may appoint the father, guardian of the estate of his minor child, requiring him to give security. 11 Al. R. 37. Lang et al. v. Peltus.

The probate court has authority to appoint guardians for minors; and the judge of that court is required to appoint guardians for those minors who have separate estates devised and settled on them, and whose fathers may be still alive. But such guardian will have no control over the person of the ward, during the life of either of the parents of such ward. Cl. Dig. 267, sec. 1. Ib. 226, sec. 27. Ib. 272, sec. 26.

When there are two or more minors, having estates undivided, derived from the same source, as legatees, distributees, or otherwise, they must all be embraced in one guardianship. Acts of 1850, sec. 32.

A minor over fourteen years of age, may choose his guardian; and his choice must be made in the presence of the judge, or be certified to him by a justice of the peace. Cl. Dig. 267, sec. 1.

The court ought to appoint as guardian, the person so chosen by a minor over fourteen years of age, if there be no strong objection to him, showing him disqualified for the office. But the court should not be led by the choice of the minor, to appoint, as guardian, a person known to it to be unworthy of the trust. The court is to exercise its own discretion, in appointing guardians for minors under fourteen years of age.
A guardian may be appointed by the father, in his will, for his minor child. *Cl. Dig.* 269, sec. 10, 11.

A testamentary guardian must declare his acceptance in open court, and must give bond, and file an inventory, as required by law, of other guardians. And he must not remove his ward from the custody of the mother, before such ward has attained the age of fifteen years; unless the orphans' court shall then declare the mother, an unfit person to have charge of the child. *Ib.*

When there is a minor, for whom no suitable person can be procured to act as guardian, the court may appoint the sheriff, guardian; and he will be required to act as guardian for such minor. *Cl. Dig.* 272, sec. 22.

**REVOCATION OF GUARDIANSHIP.**

The probate court may, for good and sufficient cause, displace a guardian, on petition specifying the grounds, giving fourteen days notice, by citation, to show cause against his removal. *Cl. Dig.* 268, sec. 4. 11 Al. R. 461, Speight v. Knight.

The removal of a guardian from the state is not, absolutely, a sufficient cause for revocation of his guardianship; but it may be a sufficient cause, in the discretion of the court. 8 Al. R. 781, Eiland, Judge, v. Chandler. 11 Al. R. 461, Speight v. Knight.

**BOND.**

Before the grant of letters of guardianship, the guardian must enter into bond, with at least two sufficient securities, approved by the judge of probate, and payable to him and his successors in office, in such penalty as he may direct, which must be at least double the estimated value of the estate of the ward. This bond will not become void on the first recovery, but may be prosecuted from time to time, against all or any of the obligors, in the name, and at the cost of the ward. *Cl. Dig.* 221, sec. 3.
POWER OF THE GUARDIAN.

A statutory guardian holds in free and common soccage; and has the custody of the person, and of the estate, of his ward. 6 Port. 77, Hine v. Nixon et al.

When one person is both executor and guardian, he does not hold any thing, as guardian, but what has been separated from the assets of the estate of the deceased, as the estate of the ward. 10 Al. R. 299, Davis v. Davis.

The probate court may authorize the guardian to keep together the personal estate of his ward, and to employ it in agriculture, on the land of his ward. Cl. Dig. 270, sec. 14.

The guardian may hire the slaves of his ward, by private contract. Act of 1850.

An act done by a guardian for his ward, without authority, will not bind the ward, unless beneficial to him. 7 Al. R. 796, Alexander v. Alexander.

A guardian has no authority to bind his ward, by any contracts; and the guardian is personally liable for necessaries furnished to his ward, by his direction. 5 Al. R. 42, Sims v. Norris & Co.

Every guardian must, within three months after his appointment, file in the office of the probate court, an inventory under oath, of all the estate of his ward, real or personal, which he shall have received, or taken into his possession, to be entered of record. Cl. Dig. 267, sec. 3.

Every guardian must exhibit, once in every year, an account of the product of the estate, and of the sale and disposition of such product, and of the disbursements: which account, must be recorded and preserved. Cl. Dig. 267, sec. 3. Ib. 270, sec. 15. Act of 1850, sec. 27.

If such account is not filed at the end of the year, the judge ought to issue a citation at the end of thirty days thereafter, requiring the guardian to file it; and the guardian is personally liable for the costs of the citation. Act of 1850, sec. 27.

Annual accounts are to be considered prima facie, correct; but may be impeached by evidence showing them incorrect. 9 Al. R. 330, Willis, adm'r. v. Heirs of Willis. Ib. 615, Cunningham and Wife v. Pool. Act of 1850, sec. 28.
SETTLEMENT BY GUARDIAN.

When it shall be necessary for a guardian to make an annual or final settlement, he must file in the office of the probate court, an account between himself and his ward, with his vouchers and other written evidence. The judge must then order a publication to be made, for at least forty days, either by posting up written notices at the door of the court-house, and three or more other public places in the county, or by advertisement for three successive weeks in some newspaper, of the time appointed for the settlement of the account. *Cl. Dig.* 229, sec. 41.

But if the estate of the ward or wards does not exceed one thousand dollars in value or amount, there must not be a publication in a newspaper. *Act of 1850*, sec. 27.

A guardian *ad litem* must be appointed, to contest the account on the part of the ward.

On the day appointed, the settlement may, on sufficient cause, be continued. At the proper time, the judge must examine the account and vouchers, hear and examine the exceptions, consider the evidence, state the account, and render a decree thereon, *Cl. Dig.* 229, sec. 41, 42.

The decree, if against the guardian, will have the force and effect of a judgment at law. But a decree declaring a balance in favor of the guardian, is not operative on the ward, and cannot be made the ground of an action against him. *Cl. Dig.* 229, sec. 42.

When a guardian shall have removed beyond the jurisdiction of the court by which he was appointed, (out of the state,) without having settled his account, the judge may, on proper application, cause notice to be given by advertisement in a newspaper published in the state requiring such guardian to file his account and vouchers for settlement, at a regular term of the court, to be held not less than three months from the date of the notice. And if he shall fail to appear and file his account and vouchers, in conformity with the notice, it will be the duty of the judge, to state an account against him, charging him with such amounts as shall appear, on the best information, to have been received by him; and to settle, and decree thereon, as re-
quired by law in ordinary settlements. But if, before the final hearing, and decree thereon, the guardian shall appear, and file his account and vouchers for settlement, and pay such costs as may have accrued on the proceeding, in consequence of his defalcation, the court must set aside the proceedings ex parte, and audit and state the account of the guardian as required by law. 

Cl. Dig. 230, sec. 47.

When a guardian living within the state, having been cited to appear and file his account and vouchers for settlement, shall fail to obey the citation, the judge must state an account against him; and cause a notice to be given to him, that if he fail to appear at the term of the orphans' court next thereafter, and file his account and vouchers for settlement, the account so stated, ex parte, will be reported for allowance, and settled according to law. If the guardian fail to appear, a decree will be made thereon, ex parte. But if the guardian appear at any time before the final decree, and file his accounts and vouchers, and pay the costs accrued, the proceedings ex parte will be set aside; and a decree will be made in the usual mode of settlement. 

Cl. Dig. 230, sec. 48. 11 Al. R. 563, Hugles v. Ringstaff.

On settlement of the account of a guardian, ex parte, his sureties may file an account for him, and represent him; and they will be allowed the compensation to which he might be entitled. 7 Al. R. 615, Carrol et al. v. Moore, adm' r.

Annual returns made by a guardian, and recorded by order of the court, are considered only prima facie correct; and will not prevent the court, on final settlement, from examining all debits and credits, on both sides, from the commencement of the guardianship. 9 Al. R. 615, Cunningham and wife v. Pool. Act of 1850, sec. 28.

The gratuitous declaration of a guardian, that he will not charge his ward, is not binding on him, at law. Ib.

When a guardian purchases property, at a sale under execution in favor of his ward, and pays by a credit on the execution, the ward may elect to have, either the property, or the money so credited on the execution, with interest. 9 Al. R. 919, Cawthorn v. McGraw.
Proceeding in favor of the ward, against an ex-guardian, should be, in the name of the ward, by his present guardian. 3 Port. 223, McLeod v. Mason.

An action cannot be maintained on a guardian's bond, while the relation of guardian and ward subsists. 8 Al. R. 781, Eiland, Judge v. Chandler.

PART VI.

SUMMARY OF THE LAW OF DOWER.

WHAT IS EMBRACED IN DOWER.

The widow's dower consists of one-third part of the real estate, of which her husband died seised, or which he had conveyed during coverture; that is, of all the real estate of which he was seised during coverture, as her estate during her natural life. It will comprehend the dwelling-house generally occupied by the husband, next before his death, with the offices, outhouses, buildings, and other improvements appurtenant thereto. But if it should appear to the court, that the whole of the said premises cannot be allotted to the widow, without injustice to the heirs, then the widow must be endowed with such part only, as the court shall deem reasonable. And she has a right to dower, in lands held to the use of, or in trust for her husband. Cl. Dig. 172, sec. 3. Ib. 157, sec. 6. 3 St. and Port. 447, Gillespie et al. v. Summerville. 14 Al. R. 286, Ing v. Murphy. Ib. 370, Edmondson v. Montague.

But if there are no children of an intestate, nor descendants of them, the widow will be entitled to one-half of the real estate, of which her husband died seised. Cl. Dig. 168, sec. 2.

Of the personal estate, the widow is entitled to a share, in
absolute right, according to the following scale. If there be no child, or but one child, she must have one-half, the debts of the deceased being first paid. If there be more than one child, but not more than four, she must have a child's part. If there be more than four children, she must have one-fifth part. But this is not strictly dower; nor is it a right by descent. Cl. Dig. 173, sec. 4.

A sale of the husband's interest in land, in his life-time, by s. fa., does not divest the widow's right of dower. 11 Al. R. 552, Nance v. Hooper.

DOWER WAIVED OR BARRED BY LEGACY.

When a testator has made provision in his will, for his widow, she will not be entitled both to the legacy and to her dower; but if she accept her legacy, she will be considered as waiving her right to dower—unless it appear plainly by the will, that the testator intended her to have the legacy, in addition to dower. If dissatisfied with the provision made for her in the will, she may signify her dissent thereto, in the circuit or probate court of the county in which she resides, at any time within one year after probate. She will then be entitled to her dower. If she do not express her dissent, in the manner, and within the time limited, she will be considered as having made her election to take under the will, and to relinquish her dower. Cl. Dig. 172, sec. 1, 3. Ib. 300, sec. 20. 10 Al. R. 977, Hilliard and wife v. Binford's heirs and adm'rs.

RELINQUISHMENT OF DOWER.

A feme covert, either over or under twenty-one years of age, may relinquish her dower. To make relinquishment of dower valid, there must be an acknowledgment to that effect, by her, on a private examination, apart from her husband, before a judge of the circuit or probate court, a justice of the peace, a clerk of the circuit or county court, or a notary public, stating that she signed, sealed and delivered the deed of relinquishment, as her voluntary act, freely, without any fear, threats or compulsion of her husband; and there must be a

When a deed from the husband, without relinquishment of dower, has been recorded, the wife may subsequently relinquish her dower, by acknowledgment, as heretofore stated; and such acknowledgment must be recorded where the conveyance of the husband has been recorded. *Ib.* 155, *sec.* 28.

When a feme covert shall join with her husband, in the execution of a deed of conveyance of land, in the presence of two or more credible witnesses, or shall acknowledge such deed, before any person authorized by law to take acknowledgment of deeds; her right of dower in the lands conveyed, will be thereby perpetually barred. *Cl. Dig.* 174, *sec.* 10.

A non-resident feme covert may relinquish her dower, by deed of release, acknowledged before a notary public, or a judge of any court of record, in the state, kingdom or territory, in which she may reside. *Cl. Dig.* 174, *sec.* 11.

**Assignment of Dower.**

Until assignment of dower to the widow, she has a right to retain full possession of the dwelling-house, in which her husband usually dwelt, next before his death, together with the out-houses, offices, or improvements, and plantations thereunto belonging, free from molestation or rent. *Cl. Dig.* 173, *sec.* 7.

The heir may assign dower to the widow; and her assent will bind her. But without her assent, she will not be bound by the act of the heir. 4 *Al. R.* 168, *Johnson, adm'r.* v. *Neil and wife.*

Dower may be allotted by the circuit, or the probate court. *Act of* 1850, *sec.* 14.

Assignment of dower can be made under the statute, by the circuit or probate court, only when the dower can be laid off by metes and bounds. In other cases, it is necessary to resort to a court of chancery, to adjust her claim. 9 *Al. R.* 901, *Barney v. Frowner and wife.*

When there has been an alienation by the husband, in the assignment of dower, the widow is not entitled to any benefit
from improvements made by the purchaser. She is entitled to one-third, according to the condition of the land, at the time of the alienation by the husband. *Ib.*

To obtain her dower, the widow must present a petition to the circuit or probate court of the county in which her husband may have usually dwelt, next before his death, setting forth the nature of her claim, and specifying the lands, in which she claims dower; and praying that dower may be allotted to her. When she has claims to dower in lands lying in different countries, she may proceed, for each several parcel, in the court of the county, in which such land may lie. She must state in her petition, who are the heirs, and who are the tenants of the freehold. *Cl. Dig.* 173, sec. 5. *7 Port.* 19, *ex'rs. of Greene v. Greene.*

The proceedings on the petition for dower, must be in a summary way. The applicant must give ten days' notice, to the executor or administrator, by serving him with a copy of the petition. When there is no executor or administrator; or when the executor or administrator does not reside in the same county with the widow; the petitioner must give notice, by publication for four times in succession, in a newspaper published in the state, and the nearest to the residence of the widow. The tenants of the freehold also, must have notice of the petition. *Cl. Dig.* 173, sec. 6. *9 Al. R.* 901, *Barney v. Frowner and wife.*

When the land has been conveyed by a non-resident grantee, his widow must assert her right to dower, before the proper tribunal, within twelve months after the death of her husband; or her right will be barred. *Cl. Dig.* 174, sec. 12.

On the petition being presented to the court, it must issue a writ to the sheriff, commanding him to summon five discreet disinterested free-holders, not connected with either party, by consanguinity or affinity; who must, under oath administered by the sheriff, for the faithful and impartial discharge of the duty assigned to them, allot and set off, to the widow by metes and bounds, one-third part, according to quantity and quality, of the lands, tenements, and hereditaments, subject to dower in that county. And they must put her in possession thereof; and this proceeding will vest in her, a title for her natural life.
When she has a claim to dower in lands lying in different countries, she may proceed in the circuit or probate court of the county where such land may lie, and recover dower in the same manner. And the sheriff and commissioners must, at the same time, allot and set off to the widow, that portion of the personal estate, to which she is entitled by law, and which shall be hers in absolute right. *Cl. Dig.* 173, *sec. 5.*

Dower cannot be claimed in the same petition, of several aliences from the husband, of different parcels of the land. 9 *Al. R.* 901, *Barney v. Frowner and wife.*

The widow may convert woodland into arable, in a reasonable proportion, in the lands held by her in dower. 7 *Al. R.* 514, *Alexander et al. v. Fisher.*

Against a purchaser from the husband, the widow is entitled at law, to damages, (mesne profits,) only from the commencement of her dower-suit; but against the heir, she is entitled to damages, from the death of her husband. In equity, damages for the detention of the land assigned to her in dower, rest on the ground of title; and the widow is entitled to interest on the arrears 11 *Al. R.* 20, *Beevers and Jennison v. Smith.*

It has been decided, that damages for detention of dower, can be obtained by the widow, only in chancery. 13 *Al. R.* 329, *Smith's heirs v. Smith's adm'r.*

A court of chancery cannot decree to a widow, a certain sum in lieu of dower, to be raised by sale of the real estate, to which dower is attached. The decree should be, for the annual payment of the sum ascertained to be the annual value of the dower. 15 *Al. R.* 439, *Potier and McCoy v. Barclay and husband.*
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