on, payable by the mortgagors respectively, shall be paid, as the same becomes due, to the respective treasurers of the several counties, who shall certify such payment to the respective commissioners of the several counties, to the intent that the same may be acknowledged, by an endorsement in writing upon the respective deeds of mortgage, which shall accordingly be done; and the monies so to the county treasurers respectively paid, shall from time to time, be by them paid to the state treasurer, as soon as conveniently may be after the same shall be received by the said county treasurers, respectively. 1794. money shall be repaid.

Passed 18th April, 1794.—Recorded in Law Book No. V. page 237.

CHAPTER MDCCXL.

An ACT *directing the descent of intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned.*

SECT. 1. *BE it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted, by the authority of the same,* That the register for the probate of wills and granting letters of administration for the city and county of Philadelphia, and of the several counties of this state, respectively, and their deputies, having power to grant letters of administration, of the goods and chattels of persons dying intestate within this commonwealth, shall, upon their granting letters of administration, take bonds, with two or more sufficient sureties (respect being had to the value of the estate,) in the name of the register, with the conditions in manner and form following, viz. "The condition of this obligation is such, that if the within bounden **A. B.** administrator of all and singular the goods, chattels and credits of **C. D.** deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him, the said **A. B.** or into the hands and possession of any other person or persons, for him, and the same, so made, do exhibit, or cause to be exhibited, into the Register's office in the county of at or before the day of , next ensuing; and the same goods, chattels and credits, and all other the goods, chattels, and credits of the said deceased, at the time of his death, which at any time after, shall come to the hands or possession of the said **A. B.** or into the hands and possession of any other person or persons for him, do well and truly administer according to law; and further, do make, or cause to be made, a true and just account of his said administration, at or before the day of , and all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the Orphans' Court of the county where the said administration is granted, shall deliver and pay unto such person or persons, respectively, as the said Orphans' Court, by their decree or

The registers to take bonds, on granting letters of administration.

Condition of the bonds.

1794. sentence, pursuant to the true intent and meaning of this act, shall limit and appoint; and if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said Register's office, making request to have it allowed and approved accordingly, if the said A. B. within bounden, being thereunto required, do render and deliver the said letters of administration, approbation of such testament being first had and made in the said Register's office, then this obligation to be void and of none effect, or else to remain in full force and virtue;" which bonds are hereby declared to be good to all intents and purposes, and pleadable in any courts of justice; and the said Orphans' Court in the respective counties shall and may, and are hereby enabled to proceed and call such administrators to account, for and touching the goods of any person dying intestate, and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear, after all debts and funeral and just expenses of every sort first allowed and deducted, amongst the wife and children, or childrens' children, if any such be, or otherwise to the next kindred to the person deceased, in equal degree, or legally representing their stocks, to every one his right, according to the rules and limitations hereafter set down, and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by the due course of the laws of this commonwealth, saving to every person or persons, supposing him or themselves aggrieved, their right of appeal: *Provided*, That the administrators be bound to furnish the inventory within one month, and to adjust and settle his accounts within one year.

Force of such bonds, &c.

Power of the Orphans' Court to compel settlement, &c.

Of inventories.

[SECT. II. Whereas inconveniences may arise from the debts of deceased persons remaining a lien on their lands and tenements an indefinite period of time after their decease, whereby *bona fide* purchasers may be injured, and titles become insecure: Therefore, *Be it enacted by the authority aforesaid*, That no such debts, except they be secured by mortgage, judgment, recognizance, or other record, shall remain a lien on said lands and tenements longer than seven years after the decease of such debtor, unless [*a demand thereof shall be made, or**] an action for the recovery thereof commenced and duly prosecuted against his or her executors or administrators, within the said period of seven years, or a copy, or particular written statement of any bond, covenant, debt or demand, where the same is not payable within the said period of seven years, shall be filed within the said period in the office of the Prothonotary of the county where the lands lie: *Provided always*, That a debt due and owing to a person, who, at the time of the decease of such debtor, is a feme covert, in his minority, *non compos mentis*, in prison, or out of the limits of the United States, shall remain a lien on the said lands and tenements (notwithstanding the said term be expired) until [*seven**] years after discoverture, or such person shall have arrived at the age of twenty-one years, be of sound mind, enlargement out of prison, or return into some one of the United States of America.]

(Repealed, 4th April, 1797, and supplied, chap. 1938.)

Of debts against an intestate's real estate.

(*The 4th section of the act of 4th April, 1797, is in the same words as the present section, omitting that part between crotchets.)

Proviso.

(**Four* years, by the 4th section of the act of 4th April, 1797.)

1794.

SECT. III. *And be it enacted by the authority aforesaid*, That the remaining part of any lands, tenements and hereditaments, and personal estate, of any person deceased, not sold or disposed of by will, nor otherwise limited by marriage settlement, shall be divided and be enjoined in manner following, to wit: if the intestate leaves a widow and lawful issue, the widow shall be entitled to one third part of the real estate, for and during her natural life, and to one third of the personal estate absolutely; and the remaining two thirds of the said estate, real and personal, shall immediately descend and be distributed to the lawful children of the intestate, such children always to inherit and enjoy, as tenants in common, in equal parts: And in case the person dying intestate shall leave several persons lawful issue in the direct line of lineal descent, and all of equal degree of consanguinity to the person so dying intestate, the said two thirds of such estate shall descend and be distributed to the said several persons, as tenants in common, in equal parts, however remote from the intestate the common degree of consanguinity may be, in the same manner as if they were all daughters of the person so dying intestate: And in case the intestate shall leave lawful issue of different degrees of consanguinity to him or her, the said two thirds of such estate shall descend, and the personal estate be distributed to the lawful child or children of the intestate, if either or any of them be then living, and to the lawful issue of such of the children as shall be then dead, leaving lawful issue, as tenants in common; such issue always to inherit, if one person, solely, and if several persons, as tenants in common, in equal parts, such share only as would have descended to his or their parent, if such parent had been then living; and each of the lawful children of the intestate always to inherit and receive such share as would have descended or been distributed to him or her, if all the children of the intestate, who shall be then dead, leaving lawful issue, had been living at the death of the intestate: And if there be no child of the intestate living at the death of the intestate, and only a grand-child or grand-children, and the lawful issue of a grand-child or grand-children, who shall be then dead, leaving lawful issue, then the real estate shall descend, and the personal estate be distributed, to such grand-child or grand-children of the intestate, and to the lawful issue of such of the grand-children of the intestate as shall be then dead, leaving issue, as tenants in common; such issue always to inherit, if one person solely, and if several persons, as tenants in common, in equal parts, such share only as would have descended to his, her or their parent, if such parent had been then living: And each of the grand-children of the person so dying intestate, who shall be living at the time of the death of the intestate, always to inherit and receive such share as would have descended or been distributed to him or her, if all the grand-children of the intestate, who shall be then dead, leaving lawful issue, had been living at the time of the death of the intestate: And the same law of inheritance, descent and distribution, shall be observed, in case of the death of the grand-children, and other descendants, to the remotest degree.

Distributions of estates, &c.

Where there is a widow and lawful issue.

Of persons in equal degree of consanguinity.

Case of lawful issue of different degrees of consanguinity.

Of grand-children and their lawful issue.

1794. SECT. IV. *And be it further enacted by the authority aforesaid,* That in case the intestate leaves no widow, the whole real and personal estate shall descend and be divided, as is directed in the preceding section with respect to the estate not disposed of in favour of the widow; and if the intestate shall leave a widow, and no lawful issue, the said widow shall have one moiety or half part of the real estate, including the mansion-house, during her natural life, except in cases, where, in the judgment of the Orphans' Court, the estate cannot with propriety be divided; and in that case she shall have and receive the rents and profits of one moiety of the real estate during her natural life, and one moiety of the personal estate absolutely, the remaining moiety to descend and be disposed of as is provided with respect to the whole estate, in case the intestate leaves no widow, and the real estate, so as aforesaid to be enjoyed by the widow during her natural life, shall descend and be disposed of as is by this act provided with respect to the whole estate, in case the intestate leaves no widow.

Where there is no widow.

Where there is a widow, but no lawful issue.

When the father shall inherit.

SECT. V. *And be it further enacted by the authority aforesaid,* That in case any person so as aforesaid seized or possessed shall die, leaving neither widow nor lawful issue, but leaving a father, the whole of the said real estate shall be enjoyed by the father of the intestate, for and during the natural life of such father; and the personal estate of the said intestate shall pass and be vested in the said father absolutely, unless the said real and personal estate, or either of them, came to the person so dying seized or possessed from the part of his or her mother, in which case the said estate, or such part thereof as shall have come from the part of his or her mother, shall descend, pass and be enjoyed or possessed, as if such person so dying seized or possessed had survived his or her father.

Exception.

When father, brothers and sisters, &c. shall inherit.

SECT. VI. *And be it further enacted by the authority aforesaid,* That if any person so dying seized shall leave neither widow nor lawful issue, but shall leave a father, and brothers and sisters, the said real estate shall descend to and be enjoyed by the brothers and sisters of the intestate, after the decease of the father, as tenants in common, in equal parts; and if any of the brothers or sisters of the intestate shall be then dead, leaving lawful issue, then it shall descend to and be enjoyed by the surviving brothers and sisters, and the lawful issue of such brothers or sisters, as shall be then dead, leaving lawful issue, such issue always to inherit, if one person, solely, if several persons, as tenants in common, in equal parts, such share only as would have descended to his, her or their parent, had such parent been then living; and each of the brothers and sisters of the person so dying intestate, who shall be living at the time of the death of the intestate, always to inherit and enjoy such share as would have descended and been distributed to him or her, if all the brothers and sisters leaving lawful issue had been living at the time of the death of the intestate; but if the intestate shall leave no brothers or sisters, nor their representatives, then the estate shall go to the father in fee simple, unless where the estate has descended from the part of the mother, as aforesaid.

When the mother shall inherit, &c.

SECT. VII. *And be it further enacted by the authority aforesaid,* That in case any person so as aforesaid seized or possessed shall die,

leaving [no*] widow nor lawful issue, nor father, but leaving a mother, the whole of the real estate shall be enjoyed by the mother of the intestate, for and during the natural life of such mother; and the personal estate of the said intestate shall pass and be vested in the said mother absolutely, unless the said real and personal estates, or either of them, came to the person so dying seized or possessed from the part of his or her father, in which case the said estate, or such part thereof as shall have come from the part of his or her father, shall descend, pass and be enjoyed or possessed, as if such person so dying seized or possessed had survived his or her mother. 1794. Exception.

SECT. VIII. *And be it further enacted by the authority aforesaid,* That if the person so dying seized shall leave neither widow nor lawful issue, but shall leave a mother, and brothers and sisters, the said real estate shall descend to and be enjoyed by the brothers and sisters of the intestate, or their representatives, after the decease of the mother, as tenants in common, in equal parts; and if any of the brothers or sisters of the intestate shall be then dead, leaving lawful issue, then it shall descend to and be enjoyed by the surviving brothers and sisters, and the lawful issue of such brothers or sisters as shall be then dead, leaving lawful issue, such issue always to inherit, if one person, solely, if several persons, as tenants in common, in equal parts, such share only as would have descended to his, her or their parent, had such parent been then living; and each of the brothers and sisters of the persons so dying intestate, who shall be living at the time of the death of the intestate, always to inherit and enjoy such share as would have descended and been distributed to him or her, if all the brothers and sisters leaving lawful issue had been living at the time of the death of the intestate. Where there is no widow nor issue, but a mother, and brothers and sisters, or their representatives.

SECT. IX. *And be it further enacted by the authority aforesaid,* That in case any child shall have any estate by settlement of the intestate, or shall be advanced by the intestate, in his or her life-time, by portion or portions, equal to the share which shall be divided and allotted to the other children, and other descendants, whether the same be by lands or personal estate, such person shall have no share of the estate of which the said person died seized or possessed; and in case any child shall have any estate by settlement from the intestate, or shall have been advanced by the said intestate in his or her life-time, whether the said portion or advancement be in real or personal property, but not equal to the share which will be due to the other children, or descendants, then so much of the surplusage of the said estate of the intestate to be distributed to such child or children, as shall make the estate of all the said children or descendants to be equal; excepting, nevertheless, that where the issue to take shall not be of equal degree to the person dying seized or possessed, the several descendants taking by representation to inherit and enjoy, the one person, solely, and several persons, as tenants in Of advancements to children, &c.

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* *The word* [no] *is omitted in the original roll, but is so obviously necessary to the sense of the act, that it has been thought proper to insert it here.*

1794. common, in equal parts, such share only as would have descended or been distributed to his, her or their parent or ancestor, if such parent or ancestor had then been living.

Of posthumous children.

SECT. X. *And be it further enacted by the authority aforesaid*, That all posthumous children shall, in all cases whatsoever, inherit in like manner, as if they were born in the life-time of their respective fathers.

When the half blood shall inherit.

SECT. XI. *And be it further enacted by the authority aforesaid*, That where any person shall die seized as aforesaid, leaving no children, or lawful issue, father or mother, brothers or sisters, or their lawful issue, of the whole blood, then brothers and sisters of the half blood, and their lawful issue, shall inherit the same as aforesaid, in preference to the more remote kindred of the whole blood, unless where such inheritance came to the said person so seized by descent, devise, or gift, of some one of his or her ancestors, in which case all those, who are not of the blood of such ancestor, shall be excluded from such inheritance.

kindred in equal degree, &c.

SECT. XII. *And be it further enacted by the authority aforesaid*, That the real and personal estate of any person dying intestate, in case such person leaves neither widow nor lineal descendant, nor father or mother, or brothers or sisters, of the whole or half blood, or lawful issue of any brother or sister of the whole or half blood, shall descend to and be divided among the next of kin of equal degree; and if any such kindred shall be then dead, leaving lawful issue, then it shall descend to and be enjoyed by such surviving kindred, and the lawful issue of such kindred as may be then dead, leaving issue, as tenants in common, such issue always to inherit, if one person, solely, and if several persons, as tenants in common, in equal parts, such share only as would have descended to his, her or their parent, if such parent had been then living; and each of the kindred in equal degree to the person so dying intestate, who shall be living at the time of the death of the intestate, always to inherit and receive such share as would have descended to him or her, if all such kindred leaving lawful issue had been living at the time of the death of the intestate.

Of dower.

SECT. XIII. *And be it further enacted by the authority aforesaid*, That the share of the estate of the intestate, in this act directed to be allotted to the widow, shall be in lieu and satisfaction of her dower at common law.

Order of paying debts.

SECT. XIV. *And be it further enacted by the authority aforesaid*, That all debts owing by any person within this state, at the time of his or her decease, shall be paid by his or her executors or administrators, so far as they have assets, in the manner and order following: First, physic, funeral expenses, and servants wages; Second, rents not exceeding one year; Third, judgments; Fourth, recognizances; Fifth, bonds and specialties; and that all other debts shall be paid without regard to the quality of the same, except debts due to the commonwealth, which shall be last paid; but if there shall not be assets sufficient to discharge and pay such bonds and specialties, and other debts, then, and in such case, the same shall be averaged, and the said creditors paid pro rata, or an equal sum or proportion in the pound, as far as the assets will extend, first paying

Proceedings, if there are not sufficient assets for all.

the bonds and specialties aforesaid; for which purpose the executors or administrators of such deceased person shall or may apply to the Orphans' Court of the proper county, which is hereby empowered to appoint three or more auditors, to settle and adjust the rates and proportions of the remaining assets due and payable to such respective creditors, whose report thereupon, if approved by the court, shall be confirmed, and the executors or administrators shall pay such creditors accordingly: *Provided nevertheless*, That no creditor, who shall neglect to exhibit his account to the executors or administrators, within twelve months after public notice given in one or more of the public newspapers of this state, and continued in such public newspapers for four weeks, shall be entitled to demand or receive any dividend of such remaining assets. 1794. Creditors when excluded from a dividend.

SECT. XV. *And be it further enacted by the authority aforesaid*, That to the end that a due regard be had to creditors, no administrator shall be compelled to make such distribution of the goods of any person dying intestate, until one year be fully expired after the intestate's death, and that each and every one, to whom any distribution and share shall be allotted, shall give bond, with sufficient securities, in the said Orphans' Court, that if any debt or debts truly owing by the intestate shall be afterwards sued and recovered, or otherwise duly made to appear, that then, and in every such case, he or she shall respectively refund and pay to the administrator his or her rateable part of that debt or debts, and of the costs of suits, and charges of the administrator, by reason of such debts, out of the part and shares so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts, so discovered after the distribution made as aforesaid. Of distribution.

SECT. XVI. *And be it further enacted by the authority aforesaid*, That in case distributions shall be made as aforesaid by the administrator, of all and singular the goods and chattels, rights and credits of the intestate, without making application to the Orphans' Court, each and every one to whom any distribution and share shall be allotted shall give bond, with sufficient sureties, to the said administrator, the condition of which bond shall be the same as is before directed, in case distribution is made by the Orphans' Court. Of distribution by parties.

SECT. XVII. *And be it further enacted by the authority aforesaid*, That in all cases, where the register hath used heretofore to grant administration, with a testament annexed, he shall continue so to do, and the will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been, if this act had never been made. Of administration, with the will annexed.

SECT. XVIII. *And be it further enacted by the authority aforesaid*, That all such of the intestate's relations, and persons concerned, who shall not lay legal claim to their respective shares within seven years after the decease of the intestate, shall be debarred from the same for ever: *Provided always*, That if any such relation or person shall, at the time of such title accrued, be within the age of twenty-one years, covert, non compos mentis, in prison, or out of the limits of the United States of America, that then such person, his or her heirs, executors or administrators (notwithstanding the said term shall have expired) shall and may recover, hold and enjoy Claims when barred. Proviso.

1794. the same, if he or she shall lay a legal claim thereto within seven years after his or her coming to full age, discoverture, coming to sound mind, enlargement out of prison, or return into some one of the said United States; and if any such relation or person concerned shall, at the time of the decease of the intestate, be feme sole, of sound mind, not in prison, and within the said United States, and shall afterwards, and within the said term of seven years, be covert, non compos mentis, in prison, or out of the United States, then such person shall not be barred his or her claim, notwithstanding the said term of seven years may have expired; provided the time which may have elapsed previously to such disability, together with the time subsequent thereto, and before such claim is made, does not exceed the said term of seven years.

How real estate may be sold to pay debts, &c.

SECT. XIX. *And be it further enacted by the authority aforesaid*, That if any person or persons shall die intestate, being owner or owners of lands or tenements within this state at the time of his, her or their death, and leave lawful issue, but not a sufficient personal estate to pay their just debts and maintain their children, in such case it shall be lawful for the administrator or administrators of such deceased person or persons to borrow on mortgage, giving the premises for security, any sum of money, not exceeding one third of the value thereof, or to sell and convey such part or parts of the said lands or tenements, as the Orphans' Court of the county where such estate lies shall in either case, from time to time, think fit to allow, order and direct, for defraying their just debts, maintenance of their children, and for putting them apprentices, and teaching them to read and write, for the improvement of the residue of the estate, if any be, to their advantage.

Of real estate in marriage settlements;

SECT. XX. *And be it further enacted by the authority aforesaid*, That no lands or tenements contained in any marriage settlement shall, by virtue of this act, be sold or disposed of contrary to the form and effect of such settlement, or shall any Orphans' Court allow or order any intestate's lands or tenements to be sold, before the administrator or administrators requesting the same shall exhibit a true and perfect inventory, and a conscionable appraisement of all the intestate's personal estate whatsoever, as also a just and true account, upon his, her or their solemn oath or affirmation, of all the intestate's debts, which shall be then come to his, her or their knowledge; and if thereupon it shall appear to the said Orphans' Court, that the intestate's personal estate will not be sufficient to pay the debts, and maintain the children, until the eldest of them attains to the age of twenty-one years, or to put them out to be apprentices, and to teach them to read and write, then, and in every such case, and not otherwise, the said Orphans' Court shall allow such administrator or administrators to make public sale of so much of the lands, as the said Orphans' Court, upon the best computation they can make of the value thereof, shall judge necessary for the purposes aforesaid, reserving the mansion house and most profitable part of the estate till the last; but before any such sale be made, the said Orphans' Court shall order so many writings to be made by the clerk, upon parchment or good paper, as the said Orphans' Court shall think fit, to signify and give notice of such sales, and of the

when real estate may be sold.

Order for sale.

Proceedings before a sale.

day and hour when, and the place where, the same will be, and what lands are to be sold, and where they lie, which notice shall be delivered to the sheriff or constables, in order to be fixed in the most public places of the county or city, at least ten days before sale; and the sheriff or constables are hereby required to make publication accordingly; and the administrator or administrators that make such sale shall bring his, her or their proceedings therein to the next Orphans' Court after the sale made; and if it shall happen that any lands be sold, by virtue of this act, for more than the said Orphans' Court's computation of the value thereof, then the administrator or administrators shall distribute the same, as by this is required for intestate's real estates. 1794. Return of the sale. Distribution of the surplus.

SECT. XXI. *And be it further enacted by the authority aforesaid*, That no lands, tenements and hereditaments, so as aforesaid sold by order of the Orphans' Court, shall be liable in the hands of the purchaser for the debts of the intestate. Of lands, so sold.

SECT. XXII. And to prevent any doubts which may hereafter arise, concerning the manner in which the partition of the intestate's estate may be made, *Be it further enacted by the authority aforesaid*, That it shall and may be lawful to and for the Justices of the Orphans' Court of the county in which the lands of the intestate shall be, upon a petition to them presented by the widow or relict, or by any child or children of such intestate, if of age, or by his or her, or by their guardian or guardians, or next friends, if under age, to appoint seven or more persons, indifferently chosen, on behalf and with consent of the parties, or where the parties cannot agree, to award an inquest to make partition, according to the purport and true meaning of this act; and upon the return made by the persons so to be appointed, or of the inquisition so to be taken, to give judgment that the partition thereby made do remain firm and stable for ever, and that the costs arising on such suit or suits be paid by the parties concerned: *Provided nevertheless*, That where any estate in lands, tenements and hereditaments, cannot be divided amongst the children, or widow and children of the intestate, without prejudice to or spoiling of the whole, the said seven or more persons, or the said inquest, as the case may be, shall make a just appraisement thereof to the Orphans' Court of the county where the same lands or tenements shall be, and thereupon the said court may, but not otherwise, order the whole to the eldest son, if he shall accept it, or any of the other sons, successively, upon the eldest son's neglect or refusal, or if there be no son, or all the sons neglect or refuse, then to the eldest daughter of the said intestate, and on her neglect or refusal, to any other of the said daughters, in the same manner successively, he, she or they, or some friend legally authorized for him, her or them, paying to the other children of the intestate their equal and proportionable part of the true value of such lands, tenements and hereditaments, as upon a just appraisement thereof, made as aforesaid, or giving good security for the payment thereof in some reasonable time, not exceeding twelve months, as the said Orphans' Court shall limit and appoint; and the person or persons to whom, or for whose use, payment or satisfaction shall be so made for their respective parts or shares of the Partition of the intestate's estate, how to be made. Proceedings where estate cannot be divided. Shares to be paid; Effect of such payment.

1794. deceased's lands, in manner aforesaid, shall be forever barred of all right, title, or demand, of, in, to, or out of the intestate's lands and tenements aforesaid; but where the widow is living, and the whole premises shall be adjudged and ordered to the eldest son, or any of the children, the wife of the person so deceased shall not be entitled to the sum, at which her purpart or share of the estate so as aforesaid ordered to the eldest son, or any of the children, shall be valued, but the same, together with the interest thereof, shall be and remain charged upon the premises, and the interest thereof shall be annually and regularly paid by the eldest son, or such other child, to whom the said lands shall be adjudged, his or her heirs or assigns, holding the said lands, to be recovered by such mother by distress, or otherwise, as rents in this commonwealth are usually recovered, to his or her said mother, during her natural life, which the said mother shall accept and receive, in lieu and full satisfaction for her dower at common law; and at the decease of the said mother, the said principal sum, so as aforesaid valued and adjudged, shall be paid by the said eldest son, or other child aforesaid, to whom the said lands shall be adjudged, his or her heirs or assigns, holding the premises, and shall be distributed and divided by the said court to and amongst the said children of her husband, and their representatives, according to the direction of this act: *Provided also nevertheless*, That when it shall appear, by the report of seven or more persons, chosen by the parties, or, where they cannot agree, by an inquest, appointed as aforesaid, that the real estate of any intestate will conveniently accommodate more than one child, the said court may settle the same on as many of the children (preference being always given to the eldest sons) as it will accommodate, without prejudice to or spoiling the whole, or, in case the intestate left no issue, the same may be assigned to so many of the next of kin to the intestate in equal degree, as such estate will conveniently accommodate, without prejudice to or spoiling the whole, (preference being given to the male heirs among such as are of kin in equal degree;) and if there be no sons, then to so many of the daughters, as the same will accommodate as aforesaid, the said children or next of kin to whom the said estate shall be so assigned, or some friend for them, paying, or securing to be paid, to the other children of the intestate, their respective parts of the value thereof, in the same manner as is herein before directed, where one of the children takes the whole of the real estate; and the said court, in directing the said payments to be made, or securities to be given, having regard to the value of the estate so assigned to the children or next of kin respectively.

Proceeding in such case where there is a widow;

and after her death.

Of partition of estate.

In favour of sons.

In favour of daughters.

Provision for children born after making a will, and not noticed therein.

SECT. XXIII. *And be it further enacted by the authority aforesaid*, That where any person, from and after the passing of this act, shall make his or her last will and testament, and afterwards shall marry, or have a child or children, not provided for in any such will, and die, leaving a widow and child, or either widow or child, although such child or children be born after the death of their father, every such person, so far as shall regard the widow or child or children after born, shall be deemed and construed to die intestate, and such child or children shall be entitled to such purparts, shares and divi-

dends of the estate, real and personal, of the deceased, as if he or she had actually died without any will; and in such cases the judges of the respective Orphans' Courts, so far as regards the wife after married, or child or children after born, shall have the same power and authority to make partitions, or where partitions cannot be made without prejudice to or spoiling the whole of that part of the estate devised to any child or children aforesaid, in that case to value, adjudge, and order the premises to the devisee or devisees of such part of the estate as cannot be divided as aforesaid, and, on the refusal of such devisee or devisees, to the children successively, as they may or can do where a person dies wholly intestate; and the devisee or devisees, or the child or children, to whom the premises shall be adjudged, shall pay the money, or give sufficient security for the same, as is herein directed, where the person dies intestate as aforesaid. 1794.

Appeal from the Register's Court.

SECT. XXIV. *And be it further enacted by the authority aforesaid*, That when any final decree or sentence shall be pronounced by any Register's Court, the party or parties, his, her or their heirs, executors or administrators, against whom such decree or sentence, or judgment, shall be given, may appeal therefrom to the Supreme Court, in all cases and instances where the sum mentioned in the said decree, sentence or judgment, or the sum or other matter in controversy, shall exceed the sum of fifty pounds.

Repeal of former acts;

SECT. XXV. *And be it further enacted by the authority aforesaid*, That the act, entitled "An act for the better settling of intestates' estates," and the act, entitled "A supplement to the act, entitled "An act for the better settling intestates' estates, and for repealing one other act of General Assembly of this province, entitled "An act for amending the laws relating to the partition and distribution of intestates' estates," (except the repealing clauses thereof,) be, and the same are hereby repealed, and made null and void: *Provided always*, That nothing herein contained shall in any degree affect the right or claim of any person or persons, which they may have acquired, or to which they may be entitled under any former laws, or prevent them from commencing any suit or suits, or carrying on and prosecuting any that may have been commenced, in the same manner, and with the same effect, as if this act had not been passed.

but not to affect titles or proceedings under them.

Passed 19th April, 1794.—Recorded in Law Book No. V. page 249. *(m)*

(m) By the 6th section of the royal charter, "the laws for regulating and governing property within the province, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, shall be and continue the same as they shall be, for the time being by the general course of the law in our kingdom of *England*, until the said laws shall be altered by the said *William Penn*, his heirs or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them." —(See appendix.)

The following is the observation of Chief Justice *Kinsey*, upon the foregoing section.

"Although it should be made a question, whether the statute laws of *England*, by the royal charter or otherwise, did, or do extend to this province; yet as the common law is generally allowed to be in force here in such cases wherein no alterations have been made by acts of Assembly; and as it appears to have been resolved in the earl of *Derby's* case, 4 *Inst.* 284, that land granted by letters patent from the crown, though out of the realm of *England*, should de-

1794. scend according to the course of the common law, it is clear, that from the date of the charter, until acts of Assembly were made to alter the same, lands, within this province, descended according to the course of common law."—

A variety of laws were accordingly made, previous to the year 1700, to regulate intestates' estates, of which a brief review will be here given; together with Chief Justice *Kinsey's* notes, or observations thereon.

By an act passed at an Assembly held in March, 1683, (110th law,) it was enacted, "That the estate of an intestate shall go to his wife, his child, or children, and if he leave no wife, child, or children, it shall go to his brothers and sisters, if any be, or to the children of such brothers or sisters; and in case no such be, one half shall go to the parents, and the other half to the next of kin: And for want of parents, one half shall go to the Governor, and for want of kin, the other half to the public. *Providing, always*, That the time of claiming exceed not three years after the death of such intestate."

By the 172d law, passed in the following year, (May, 1684,) "One third of the personal estate shall go to the wife; and one third of the lands and tenements during her natural life; the remainder, together with the other two thirds of the estate, shall go to the children, the eldest son having a double part or share; and in case the intestate leaves no child, then half the personal estate to the widow, and the moiety of the real estate during her natural life, the remainder thereof to the next of her husband's kin. And if he leaveth no wife, child, or children, it shall go to his brothers and sisters, if any be, or to the children of such brothers and sisters; and in case no such be, one half shall go to the parents, and one half shall go to the Governor; and for want of kin, the other half to the public stock of the county. And the estate of an intestate widow shall go to her child or children, to be divided and shared as before; and if she leave no child or children, the estate to be disposed of as before, if any be. And the estate of an intestate single man or woman shall go to his or her brother and sister, if any be, and for want of such, as before limited. *Provided*, That his or her debts be first paid; and that the time of claiming be within three years after the decease of the intestate party."

"From the passing of this act," Chief Justice *Kinsey* observes, "the course of the descents of land was altered. The eldest son, by this act, (where there were other children,) taking a double share only."

2. "By this act, it seems, where there were no children, the brothers and sisters, or their children, (where such there were,) of the intestate, took a joint estate; and where there were none, the parents took half the estate."

3. "This act continued to the year 1693, and then it received some alterations; amongst others, where there were no children, brothers or sisters, or their issue, were to inherit; and if there were none of these, it was to go to the parents; and for want of kindred, one half to the Governor, the other half to the county stock."

4. "The last mentioned act continued until 1700."

By the 188th law, passed in May, 1688, it was enacted, "That any person who died, or shall die intestate, being owner of lands within this province or territories, and hath left, or shall leave legal issue, it shall be lawful for the Court of Orphans, with the approbation of the Governor and Council, to empower the widow or administrator, in case of considerable debts, charge of child or children, to make sale of such parts or tracts of the said land, as the council and court shall judge meet, direct towards the defraying of such just debts, the education of such child or children, support of the widow, and the better improving the remainder of the estate to their advantage, and that this law continue and be in force for one whole year, and no longer."

Chief Justice *Kinsey* observes upon this act, "that it was continued to the year 1693, when executors and administrators were authorized to sell without the application here directed."

It appears by the petition of right in Governor *Fletcher's* time, the above law was declared to be in force on the 1st June, 1693, (See this petition prefixed to the first volume of this edition.)

But at an assembly held 15th of May and 1st of June, 1693, an act was passed entitled "The law about testates and intestates estates," by which it was enacted (in substance) after declaring real and personal estates liable to be taken in execution or sold by executors or administrators for payment of debts, "that the surplus of testators or personal estates after payment of debts, should be proportionably distributed according to their last wills; and the surplus of intestates' personal estates after payment of debts, should be distributed, one third to the wife, the residue among his children, and

such as legally represent them, (if any of them be dead) the eldest son having a double part or share; and if there be no children nor legal representatives of them, one moiety shall be allotted to the wife, the residue equally to intestates next of kin in equal degree, and those who represent them; and if intestate left no wife, child, or children, it shall go to his brothers and sisters, if any be, or to the children of such brothers and sisters; and in case no such shall be, it shall go to the parents; and for want of kindred, one half to the Governor for the time being, and the other half to the public stock of the county where such estate lyeth. And the personal estate of an intestate widow to go to her child or children, to be disposed of as aforesaid; and, of a single man or woman dying intestate, to go to his and their brothers and sisters, if any be, and for want of them, as before limited, *Provided*, That where testators, or intestates personal estates are sufficient to pay all debts, &c. then the real estate to be distributed in manner following. Testators' real estates to remain as their last wills and testaments devise the same; and one third of all intestates' lands to the wife for life, the residue to be allotted and distributed as the surplusage of personal estate is limited and directed.

Refunding bonds required, as well on the distribution of intestates, as of testates' estates. Claims not made within three years to be barred.

Executors and guardians to give bond, &c. to stand in force till they settle their accounts, and were legally discharged, and if any man shall refuse this honest care and charge in the government, unless he have five children to take care of, or is already executor to one will, or hath persons nearer related to him who in all likelihood will impose that charge upon him he shall be fined at the discretion of the court, who shall appoint another, &c."

"This act," says C. J. *Kinsey* continued to the year 1694, when another act was made authorizing sales of lands to be made by the widow or administrators, with the leave of the Governor and Council, or the county court, where there were debts to be paid, a charge of children, or it was necessary for the improvement of the residue of the estate, which last law continued to the year 1696."

2. "But then the first law was revived, which enabled executors or administrators to sell for payment of debts, and continued in force from the year 1696 to the 27th November, 1700."

"3. At which time two acts passed. The first entitled "An act for ascertaining the descent of lands, &c." whereby executors and administrators are authorized to sell their testators or intestates lands in manner directed by this act. The other act which passed the same session, is entitled "An act to empower widows and administrators to sell so much of the lands of intestates as may be sufficient to clear their debts, &c." which last mentioned act provides "That widows and administrators may sell so much lands of intestates (where there is not sufficient personal estate) as the Orphans' Court shall think fit, for payment of debts, education of children, and improvement of the residue. 1794.

4. "These acts continued till the 13th of the twelfth month 1705, and then were repealed."

The law about testates and intestates estates, or the act of revival, alluded to by the Chief Justice in No. 2, was passed in 1697, and is nearly in the same words as the act of 1693.

The act of 1700, for ascertaining the descent of lands, &c. alluded to in No. 3, after following the letter of the former acts, provides for the case of advancements to children, and declares that there shall be no representations admitted among collaterals, after brothers' and sisters' children; and the limitation for claims to be made is enlarged to seven years.

The act of 4th Anne, for the better settling of intestates estates, passed in 1705, (chap. 135,) is repealed by the act in the text.

The act directing the order of payment of debts of persons deceased, passed in 1705, (chap. 134,) is supplied by the act in the text.

An act for amending the laws relating to the partition and distribution of intestates estates, 22 Geo. 2, was passed 4th Feb'y, 1748-9, and repealed 23d March, 1764.

A supplement to the act, entitled "An act for the better settling intestates estates, and for repealing one other act of General Assembly of this province, entitled "An act for amending the laws relating to the partition and distribution of intestates estates, (chap. 512.) passed 23d of March, 1764, was repealed by the act in the text.

The old intestate laws are considerably altered by the act in the text, and that the reader may have a correct view of the change in the old law, the acts of 1705 and 1764, are herein inserted intire.

1794. *An* ACT *for the better settling of Intestates estates.*

Be it enacted, That the Register-General and his deputies, having power to grant letters of administration of the goods and chattels of persons dying intestate within this province, shall, upon their granting such letters of administration, take sufficient bonds, with two or more able securities, respect being had to the value of the estate, in the name of the Register-General, with the conditions in manner and form following, *mutatis mutandis*, *viz.*

"THE CONDITION OF THIS OBLIGATION IS SUCH, That if the within bounden A. B. administrator of all and singular the goods, chattels and credits of C. D. deceased, do make, or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him the said A. B. or into the hands and possession of any other person or persons for him: and the same so made do exhibit, or cause to be exhibited, into the Register's-Office, in the county of at or before the day of next ensuing; and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A. B. or into the hands and possession of any other person or persons for him, do well and truly administer according to law. And further do make, or cause to be made, a true and just account of his said administration, at or before the day of And all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the said administrator's accounts, the same being first examined and allowed of by the Orphans' Court of the county where the said administration is granted, shall deliver and pay unto such person or persons respectively as the said Orphans' Court, in the respective county, by their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint. And if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said Register's office, making request to have it allowed and approved accordingly: If the said A. B. within bounden, being thereunto required, do render and deliver the said letters of administration, approbation of such testament being first had and made in the said Register's office, then this obligation to be void and of none effect, or else to remain in full force and virtue."

Which bonds are hereby declared and enacted to be good, to all intents and purposes, and pleadable in any courts of justice; and also, that the said Orphans' Court, in the respective counties, shall and may, and are hereby enabled to proceed and call such administrators to account, for and touching the goods of any person dying intestate: And upon hearing, and due consideration thereof, to order and make just and equal distribution of what remaineth clear, after all debts, funeral and just expenses of every sort, first allowed and deducted, amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person, in equal degree, or legally representing their stocks, to every one his right, according to the laws in such cases, and to the rules and limitations hereafter set down: and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of laws of this province; saving to every one supposing him or themselves aggrieved, their right of appeal to the Provincial or Supreme Court of this province.

11. *Provided always*, That the said Orphans' Court in each county, which is by this act enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following, that is to say, one third part of the said surplusage to the wife of the intestate, and all the residue, by equal portions, to and amongst the children of such person dying intestate, allowing the eldest son two shares; and to such persons as legally represent such children, in case any of the said children be then dead (other than such child or children who shall have any estate by the settlement of the intestate, or shall be advanced by him in his life-time, by portion or portions, equal to the share which shall by such distribution be allotted to the other children) to whom such distribution is to be made. And in case any child who shall have any estate by settlement from the intestate, or shall be advanced by the said intestate in his life-time by portion, not equal to the share which will be due to the other children by such distribution as aforesaid, then so

much of the surplusage of the estate of such intestate to be distributed to such child or children, as shall have any land by settlement from the intestate, or were advanced in the life-time of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated, the eldest son being allowed two shares as aforesaid. And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, and the residue of the said estate to be distributed equally to every of the next kindred of the intestate, who are in equal degree, and those who legally represent them: *Provided*, That there be no representatives admitted amongst collaterals, after brothers and sisters children. And in case there be no wife, then all the said estate to be distributed equally to and amongst the children, the eldest son to have two shares as aforesaid. And in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner aforesaid

III. *Provided also*, and to the end that a due regard be had to creditors, That no such distribution of the goods of any person dying intestate be made, till after one year be fully expired after the intestate's death. And that such and every one to whom any distribution and share shall be allotted, shall give bond, with sufficient securities, in the said Orphans' Court, that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear, that then, and in every such case, he or she shall respectively refund and pay back to the administrator his or her rateable part of that debt or debts, and of the cost of suit and charges of the administrator, by reason of such debts, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts, so discovered, after the distribution made as aforesaid.

IV. *Provided always, and be it further enacted*, That in all cases, where the Register-General hath used heretofore to grant administration, with a testament annexed, he shall continue so to do; and the will of the deceased, in such testament expressed, shall be performed and observed in such manner as it should have been if this act had never been made.

V. *Provided also*, That all such of the intestate's relations, and persons concerned, who shall not lay legal claim to their respective shares, within seven years after the decease of the intestate, shall be debarred from the same for ever.

VI. *And be it further enacted*, That if any person or persons shall die intestate, being owners of lands or tenements within this province at the time of their death, and leave lawful issue to survive them, but not a sufficient personal estate to pay their just debts and maintain their children, in such case, it shall be lawful for the administrator or administrators of such deceased to sell and convey such part or parts of the said lands or tenements, for defraying their just debts, maintenance of their children, and for putting them apprentices, and teaching them to read and write, and for improvement of the residue of the estate, if any be, to their advantage, as the Orphans' Court of the county where such estate lies shall think fit to allow, order and direct from time to time.

VII. *Provided always*, That no lands or tenements, contained in any marriage settlement, shall, by virtue of this act, be sold or disposed of, contrary to the form and effect of such settlement; nor shall any Orphans' Court allow or order any intestate's lands or tenements to be sold before the administrator, requesting the same, doth exhibit one or more true and perfect inventories and conscionable appraisement of all the intestate's personal estate whatsoever, as also a just and true account, upon his or her solemn affirmation, of all the intestate's debts which shall be then come to his or her knowledge; and if thereupon it shall appear to the court, that the intestate's personal estate will not be sufficient to pay the debts and maintain the children, until the eldest of them attains to the age of twenty-one years, or to put them out to be apprentices, and teach them to read and write, then, and in every such case, and not otherwise, the court shall allow such administrator to make public sale of so much of the said lands, as the court, upon the best computation they can make of the value thereof, shall judge necessary for the purposes aforesaid, reserving the mansion-house and most profitable part of the estate till the last. But before any such sale be made, the court shall order so many writings to be made by the clerk, upon parchment or good paper, as the court shall think fit, to signify and give notice of such sales, and of the day and hour when, and the place where the same will be,

1794. and what lands are to be sold, and where they lie; which notice shall be delivered to the Sheriff or Constables, in order to be fixed in the most public places of the county or city, at least ten days before sale; and the Sheriffs or Constables are hereby required to make publication accordingly, and the administrator that makes such sale shall bring his or her proceedings therein to the next Orphans' Court, after the sale made. And if it shall happen that any lands be sold, by virtue of this act, for more than the Court's computation of the value thereof, then the administrator shall be accountable for the same, as by this act is required for intestates personal estates.

VIII. *And be it further enacted*, That the surplusage or remaining part of the intestate's lands, tenements and hereditaments, not sold, or ordered to be sold by virtue of this act, and not otherwise limited by marriage settlement, shall be divided between the intestate's widow and children, or the survivors of them, who shall equally inherit and make partition, as tenants in common may or can do. But if the intestate leaves a widow and no child, then such widow or relict shall inherit one moiety or half part of the said lands and tenements, and the other moiety shall descend and come to the intestate's next heir, according to the course of the common law. But if the intestate leaves no widow nor child living at the time of his death, or if the children all die in their minority, without issue, then the said lands and tenements shall descend and come to the intestate's heir at law, according to the course aforesaid. But if any of the intestate's children, dying before the intestate, shall leave lawful issue, such issue shall equally inherit the intestate's lands and tenements, with their uncles or aunts, and make partition as aforesaid.

IX. *Provided always*, That no widow or child of any intestate, having so much land by settlement from the said intestate, as, by the said Court's computation of the value thereof, shall be equal to the share or purpart of the intestate's lands, which by this act are to be allotted to any of the other children in manner aforesaid, then such widow or child, so provided for, shall have no share of the said surplusage of the intestate's other lands. But if the value of the land, so settled by the intestate, shall not, by the computation aforesaid, amount to an equal share, then the said court shall allot to the party so much of the said other lands, as shall make the shares or estate of the widow and all the said children equal, as near as can be estimated, the eldest son having a double share as aforesaid.

X. *Provided also*, That nothing in this act contained shall give any widow a right or claim to any part of such lands or tenements, for her dower or thirds, as shall yield yearly rents, or profits, whereof her husband died seized, for any longer time than the term of her natural life; which dower she shall hold as tenants in dower do in England. And the said profitable lands or tenements, and the unimproved or rough land next adjacent thereto, shall not be sold, but for payment of the intestate's debts.

XI. *Provided also*, That no partition of the lands or tenements which are to be divided by this act, shall be made by or for the relict or younger children of the intestate, if the heir at law will, within the space of twelve months, pay so much money, or other effects, to the person or persons demanding such partition, as their respective shares or purparts shall amount unto, by the valuation of four or more persons indifferently chosen by both parties, or by an inquest appointed by the Orphans' Court to value the same, where the parties cannot otherwise agree. And the person or persons, whether minors or others, to whom, or for whose use, payment or satisfaction shall be made for their respective purparts by the heir at law, in manner aforesaid, shall be for ever debarred of all the right, title and demand, which he or they can or may have, of, in or to such share or purparts, by virtue of this act; but the same shall be held and enjoyed by the heir at law, as freely and fully as the intestate held the same.

XII. And in case such intestate shall have no known kindred, then all his lands, tenements and hereditaments, shall escheat or go to the immediate landlord of whom such lands are held, his heirs and assigns; and if immediately held of the proprietary, then to the proprietary, his heirs and assigns; and all the goods, chattels and personal estate whatsoever, of such person dying intestate, and without kindred as aforesaid, shall go to the proprietary and governor, his executors or administrators. But if any of the said intestate's relations shall appear, and make their claims to such intestate's personal estates within seven years after the decease of the intestate, they shall be restored thereunto.

XIII. And if the lawful heir to any such lands or tenements shall at any time, within twenty-one years after the

intestate's decease, appear, he may traverse the inquisition or office found for the land so escheated, and recover the same, paying the lord or person in possession, for the improvements made thereupon, according to the valuation of twelve men.

A supplement to the act, entitled "An act for the better settling intestates estates, and for repealing one other act of General Assembly of this province, entitled "An act for amending the laws relating to the partition and distribution of intestates estates."

Whereas an act of General Assembly of this province was passed in the fourth year of Queen Anne, entitled "An act for the better settling intestates estates, which, by one other act, passed in the twenty-second year of his late majesty King George the second, was in some parts thereof altered, explained and amended; and forasmuch as some further explanations and amendments are found necessary; therefore, and in order to reduce the laws relating to intestates estates into as few acts as may be, and repealing such as shall thereby become of no further service, *Be it enacted*, That from and after the fourth day of February, one thousand seven hundred and forty-eight, if after the death of any father and mother any of their children hath died, or, at any time after the passing of this act, shall die intestate, in their minority, unmarried, and without issue, but not otherwise, the lands, tenements, hereditaments and estates, real and personal, of every such intestate, shall be equally divided amongst the surviving children, and the representatives of any child or children then dead, those representatives taking only such part or share, as should have passed to the child or children they represent respectively in severalty forever. But if any child, either of age or in his or her minority, having or being entitled to any personal estate under such father, shall, after the passing of this act, die intestate, unmarried, and without issue, during the life of his or her mother, all such personal estate shall be equally divided between such mother of the deceased, and his or her brothers and sisters, and their legal representatives, in case any such brother or sister be then dead, they the said representatives only taking the share that should have passed to his, her or their parents, had he or she been living.

II. *And be it further enacted*, That the shares and purparts of intestates real estates, which by the act for settling intestates estates aforesaid are given to widows, shall be construed and understood to be estates for their natural lives respectively, and not otherwise. 1794.

III. And to prevent any doubts which may hereafter arise, concerning the manner in which the partition of intestates estates may be made, *Be it enacted*, That it shall and may be lawful to and for the Justices of the Orphans' Court of the county in which the lands and tenements of intestates shall be, upon a petition to them presented by the widow or relict, or by any child or children of such intestate, if of age, or by his or her, or by their guardian or guardians, or next friends, if under age, to appoint four or more persons, indifferently chosen on behalf and with consent of the parties, or, where the parties cannot agree, to award an inquest, to make partition according to the purport and true meaning of the act for settling intestates estates herein before mentioned; but so, nevertheless, that due regard be had to the amendments made by this act; and upon the return to them made by the persons so to be appointed, or of the inquisition so to be taken, to give judgment, that the partition thereby made do remain firm and stable for ever, and that the cost arising on such suit or suits be paid by all the parties concerned.

IV. *Provided nevertheless*, That where any estate in lands, tenements and hereditaments, cannot be divided amongst the children, or widow and children of the intestate, without prejudice to or spoiling of the whole, the same being so represented and made appear to the Orphans' Court of the county where the same lands or tenements shall be, then the said court may, but not otherwise, order the whole to the eldest son, if he shall accept it, or any of the other sons successively, upon the eldest son's refusal; or if there be no son, or all the sons refuse, then to the eldest daughter of the said intestate, and on her refusal, to any other of the said daughters successively; he or they, or some friend for him, her or them, paying to the other children of the intestate their equal and proportionable parts of the true value of such lands, tenements or hereditaments, as upon a just appraisement thereof, pursuant to the act for settling intestates estates aforesaid, is directed, or giving good security for the payment thereof in some reasonable time, as the said Orphans' Court shall limit and appoint; and the person or persons to whom, or whose use, payment or satisfaction shall be so made for their respective parts or shares

1794. of the deceased's lands, in manner aforesaid, shall be forever barred of all right, title or demand, of, in, to or out of, the intestate's lands and tenements aforesaid. But where the wife is living, and the whole premises shall be adjudged and ordered to the heir at law, or any other of the children, the wife of the person so deceased shall not be entitled to the sum at which the purpart or share of her estate, so as aforesaid ordered to her heir at law, or any of the children, shall be valued, but the same, together with the interest thereof, shall be and remain charged upon the premises, and the interest thereof shall be regularly and annually paid by the heir at law, or such other child to whom the same shall be adjudged, his or her heirs or assigns holding the said lands, to be recovered by such mother, by distress or otherwise, as rents in this province are usually recovered, to his or her said mother, during her natural life; which the said mother shall accept and receive, in lieu and full satisfaction for her dower at common law: And at the decease of the said mother the said principal sum, so as aforesaid valued and adjudged, shall be paid by the said heir at law, or other child aforesaid, to whom the same shall be adjudged, his or her heirs or assigns holding the premises, and shall be distributed and divided by the said court to and among the said children of her husband, and their representatives, according to the directions of the act of Assembly herein before mentioned, made in the fourth year of Queen Anne, allotting two shares to the eldest son, or to his representative or representatives.

v. *And be it further enacted*, That where any person, from and after the fourth day of February, one thousand seven hundred and forty-eight, hath made, or hereafter shall make, his or her last will and testament, and afterwards hath married or had, or after the passing of this act shall marry or have, a child or children not provided for in any such will, and die, although such children be born after the death of their father, every such person, so far as shall regard the child or children after born, shall be deemed and construed to die intestate, and such child or children shall be entitled to like purparts, shares and dividends of the estate, real and personal, of the deceased, as if he or she had actually died without any will: And in such cases the Justices of the respective Orphans' Courts, so far as regards the wife after married, or child or children after born, shall have the same power and authority to make partitions, or where partitions cannot be made, without prejudice to or spoiling the whole of that part of the estate devised to any child or children aforesaid, in that case to value, adjudge and order the premises to the devisee or devisees of such part of the estate as cannot be divided as aforesaid, and on the refusal of such devisee or devisees, to the children successively, as they may or can do where a person dies wholly intestate; and the devisee or devisees, or the child or children to whom the premises shall be adjudged, shall pay the money, or give sufficient security for the same, as is herein directed where the person dies intestate as aforesaid.

vi. *And be it further enacted*, That so much of the act of Assembly herein before recited, entitled "An act for better settling intestates estates," as is herein and hereby altered, or is repugnant to the provisions made by this act, shall be and is hereby repealed, made null and void, any thing in the said act contained to the contrary thereof notwithstanding.

vii. *And be it further enacted*, That the act herein before mentioned, passed in the twenty-second year of the late king George the second, entitled "An act for amending the laws relating to the partition and distribution of intestates estates," and every part thereof, shall be and is hereby declared to be repealed, and made null and void, to all intents and purposes whatsoever.

viii. *Provided nevertheless*, That nothing in this act contained shall be deemed, construed or taken to bar, defeat or destroy any right, title or interest, heretofore arisen or accrued to any person or persons, of, in, or to any estate, real or personal, or to alter or make void any settlements or partitions of intestates estates, made in virtue of the act herein last before recited, and hereby repealed.

See vol. 1, page 81, (chap. 197,) and the notes thereto subjoined, and the act for the probate of wills, *ib.* page 33, (chap. 133,) and the notes thereto subjoined.

The following cases have occurred under the former intestate laws.

Anonymous, 1774.

John Fisher having two sons and a daughter, made his will, and devised his plantation to his son *Matthias* in fee. Matthias died intestate, in his minority, without issue.

Question: Whether his heirs at common law shall take, or it shall divide among his other brother and sisters, under the supplemental intestate law, (23d March, 1764.)

On a trial in ejectment for the plantation, it was agreed by counsel, that

the opinion of the court should be conclusive to the jury.

Mr. Justice *Willing*, and Justice *Lawrence*, were of opinion, and so delivered it to the jury, that the estate should be divided; and the plaintiff suffered a nonsuit. 1 *Dallas' Rep.* 20.

The same point was solemnly decided in *Kerlin's* lessee v. *Bull*, 1 *Dallas' Rep.* 175.

Walton v. *Willis*, 1 *Dallas' Rep.* 265. Where an heir at law took an intestate's lands at a valuation, it had been the practice of the Orphans' Court throughout the state, only to require him to give *bonds* to those who were entitled, under the act of Assembly, to a distributive share of his estate.

The *Chief Justice* said, in the course of the argument in this cause, that the practice above mentioned, was illegal and improper; for the Orphans' Courts ought, instead of *bonds*, which are a mere personal security, to take *recognizances*, by which the lands would be bound for the payment of the distributive shares. He added, that the court would not enter into a retrospect upon this subject; but that, for the future, they would expect a conformity to the opinion now given.

And afterwards, in the same case, *ib.* page 351, being an appeal to the Supreme Court from the *Orphans' Court* of *Philadelphia* county, *M'Kean*, C. J. stated the case, and delivered the opinion of the court, in the following manner.

Elizabeth Willis being seized of the premises, died intestate, leaving issue a daughter, named *Elizabeth*, who had intermarried with *Samuel Walton* the appellant, and by him had issue two sons, *Joseph* and *Boaz*; and four grand-children, to wit, *Thomas* the respondent, *Solomon*, *Musgrove* and *Rebecca*, being the children of her son *Solomon Willis*, deceased, who had died before her, intestate. The daughter, *Elizabeth Walton*, died after her mother and her husband, the appellant, and their two children, before named, survived her. *Thomas Willis*, the respondent, applied by petition to the Orphans' Court of the county of *Philadelphia*, held on the 1st of *April*, 1782, for a partition of the premises, or, if they could not be divided without prejudice to, or spoiling the whole estate, that a valuation thereof might be made agreeably to the directions of the acts of Assembly in such case made and provided. An inquest was accordingly had, and a return made, that the premises could not be divided without prejudice to, or spoiling the whole, and valuing the same at £. 358. This return was confirmed by the court on the 10th of June, 1782, and the premises were adjudged to, and accepted by *Thomas Willis*, the respondent, at the above valuation; and for securing the payment of that sum in due proportions to the other *grand-children*, he offered to the court two sureties, who were approved of, and directed to give bonds in the office of the clerk of the court, unto the other grand-children, for their respective shares; *but no such bonds or security have yet been given.* 1794.

On these proceedings an appeal is brought before this court; and, upon the argument, the counsel have done great justice to their respective clients. It was our wish, however, that the opinions and practice of the several *Orphans' Courts* of *Pennsylvania*, had been ascertained in cases of this description; and that we might be informed, whether any case upon similar principles, had been ever determined in the *Supreme Court*; for we should be exceedingly cautious in pronouncing a judgment that might shake estates held in this way. As we have not yet obtained full satisfaction on this head, we would still wish to defer giving our opinion; but that we think it proper, from the length of time the cause has been under advisement to proceed upon the lights we have received.

On the part of the appellant six exceptions have been taken to the proceedings in the *Orphans' Court.*

1. That it is no where mentioned who are the representatives of *Elizabeth Willis*, the intestate; nor into how many parts the estate should be divided; but the whole is left to the sheriff.

2. That the court had adjudged the estate to a *grandson*; whereas they had no authority to go beyond the first degree in the descending line.

3. That even if the acts of Assembly did empower the court to go farther, to wit, to the grand-children, yet that the adjudication ought to have been to all the children of the eldest son, and not to his eldest son exclusively.

4. That no provision is made for the appellant, *Samuel Walton*, who is tenant by the curtesy of his wife's share, to wit, of a third part, in three parts to be divided.

5. That the judgment is uncertain with respect to the valuation money; inasmuch as the amount of each share is not particularized, nor the time of payment limited.

6. That the partition ought to be made by one inquest, if practicable; but if not practicable, and so returned, the valuation ought to have been made by another inquest; and that on the

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whole, no estate can be vested in *Thomas Willis*, by his acceptance at the valuation, as no security has yet been given for the money.

The weight of these exceptions depends on the due construction of the act of Assembly, entitled "An act for the better settling of intestates estates," the supplement to that act, and the practice under both of them.

1. With respect to the *first* exception; we think it would be well for the party praying for a partition of an intestate's real estate, to be particular in the names of the persons entitled to shares, and of the purparty of each; and in this respect to pursue the form of a declaration in partition, and of the return of a writ *de partitione facienda*. But to reverse an inquest for this omission, would certainly affect many estates, as these proceedings in the *Orphans' Courts*, are frequently drawn by persons not much skilled in strict forms; and in the present case, as the return of the sheriff has been, that the estate could not be divided without prejudice to, or spoiling the whole, no wrong or damage seems to have been done to any one. For these reasons we must overrule this objection.

2. The *second* exception introduces a question, whether a *grandson*, that is, the eldest son of the eldest son of the intestate, is entitled to an estate, which cannot be divided, at the valuation, in the same manner as his *father?* And this must be decided by the words, purview, and intent of the legislature, in the two acts of Assembly which have already been cited. The *main intent* of these acts, appears to have been, that real estates should be divided among the children, or representatives in the descending line of an intestate; and not descend to the heir at common law. But a *secondary, and the next intent*, seems to have been, to prevent estates from being split and frittered into many parts, to their manifest prejudice; and accordingly, it is provided, that where that would happen, the eldest son, or heir at law, should have his election of taking the land at a valuation, to be made in the manner prescribed in the acts.

The reason of a law will have a great influence in determining its *extent*, and on the present occasion, the reason alluded to, is much stronger in the case of a *grandson*, than of a *son;* for in this case, the distributive shares will probably be most numerous, and, consequently, most injurious to the land by a partition or division. The words "heir at law," in both acts, are, in strict grammatical construction, an expression, or substitute for *eldest son;* but the reason of the law, and the usage ever since the passing those acts of Assembly, (as we have been informed) will warrant a more extensive and beneficial interpretation of them. We think, therefore, that this objection likewise fails, as well as

3. The *third* objection, which we overrule; *Thomas* being alone the heir at common law.

4. But the *fourth* exception appears to the court to be *fatal*. There ought to have been a provision made for *Samuel Walton*, who had an estate for life by the curtesy, and yet he is not even *named* in the *sentence*, or *decree* of the court below. When a writ *de partitione facienda* is issued, the sheriff is obliged to *summon* all the parties to attend; and if they do attend, he must make partition in their *presence*. The same thing is not, indeed, *expressly* required in the partition, or valuation to be made under the acts of Assembly; yet natural justice, and the constant rules of all courts require, that every person, who is interested in the proceedings, should be *summoned* and *heard*, 3 Mod. 378. It may not, perhaps, be the practice, nor is it necessary in this case, that it should *be set out in the return by the inquest*, though we would wish that to be done, but it is essential to justice that all parties should in fact have notice. On the proceedings before the *Orphans' Court*, the appellant has not been made even a *party* in the decree; and the presumption, of course, is, that he was neither *summoned, nor present*. If he had been present, he might possibly have urged such arguments, as would have induced the inquest to have put a higher estimate, or value, upon the premises, and an opportunity ought to have been given to him for that purpose.

5. As to the *fifth* exception; there does not appear to be sufficient certainty in the sentence of the court: inasmuch as the purparts of the valuation money are not specified, nor the time of payment fixed. But this court might reduce both these points to certainty, were there no other exceptions; and in that case, the whole costs of the appeal would fall upon the respondent.

6. On the *sixth* exception, we must observe, that the practice in the *Orphans' Courts* has been to direct the same inquest, which is appointed to make partition of real estate, if that cannot be done without prejudicing the whole, then to make the valuation. This court, therefore, will not now un-

dertake to alter this long established practice, though it is liable to some exceptions. But we are of opinion, that the fee in the premises cannot yet be vested in *Thomas Willis*, as he neither paid, nor secured the payment of the valuation money to those who are entitled to receive it.

Upon the whole let the sentence, and decree of the Orphans' Court, be reversed.

Upon the death of a man, intestate, his lands are bound for the payment of his debts in such a manner, that they may be taken in execution and sold, notwithstanding the heir may have previously sold and conveyed the same to *bona fide* purchasers; and in such case, the purchaser from one heir is bound to contribute in aid of the other heirs, whose lands remain unsold. *Graff* v. *Smith's* administrators, 1 *Dallas*, 481. But on this subject, see the notes to chap. 48, vol. 1, page 8, and sect. 21, of the act in the text with respect to purchasers under an order of the Orphans' Court.

And see the construction of the 21st section of the act in the text, in *Moliere's* lessee v. *Noe*, 4 *Dallas' Rep.* 450. In which it is held, that a purchaser of intestates' lands under an order of Orphans' Court, is protected from the lien of *judgments*, as well as *other debts* of intestate; but not from mortgages.

The act of 1705, only regulated the descent of lands among the children, where the father was seized thereof, and might dispose of them by *deed* or *will*.

This principle was held in the cases of the *Lessees of Souder and wife, and Shultz and wife*, v. *Morningstar*, at *York, Nisi Prius, October*, 1793, before *M'Kean*, C. J. and *Yeates* J. (*MSS. Reports.*)

On the 15th of July, 1745, *John George Countz* conveyed, by deed, the premises in the declaration mentioned, containing 150 acres, "to *Philip Morningstar*, (father of defendant, and wives of the plaintiff's lessors,) and his heirs begotten on his present wife *Eve Morningstar*, forever, to have and to hold the same to the said P. and his heirs born of his present wife *Eve* forever, with covenant of warranty."

The question submitted to the court for their decision, was, whether the lands intailed by this deed, descend agreeably to the course of the common law, *per formam doni*, or are to be distributed according to the acts of Assembly regulating the estates of intestates.

For the plaintiffs, it was contended, that wherever the ancestor takes an estate of freehold, and an estate is limited either mediately or immediately *to his heirs*, they are to be deemed words of limitation and not of purchase. *Shalley's case*, 1 *Rep.* 104 a. This rule is unshaken. Where the heir takes in the *character* of heir, he must take in the *Quality* of heir. *Jones* v. *Morgan*, 1 Bro. Chan. ca. 216, all heirs taking as heirs, must take by descent, *ib.* 219. In *England* the leading custom is, that the eldest son shall inherit lands: But it is otherwise in *Pennsylvania*, where all the children by the act of 1705, are put upon an equal footing, except that the eldest son takes a double share. The intestate act of 1705, is a general law of descents and distribution. 1 *Dallas' Rep.* 482, one co-heir shall have contribution against another co-heir, under our laws of descent, *ib.* 484-5. Our constitution and laws favour equality among the heirs and distribution of estates, *ib.* 178. The children of an intestate take by descent analogous to the heirs of *gavel-kind* lands. Where lands of the nature of *gavel-kind* are given to B. and his heirs, he having issue divers sons, all his sons after his decease shall inherit Co. Lit. 10, a. One seized of lands in *gavel-kind*, gives or devises the same to a man and his *eldest* heirs, he cannot hereby alter the customary inheritance, and the law rejecteth the adjective "eldest," ib. 27, a-b, all the heirs shall inherit an estate tail in *gavel-kind* lands. *Weeks* v. *Carvel*, Noy. 106. Upon recovery of lands in borough English, writ of error descends according to the lands, 1 Leon. 261. He who is special heir by the custom, as of Borough English land, shall bring the writ of error, and not the heir at common law, 4 Leon. 5. A conveyance of gavel-kind lands obtained from persons uninformed of their rights, was set aside though there was no actual fraud or imposition, 2 Bro. Chan. Ca. 151, A. having three sons, B. C. and D. D. died, leaving a daughter E. A. purchased lands in Borough English, and died. Adjudged they shall descend to E. 2 *Ld. Raym.* 1024. Each son takes a part of gavel-kind lands, but the youngest son takes the whole of Borough English lands, *ib.* 1025, one seized of lands in Borough English made a feoffment to the use of himself and the heirs male of his body begotten, *secundum cursum communis legis*; and held, that the youngest son shall have them by descent notwithstanding. Dyer. 179, b. pl. 45. *Heirs male* of testator's body may be meant as synonymous to *issue male*. Cowp. 314. In a provision for children by marriage settlements, all are entitled; for as there are no chil-

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1794. dren *in esse* before marriage to whom it can be applied, it must mean all; and there is no place to draw the line in; nor any reason why it should be for one more than another. It is a parental provision made as a debt of nature, and therefore all are entitled. 1 Vez. 114. We are credibly informed that a decision similar to what we contend for, has taken place in *Connecticut*, in the case of *Chester* v. *Chester*. And we further contend, that our construction supports the real intention of the conveyance, and the true spirit of the laws and constitution of this commonwealth. We have nothing further to do with the pride of family in the character of an elder son.

The counsel for the defendant were prepared to proceed in the argument, when they were told by the court, that they would be saved that trouble.

The court observed, that it was too late now to stir this point, whatever reason there might have been for it in the first instance. The invariable opinion of lawyers, since the act of 1705, had been, that lands intailed descended according to the course of the common law, and it has been understood generally, that it has been so adjudged in early times. All the common recoveries which have been suffered by the heirs of donees in tail, have been conformable to that principle. As to gavelkind lands, it is observed by Mr. *Hargrave*, (Co. Lit. 10 a. note 3,) that all the sons are as much heirs to *such* land, as the eldest son is heir to land descending according to the course of the common law. The custom of gavelkind extends to estates tail, and that too, irresistibly, according to some authorities; and cites, Dyer, 179, b. Robins. Gavelk. 94—on this *custom*, therefore alone, depend all the resolutions. Our act of 1705, only regulates the descent of lands amongst the children, where the father is seized thereof, and might dispose of them by deed or will; it leaves other cases of descent as they were at common law; and hence an elder brother succeeds to the estate of a younger brother, who dies intestate, unmarried, and of full age, in preference to his other brothers and sisters. In the present case, the lands are claimed under the grandfather, *per formam doni*, through the father. We are clearly of opinion with the defendant.

So a trust estate, in *Pennsylvania*, descends, in case of intestacy, to the heir at common law. Lessee of *Jenks* v. *Backhouse*. 1 Binney, 91, which also recognizes the foregoing case.

Under the act of 1705, the real estate of a mother, being a widow, is subject to the same rules of distribution, as that of a father dying intestate, (*MSS. Rep.* Sup. Court. December, 1799,) *Eshelman's lessee* v. *Hoke*.

And in the case of *Joseph Duncan*, administrator of *Dinah Duncan*, v. administrators of *Daniel Duncan*, deceased, The following case was stated for the opinion of the court, at the circuit court at *Carlisle*.

The said *Dinah Duncan* was the widow of the aforesaid Daniel, and died on the 4th January, 1791.

It is agreed, that the defendants having made distribution of the estate of the said Daniel Duncan, among his representatives, that distribution shall stand as far as it has been made; and that the plaintiff shall only claim his share of his mother, the said *Dinah's* estate, as her eldest son; and it is submitted to the court, to determine whether the said Joseph Duncan, as eldest son of the said *Dinah*, is entitled to two shares of her estate, she having died before the passing the late act of distribution; and upon the courts determination of that question, referees are appointed to settle the account between the parties; but the defendants not to be accountable to the plaintiff, further than his distributive share of his said mother's estate.

For the defendants it was insisted, that the 2d section of the act of 1705, only respected the case of a father dying intestate; of one capable of having a wife according to the provisions of the enacting clause; and that the pronouns *him* and *his* were not applicable to a mother dying intestate. In *Holt* v. *Frederick*, 2, P. Wms. 356, it was decreed, that the act of distributions was founded on the custom of *London*, which never affected a widow's personal estate; and if a mother, being a widow, makes advancements to a child, and dies intestate, having other children, the child so advanced, shall not bring what he received from his mother into *hotchpot*.

Yates, J. said, that he thought this point had been at rest, since the decision of the case between the lessee of *Eshelman* v. *Hoke*, in bank, *Dec'r*, 1799, which settled the question as to the mother's lands; that the uniform practice had been to distribute the personal property of widows, who were mothers, in the same manner as that of fathers, under the law of 1705; and that the words *him* or *his*, included as well the female as male sex, by the fair rules of construction. See 2 Vez. 213.

Brackenridge, J. said, he had not fully made up his mind on the subject; the determination was therefore postponed.

But, in the term of September, following, the case being stated to *Shippen*, C. J. and *Smith*, J. the court were unanimously of opinion, that the plaintiff was entitled to two shares of the surplusage of the personal estate of his mother, as her eldest son. (*MSS. Reports.*) 1801.

In the lessee of *Richard Dearmond* v. *Mary Robinson* and *others*, Northumberland, October, 1798, before *Yeates* and *Smith*, Justices. (*MSS. Reports.*) In the course of the trial, it was admitted by the counsel on both sides, and resolved by the court; that no child or children of the intestate, could, by their acts, defeat the operation of the law of 23d May, 1764, as to the appraisement of the lands of the ancestor, where the same could not be divided without prejudice to, or spoiling of the whole. By their deeds, they can transfer no more than their qualified interests in the lands, and their assignees hold the same precisely in the same manner as they themselves held them, subject to an eventual appraisement. It is evident, that in the first instance, the lands are subjected to the payment of the debts of the parent, and the purparts of each of the children, are bound by judgments had against them respectively. When the real estate is transmuted into personalty, under the operation of the law, by approved security being given in the Orphans' Court for the amount of the appraisement, the former incumbrances on the *children's* undivided shares of the lands, cease, and are transferred into liens on their respective purparts of the valuation. The creditors by mortgage or judgement still retain a legal preference as to their demands to a proportion of the appraisement, corresponding with the children's interest in the lands.

Where there is a balance due to the administrators, or judgments unsatisfied against the intestate, the shares of the several children in the appraisement, must necessarily be diminished in proportion thereto. The liens of the respective judgment creditors against the different children, must also be deducted from their purparts. Under such circumstances, the children would not be entitled to their shares of the valuation, unless they gave refunding bonds.

In the case of *Michael Hubley*, president of the Orphans' Court of *Lancaster* county, v. *James Hamilton*, *Lancaster*, May, 1794.—Before *M'Kean*, C. J. & *Yeates*, J. which was debt on recognizance, on the valuation of the real estate of a person who had died intestate. A question was made, whether on the valuation of real estate of an intestate, in case it could not be divided, without prejudice to, or spoiling the whole, the person accepting it, was bound to pay interest for the distributive shares of the other children, from the time of the confirmation of the inquisition and his acceptance of the lands, or from the time limited and appointed by the Orphans' Court for the payment thereof.

Per Cur. The practice in *Lancaster*, and most of the western counties, has been uniformly only to charge interest from the time affixed by the Orphans' Court, and most appraisements probably have been made under the idea of the usage. It might be inequitable, therefore, to make this case an exception out of the general custom. But the act of 4th Geo. 3, (1764,) does not warrant this construction. The men appointed by the Orphans' Court, or where the parties cannot agree, the inquest, are to make a just appraisement. The Orphans' Court are appointed to limit a reasonable time, for the payment of the shares of the other children, but not to control, or substantially alter the sum affixed by those, on whom that duty devolves by law. Upon the same principles precisely, that a widow, under the practice, gets her interest, on one third of the principal charged on the lands, from the time of a child's acceptance of the real property at a valuation, in order to obtain a subsistence thereout, the children ought to receive the interest on their distributive shares, from the same period, and for the same purposes. The present usage is fundamentally wrong, and must in future be altered. (*MSS. Reports.*)

It will be observed that most of the authorities before cited, apply equally to the existing state of the intestate laws. We will now proceed to state the alterations in, or additions to the act in the text; and also the cases which have since been decided.

By a supplement to the act in the text, passed 4th of April, 1797, (chap. 1938,) it is enacted, that when any legatee, creditor, or person interested in the real or personal estate of a person who has heretofore died, or hereafter shall die, with a last will or testament, or surety in any administration bond for administering the estate of any decedent, shall declare on oath or affirmation, that he, she, or they, have sufficient cause to believe that the executors or administrators, with or without a will annexed, of such decedent, are wasting or mismanaging the estate of such decedent, and shall make application for security to the Orphans' Court of the county in which letters testa-

1794. mentary, or letters of administration, with or without a will annexed, have been, or shall be granted, the said Orphans' Court are hereby empowered to examine the cause of complaint; and if it should appear to them that the same is just, it shall and may be lawful for such court to order such executors or administrators to give such sufficient bond, with sureties, or such further security as they may judge necessary, according to the value of the estate, which securities shall be taken and filed in the said Orphans' Court, in the name of the Commonwealth of *Pennsylvania*, and the said bonds shall be deemed and considered in trust, for the benefit of all persons interested in said estate, whether as legatees, legal representatives, creditors, or sureties in former administration bonds. And in case such executor or administrator shall refuse or neglect, for the space of thirty days after due notice of such order, to give the security, or, further security, so ordered, then the said court shall vacate the letters testamentary or of administration, and award new letters to be granted and issued by the register of the proper county, to such person or persons, and upon such security as the court shall think proper; and shall moreover order the first executor or administrator to deliver over and pay to the successor, all and every the goods, chattels, rights, credits, title deeds, evidences and securities, which were of the decedent, and which came to his or their hands, and remain unadministered, and pay over the balance which shall remain due from him or them to the said successor, in such manner and time as the said court shall, upon an examination and confirmation of such account (to be had according to the usual course of proceeding in case of accounts of executors and administrators settled in such courts) award and order. And if such superseded executor or administrator shall neglect or refuse to comply with the award and order of the court touching the premises, the court, on motion, shall proceed against him or them, as is lawful in cases of contempt, or the succeeding administrator may proceed at law against him or them, or his or their sureties, if any there be, or against any other person or persons who may be possessed thereof, for the recovery thereof; or both the said remedies may be pursued at the same time, if the case so require, until the end be fully attained.

§ 2. In all cases, where a return of *nulla bona* shall have been made by the Sheriff of the proper county, to an execution against any such executors or administrators, their sureties shall, on notice thereof, unless they can shew goods or chattels, lands or tenements, in some other county, which may be seized and taken in execution by a *testatum fieri facias*, to satisfy the same, be liable to pay the amount of the debt and costs therein, in actions brought against them on the said bonds, and such further proof, or evidence in support thereof, as by law would have intitled the suitor or suitors to recover his, her or their demand of the said executors, or administrators, *de bonis propriis*; provided such suits shall be instituted against the sureties, within seven years after the date of the respective bonds; and the whole amount of the sums of money to be recovered thereupon shall not exceed the penalties of the said bonds respectively.

§ 3. Any executor or administrator, with or without a copy of the will annexed, may, with leave of the registers, or Orphans' Court in the respective counties, make a settlement of his or their accounts, so far as he or they shall have administered the estate of the deceased; and also with leave of either of the said courts, may be dismissed from the duties of his or their appointment, and surrender the residue of the estate under his or their care to such person or persons as the said court may appoint; the register of the respective counties, in every such case is hereby authorized and required to take bond, with two sufficient sureties, in a penalty of double the amount of the real value of such estate, and also to administer the usual oaths or affirmations, to such person or persons so appointed, and to grant letters of administration of the unadministered part of such estate.

§ 4. [The same as sect. 2 of the act in the text, altered as there noticed in the margin.]

§ 5. Where an intestate leaves a widow, and no lawful issue, the real and personal estate, not given by the former act to the widow, shall descend and be divided as is directed by this act, and the act to which this is a supplement, in cases where the intestate shall leave neither widow nor lawful issue; and where any woman shall hereafter die intestate, without leaving a husband, her estate, real and personal, shall descend and be divided in the same manner as is directed by this act, and the act to which it is a supplement, in cases where men have died, or shall die intestate; but where she leaves a husband, he shall take the whole personal estate, and the real es-

tate shall descend and go in the same manner as is directed in the case of men dying intestate, saving to the husband his right as tenant by the curtesy; and if any intestate shall die seized of real estate in fee simple, and shall leave no widow, nor lawful issue, father, brother, sister, or their representatives, then the said estate shall go and be vested in fee simple in the mother, unless where such estate has descended from the part of the father, in which case it, or such part thereof, as shall have come from the part of his or her father, shall pass and be enjoyed, as if such person, so dying seized, had survived his or her mother; and where any person shall die seized or possessed of any real or personal estate, leaving neither widow nor lawful issue, father or mother, but brothers and sisters of the whole blood, the said estate shall descend to and be vested in such brothers and sisters, as tenants in common, in equal parts; and if any of the brothers and sisters of the intestate shall be then dead, leaving lawful issue, then it shall descend to and be enjoyed by the surviving brothers and sisters, and the lawful issue of such brothers or sisters as shall be then dead, such issue always to inherit, if one person, solely, if several persons, as tenants in common, in equal parts, such share only as would have descended to his, her or their, parent, had such parent been then living, and each of the brothers and sisters of the persons so dying intestate, who shall be living at the time of the death of the intestate, always to inherit and enjoy such share as would have descended and been distributed to him or her, if all the brothers and sisters, leaving lawful issue, had been living at the time of the death of the intestate.

§ 6. If the intestate shall die seized of real estate, leaving neither widow nor lawful issue, father or mother, brother or sister of the whole blood, but shall leave lawful issue of deceased brothers or sisters, the said estate shall be enjoyed and possessed by such lawful issue, in the same shares and proportions, and for such estates, as is directed in case some of the brothers or sisters are living.

§ 7. If the intestate shall die seized or possessed of real or personal estate as aforesaid, leaving neither widow nor lawful issue, father or mother, but brothers and sisters of the whole and half blood, or their representatives, the brothers and sisters of the whole blood, and the legal representatives of such of the whole blood as are dead, shall inherit the real estate in fee simple, and the personal estate shall be distributed equally between the brothers and sisters of both the whole and half blood, or their representatives; but if there are no lawful issue, widow, father or mother, brothers or sisters, or their representatives of the whole blood, then brothers and sisters of the half blood shall inherit the real estate in fee simple, and the personal estate absolutely, the estate, both real and personal, to be held by them, as tenants in common, in equal parts, except such parts of the real estate as came to such intestate by descent, devise or gift of some one of his or her ancestors, in which case, all those, who are not of the blood of such ancestor, shall be excluded from such inheritance, and such part of the real estate.

§ 8. Like proceedings may be had where the intestate leaves no children, or their legal representatives, both in making partition, or where the estate cannot be divided without prejudicing or spoiling the whole, by directing an appraisement, and ordering the whole to the eldest brother or his issue, if any of such issue shall then be of full age, if he or she shall accept it, or to any other of the brothers or their issue successively, if any of such issue shall then be of full age, upon the refusal by the eldest brother, or his issue, or if there be no brothers or their issue, or they all neglect or refuse, then to the eldest sister or her issue, if any of such issue shall then be of full age, and on her neglect or refusal, to any other sister, or her issue successively, if any of such issue shall then be of full age, in the manner and on the conditions directed by the act, to which this is supplementary, with respect to the children of an intestate; and the same mode of dividing, assigning and appraising estates, shall be observed in all cases, where by this act, or the act to which this is supplementary, estates are to be vested in several persons, as tenants in common.

§ 9. Where any executor, administrator or guardian shall have stated and filed his account in the office of the register for the probate of wills, &c. it shall be the duty of the register to give notice in at least three of the most public places in the county, to all legatees, creditors and other persons (as the case may be,) setting forth that such executor, &c. has filed his account, and that the same will be presented to the Orphans' Court for confirmation and allowance, at the time and place for that purpose appointed, a copy of which notice shall also be set up in his office;

1794. and no such account shall be confirmed and allowed by the said court, unless such notice shall have been given, and a copy thereof set up in the office aforesaid, at least thirty days prior to the time appointed for such confirmation and allowance.

§ 10. [Devise to wife to be deemed in lieu of Dower; but she may elect. (See General Index, "Dower.")]

§ 11. [Bonds taken by the registers shall be in the name of the commonwealth; and the second section of the act in the text, repealed.]

By a further supplement passed 2d April, 1804, (chap. 2486.) Where any person hath died, or hereafter may die intestate, seized of real estate in this commonwealth, subject to partition or valuation, as prescribed by the act to which this is a supplement, which real estate cannot be divided, but hath been, or shall be appraised, and none of the children or other legal representatives of the deceased, will take the same at the valuation, it shall then be the duty of the Orphans' Court, on the application of any one of the children, or other legal representative, to grant a rule upon all the heirs, or other persons interested in such estate, to shew cause on the first day of the next regular session of said court, why the estate of the intestate should not be sold; *Provided*, a copy of such rule be served on such of the heirs or representatives interested, as reside in the county where the estate lies, by delivering it to the person if of age, or his or her guardian, if a minor, by leaving a copy thereof at their usual place of abode, at least twenty days before the time of holding the court, as aforesaid, and that notice shall be given to such of the heirs, or other legal representatives, as live out of the county in which the estate lies, by publishing a copy of said rule, certified by the clerk of the Orphans' Court, in the newspaper printed in the county, if any be there printed; and if not, in the newspaper printed nearest to such county, at least four weeks previously to the court; and if cause be not shewn to the said court according to the said rule, it shall and may be lawful for the said court, and they are hereby enjoined and required, on due proof of notice of the aforesaid rule being given, to make an order or decree, commanding the executor or executors, administrator or administrators (as the case may be,) to expose the real estate of the intestate to public sale on the premises, on a day certain, upon such terms as the court may think proper to direct; of all which the executor or executors, administrator or administrators, shall give at least ten days notice, by advertisement in the newspaper printed in such county if any there be, and if none, then in that nearest to the county where the land lies.

§ 2. Upon such sale made as aforesaid, and return thereof to the aforesaid court, it shall be the duty of said court, and they are hereby required, on motion of the purchaser, to confirm the sale, and to decree the estate in the premises, so sold, to be transferred and vested in such purchaser, as fully as the intestate held the same at his decease, subject and liable to the payment of the purchase money, according to the terms prescribed by the court in the order of sale; and said court shall cause the proceeds of such sale to be distributed in such manner as according to law and justice may be proper.

By a further supplement, passed, 1st April, 1806, (chap. 2584.) When any person or persons have heretofore died, or shall hereafter die intestate, seized of real estate, situate, lying and being in one tract, or in one or more tracts adjoining each other, on the line or lines of any county or counties in this commonwealth, whereby part or parts of the said tract, or adjoining tracts, is, are or may be in two or more of the said counties adjoining, it shall and may be lawful, in case of an application to the Orphans' Court of the county in which the principal mansion is situate, for an inquest to make partition or appraise the real estate of such intestate, to issue their writ to the Sheriff of the county within the jurisdiction of said court, specifying the lands in the said county, and the county or counties adjoining, of which a partition or valuation is intended to be made, and thereupon it shall and may be lawful for the said Sheriff to summon an inquest, according to law, to divide or value the said lands, in the same manner as if the whole were within his proper bailiwick; and upon the return thereof to the Orphans' Court, out of which such writ issued, the said court may further proceed thereon as if all the said lands were in the county, and within the jurisdiction of said court, and to decree partition thereof, or allot the whole to any one of the heirs, according as the inquisition may be returned to them, as fully and amply as they now may or can do, where real estate is wholly in any one county, and any recognizance or recognizances taken by them, in pursuance of such proceeding, shall be valid and effectual to all intents and purposes, and the final decree of such court thereon shall have the same operation, to vest the title of such estate in the

heir or heirs who may accept of the same, as any decree of any Orphans' Court in any county within their jurisdiction heretofore has had: *Provided*, that an exemplification of the proceedings, which may at any time hereafter be had, shall, within twenty days after the final decree therein, be delivered to the clerk or clerks of the Orphans' Court or Courts in such adjoining county or counties in which the application shall not have been made, and in which any parts of the said lands are or may be situated, which clerk or clerks shall enter the same of record on the Orphans' Court Docket of his proper county, at the joint expense of all parties concerned therein.

By an act passed 7th April, 1807, (chap. 2813.) § 6. When partition is made of an intestate's real estate, and a part is allotted to each of his children or representatives, in case there be a widow of the intestate living, and entitled to part of the said real estate during her life, it shall be the duty of the inquest or referees making partition, to estimate the value of the said part, and to apportion the same among the respective shares of the children or representatives; and upon confirmation thereof by the Orphans' Court, the same shall remain as a charge upon the said shares, and the interest thereof shall be annually and regularly paid to such widow, and may be recovered by action of debt, or by distress, as rents are usually recovered in this commonwealth; and where the estate of the intestate is divided into fewer parts than there are children or representatives, the same proceedings shall be had to estimate and apportion the value of the widow's purpart among the said parts, which shall remain a charge thereon, and the interest thereof shall be paid, and may be recovered as aforesaid; and upon the decease of any such widow the whole value of the said purpart shall be distributed among all the said children or representatives, in proportion to their respective shares, according to law.

§ 7. Where the estate of an intestate is divided into a fewer number of parts than there are children or representatives, and any one or all of the said parts is or are refused to be taken by the children or representatives, the like proceedings shall be had to sell the parts so refused, as is directed in case of an appraisement of the whole in and by the act of 2d of April, 1804. And any such sale or sales heretofore made by the decree of any Orphans' Court is, and are hereby ratified and confirmed.

§ 8 In order to give the younger children, or representatives of an intestate, an opportunity of accepting or refusing the estate of the intestate, in case of an appraisement or partition into fewer parts than there are children or representatives, the Orphans' Courts of the different counties of this commonwealth are hereby authorized, upon application, to grant a rule upon any of the children or representatives, to come into court within a certain time, and to accept or refuse the same; a copy whereof shall be served upon the party personally, ten days before the return thereof, in case he, she or they reside within the county, or if they reside out of the county, a copy of the rule shall be published in at least one newspaper printed in the proper county, or if there be none therein, then in some adjacent county, and in one daily newspaper of the city of Philadelphia, for the space of one month before the return thereof; and in case he, she or they do not come in, according to the said rule, and accept or refuse, the court shall and may direct the same to be offered to the next child or representative in order. (*Infra*, act of March, 1808, § 2.) 1794.

§ 9. Where any person shall die intestate, after the passing this act, leaving lands or tenements in more than one county in this commonwealth, if after inquisition held, any of the legal representatives of such intestate shall accept of the real estate upon the valuation thereof, in any one county, such person shall not have the right of preference, or elect to take the real estate, or any part thereof in any other county, until all the other heirs or legal representatives shall refuse to take the same at such valuation.

§ 10. Where it shall be made to appear to the Orphans' Court, that a minor child or children, is or are possessed of real estate, but is or are not possessed of personal estate, adequate to the maintenance and education of such minor child or children, then, and in every such case, the Orphans' Court of the county where the real estate lies, shall allow the guardian or guardians of such child or children, to make public sale thereof, or of so much of the said real estate, upon the best computation they can make of the value thereof, as the said court shall judge necessary for the purposes aforesaid, and to make a title thereto to the purchaser; *Provided always*, That the guardian or guardians aforesaid, shall, before they proceed to convey, give bond, with sufficient surety, to the Orphans' Court, to dispose of the proceeds of sale for the use of the said minor or minors, and to invest within six months from the receipt of the

1794. same, so much thereof, if any there be, as shall not be immediately required, in good real, or other securities for the same use.

§ 11. Where any person or persons shall hereafter die, having made and executed any testament and last will, and shall not therein have disposed of the residue of his or her personal estate, the executor or executors therein named, shall distribute such undisposed of residue to and among the next of kin, agreeably to the intestate laws of this commonwealth; *but nothing in this section contained, shall be construed to affirm or deny the right of any executor or executors to such undisposed of residue prior to the passing of this act.*

(The latter part of the foregoing section has become useless by the decision of *Wilson*, widow, v. *Wilson's* executors, at *Lancaster* Supreme Court, May, 1811.—In which case it was determined, by two Judges against one, that the executor, in *Pennsylvania*, was not entitled to the undisposed of residue, but was a trustee for the next of kin, before the passing of this act. This section therefore remains as confirming the pre-existing law.)

By an act passed 26th March, 1803, (chap. 2965,) to amend certain parts of the last recited act, it is enacted, § 2. That the publication of the notice required in and by the 8th section of the said act, after an appraisement or partition of an intestate's estate, shall be deemed sufficient if published in at least one newspaper, printed in the proper county, or if there be none therein, then in the county nearest thereto, wherein a newspaper may be published, and at least once a week for four weeks successively, prior to the return thereof, in one daily newspaper of the city of Philadelphia. And on any application for a valuation, or partition of an intestate's estate, where any of the children or legal representatives reside out of the county wherein the lands lie, notice in like manner may be given where personal notice cannot be given as required by the said section, of the time and place of executing the order of the court and taking the inquisition thereon. And if upon the return of any such inquisition, all the children or legal representatives of the intestate shall appear in court, personally, or by guardian or attorney in fact duly constituted, and refuse to accept of the estate, or any part thereof, if divided, at the valuation thereof, and shall unanimously desire the same or any part to be sold by the order of the court, the said court may order or decree the sale thereof, without granting any rule to shew cause why the said estate or part thereof should not be sold, any practice to the contrary notwithstanding: and to remove doubts, all proceedings heretofore had, and decrees made in the Orphans' Court, in pursuance of the act of 2d April, 1804, or of the act which is hereby amended, where notice has been given in the newspapers of the application for a partition or valuation, or where by the consent of the legal representatives, a rule to shew cause has been waived, if otherwise legal, are hereby declared to be valid.

§ 3. Where the Orphans' Court of any county hath heretofore decreed, or hereafter may decree sale of an intestate's real estate, or part thereof by the administrators, the said court is hereby authorized to require and take sufficient security from such administrators, conditioned for the faithful execution of the power committed to them in making such sale, and truly to account for and pay over the proceeds thereof in such manner as the said court shall legally decree.

Finally, by an act passed 1st April, 1811, entitled "An act relative to dower, and for other purposes"—§ 2. In all cases after the final settlement of any administration account in the Orphans' Court, if it shall appear there are not sufficient assets to pay and satisfy the balance appearing to be due and owing from the estate of the deceased, it shall be lawful for the said court, on the application of the executors and administrators, or any others interested therein, to make an order that so much of the real estate of which the deceased was seized or possessed at the time of his decease, shall be sold by the executors and administrators as in the judgment of the court shall be sufficient to satisfy such balance; and the said court shall likewise decree in such cases what contribution shall be made by the heirs or devisees respectively towards the payment of any debts chargeable on the real estate of any testator, either generally, in the first instance, or where the land decreed to be sold shall have been in any manner devised to any heir or devisee, after any such sale being made; and all such sales shall be had, made and conducted, as in other cases of sales made under the decree of the Orphans' Court by the existing laws.

Where lands, &c. shall escheat to the commonwealth for want of heirs. See the act to declare and regulate escheats, vol. 2, page 425.

But, by the supplement to that act, ante. page 4, every person, being a citizen or subject of any foreign state, shall be able and capable in law, of acquiring and taking by devise or descent, lands and other real property in this commonwealth, and of holding and disposing of the same, in as full and ample a manner as the citizens of this state may or can do, and no such lands or estate so held by devise or descent, shall escheat or be forfeited to the commonwealth, for or on account of the alienage of such person claiming the

same under any last will, or succeeding thereto, according to the laws of this commonwealth.

§ 2. All such persons shall be able and capable in law to dispose of any goods and effects, to which they may be entitled within this state, either by testament, donation or otherwise, and their representatives, in whatever place they may reside, shall receive the succession, according to the laws of this commonwealth, either in person or by attorney, in the same manner as if they were citizens of this commonwealth.

§ 3. Nothing herein contained shall be construed to prevent the sequestration of any real or personal estate belonging to any such alien, during the continuance of war between the United States of America, and the state or prince, of which such person may be a citizen or subject.

The 15th and 16th sections of the act in the text are similar to the old law, except as to the apportionment of the assets.

Upon the old law, it has been decided, that the order prescribed to the executors, &c for payment of debts, respects voluntary, and not compulsory, payments. *By the Court.* There does not exist a doubt in our minds about the genuine meaning of the act of Assembly. It would be attended with the most inconvenient and pernicious consequences, to determine, that a creditor could not compel a payment from his debtor's estate, nor even bring a suit against the executors for a period of twelve months. The order of paying debts, obviously respects voluntary, and not compulsory payments. Such was the construction coeval with the act; and there has not, to this time, been a single departure from it. *Roberts* v. *Cay's executors*, 2 *Dallas' Rep.* 260.

In the case of *Scott, administrator* of *Patterson* v. *Ramsay;* which was error from the Common Pleas of Washington county, a case was stated for the opinion of the court, in substance as follows. *John Patterson* died intestate, possessed of personal property, and seized in fee of real estate. At the time of his death several persons had obtained judgments against him before justices of the peace. After his death, several creditors obtained judgments against his administrator on debts by simple contract. The personal estate being insufficient, the real estate was sold by order of Orphans' Court, and after the sale, some of the judgments obtained before justices of the peace were filed in the court of Common Pleas, and others were not filed. The questions for this court were two.

1. Whether the simple contract creditors (of whom the defendant in error was one,) who obtained judgment against the administrator, were to be considered in any respect as judgment creditors of the intestate, and as such entitled to any preference in the payments to be made by the administrator out of the personal assets, or the proceeds of the real estate. 1794.

2. Whether the creditors who obtained judgment before justices of the peace in the intestate's life, were to be considered as judgment creditors, within the 14th section of the act in the text; and whether any distinction was to be made between those whose judgments were filed, and those whose judgments were not filed, in the office of the Common Pleas.

Tilghman, C. J. delivered the court's opinion.

The first question has been determined by this court in the case of *Wootering* v. *The executors of Stewart,* December term, 1799. It was there decided on argument and full consideration, that the order of payment was to be according to the nature of the debt at the time of the testator's decease; and consequently a simple contract creditor obtained no preference by obtaining judgment against the executors.

It has been contended, on the *second* point, that the term *judgments,* in the act of Assembly of 19th April, 1794, is to be restrained to judgments in a court of record. But it appears to the court, that the meaning of the word, and the intent of the legislature both call for a more liberal construction. In the same session an act was passed by which the jurisdiction of justices of the peace was extended to *twenty pounds,* and their judgments when recorded in the office of the prothonotary of the court of Common Pleas, were "to have the same effect as judgments obtained in the court of Common Pleas." Of course they become a lien on lands, and it would be most extraordinary if the Legislature could intend to make them a lien on lands, and yet be of no consideration with respect to personal assets. We are therefore of opinion, that these judgments, when filed in the prothonotary's office, or when made known to the administrator before he pays away the estate, are to be on a footing with judgments in courts of record. But as great inconvenience might ensue, if administrators were obliged at their peril to take notice of such judgments, the court desire it to be understood, that they give no opinion whether the administrator would be guilty of a *devas-*

1794. *tavit* if he paid the estate to creditors of an inferior nature, before he received notice of judgments rendered by justices of the peace, and not filed. 1 *Binney*, 221.

Executors or administrators cannot vary the rights of creditors, as to their shares of the assets: liens on the estates of decedents attach from their death. *Provost* v. *Nicholls*, Supreme Court, March, 1808. *(MSS Reports.)*

A claim against an intestate's estate, for damages on account of the breach of articles of agreement under seal, is a debt by specialty within the meaning of the 14th section of the act in the text. *Frazer* v. *Dunwoody's* administrators. 1 *Binney*, 254.

The case of *Johnson, plaintiff in error*, v. *Haines' lessee*, was decided under the act in the text, and prior to the passage of the supplement in 1797.

But though the case is now provided for, the principles of the decision still remain as part of the law of the land. It cannot therefore, with propriety be omitted.

Ejectment for a house and lot in *Germantown*, of which *Rebecca Vanaken* died seized on the 13th of Feb'y, 1797, intestate, and leaving no father, mother, child, grand child, brother or sister living.

But the intestate had had brothers and sisters, who died under these circumstances.

1st. *Richard*, who died without issue.

2nd. *Catharine*, who married *Casper Wistar*, and left issue *Richard, Margaret, Catharine, Rebecca, Sarah* and *Casper*; of this family *Richard, Margaret, and Rebecca*, are dead; but all of them leaving issue.

3rd. *Anne*, who married —— *Lukens*, and left issue, *John, Mary, Daniel, Derrick* and *Rebecca*; all of this family died in the life of the intestate, but all of them left issue.

4th. *John*, who died in the life-time of the intestate, but left issue *Anthony*, (plaintiff in error,) *John, Joseph*, and *Margaret*, and *Margaret* also died in the intestate's life-time, leaving issue.

5th. *Margaret*, who intermarried with *Reuben Haines*, and left issue, *Casper*, (the lessor of the plaintiff below,) *Catharine, Josiah* and *Reuben*; *Josiah* is dead leaving one son, who is now alive, and *Reuben* is dead without issue.

It was agreed that *Margaret*, the daughter of *Catharine*, who was the sister of *Rebecca*, died in the life-time of the intestate.

And the questions submitted to the court are, whether the plaintiff in error is entitled to the whole of the premises? and if he is not, how the premises are to be divided?

Judgment was entered by consent below, to expedite the decision in the High Court of Errors and Appeals.

The plaintiff in error claimed the whole of the premises as heir at law of the intestate; and the lessor of the defendant insisted that the premises ought to be divided, on the principles of the act in the text.

M'Kean, C. J delivered the unanimous opinion of the court, in the absence of *Chew*, President, as follows:

The intestate died, leaving the children of several of her brothers and sisters, and a grand-child of one of her brothers; and it is now made a question, whether her real estate shall be divided among these surviving relations, or descend entirely to her heir at law.

By the 6th section of the charter granted to *William Penn*, the laws of *England* "for regulating and governing of property, as well for the descent and enjoyment of lands, as for the enjoyment and succession of goods and chattels," were introduced and established in *Pennsylvania*, to continue till they were altered by the legislature of the province. The common law being, therefore, the original guide, and the plaintiff in error being the heir at common law, his title must prevail, unless it shall appear, that an alteration in the rule has been made, by some act of the General Assembly.

Now, when the intestate died, there was but one law in existence on the subject; (the act in the text.) And though the sixth section of that act provides for the case of a person dying intestate, leaving "neither widow, nor lawful issue, but *leaving a father, brothers* and *sisters*," it does not provide, nor does any other of the sections provide, for the case of a person dying intestate, *without* lawful issue, and leaving no *father* or *mother*, brothers or sisters. The descent of the real estate, in this specific case, was not, therefore, altered, or regulated, by any act of the General Assembly, when the estate was vested in the person entitled to take, at the death of the intestate.

It is probable, that if the case had been stated to the legislature, they would have directed the same distribution in the year 1794, that they have since done by the act of the year 1797; and it is urged, that as there is equal reason for making such a distribution, where no father survives, as where a father does survive, the intestate, the court ought, upon the obvious principle and policy of the law, to supply the de-

ficiency. But it must be remembered, that the system of distributing real estates in cases of intestacy, is an encroachment on the common law; and wherever such an encroachment takes away a right, which would otherwise be vested in the heir at law, the operation of the statute should not be extended further, than it is carried by the very words of the legislature.

We are, upon the whole, unanimously, of opinion, that the judgment below should bereversed; and that judgment should be given for the plaintiff in error. 4 *Dallas, Rep.* 64.

And in *Cresoe* v. *Laidley*, determined in 1810, which was an ejectment for a house and lot in the city of *Philadelphia*, under the following circumstances, which were stated in a case for the opinion of the court.

Samuel Eldridge of the city of *Philadelphia* died intestate on the 13th of October, 1804. Seized of the premises in the declaration mentioned. At the time of his death, his wife was enseint of a son who was born on the day of 1804, and named Samuel, to whom the premises descended, and who became seized thereof The widow of the intestate afterwards intermarried with *John Harland*, junr. by whom she has issue a son now living, shortly after whose birth, *Samuel Eldridge* the younger died seized of the premises, an infant, unmarried, and without issue, leaving the following relations, on the maternal side, viz. a *brother of the half blood, a mother*, a maternal grandfather and grandmother. On the paternal side he left,

1st *Jane Smith*, the only child of *Elisha Eldridge*, who was the oldest son of *Daniel Eldridge*, the oldest son of the intestate's great grandfather; and *Daniel Eldridge*, the second son of the said *Daniel*

2nd. *Thomas Eldridge, William Eldridge* and *Mary Bishop*, the children of *Thomas Eldridge*, the second son of the said great grandfather.

3rd. *Martha Garetson*, the daughter of *Esther*, who was a daughter of the said great grandfather.

4th. *Zilpah Hand* and *Jehu Eldridge*, the children of *Eli Eldridge*, who was the fourth son of the said great grandfather.

5th. *Hannah Cresoe* (the plaintiff,) a daughter of the said great grandfather, and the intestate's paternal great aunt.

The question for the opinion of the court, was, whether the premises descended to the heir at common law, or were to be distributed under the intestate laws of *Pennsylvania*; and if the latter, to how much, if any, the plaintiff was entitled. 1794.

After an elaborate argument, the opinion of the court was delivered, by, *Tilghman*, C. J. The court are to give their opinion on a case stated, the material parts of which may be comprised in a small compass.

Samuel Eldridge died intestate, seized of lands in fee simple, which had come to him by descent from his father. He left, living at the time of his death, a mother, a brother of the half blood on the part of his mother, a maternal grandfather and grandmother, a paternal great aunt (the plaintiff,) and several cousins, children of paternal great uncles and great aunts. The plaintiff claims one fifth part of *Samuel Eldridge's* lands, as one of his next of kin. The defendant holds under the heir at common law. The question is, whether this case is included in either of the acts directing the descent of real estates of persons dying intestate.

On the part of the plaintiff it has been contended, that this case is included, not within the words, but the spirit and intent of the 12th section of the act of the 19th April, 1794. That section is in these words: (see the 12th sect. of the act in the text.) The case before the court differs from this section of the law in two respects. The intestate left a mother, and a brother of the half blood. The plaintiff's counsel get over this, by endeavouring to prove from other parts of the law, that neither the mother, nor brother of the half blood on the part of the mother, can take any thing in this case, where the estate descended to the intestate from his father. This being the case, they think it unreasonable that their existence should prevent the next of kin from taking. They construe the words "mother or brother of the half blood," by adding to them the words "capable of taking any thing under this act." We think that the principles on which the law must be construed, were fixed by the case of *Johnson*, v. *Haines*, (*supra*,) decided by the unanimous opinion of the High Court of Errors and Appeals. The rule there laid down by C. J. *M'Kean*, who delivered the opinion of the court, was that the heir at common law should take, except in the specific cases enumerated in the act. The case there decided, was full as hard as the present. There could not be a doubt but the legislature would have included it in the act of 19th April 1794, if it had occurred to them. But the decision was founded on wise principles. It tended to produce certain-

1794. ty, which is of the utmost consequence in the law of descents. We may easily know the law, when it is established that the heir at law takes in every case not specified in the acts of assembly; but there will be no end to difficulties, if we attempt to supply the omissions of the acts, by inserting what we may suppose to have been intended by the legislature. There is another powerful reason for the strict construction of the act of 19th April, 1794. It was discovered to be defective in many respects, to remedy which, the act of 4th April, 1797, was passed. That act included the case which had occurred in *Johnson* v. *Haines*, and many other omitted cases: but it made no alteration in the 12th section of the first act, on which the present question turns. Now the latter act being made for the express purpose of supplying the defects of the first, it must be supposed that the first act was examined with great attention, and every alteration introduced, which was thought necessary. I make no doubt but many cases are still unprovided for, because they were unseen. As they occur from time to time, they may be included in new laws, if it shall be judged expedient. In the mean time, the heir at common law will take in all such cases. Upon the whole, we are clearly of opinion, that the plaintiff is not entitled to recover, because she has not brought her case within either of the acts of assembly.

Judgment for the defendant.—2 Binney, 279.

Where lands have been directed to be sold by the Orphans' Court for payment of debts of an intestate, &c. the surplus shall be distributable as real estate, *Diller* v. *Young, executor* of *Diffenderfer*, Sup. Court, December, 1797, (MSS. Reports,) see § 20, of the act in the text.

A child dying intestate, without wife or child, the father takes all his personal estate. *Robinson* v. *Robinson's* executors, Sup. Court, December, 1799, (MSS. Reports.)

A brother dying intestate, after 19th April, 1794, leaving neither wife nor children, his brothers and sisters of the half blood, are entitled to equal distributive shares of his personal estate with those of the full blood, the act of 19th April, 1794, not providing for this case, *Preston* v. *Hoskins* and *others, administrators of Pennel*, Sup. Court, March, 1800, (MSS. Reports.)

One died intestate in 1798, unmarried, without father, mother, brother or sister, leaving uncles and aunts on the father's and mother's side, and the issue of some who were dead; the whole estate goes to such uncles and aunts, and the issue representing such as are dead, equally, *Walker's administrator* v. *Smith*, Supreme Court, March, 1803, (MSS. Reports.)

Jacob Tobe v. *William* and *John Barnet, administrators of Henry Barnet.*

This was an appeal from the Circuit Court of *Northampton* county.

Jacob Tobe the appellant married a daughter of *Henry Barnet*, and became indebted to his father-in-law in a considerable sum, for which he gave his bond with warrant of attorney. Judgment was entered against *Tobe*, and executions issued against his property, both in the lifetime of Barnet, and after his death, but without effect; the principal part of the judgment remained unsatisfied, and *Tobe* was insolvent. *Henry Barnet* died intestate; whereupon an inquest of partition was awarded by the Orphans' Court; and his real estate not being susceptible of a division into as many parts as there were claimants, was appraised by the inquest, and ordered by the court to certain of the children and grand-children upon the terms prescribed by law, *viz.* upon their giving good security, which in practice is a bond and recognizance, to pay to their other children their equal and proportionable part of the appraised value of the estate. No part of the real estate was ordered to *Tobe* and his wife, who was still living, but he was entitled in right of his wife to one-fifth part of the valuation.

The appellers, who were sons of *Henry Barnet*, and to each of whom a part of the real estate was ordered, petitioned the Orphans' Court that the money, which by virtue of the inquest and valuation accrued to *Tobe* in right of his wife, might be made payable to them as administrators in satisfaction of *Tobe's* debt; or that it might be secured in some other way for the benefit of Barnet's estate. The Orphans' Court decreed against the petition; and the Circuit Court, upon appeal, reversed the decree, and ordered the distributive share of *Tobe* in right of his wife to be deducted from the sum due on the judgment, and that giving him credit therefor should be deemed a full payment to him in right of his wife.

Tilghman, C. J. after stating the above facts, proceeded to deliver the opinion of the court as follows.

Many exceptions were taken to the Judgment of the Circuit Court, but on the argument they were reduced to two.

1. That the Orphans' Court had no jurisdiction to act on the matter of the petition.

2. That it was unjust to deduct the husband's debt from the wife's share of her father's real estate.

1. In supporting the first point, it was urged that the Orphans' Court had no authority but what they derived from the act of Assembly, directing them to make partition of the intestate's estate; and that in case of a dispute they have no mode of ascertaining the amount of a

debt. But there are cases in which the Orphans' Court must take upon themselves to decide facts incidental to the partition of an estate. For instance, if a dispute should arise concerning the amount of *an advancement* made by the intestate in his life to one of his children, partition cannot be completed till this amount be ascertained. If necessary, facts may be ascertained by a jury; so that there seems to be no difficulty in surmounting this part of the objection. If instead of a debt due from *Tobe* to his father-in-law, he had received from his father-in-law an advance, of money in part of his wife's share of the estate, there is no doubt but the Orphans' Court could, and must have deducted the amount of the advance. The case of a debt, to be sure, is not quite the same; although in fact this debt has drawn as much from the estate of *Henry Barnet* into the hands of his son-in-law, as if it had been an actual advance. But inasmuch as *Tobe* cannot come at his wife's share without the aid of the Orphans' Court, I see no reason why that court may not deduct what appears to be due from him to the other heirs in a case like the present, where if he once gets hold of the money or the bond, there is reason to fear that payment of his debt will never be obtained. I speak now, taking it for granted that *Tobe* is entitled to receive the amount of his wife's share, which is the second point for consideration.

2. The Orphans' Court have ordered that a bond should be given to *Tobe* in right of his wife, for the amount of her share. It is said, and not without great plausibility, on the part of the appellant, that this bond being given in lieu of land, ought to be considered as the property of the wife; that if the bond was passed immediately to her, and she should survive her husband, it would be her absolute property, and that it is hard to deprive her of this chance. There certainly may be hardships in cases of the kind, which probably the Legislature were not aware of, when they directed the mode of partition. But we must take the law as we find it written. There is no ground for saying that the share, thus directed to be paid in money, remains for any intent or purpose, of the nature of real estate. It is converted completely into personal property. The bond would be altogether in the power of the husband. He might release it, assign it, or dispose of it in any way he thought proper. It is to be regretted the courts in this state are not vested with the power exercised by the Court of Chancery in *England*, of insisting on some provision for the wife, when the husband applies to them for the purpose of getting possession of her personal property. But we have no trace of any such exercise of power by our courts. It must be taken for granted then, that they possess no such power. That being the case, *Jacob Tobe* appears to be substantially the owner of his wife's share. If it was payable in cash, he would have a right to demand it; and being in fact no more than money to be secured by bond payable in a time to be fixed by the Orphans' Court, not exceeding twelve months from the partition, I am constrained to consider it as his property. 1794.

I am therefore of opinion, that the equity of this case demands, that the balance due on the judgment against *Jacob Tobe* should be deducted from his wife's share, and that the judgment of the Circuit Court be affirmed.

Brackenridge J. concurred.

Yeates J. and *Smith* J. gave no opinion, as the appeal was from their decision. 1 *Binney* 358.

The following case occurred at a Circuit Court, at Franklin county, September, 1804, before *Yeates* and *Smith* Justices, (MSS. Reports.)

Walter Beatty and *Nancy his wife* v. *Samuel Smith*.

Debt on recognizance in the Orphans' Court; plea, payment, with leave to give the special matters in evidence. The facts were these.

Samuel Smith father of *Nancy*, plaintiff's wife, and of defendant, died in 1763, intestate, seized of a tract of 408 3-4 acres, of land, leaving a widow, four daughters, and one son, his youngest child, then aged six years. *Nancy* the plaintiff, was the youngest daughter, and then aged about seven years. The family were brought up together, and lived on the land, until the daughters were severally married. *Nancy* married in 1778. The defendant occupied the lands afterwards for his own use.

On the 4th September, 1797, the plaintiffs applied for a partition or valuation of the real estate. The jury finding that the same could not be divided without prejudice to the whole, made a valuation thereof, and the defendant accepted the lands, and entered into recognizances for the payment of the distributive shares of his sisters, on 27th of November.

The defendant gave notice of several matters, for which he claimed set-offs.

1st. That the improvements on the land made since the death of the intestate, until the time of valuation, being appraised with the land, he claimed to be allowed an equivalent therefor, proportioned to each child's share. 2d. He also claimed an allowance for taxes paid for the real estate between 1780 and 1797. 3d. Likewise for his trouble, costs and expenses, in defending an ejectment brought against him, according to a family agreement, and in which there was a

1794. subsequent eviction, on the 23d April, 1799, of 47 acres, part of the lands appraised, and for the taxes paid by him on those 47 acres. This was excepted to, and after argument;—*By the Court:* Unquestionably the recognizance in the Orphans' Court, is in the nature of a judgment The interests of minors, as well as persons of full age, would be strangely affected, if a doctrine should prevail, that while they were divested of their interests in the land, their distributive shares of the valuation should not be placed on a secure and permanent footing. If they are liable to have their dividends reduced, by circumstances or considerations which have occurred anterior to the recognizance solemnly given, they will be but badly protected by the law. Why was not this defence set up by the son in the Orphans' Court, previous to their decree, and his subsequent recognizance? Can any good reason be assigned for it. We cannot presume, that the inquest have appraised valuable permanent improvements made at the son's expense, as the property whereof the father died seized.

The testimony on the two first *items* must be overruled. As to the two last items, which have happened since the valuation, as it is said, under the agreement of the family, evidence applicable to them may be admitted.

As to the power of the Orphans' Court to decree a sale of lands for payment of debts, though there are no minor children; see 4 *Dallas' Rep.* 451, (note 1.)

Where one administrator receives money of the estate, and pays it over, how his account shall be settled, see 1 *Dallas' Rep.* 311.

A creditor taking bond from an executor or administrator discharges the old debt; and the executor or administrator, calling himself such in the bond, is surplusage. 1 *Dallas' Rep.* 347, (note *)

An administrator is chargeable with interest, where he has been guilty of neglect in not putting out the money of the intestate, or has used it himself; and it lies upon him to shew what has been done with it. But he is not liable for interest until after twelve months from the intestate's death. 1 *Binney*, 194, (see vol. 1, pa. 88.)

An executor who receives the surplus proceeds of his testator's land, which has been sold under execution, is chargeable with them in account as executor, notwithstanding he is husband of the devisee of one half the estate, and claims to have received them in that character. 2 *Binney*, 294.

If an executor purchase the real estate of his testator at Sheriff's sale, and it is afterwards sold again, in consequence of his not adhering to his purchase, he is chargeable in account with the largest of the sums at which it was struck off. 2 *Binney*, 294.

If there are errors in an account reported by auditors to the Orphans' Court, and confirmed by their decree; the Supreme Court, upon an appeal, will rectify them as the Orphans' Court should have done, and not set aside the whole account. The auditors are mere clerks. 2 *Binney*, 296.

If a devisee, or one of the heirs, loses his lands by an execution, he is entitled to a contribution from the owners of the remaining part of the testator's lands. 2 *Binney*, 299.

CHAPTER MDCCXLI.

An **ACT** *to suspend, for the time therein mentioned, part of an act, entitled "An act to appropriate certain sums of money, for the laying out, opening and improving sundry roads within this commonwealth, and for other purposes therein mentioned," and to confirm part of a road laid out in pursuance of said act.* (*)

(* Chap. 1683.)

WHEREAS, in and by the act, entitled "An act to appropriate certain sums of money for the laying out, opening and improving sundry roads within this commonwealth, and for other purposes therein mentioned," passed the eleventh day of April, one thousand seven hundred and ninety-three, it is, among other things, enacted, that the sum of four hundred dollars be appropriated for viewing and laying out a road from Philadelphia to the borough of York, in York county, through West-Chester and Strasburg, and crossing the Susquehanna at the place commonly called the Blue Rock: And whereas it appears, as well from the representations of a great num-