

REPORT
of the
JOINT STATE GOVERNMENT COMMISSION
OF THE GENERAL ASSEMBLY OF
THE COMMONWEALTH OF PENNSYLVANIA



Relating to the Following

DECEDENTS' ESTATES LAWS

Fiduciaries Act of 1949

Fiduciaries Investment Act of 1949

Pursuant to Senate Resolution No. 34 of the
General Assembly of 1947

The Joint State Government Commission was created by Act No. 459, Session of 1937, as amended by Act No. 380, Session of 1939, and Act No. 4, Session of 1943, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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† Resigned.

* Deceased.

FOREWORD

Pursuant to Senate Resolution Serial No. 34 of the regular session of the General Assembly of 1947, the Joint State Government Commission was directed to "further study, revise and prepare for re-enactment the Orphans' Court Partition Act, the Orphans' Court Act, the Revised Price Act, the Register of Wills Act and the Fiduciaries Act, together with all of their supplements and all separate laws that should properly be incorporated therein, and to present them for the consideration of the General Assembly at its next session."

The Joint State Government Commission, as directed by Senate Resolution Serial No. 46 of the 1945 session of the General Assembly, submitted to the 1947 session drafts of an Intestate Act, a Wills Act, an Estates Act and a Principal and Income Act, all of which were enacted. These, with comments, are contained in the Commission's report, *Decedents' Estates Laws of 1947*.

Continuing the study of Decedents' Estates Laws under the 1947 directive, the Advisory Committee prepared drafts of the Fiduciaries Act of 1949 and the Fiduciaries Investment Act of 1949 which the Joint State Government Commission approved and submitted to the 1949 Session of the General Assembly.

The Fiduciaries Act of 1949 (Act No. 121) represents a complete revision of the Fiduciaries Act of 1917 with particular attention to the simplification of procedure. The Fiduciaries Investment Act of 1949 (Act No. 544) brings together in an orderly form, the investment provisions relating to Pennsylvania fiduciaries, except personal representatives, whether subject to the jurisdiction of the orphans' court or of the common pleas court.

There are submitted herewith the Fiduciaries Act of 1949 and the Fiduciaries Investment Act of 1949, together with explanatory comments on each section. The changes to existing law are fully explained in the comments.

WELDON B. HEYBURN, *Chairman.*

*Joint State Government Commission
Capitol Building
Harrisburg, Pennsylvania
1949*

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HISTORY OF FIDUCIARIES ACT OF 1949

House Bill No. 795

Introduced by the Honorable Thomas H. Lee and
the Honorable Homer S. Brown

In the House

Referred to the Committee on Judiciary, March 1.
Reported as committed, March 8.
Passed First Reading, March 9.
Passed Second Reading, March 14.
Passed Third Reading and final passage, March 15 (206-0).
House concurrence laid on the table, March 31.
Taken from the table, April 5.
†House concurred in Senate Amendments, April 5 (206-0).

In the Senate

Referred to the Committee on Judiciary General, March 16.
Reported as committed, March 23.
Passed First Reading, March 23.
Passed Second Reading, March 24.
†Amended on Third Reading, March 29.
Passed Third Reading and final passage, March 30 (50-0).

Approved by the Governor, April 19, 1949.
Act No. 121

† Amendments were made only to conform to original text.

FIDUCIARIES ACT OF 1949

No. 121

AN ACT

Relating to the administration and distribution of decedents' estates, trust estates, minors' estates and absentees' estates, both as to real and personal property, and the procedure relating thereto; including the disposition of such estates or portions thereof and the determination of title thereto without the appointment of a fiduciary in certain cases; the appointment, bond, removal and discharge of fiduciaries of such estates, their powers, duties and liabilities; the rights of persons dealing with such fiduciaries, and the rights of persons claiming an interest in such estates or in property distributed therefrom whether as claimants or distributees, and containing provisions concerning guardians of the person of minors, the powers, duties and liabilities of sureties and of foreign fiduciaries, the abatement, survival and control of actions and rights of action, and the presumption of death; and also generally dealing with the jurisdiction, powers and procedure of the orphans' court and of the register of wills in all matters relating to fiduciaries.

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* "Representative" in original.
 ** "and" omitted in original.
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The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

ARTICLE I.

PRELIMINARY PROVISIONS.

SECTION 101. *Short Title.*—This act shall be known and may be cited as the Fiduciaries Act of 1949.

SECTION 102. *Definitions.*—The following words when used in this act, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

(1) "Clerk" means the clerk of the orphans' court having jurisdiction.

(2) "Court" means the orphans' court having jurisdiction.

(3) "Fiduciary" includes personal representatives, guardians and trustees, whether domiciliary or ancillary, individual or corporate, subject to the jurisdiction of the orphans' court.

Comment. The 1917 Act defines fiduciary in Section 1 to "include executors, administrators, guardians, and trustees, whether domiciliary or ancillary, subject to the jurisdiction of the orphans' court of any county of this Commonwealth." "Fiduciary" is defined in Section 101 of the Statutory Con-

struction Act, 46 PS 601, to be “an executor, administrator, guardian, committee, receiver, trustee, assignee for the benefit of creditors, and any other person, association, partnership, or corporation, acting in any similar capacity.”

(4) “Personal representative” means an executor or administrator of any description.

Comment. “Personal Representative” is defined in Section 101 of the Statutory Construction Act, 46 PS 601, to be “the executor or administrator of a decedent.”

(5) “Register” means the register of wills having jurisdiction to grant letters testamentary or of administration.

(6) “Trust” means any trust, whether testamentary or inter vivos, subject to the jurisdiction of the orphans’ court.

(7) “Foreign fiduciary” means a personal representative, guardian of a minor or testamentary trustee appointed under the laws of the jurisdiction in which the decedent was domiciled at the time of his death or in which the minor is domiciled and not also appointed under the laws of the Commonwealth.

SECTION 103. *Title to Personal Estate.*—Legal title to all personal estate of a decedent shall pass at his death to his personal representative, if any, as of the date of his death.

Comment. This section, together with Section 104, is included in these preliminary provisions so that the draftsmen’s position concerning the location of title is clearly set forth. Section 103 is declaratory of existing case law. The words “*as of the date of his death*” are suggested by language in the Bankruptcy Code: cf. 11 USCA 110.

SECTION 104. *Title to Real Estate.*—Legal title to all real estate of a decedent shall pass at his death to his heirs or devisees, subject, however, to all the powers granted to the personal representative by this act and lawfully by the will and to all orders of the court.

Comment. The distinction made in Sections 103 and 104 between the title to real property and the title to personal property is believed to be justified by their different natures. It is also justified by numerous practical difficulties which would arise if it were declared that legal title to real estate as well as to personal property vests in the personal representative, or that title to personal property vests in the legatees or next of kin. It is considered advisable to make a definite declaration as to where title is located rather than to have the question answered only by examining the various provisions of the Act.

SECTION 105. *Effective Date.*—This act shall take effect on the first day of January, one thousand nine hundred and fifty, subject to the following exceptions:

(1) *Decedents' Estates.* All sections of Articles I to VII, both inclusive, shall apply only to the estates of decedents dying on or after that day, and as to the estates of persons dying before that day, the existing laws on the topics included within those sections shall remain in effect.

(2) *Trust Estates.* Sections* 949 entitled "*Disagreement Among Trustees*," 961 entitled "*Power to Sell*," 963 entitled "*Order of Court*," insofar as it authorizes the court to approve the grant of an option, and 984 entitled "*Disposition of Minor's Income*," shall apply to testamentary trusts and irrevocable trusts only if becoming effective on or after that day but shall apply to revocable trusts whenever created. As to testamentary trusts and irrevocable trusts effective before that day, the existing laws on the topics included within such sections or designated portions thereof shall remain in effect.

Comment. The exceptions listed are instances where it is believed a retroactive application would disturb vested property rights.

(3) *Minors.* Subsection (a) of section 1045 entitled "*Guardian Named in Conveyance*" shall apply only to guardians named in wills, irrevocable trusts or other irrevocable instruments becoming effective on or after that day but shall apply to revocable trusts or designations whenever created or made. As to guardians appointed by wills, irrevocable trusts or other irrevocable instruments effective before that day, the existing laws on the topics included within subsection (a) of Section 1045 shall remain in effect.

Comment. The subsection mentioned is believed to be the only instance in Article X where a retroactive application would disturb a vested right.

SECTION 106. Severability.—If any provision of this act or the application thereof to any person or circumstances is held invalid, the remainder of this act and the application of such provision to other persons or circumstances shall not be affected thereby, and to this end the provisions of this act are declared to be severable.

Comment. This is similar to Section 18 of the Estates Act of 1947.

ARTICLE II.

DISPOSITIONS INDEPENDENT OF LETTERS.

A. Wages or Salary; Small Estates.

SECTION 201. Payment of Wages or Salary to Family.—Any employer of a person dying domiciled in the Commonwealth

* "Section" in original.

at any time after the death of the employee, whether or not a personal representative has been appointed, may pay wages or salary in an amount not exceeding two hundred and fifty dollars due to the deceased employee to the spouse, any child, the father or mother, or any sister or brother (preference being given in the order named) of the deceased employee. Any employer making such a payment shall be released to the same extent as if payment had been made to a duly appointed personal representative of the decedent and he shall not be required to see to the application thereof. Any person to whom payment is made shall be answerable therefor to anyone prejudiced by an improper distribution:

Comment. This replaces Section 49(f) of the Fiduciaries Act of 1917, and differs from it in the following respects:

(1) The requirement that the employer wait for thirty days is omitted.

(2) The husband as well as the wife is included.

(3) "*Wages or salary in an amount not exceeding two hundred and fifty dollars*" rather than "all wages . . . where such wages due do not exceed two hundred and fifty dollars in amount" has been used to make it clear that \$250 of wages or salary can be paid even when the total due exceeds \$250.

(4) "*Any child*" rather than "children" is used so that it is clear that an employer may make payment to any child. For his own protection, the employer would, of course, make payment only to an adult.

(5) It is now clear that the employer has no obligation to determine whether letters have been granted.

(6) No provision is made concerning payments to "undertaker, physician, boarding-house keeper, and nurse, each his or her pro rata share upon affidavit of fact furnished." Payment to any of these can be made by the employer upon receipt of a certified copy of a decree under Section 202 where there is no spouse, child, parent, sister or brother to whom the employer can make payment under this section. Also avoided is the slight discrepancy in the order of distribution among creditors existing between Section 13 and Section 49(f) of the 1917 Act.

(7) The words "*shall be answerable therefor to anyone prejudiced by an improper distribution*" have been included to avoid any constitutional question: cf. *Coral Gables First National Bank v. Hart*, 20 S. 2d 647 (Fla. 1945), annotated 44 Mich. L. R. 492.

SECTION 202. *Settlement of Small Estates on Petition.*—When any person dies domiciled in the Commonwealth owning property (exclusive of real estate and of wages or salary payable under section 201, but including personal property claimed as the family exemption) of a gross value not exceeding one thousand dollars, the orphans' court of the county wherein the decedent was domiciled at the time of his death, upon petition of any party in interest, in its discretion, with or without appraisal, and with such notice as the court shall direct, and

whether or not letters have been issued or a will probated, may direct distribution of the property (including wages or salary not paid under section 201) to the parties entitled thereto. The decree of distribution so made shall constitute sufficient authority to all transfer agents, registrars and others dealing with the property of the estate to recognize the persons named therein as entitled to receive the property to be distributed without administration, and shall in all respects have the same effect as a decree of distribution after an accounting by a personal representative. Within one year after such a decree of distribution has been made, any party in interest may file a petition to revoke it because an improper distribution has been ordered. If the court shall find that an improper distribution has been ordered, it shall revoke the decree and shall direct restitution as equity and justice shall require.

Comment. This is based in part on the last sentence of Section 2(c) of the 1917 Act as amended by the Act of 1939, P. L. 712, and in part on Section 12(f) of the 1917 Act, as last amended by Act of 1939, P. L. 199. A similar procedure is provided in other states. See article, 44 Mich. L. R. 329, 394, et seq. It should be noted that unlike Section 12(f) of the 1917 Act, this section cannot be employed to secure an exemption from real estate. Section 213 must be employed for that purpose. The broad discretion given to the court concerning notice and appraisal should make it possible for each court to adopt a procedure best adapted to local conditions.

B. Family Exemption.

SECTION 211. When Allowable.—The spouse of any decedent dying domiciled in the Commonwealth, and if there be no spouse, or if he has forfeited his rights, then such children as form a part of the decedent's household, may retain or claim as an exemption and as a reasonable requirement for support during the settlement of the estate, either real or personal property, or both, not theretofore sold by the personal representative, to the value of seven hundred and fifty dollars. The surviving husband or wife shall be a competent witness as to all matters pertinent to the issue of forfeiture of the right to the exemption.

Comment. This is based on Section 12(a) of the 1917 Act and differs from it in the following respects:

(1) In accordance with the recommendation of the Pennsylvania Bar Association Committee (Pennsylvania Bar Association Quarterly, June, 1941, page 315), the right of exemption has been given also to a surviving husband.

(2) It is provided expressly that the children must form a part of the decedent's *household* rather than a "part of the family." The language of the 1917 Act is: "The widow, if any, or if there be no widow, or if she has forfeited her rights, then the children forming part of the family of any

decedent dying, testate or intestate.” The wording of the 1917 Act does not make it clear whether the widow must be “part of the family,” but case law has established that the family relationship must exist or that the destruction of the family relationship was due to such fault of the husband as would have entitled the widow to a divorce. So also it has been determined by case law that children must form a part of the decedent’s household to be entitled to the exemption. Children are, of course, a part of the family regardless of where they live. The determining feature under case law is whether they are a part of the *household*, and therefore this word has been used.

(3) Consideration has been given as to whether the right to the exemption should be confined to minor children and it has been concluded that no change should be made.

(4) The words “*and as a reasonable requirement for support during the settlement of the estate*” have been added to secure the benefit of a deduction for Federal estate tax purposes under Section 812(b) of the Internal Revenue Code which allows as a deduction “Such amounts . . . (5) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent.”

(5) Increasing the exemption to \$750 is considered advisable because of the reduced purchasing power of the dollar since 1917.

(6) The 1917 Act allows the exemption to the widow or children “of any decedent dying, testate or intestate, within this Commonwealth, or dying outside of this Commonwealth, but whose estate is settled in this Commonwealth.” This language has been changed to allow the exemption only from the estates of persons dying domiciled in the Commonwealth.

(7) The words “proceeds of either real or personal property” appearing in Section 12 of the 1917 Act have been omitted because they are confusing.

SECTION 212. *Payment or Delivery of Exemption.*—

(a) *Items Claimed.* The personal representative, if any, shall deliver to the spouse or children the items of personal property claimed as the exemption, at the values fixed by the inventory and appraisalment.

(b) *Property Set Aside for Minors.* When any spouse or child entitled to all or part of the exemption is a minor, the guardian of his estate, and if no such guardian has been appointed then the personal representative, without request made to him by anyone, shall select, for the use and benefit of the minor, real or personal property to the full value to which he is entitled, and in so doing the guardian or personal representative shall be governed by the necessities of the minor under the circumstances of each case.

(c) *Control of Court.* On petition of any party in interest, the court, with or without appraisal and on such notice as it shall direct, may control the distribution and the valuation of articles of personal property retained or claimed.

Comment. When the surviving spouse has custody of the personal property, he can retain it as under Section 12 of the 1917 Act. When the amount of the entire personal estate is small he can acquire it by court decree under Section 202. Section 212 is intended to apply when none of these methods is feasible. As under Section 12 of the 1917 Act, it is contemplated that the surviving spouse, the adult children or those acting for minors will choose property at values fixed in the inventory. These items of property can be set apart without any involved procedure if the personal representative and the person entitled to the exemption agree upon the values fixed in the inventory. It is realized that there is opportunity for abuse where the surviving spouse is the personal representative. However, when this is the case the personal representative would be subject to surcharge at the time of his accounting or to the control of the court under subsection (c).

When the personal representative is not the person entitled to the exemption, he would be taking no greater risk in allocating property to the exemption than he takes in selling assets of the estate and using the proceeds to pay a preferred claim.

Subsection (b) is suggested by Section 12(e) of the 1917 Act.

Subsection (c) is intended to make it possible for the court to allow the exemption with such notice and procedure as it deems necessary in the particular circumstances. Thus appraisement could be waived as under the Act of 1941, P. L. 9, 20 PS 471, amending Section 12(a) of the 1917 Act. This is a proper subject for rules of court as it is believed that the requirements in more populous counties should differ from those in less populous counties where the parties involved and the circumstances are often personally known to the judge.

SECTION 213. *Payment from Real Estate.*—

(a) *Appraisement.* If the exemption is claimed in whole or in part out of real estate, the appraisement of the real estate shall be made by two appraisers appointed by the court, upon petition and after such notice as the court shall direct. The orphans' court of the county where letters testamentary or of administration have been granted, or should no letters have been granted then of the county within which was the family or principal residence of the decedent, shall have jurisdiction concerning the exemption, whether the real estate is situate in that county or in any other county of the Commonwealth. When real estate is located outside of the county of original jurisdiction, the orphans' court of the county of original jurisdiction may, in its discretion, direct that an application for the appointment of appraisers shall be made to the orphans' court of the county in which the real estate is located. The appraisers so appointed shall fix the value of the real estate as of the date of presenting the petition for their appointment and shall receive such compensation as shall be allowed by the court appointing them. Exceptions to appraisements shall be filed with the court of original jurisdiction which may, in its discretion, refer the excep-

tions to the orphans' court of the county in which the real estate is located. Upon compliance with such requirements of notice as the court shall direct, the court of original jurisdiction may confirm the appraisement and set apart the real estate to the surviving spouse, child or children entitled thereto.

(b) *Real Estate Valued at More than Amount Claimed.*

When the real estate of the decedent cannot be divided so as to set apart the amount claimed without prejudice to or spoiling the whole or any parcel of it and the appraisers shall value such real estate or parcel thereof at any sum exceeding the amount claimed, it shall be lawful for the orphans' court of original jurisdiction to confirm the appraisement and to set apart such real estate or parcel thereof for the use of the surviving spouse, child or children, conditioned, however, that the surviving spouse, child or children shall pay the amount of the valuation in excess of the amount claimed, without interest, within six months from the date of confirmation of the appraisement. If the surviving spouse, child or children shall refuse to take the real estate or parcel thereof at the appraisement, or shall fail to make payment as provided above, the court, on application of any party in interest, may direct the personal representative or a trustee appointed by the court to sell the same and the sale in such case shall be upon such terms and security as the court shall direct.

(c) *Payment of Surplus.* The real estate, if taken by the surviving spouse, child or children, shall vest in him or them, upon his or their payment of the surplus above so much of the exemption as shall be claimed out of the real estate to the parties entitled thereto or to the personal representative of the decedent, as the court, in its discretion, shall direct. If the real estate is sold, so much of the exemption as shall be claimed out of it shall be paid out of the purchase money to the surviving spouse, child or children entitled thereto, and the balance, after payment of costs, shall be distributed to the parties entitled thereto or to the personal representative of the decedent, as the court, in its discretion, shall direct.

(d) *Recording and Registering Decrees.* A certified copy of every decree confirming an appraisement of real estate and setting it apart to the surviving spouse, child or children shall be recorded in the deed book in the office of the recorder of deeds of each county where the real estate shall lie, shall be indexed by the recorder in the grantor's index under the name of the decedent and in the grantee's index under the name of such surviving

spouse, child or children, and shall be registered in the survey bureau or with the proper authorities empowered to keep a register of real estate in the county: Provided, That no decree conditioned upon payment of any surplus by the surviving spouse, child or children shall be recorded or registered unless there is offered for recording, concurrently therewith, written evidence of the payment of such surplus.

(e) *Costs and Expenses.* All costs, appraisers' fees and expenses of recording and registering incurred in claiming the exemption shall be part of the general administration expenses of the estate.

Comment. This section is almost identical with the provisions concerning the spouse's allowance in Section 10 of the Intestate Act of 1947. The only substantial change is the exclusion of a reference to the allowance of an exemption in an estate where the decedent is a nonresident.

SECTION 214. *Income.*—When the family exemption does not exhaust the entire real and personal estate, the income of the estate shall be equitably prorated among the surviving spouse, child or children and the others taking the estate.

Comment. This is based on the language of Section 10(e) of the Intestate Act of 1947. It replaces Section 12(i) of the 1917 Act.

SECTION 215. *Other Remedies.*—The surviving spouse, child or children may also collect the exemption out of real and personal estate, together with income thereon, in the manner provided by law for the collection of legacies.

Comment. This is based on similar provision in connection with the spouse's allowance in the Intestate Act of 1947. See Section 801 for enforcement of the payment of legacies charged on real or personal property.

SECTION 216. *Grantee or Lienholder.*—

(a) *Rights Accruing Before Death; Purchase Money Obligation.* Nothing in this article shall be construed as impairing any lien existing at death for the purchase money of real estate.

(b) *Rights Accruing After Death.* A decree setting apart a family exemption shall be void as against a subsequent bona fide grantee of, or holder of a lien on, real estate, unless the decree granting the exemption from real estate, or a duplicate original or certified copy thereof, is recorded in the deed book in the office of the recorder of deeds in the county in which the real estate lies, within one year after the death of the decedent, or, if thereafter, then before the recording or entering of the instrument or lien under which such grantee or lienholder claims.

Comment. This is based upon the Wills Act of 1947, Section 13, dealing with the spouse's election. When the decree is conditioned upon payment of a surplus, the person or persons entitled to the exemption as against a bona fide grantee or lienholder must pay the surplus and record the decree within one year of death. The claimant as against other persons would have six months from the confirmation of the appraisal under Section 213(b) to pay the surplus.

ARTICLE III.

PERSONAL REPRESENTATIVE; APPOINTMENT, BOND, REMOVAL AND DISCHARGE.

A. Grant of Letters.

SECTION 301. *Proper County.*—Letters testamentary or of administration on the estate of a decedent domiciled in the Commonwealth at the time of his death shall be granted only by the register of the county where the decedent had his last family or principal residence. If the decedent had no such domicile in the Commonwealth, letters testamentary or of administration may be granted by the register of any county wherein property of the estate shall be located and, when granted, shall be exclusive throughout the Commonwealth.

Comment. This section is based on Section 2(a) of the Fiduciaries Act of 1917. A distinction is made between persons domiciled in Pennsylvania and those merely having property within the Commonwealth. Since persons may be domiciled in Pennsylvania without a family or principal residence here, it is provided that letters shall be granted where the decedent had his "last" family or principal residence rather than his residence "at the time of his decease". This covers persons who leave Pennsylvania but never establish a domicile elsewhere.

When the decedent was domiciled elsewhere, letters, whether original or ancillary, can be granted in any county in which any property of the decedent is located. This permits the grant of original letters as well as of ancillary letters and covers cases in which the decedent leaves no property at his domicile or provides in his will for separate administration in Pennsylvania: cf. *Harding's Est.*, 12 D. & C. 633, 15 D. & C. 515; *Pepper's Est.*, 148 Pa. 5; *Kortright's Est.*, 19 Dist. 1056, 237 Pa. 138. The grant of letters in any county where such a decedent has left property avoids the question of where the principal part of the estate and goods of the decedent were located. This is consistent with Section 10(b) and Section 11 of the Intestate Act of 1947.

The words "*family or principal residence*" are retained to make certain that they apply to a definite place within the Commonwealth. "Domicile" is employed frequently in the 1917 and 1947 Acts in the sense of location generally within the Commonwealth rather than within a particular county of the Commonwealth: cf. Intestate Act of 1947, Section 14; Wills Act of 1947, Section 19; *Raymond v. Leishman*, 243 Pa. 64; *Restatement, Conflict of Laws*, Section 9. No provision is made for staying proceedings in one

county when letters have been granted in another. This is covered by case law: cf. *Freer Est.*, 353 Pa. 351.

SECTION 302. *When Twenty-one Years Elapsed.*—Letters testamentary or of administration shall not be granted after the expiration of twenty-one years from the decedent's death, except on the order of the court, upon cause shown.

Comment. This is based on Section 2(b) of the Fiduciaries Act of 1917. The word "originally" has been omitted to avoid confusion. This omission is consistent with case law which has interpreted the word to mean "in the first instance" thus imposing on the Orphans' Court the duty to determine primarily the propriety of a grant of letters (*Hanbest's Est.*, 21 Pa. Super. 427) whether original or subsequent. Retention of the section seems advisable because it controls the possible grant of letters when the purpose of the petition is to lay the ground for a fraudulent claim.

SECTION 303. *Contents of Petition.*—A petition for the grant of letters testamentary or of administration shall state, under oath, so far as they are known:

(1) The decedent's name, age, state or *country of domicile, his last family or principal residence, and the place, day and hour of his death;

(2) If the decedent died intestate, the name and residence address of the surviving spouse, if any, and the names, relationships and residence addresses of other heirs;

(3) If the decedent died testate, whether he has married or any child has been born to or adopted by him since the execution of the will;

(4) If the decedent was domiciled in the Commonwealth at the time of his death, the estimated value of all his personal property, and the estimated value and the location of his real property situated in the Commonwealth;

(5) If the decedent was not domiciled in the Commonwealth at the time of his death, the estimated value of his personal property in the Commonwealth, the estimated value of his personal property in the county in which the petition is filed, and the estimated value and location of his real property in the Commonwealth;

(6) The name and residence address of each person to whom letters are requested to be granted;

(7) Any other facts necessary to entitle the petitioner to letters.

* County in original.

Comment. This is based upon the first paragraph of Section 2(d) of the Fiduciaries Act of 1917, as amended.

SECTION 304. Affidavit.—The affidavit to a petition for the grant of letters may be taken before the register of any county of the Commonwealth.

Comment. This is based upon the second paragraph of Section 2(d) of the 1917 Act added by the Act of 1939, P. L. 209.

SECTION 305. Persons Entitled.—

(a) *Letters Testamentary.* Letters testamentary shall be granted by the register to the executor designated in the will, whether or not he has declined a trust under the will.

Comment. The 1917 Act contains no provision for persons entitled to letters testamentary. It seems advisable to include it here for completeness. The words "*whether or not he has declined a trust under the will*" are suggested by a similar provision in Section 56(c) of the 1917 Act.

(b) *Letters of Administration.* Letters of administration shall be granted by the register, in such form as the case shall require, to one or more of those hereinafter mentioned and, except for good cause, in the following order:

(1) Those entitled to the residuary estate under the will;

(2) The surviving spouse;

(3) Those entitled under the intestate law as the register, in his discretion, shall judge will best administer the estate, giving preference, however, according to the sizes of the shares of those in this class;

(4) The principal creditors of the estate;

(5) Other fit persons;

(6) If anyone of the foregoing shall renounce his right to letters of administration, the register, in his discretion, may appoint a nominee of the person so renouncing in preference to the persons set forth in any succeeding clause.

Comment. This is based in part upon Section 2(c) of the Fiduciaries Act of 1917.

Clauses (1) to (5) indicate more clearly than the 1917 Act the exact order of preference to be followed in the granting of letters. They are declaratory of existing case law.

Granting the right to the register in clause (6) to appoint a nominee if he so desires before someone in the next class is a change in existing law: *McClellan's Ap.*, 16 Pa. 110. It should enable the register to work out a satisfactory compromise where the interests of the persons in the different classes are not friendly and the persons having the preferred right do not

care to administer but would do so rather than let someone other than a nominee administer the estate.

(c) *Time Limitation.* Except with the consent of those enumerated in clauses (1), (2) and (3), no letters shall be issued to those enumerated in clauses (4) and (5) of subsection (b) until seven days after the decedent's death.

Comment. There should be no inference from this subsection that the order of grant of letters may be disregarded entirely after seven days from the date of death. This is merely a minimum requirement.

SECTION 306. *Persons Not Qualified.*—No person shall be qualified to serve as personal representative who is—

(1) Under twenty-one years of age;

(2) A corporation not authorized to act as fiduciary in the Commonwealth;

(3) A person, other than an executor designated by name or description in the will, found by the register to be unfit to be entrusted with the administration of the estate.

Comment. This is a new section which has no counterpart in the 1917 Act. The section is declaratory of existing law in requiring that the executor be twenty-one (*McKernan's Est.*, 20 Montg. 207; cf. Fiduciaries Act of 1917, Section 4); in recognizing that only certain resident and nonresident corporations can act as fiduciaries (Banking Code of 1933, Section 1506, 7 PS 819-1506) and in allowing the register to disregard unfit persons: *Friese's Est.*, 317 Pa. 86. It has been thought inadvisable to include provisions for refusing letters of administration to persons of "unsound mind," embezzlers or insolvent persons: cf. *Miller's Est.*, 216 Pa. 247. Such persons can be excluded under clause (3). To exclude them specifically might raise too many issues of fact for determination by the register.

SECTION 307. *Non-residents.*—

(a) *Discretion of Register.* The register shall have discretion to refuse letters of administration to any individual not a resident of the Commonwealth.

(b) *Power of Attorney.* If a personal representative is or becomes a nonresident of the Commonwealth, the acceptance of his letters, or the act of becoming a nonresident, as the case may be, shall constitute the Secretary of the Commonwealth his attorney-in-fact upon whom service of process and notices may be made as to all causes of action relating to the decedent or the administration of his estate.

Comment. Subsection (a) is new. However, it is declaratory of existing law: *Frick's Ap.*, 114 Pa. 29; *Friese's Est.*, 317 Pa. 86. The power to dis-

regard nonresidents avoids unnecessary delay occasioned by difficulty in locating them.

Subsection (b) is suggested by the Act of 1929, P. L. 1721, as amended, 75 PS 1201. It is also suggested by the last two sentences of Section 57(a) of the 1917 Act, and by the Act of 1927, P. L. 475, 20 PS 344.

SECTION 308. *Letters of Administration c. t. a.*—When there is a will, but no executor qualifies, letters of administration cum testamento annexo may be granted to the person or persons entitled thereto.

Comment. This is based on Section 3(a) of the 1917 Act. The wording “*When . . . no executor qualifies*” is employed to apply whether one or more executors have been named.

“*To the person or persons entitled thereto*” refers to the persons listed in Section 305. No reference is made to the powers of administrators c. t. a. as in the 1917 Act, Section 3(d). These are considered in Section 516, *infra*.

SECTION 309. *Letters of administration d. b. n. or d. b. n. c. t. a.*—When an entire vacancy occurs in the office of personal representative before administration is completed, the register, in a case of intestacy, shall grant letters of administration de bonis non, and in a case of testacy, letters de bonis non cum testamento annexo, to the person or persons entitled thereto.

Comment. This takes the place of Sections 3(b) and (c) of the Fiduciaries Act of 1917. No reference is made to the rights of the executor of a deceased executor as in Section 3(b) of the 1917 Act or to the powers of administrators d. b. n. or d. b. n. c. t. a. as in Section 3(e) of the 1917 Act. These are included in Sections 514 and 517, *infra*. As in Section 308 “*the person or persons entitled thereto*” refers to the persons listed in Section 305.

SECTION 310. *Letters of Administration Durante Minoritate, Durante Absentia, and Pendente Lite.*—Whenever the circumstances of the case require, letters of administration durante minoritate, durante absentia, or pendente lite may be granted to any fit person or persons, after such notice, if any, as the register shall require.

Comment. This is based on Section 4 of the 1917 Act. It should be noted that letters durante absentia are granted only when there is a decedent. Section 1202, *infra*, includes provision for the appointment of *trustees* durante absentia where persons are unheard of but have not been declared dead. “*To any fit person or persons*” rather than “*person or persons entitled thereto*” is used because it is not intended that the register be bound by the order set forth in Section 305. The administrator pendente lite, for example, probably should be a person having no interest in the outcome of the litigation.

SECTION 311. *Oath of Personal Representative.*—Before letters shall be granted to a personal representative by the reg-

ister the personal representative shall swear that he will well and truly administer the estate according to law. The oath of a corporate personal representative may be taken by any of its officers.

B. Bond.

SECTION 321. *Individual Estate.*—Except as hereinafter provided, before letters shall be granted to any personal representative, he shall execute and file a bond which shall be in the name of the Commonwealth, with sufficient surety, in such amount as the register considers necessary, having regard to the value of the personal estate which will come into the control of the personal representative, and conditioned in the following form:

(1) *When One Personal Representative.* The condition of this obligation is, that if the said personal representative shall well and truly administer the estate according to law, this obligation shall be void; but otherwise, it shall remain in force.

(2) *When Two or More Personal Representatives.* The condition of this obligation is, that if the said personal representatives or any of them shall well and truly administer the estate according to law, this obligation shall be void as to the personal representative or representatives who shall so administer the estate; but otherwise, it shall remain in force.

Comment. The section is intended to apply to all personal representatives except those listed in Section 323. Thus, no special reference is made to administrators as in Section 8 (a) of the 1917 Act, to administrators c. t. a. as in Section 8 (b), or to nonresident executors as in Section 8 (c).

"Having regard to the value of the personal estate which will come into the control of the personal representative" is included because the power of a personal representative who has been required to give bond upon the grant of letters to receive the proceeds of the sale of real estate is conditioned on the court passing upon the necessity of additional security. See Sections 541, 543, and 544.

The separate provision applying where there are two or more personal representatives is included so that a personal representative, where a joint bond is given, will not be liable to his surety for the defaults of the other personal representative. Cf. *Davis's Ap.*, 23 Pa. 206; *Boyd v. Boyd*, 1 Watts 365. It is not intended to change existing law which requires a personal representative to be reasonably watchful of his co-fiduciaries, but it is intended to prevent him from being liable as a surety regardless of fault merely because he has joined in the execution of a joint bond.

SECTION 322. *Fiduciary Estate.*—The register, in his discretion, upon the application of any party in interest, in addition to any bond required for the decedent's individual estate, may require a separate bond in the name of the Commonwealth, with

sufficient surety, in such amount as the register shall consider necessary for the protection of the parties in interest in an estate of which the decedent was a fiduciary, and conditioned in the following form:

(1) *When One Personal Representative.* The condition of this obligation is, that if the said personal representative shall well and truly account for property held by the decedent as fiduciary according to law this obligation shall be void; but otherwise, it shall remain in force.

(2) *When Two or More Personal Representatives.* The condition of this obligation is, that if the said personal representatives or any of them shall well and truly account for property held by the decedent as fiduciary according to law, this obligation shall be void as to the personal representative or representatives who shall so account; but otherwise, it shall remain in force.

Comment. This is based on Section 8(e) of the 1917 Act. It is considered inadvisable to provide that the petition for letters (Section 303) set forth the value of property held by the decedent as a fiduciary. As now written, and in accordance with existing law, the initiative for securing the additional security must originate with a party in interest.

SECTION 323. *When Not Required.*—

(a) *Corporate Personal Representative.* No bond shall be required of a bank and trust company or of a trust company incorporated in the Commonwealth, or of a national bank having its principal office in the Commonwealth, or, in the discretion of the register, of a foreign corporation, or of a national bank having its principal office out of the Commonwealth, otherwise qualified to act.

Comment. This subsection is suggested by Section 1106 of the Banking Code, 7 PS 819-1106. It is also suggested by the authorization frequently given in the 1917 Acts to the register and to the court to accept the bond of corporate fiduciaries without security. By the Act of 1945, P. L. 509, 71 PS 733-1011 a surcharge against a corporate fiduciary now has the same priority as a deposit in the event of liquidation.

It seems advisable to make the subsection apply specifically to national banks. See article, 51 Dick. L. R. 169, on the applicability of provisions of the Banking Code of 1933 to national banks.

Nonresident corporations have been required to give bond under the provisions of Section 1506 of the Banking Code, 7 PS 819-1506, but this has not necessarily required sureties.

(b) *Resident Executor.* No bond shall be required of an individual executor who is a resident of the Commonwealth unless it is required by the will or is ordered by the court.

Comment. This is in accordance with existing law.

(c) *Nonresident Executor.* No bond shall be required of an individual executor not a resident of the Commonwealth who has been excused from filing a bond by express direction of the testator in his will unless the register, for cause, deems it necessary, in which event the register, in fixing the amount of the bond, shall have regard to all the circumstances, including the amount of transfer inheritance tax and estate tax due the Commonwealth and the amount of the decedent's debts.

Comment. This subsection together with Section 321, like Section 8(c) of the 1917 Act, requires bonds of nonresident executors. However, in accordance with the laws of numerous states, the testator is authorized to excuse his nonresident executor from giving bond; but since the rights of the Commonwealth and of creditors as well as of beneficiaries are involved, provision is made whereby a bond can be required regardless of the will if the register deems it necessary. Where a bond is required the register should require not more than twice the amount of the probable debts and claims of the Commonwealth. In such circumstances the requirement of a bond based on the entire value of the estate would be an abuse of discretion unless there was reason to anticipate that the claims would approximate that amount. Among other circumstances which should guide the register is whether the assets of the estate will be removed from the Commonwealth for administration.

SECTION 324. *Requiring or Changing Amount of Bond.*—The court, upon cause shown and after such notice, if any, as it shall direct, may require a surety bond, or increase or decrease the amount of an existing bond, or require more or less security therefor.

Comment. This is based in part upon Section 8(f) of the 1917 Act providing for additional security upon the taking of exceptions, and Section 9(b) of the 1917 Act under which a fiduciary may petition the court for reduction of his bond. See also Section 54 of the 1917 Act under which additional security can be required of a personal representative when any ground exists justifying his removal.

C. Removal and Discharge.

SECTION 331. *Grounds for Removal.*—The court shall have exclusive power to remove a personal representative when he—

Comment. This is based on the introductory paragraph of Section 53(a) of the 1917 Act.

(1) is wasting or mismanaging the estate, is or is likely to become insolvent, or has failed to perform any duty imposed by law; or,

Comment. This is based on Sections 53(a)1, 53(a)6 and 54(a)2 of the 1917 Act.

(2) has been adjudged a lunatic, a habitual drunkard, or a weak-minded person; or,

Comment. This is based on Section 53(a)2 of the 1917 Act.

(3) has become incompetent to discharge the duties of his office because of sickness or physical or mental incapacity and his incompetency is likely to continue to the injury of the estate; or,

Comment. This is based on Section 53(a)3 of the 1917 Act.

(4) has removed from the Commonwealth or has ceased to have a known place of residence therein, without furnishing such security or additional security as the court shall direct; or,

Comment. This is based on Section 53(a)4 of the 1917 Act.

(5) when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office.

Comment. This is based on Section 53(a)8 of the 1917 Act.

SECTION 332. Procedure for and Effect of Removal.—The court on its own motion may, and on the petition of any party in interest alleging adequate grounds for removal shall, order the personal representative to appear and show cause why he should not be removed, or, when necessary to protect the rights of creditors or parties in interest, may summarily remove him. Upon removal, the court may direct the grant of new letters testamentary or of administration by the register to the person entitled and may, by summary attachment of the person or other appropriate orders, provide for the security and delivery of the assets of the estate, together with all books, accounts and papers relating thereto. Any personal representative summarily removed under the provisions of this section may apply, by petition, to have the decree of removal vacated and to be reinstated, and, if the court shall vacate the decree of removal and reinstate him, it shall thereupon make any orders which may be appropriate to accomplish the reinstatement.

Comment. This is based on Sections 53(b) and 53(c) of the 1917 Act. Section 53(b) deals with removal upon petition, citation, and hearing, and Section 53(c) provides for summary removal. Section 332 combines the substance of both these subsections in much simpler language.

Since Sections 16 and 18 of the Orphans' Court Act include ample machinery for the enforcement of decrees, there is no need to repeat any of its procedure in this Act as was done in Section 53(e) of the 1917 Act.

SECTION 333. Discharge of Personal Representative and Surety.—After confirmation of his final account and distribution

to the parties entitled, a personal representative and his surety may be discharged by the court from future liability. The court may discharge only the surety from future liability, allowing the personal representative to continue without surety, upon condition that no further assets shall come into the control of the personal representative until he files another bond with sufficient surety, as required by the register.

Comment. This replaces Section 52 of the 1917 Act.

ARTICLE IV.

INVENTORY AND APPRAISEMENT.

General Comment. This article replaces Section 11 of the 1917 Act with the following principal differences:

1. The period for filing the inventory is increased from thirty days to three months.

2. All real estate is included, but real estate located outside of Pennsylvania is not extended into the totals and appears in memorandum form only.

3. No procedure is set forth (as in Section 11(b) of the 1917 Act) for compelling the filing of the inventory. There is adequate machinery in the Orphans' Court Act (Sections 16 and 18) for compelling compliance with all duties of fiduciaries.

4. There is no detailed listing of types of property to be included in the inventory.

SECTION 401. *Duty of Personal Representative.*—

(a) *General Assets.* Within three months after his appointment, every personal representative shall file with the register an inventory and appraisal, verified by his affidavit, of all real and personal estate of the decedent, except real estate outside of the Commonwealth: Provided, That an ancillary personal representative shall include therein only assets for which he is responsible.

Comment. This replaces Sections 11(a) and 11(j) of the 1917 Act. Because of the all-inclusive language employed, a detailed enumeration of property to be included in the inventory as in Section 11 of the 1917 Act is unnecessary. While it is not required, it is suggested that a notation should be made of encumbrances on property included in the inventory, especially mortgages and judgments on real estate. It is not contemplated that the real estate will be described by metes and bounds.

(b) *Real Estate Outside of Commonwealth.* The inventory shall include at the end a memorandum of real estate outside of the Commonwealth. The memorandum, at the election of the personal representative, may indicate the value of each item

of real estate included therein, but the values so fixed shall not be extended into the total of the inventory or included as real estate in subsequent accountings.

Comment. The provision for a memorandum of real estate outside of the Commonwealth is included not as a basis for future accountability of the personal representative but for the purpose of supplying creditors and persons interested in the estate with essential information. It is also included because it is often difficult to know whether assets located outside the state are real estate beyond the jurisdiction of the Pennsylvania courts or personal property for which the personal representative is accountable in Pennsylvania. If such items are included in memorandum form and are later reduced to cash or to such form that they can be brought into the accounting and jurisdiction of the Pennsylvania courts, then the accountant can charge himself with their then value. In the meantime persons interested in the estate are given some idea of the extent of the assets owned by the decedent at his death.

SECTION 402. *Valuations; Appraisers.*—The personal representative shall determine and state in figures opposite each item of the inventory its fair value as of the date of the decedent's death, based upon a just appraisal of each item made by two or more appraisers, who shall be sworn well and truly and without prejudice or partiality to appraise the assets of the estate to the best of their skill and judgment.

Comment. This replaces Sections 11(i), 11(j) and 11(k) of the 1917 Act.

SECTION 403. *Supplemental Inventory.*—Whenever any property not included in the inventory and appraisal comes to the knowledge of the personal representative, he shall file, within thirty days of its discovery, a supplemental inventory and appraisal thereof with the register.

Comment. This is based on Section 11(h) of the 1917 Act. The retention of this requirement will make it possible for persons interested in the estate to require a disclosure of estate assets without unreasonable delay. However, in many instances, especially where the after-discovered assets are inconsequential, it is to be anticipated that the present practice of including them in a subsequent accounting without prior inventory thereof will be continued.

SECTION 404. *Claims Against Personal Representative.*—The appointment of a personal representative shall not operate as a discharge or bequest of any debt which he owes the decedent or of any claim which the decedent had against him, but any such debt or claim, if it survives, shall be included in the inventory.

Comment. This replaces Section 11(d) of the 1917 Act. While it may be unnecessary, it is included to avoid any inference that the appointment of a personal representative is a discharge of his indebtedness.

ARTICLE V.

PERSONAL REPRESENTATIVES; POWERS, DUTIES
AND LIABILITIES.

A. In General.

SECTION 501. *Possession of Real and Personal Estate; Exception.*—A personal representative shall have the right to and shall take possession of, maintain and administer all the real and personal estate of the decedent, except real estate occupied by an heir or devisee. He shall collect the rents and income from each asset in his possession until it is sold or distributed, and, during the administration of the estate, shall have the right to maintain any action with respect to it and shall make all reasonable expenditures necessary to preserve it. The court may direct the personal representative to take possession of, administer and maintain real estate occupied by an heir or a devisee if this is necessary to protect the rights of claimants or other parties. Nothing in this section shall affect the personal representative's power to sell real estate occupied by an heir or devisee.

Comment. With regard to personal estate, this section restates existing law. With regard to real estate, it is a distinct departure from existing Pennsylvania law and is based on the premise that the personal representative except as stated should have the duty as well as the right to control real estate until it is sold or distributed by decree or until control is relinquished to the heir or devisee because it is not needed for administration. The theory of the drafters has been that the legal and equitable title to real estate passes to heirs or devisees as heretofore, but that real estate should be administered as personal property, with a few minor exceptions when the nature of real estate requires a different treatment. During administration the personal representative will have the same powers over real estate as he has over personal property except as the Act makes express provisions to the contrary.

It is not contemplated that rents shall be collected by the personal representative from real estate occupied by an heir or devisee unless needed for payment of claims.

SECTION 502. *Renunciation of Right to Administer Property.*—When any property is of no value to the estate, the court may authorize the personal representative to renounce his right to administer it.

Comment. This section is consistent with existing law under which a fiduciary is not required to exercise his right to administer estate property when in his reasonable judgment it is inadvisable to do so: cf. *Reynolds v. Cridge*, 131 Pa. 189; *Pearlman Trust*, 348 Pa. 488. This section should prove helpful to personal representatives and to the estate when the personal representative hesitates about assuming the risk that his judgment to

abandon property for estate purposes may prove to have been in error. When the personal representative's right to administer is renounced, full legal and equitable title will be in those beneficially interested in the asset, subject of course to their right to disclaim: cf. *Roop v. Greenfield*, 352 Pa. 232.

SECTION 503. *Liability Insurance.*—The personal representative, at the expense of the estate, may protect himself, his employees and the beneficiaries by insurance from liability to third persons arising from the administration of the estate.

Comment. There is no similar provision in the 1917 Act. The right to carry public liability insurance is recognized in *Reiff's Est.*, 49 D. & C. 119.

SECTION 504. *Continuation of Business.*—The court, aided by the report of a master if necessary, may authorize the personal representative to continue any business of the decedent for the benefit of the estate and in doing so the court, for cause shown, may disregard the provisions of the will, if any. The order may be with or without notice. If prior notice is not given to all parties in interest, it shall be given within five days after the order or within such extended time as the court, for cause shown, shall allow. Any party in interest may, at any time, petition the court to revoke or modify the order. The order may provide—

(1) For the conduct of the business, by the personal representative alone or jointly with others, or, unless restricted by the terms of the will, as a corporation to be formed;

(2) The extent of the liability of the estate or any part thereof, or of the personal representative, for obligations incurred in the continuation of the business;

(3) Whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole;

(4) The period of time the business may be conducted; and,

(5) Such other regulations, including accountings, as the court shall deem advisable.

Comment. This section has no counterpart in existing Pennsylvania law. Under existing Pennsylvania case law, at least as against the decedent's creditors, the personal representative faces the unhappy situation of suffering liability for any loss arising from continuance of the decedent's business, and of being accountable to the estate if profits are realized: *Nagle's Est.*, 305 Pa. 36; *Istocin's Est.*, 126 Pa. Super. 158. As against legatees, his position is improved if the testator has given him broad powers: cf. *Whitman's Est.*, 195 Pa. 144. Compare Section 522 dealing with the personal liability of personal representatives under written contracts, and

Miller v. Jacobs, 361 Pa. 492, on tort liability. The personal representative will not of course be relieved of responsibility for his individual wrongs or negligence.

SECTION 505. *Incorporation of Decedent's Business.*—After notice to all parties in interest, aided by the report of a master if necessary, the court, unless restricted by the terms of the will, may authorize the personal representative alone or jointly with others, to organize a corporation to carry on the business of the decedent, whether the business was owned solely by him or with others, and may contribute for stock of the corporation, as capital, all or part of the property of the estate which was invested in the business at the time of the death of the decedent.

Comment. This is based on Section 42 of the 1917 Act. The important difference between Section 505 and Section 42 of the 1917 Act is that consent of all parties in interest to incorporation is not required in Section 505.

SECTION 506. *Investment of Funds.*—Subject to his duty to liquidate the estate for prompt distribution and to the provisions of the will, if any, the personal representative may invest the funds of the estate but shall have no duty to do so. Any such investment, except as the court may otherwise direct, shall be restricted to obligations of the United States or the United States Treasury, of the Commonwealth, or of any political subdivision of the Commonwealth.

Comment. This has no statutory precedent. Existing case law has approved investment of funds by personal representatives and indicates that there is a duty to invest in certain circumstances: cf. *Kohler Est.*, 348 Pa. 55.

SECTION 507. *Claims Against Co-Fiduciary.*—When one of two or more personal representatives shall be individually liable to the estate, the other or others shall take any legal action against him necessary to protect the estate.

Comment. This is based on Section 38 of the 1917 Act.

SECTION 508. *Revival of Judgments against Personal Representative.*—When the decedent held a judgment which is a lien on the real estate of the personal representative, any party in interest may suggest his interest in the judgment upon the record thereof and bring an appropriate action to revive it and to continue its lien. Any judgment so revived shall remain for the use of all parties in interest.

Comment. This is based on Section 39 of the 1917 Act. It applies when the personal representative is merely a terre tenant. In this respect it is broader than Section 39 of the 1917 Act which applies only when the representative is a judgment debtor.

SECTION 509. *Power of Attorney.*—A personal representative may convey real estate, transfer title to personal estate, or perform any other act of administration by an attorney or attorneys-in-fact: Provided, That this provision shall not authorize him to delegate the exercise of any discretionary power except when the will shall authorize such a delegation.

Comment. This section is declaratory of existing law applicable to all fiduciaries: *Kohler Est.*, 348 Pa. 55. It is broader than Section 29 of the 1917 Act which is restricted to powers in connection with conveyances of real estate.

SECTION 510. *Voting Stock by Proxy.*—The personal representatives or a majority of them, either in person or by proxy, may vote stock owned by the estate.

Comment. This is suggested by Section 43 of the 1917 Act. However, it omits the portion of Section 43 dealing with the voting of stock when the personal representatives cannot act unanimously. That is now covered by Section 519 which applies to all powers and is not restricted to the voting of stock.

SECTION 511. *Nominee Registration; Corporate Fiduciary as Attorney-in-Fact.*—

(a) *Corporate Personal Representative.* A bank and trust company or a trust company incorporated in the Commonwealth, or a National bank with trust powers having its principal office in the Commonwealth, may keep investments or fractional interests in investments held by it, either as sole personal representative or jointly with other personal representatives, in the name or names of the personal *representatives or in the name of a nominee of the corporate personal representative: Provided, the consent thereto of all the personal representatives is obtained: And provided further, That all such investments shall be so designated upon the records of the corporate personal representative that the estate to which they belong shall appear clearly at all times.

Comment. This is based on Section 1108 of the Banking Code, 7 PS 819-1108, extended to include national banks.

(b) *Individual Personal Representative.* A personal representative serving jointly with a bank and trust company or a trust company incorporated in the Commonwealth, or with a National bank having its principal office in the Commonwealth, may authorize or consent to the corporate personal representa-

* "representative" in original.

tive having exclusive custody of the assets of the estate and to the holding of such investments in the name of a nominee of such corporate personal representative, to the same extent and subject to the same requirements that the corporate personal representative, if it were the sole personal representative, would be authorized to hold such investments in the name of its nominee.

Comment. This is based on the Act of 1945, P. L. 560, 7 PS 819-1109 (c) and (d). Cf. Section 3 of the Uniform Fiduciaries Act of 1923, 20 PS 3351.

(c) *Corporate Fiduciary as Attorney-in-Fact.* An individual personal representative may employ a bank and trust company or a trust company incorporated in the Commonwealth, or a National bank with trust powers having its principal office in the Commonwealth, to act as his attorney-in-fact in the performance of ministerial duties, including the safekeeping of estate assets, and such attorney-in-fact, when so acting, may be authorized to hold such investments in the name of its nominee to the same extent and subject to the same requirements that such attorney-in-fact, if it were the personal representative, would be authorized to hold such investments in the name of its nominee.

Comment. This subsection is intended to make it possible for an individual personal representative to appoint a corporate fiduciary to act as his agent and to secure the numerous advantages of nominee registration. The corporate fiduciary's records, under the requirements of subsection (a) would show not only for whom the corporate fiduciary was agent, but also the name of the estate for which its principal was the fiduciary.

SECTION 512. *Acceptance of Deed in Lieu of Foreclosure.*—The personal representative may take for the estate from the owner of property encumbered by a mortgage owned by the estate, a deed in lieu of foreclosure, in which event the real estate shall be considered personalty to the same extent as though title were acquired by foreclosure at sheriff's sale. Any deed or deeds heretofore so accepted are hereby made valid in accordance with the provisions hereof.

Comment. This is almost identical with Section 41(a) 4 of the 1917 Act as amended by the Act of 1941, P. L. 819, 20 PS 805.1.

SECTION 513. *Compromise of Controversies.*—Whenever it shall be proposed to compromise or settle any claim whether in suit or not, by or against the estate of a decedent, or to compromise or settle any question or dispute concerning the validity or construction of any will, or the distribution of all or any part of any decedent's estate, or any other controversy affecting any

estate, the court, on petition by the personal representative or by any party in interest setting forth all the facts and circumstances, and after such notice as the court shall direct, aided if necessary by the report of a master, may enter a decree authorizing the compromise or settlement to be made.

Comment. This is based on Section 40 of the 1917 Act.

SECTION 514. *Death of Fiduciary.*—The personal representative of a deceased fiduciary by reason of his position shall not succeed to the administration of, or have the right to possess, any asset of an estate which was being administered by his decedent, except to protect it pending its delivery to the person entitled to it. The account of the deceased fiduciary may be filed by his personal representative and it shall be filed if the court shall so direct. The court may direct the personal representative of a deceased fiduciary to make distribution and to make the transfers and assignments necessary to carry into effect a decree of distribution.

Comment. There is no statutory precedent for this section, except Section 3(b) of the 1917 Act which states that an executor of a deceased executor "shall in no case be deemed executor of the first testator". The duty to state the account (*Wagner's Est.*, 227 Pa. 460) and the right of the succeeding fiduciaries to compel an accounting (*Krick's Est.*, 342 Pa. 212) have been recognized in case law. It is contemplated that where administration of the estate is not complete, the personal representative of the deceased personal representative can deliver assets immediately to the succeeding personal representative and include a distribution account in his subsequent accounting showing delivery of such assets to the succeeding personal representative. When administration is complete, the account can show the retention of the assets and transfer can be made to the parties in interest entitled to distribution without the appointment of a succeeding personal representative.

SECTION 515. *Incompetence of Personal Representative.*—The fiduciary of the estate of an adjudged incompetent personal representative by reason of his position shall not succeed to the administration of, or have the right to possess, any asset of an estate which was being administered by the incompetent, except to protect it pending its delivery to the person entitled to it. The account of the incompetent personal representative may be filed by the fiduciary of his estate and it shall be filed if the court shall so direct.

Comment. This has no counterpart in existing legislation. However, the problem is the same as that in Section 514 and requires similar treatment.

SECTION 516. *Administrator c. t. a.*—An administrator with the will annexed shall have all the powers given by the will to

the executor, unless otherwise provided by the will. When he has been required to give bond, no proceeds of real estate shall be paid to him until the court has made an order excusing him from entering additional security or requiring additional security, and in the latter event, only after he has entered the additional security.

Comment. This is based on Section 3(d) of the 1917 Act. No mention is made of the duties and liabilities. These exist whether mentioned or not.

SECTION 517. Administrator d. b. n. and d. b. n. c. t. a.—An administrator de bonis non, with or without a will annexed, shall have the power to recover the assets of the estate from his predecessor in administration or from the personal representative of such predecessor and, except as the will shall provide otherwise, shall stand in his predecessor's stead for all purposes, except that he shall not be personally liable for the acts of his predecessor. When he has been required to give bond, no proceeds of real estate shall be paid to him until the court has made an order excusing him from entering additional security or requiring additional security, and in the latter event, only after he has entered the additional security.

Comment. This is based on Section 3(e) of the 1917 Act.

SECTION 518. Surviving or Remaining Personal Representatives.—Surviving or remaining personal representatives shall have all the powers of the original personal representatives, unless otherwise provided by the will.

Comment. This is based on Section 28(d) of the 1917 Act. The language of Section 518, unlike the language of Section 28(d) of the 1917 Act is not confined to powers for the disposal of real estate.

SECTION 519. Disagreement of Personal Representatives.—

(a) **Decision of Majority.** If a dispute shall arise among personal representatives, the decision of the majority shall control unless otherwise provided by the will, if any. A dissenting personal representative shall join with the majority to carry out a majority decision requiring affirmative action and may be ordered to do so by the court. A dissenting personal representative shall not be liable for the consequences of any majority decision even though he joins in carrying it out, if his dissent is expressed promptly to all the other personal representatives: Provided, That liability for failure to join in administering the estate or to prevent a breach of trust may not be thus avoided.

Comment. This subsection is suggested by Section 43 of the 1917 Act authorizing the majority of fiduciaries to vote stock, by the recommendation of the Pennsylvania Bar Association Committee on Decedents' Estates and

Trusts (Pa. Bar Ass'n Qu., June 1941, p. 273) that the power be extended to all powers of personal representatives, and by Section 11 of the Uniform Trusts Act. It is to be noted that no attempt is made by this subsection to make deeds of less than all personal representatives valid. All personal representatives would be required to sign. The dissenting personal representative can protect himself and when he will not cooperate the others can petition the court for its aid.

(b) *When no Majority.* When a dispute shall arise among personal representatives as to the exercise or non-exercise of any of their powers and there shall be no agreement of a majority of them, unless otherwise provided by the will, the court, upon petition filed by any of the personal representatives or by any party in interest, aided if necessary by the report of a master, in its discretion, may direct the exercise or non-exercise of the power as the court shall deem for the best interest of the estate.

Comment. It is not intended that the power of one of two or more personal representatives to act alone in the sale of personal property shall be restricted by this subsection: cf. *Schell v. Deperven*, 198 Pa. 600. By making application of the section discretionary with the court, it is believed that the court can compel fiduciaries to attempt first to reconcile their differences without using the section as a cloak for securing advisory opinions on all questionable matters.

SECTION 520. *Effect of Revocation of Letters, Probate of Will, Later Will or Codicil.*—No act of administration performed by a personal representative in good faith shall be impeached by the subsequent revocation of his letters or by the subsequent probate of a will, of a later will or of a codicil: Provided, That regardless of the good or bad faith of the personal representative, no person who deals in good faith with a duly qualified personal representative shall be prejudiced by the subsequent occurrence of any of these contingencies.

Comment. This is based on Section 5 of the 1917 Act. Compare also Section 21(b) of the Register of Wills Act which provides that an appeal from probate or from the grant of letters shall not prejudice the acts of a duly appointed personal representative.

SECTION 521. *Notice of Devise or Bequest to Corporation or Association.*—A personal representative to whom original letters are granted shall send a written notice, within three months after the grant of letters, to each corporation or association named as a beneficiary in the decedent's will, stating the date of the decedent's death, the county where the will has been probated, and that it is named as a beneficiary.

Comment. This is based on Section 19 of the 1917 Act. It differs from the 1917 Act in requiring notice to associations as well as corporations and

in not requiring that the personal representative state the "nature and amount of such devise and bequest".

SECTION 522. *Liability of Personal Representative on Contracts.*—Unless he expressly contracts otherwise, in writing, a personal representative shall not be personally liable on any written contract which is within his authority as personal representative and discloses that he is contracting as personal representative of a named estate. Any action on such a contract shall be brought against the personal representative in his fiduciary capacity only, or against his successor in such capacity, and execution upon any judgment obtained therein shall be had only against property of the estate.

Comment. This is based on Section 1 of the Act of 1939, P. L. 871, 20 PS 1171. Under the 1939 Act the personal representative apparently was not personally liable on contracts which were not within his authority. Under Section 521 he is excused only from liability on contracts made within his authority. No detailed provisions concerning contracts and torts are included here similar to those in Sections 12-14 of the Uniform Trusts Act. It is thought advisable to leave this to case law guided by the general principles set forth in the Restatement of Trusts.

SECTION 523. *Inherent Powers and Duties.*—Except as otherwise provided in this act, nothing in this act shall be construed to limit the inherent powers and duties of a personal representative.

Comment. This section has been added out of an abundance of caution to make it clear that the powers listed in the Act are not all-inclusive. For example, we do not wish to interfere with the personal representative's right to make repairs to property, to deposit money in bank, to give receipts, etc.

B. Sales, Pledges, Mortgages, Leases, Options *and Exchanges.

SECTION 541. *Power to Sell.*—Except as otherwise provided by the will, if any, the personal representative may sell, at public or private sale, any personal property whether specifically bequeathed or not, and any real property not specifically devised. When the personal representative has been required to give bond, no proceeds of real estate shall be paid to him until the court has made an order excusing him from entering additional security or requiring additional security, and in the latter event, only after he has entered the additional security.

Comment. As applied to real estate, this is a fundamental change from existing law. It seems advisable that the personal representative have the same right to sell real estate not specifically devised as he has to sell

* "and" omitted in original.

personal property. Under existing law, a personal representative, unless given such authority by will or court decree, has no power to dispose of real estate. Yet the same personal representative, who if he is an executor has given no bond, may sell personal property of substantial value. For example, if the decedent owns a large store, the executor can sell the business but not the real estate without court order, but if the enterprise was incorporated, he can sell the stock of the corporation which would carry the real estate with it. If the personal representative seems likely to abuse his discretion, a procedure is provided in Section 545 for restraining sale. The right to sell property specifically bequeathed is included to avoid questions which might be raised concerning the personal representative's right to sell personal property—particularly when dealing with stock transfer agents. The last sentence is included so that the court can require additional bond when that is advisable, and so that the original bond required under Section 321 need not be as large as would otherwise be required. This is consistent with Section 16(f) of the 1917 Act.

SECTION 542. *Power to Lease.*—Except as otherwise provided by the will, if any, the personal representative may lease any real or personal property which he is entitled to possess. The lease may be for a term expiring not more than one year after the decedent's death unless it is terminable by the personal representative at any later time on thirty days' notice, or unless a longer term is approved by the court.

Comment. Since the normal administration of an estate requires almost one year, it is believed that a lease for that period would not unduly tie up the administration of the estate. Persons entitled to possession of the property under Section 501, however, will not be disturbed in their enjoyment of it by a lease to a third person. Compare Section 31 of the 1917 Act which gives guardians and trustees the right to lease for five years and for a longer term with court approval.

SECTION 543. *Order of Court.*—When the personal representative is not authorized to do so by this act or is not authorized or is denied the power to do so by the will, if any, or when it is advisable that a sale have the effect of a judicial sale, he may sell any real or personal property of the decedent, including property specifically devised, at public or private sale, or may pledge, mortgage, lease, or exchange any such property, or grant an option for the sale, lease, or exchange of any such property, under order of the orphans' court of the county where letters testamentary or of administration were granted, upon such terms and upon such security and after such notice as the court shall direct, whenever the court shall find such sale, pledge, mortgage, lease, exchange, or option to be desirable for the proper administration and distribution of the estate.

Comment. It is advisable that the Orphans' Court be granted broad power to authorize disposition of real estate. This section will take the

place of several provisions of the 1917 Act, including Section 16, which authorizes sales and mortgages for payment of debts. It is contemplated that Section 543 will be supplemented by rules of court which will outline the requirements of the petition and the procedure to be followed. In this manner the requirements can be altered to meet the circumstances in the various counties.

SECTION 544. *Power Given in Will.*—A testamentary power to sell, unless expressly restricted, shall include the power to sell at public or private sale or to mortgage for any purpose of administration or distribution, but shall not include the right to grant an option without court order. A private sale may be made, with court approval, under the provisions of this act, although the will has directed a public sale. A testamentary power to sell, pledge, mortgage, lease, or exchange, or to grant an option for a purchase, lease, or exchange of property not given to any person by name or description shall be deemed to have been given to the personal representative and may be exercised without court approval. When the personal representative has been required to give bond, no proceeds of real estate shall be paid to him until the court has made an order excusing him from entering additional security or requiring additional security, and in the latter event, only after he has entered the additional security.

Comment. This is based on Section 28 of the 1917 Act. However, under Section 28(c) of the 1917 Act a personal representative not named in the will can exercise the powers therein granted only with court approval. Under Section 544 court approval is required only when there is to be a variance from the testamentary authority or direction.

While Section 544 provides expressly that a testamentary power to sell includes a power to mortgage, power to lease is not mentioned. Section 542 gives a power to lease on a month-to-month basis or until one year after the decedent's death. If a lease is to be granted for a longer period without court approval, the testamentary power should not be implied.

The statement in Section 28(a) of the 1917 Act that the power given the personal representative over real estate shall be "as if the same had been thereby devised to them to be sold" is omitted as unnecessary because Section 104 makes the title of heirs and devisees clearly subject to the powers granted to the personal representative.

SECTION 545. *Restraint of Sale.*—The court, on its own motion or upon application of any party in interest, in its discretion, may restrain a personal representative from making any sale under an authority not given by will or from carrying out any contract of sale made by him under an authority not so given. The order may be conditioned upon the applicant giving bond for the protection of parties in interest who may be prejudiced thereby. The order shall be void as against a bona fide grantee

of, or holder of a lien on, real estate unless the decree restraining the sale, or a duplicate original or certified copy thereof, is recorded in the deed book in the office of the recorder of deeds in the county in which such real estate lies, before the recording or entering of the instrument or lien under which such grantee or lienholder claims.

Comment. This is considered a necessary precaution because of the broad authority granted under Section 541. It also may provide a means for saving real estate from sale when the court, except for the protection afforded by a bond, might be compelled to authorize sale. While the court on its own motion may restrain a sale, its right to proceed further on its own motion, at least where all parties in interest are *sui juris*, is questionable: cf. *Stitzel's Est.*, 221 Pa. 227. This section would not, of course, interfere with the right to set aside a sale for fraud.

SECTION 546. *Purchase by Personal Representative.*—In addition to any right conferred by a will, if any, the personal representative, in his individual capacity, may bid for, purchase, take a mortgage on, lease, or take by exchange, real or personal property belonging to the estate, subject, however, to the approval of the court, and under such terms and conditions and after such reasonable notice to parties in interest as it shall direct. When the purchaser, mortgagee, or lessee is the sole personal representative, the court may make an order directing its clerk to execute a deed or other appropriate instrument to him.

Comment. This is based on Sections 16(k), 18(f) and 28(e) of the Act of 1917. No provision is made for execution of the deed where the purchaser is not the sole fiduciary. In such circumstances the fiduciaries, under the Uniform Interparty Agreement Act of 1927, P. L. 984, 69 PS 541, can convey to one of them or conveyance can be made as the court directs.

SECTION 547. *Title of Purchaser.*—If the personal representative has given such bond, if any, as shall be required in accordance with this act, any sale, mortgage, or exchange by him, whether pursuant to a decree or to the exercise of a testamentary power or of a power under this act, shall pass the full title of the decedent therein, unless otherwise specified, discharged from the lien of legacies, from liability for all debts and obligations of the decedent, from all liabilities incident to the administration of the decedent's estate, and from all claims of distributees and of persons claiming in their right, except that only a sale under section 543 shall divest liens of record at the time of the decedent's death. Persons dealing with the personal representative shall have no obligation to see to the proper application of the cash or other assets given in exchange for the property of the estate. Any sale or exchange by a personal representative pur-

suant to a decree under section 543 shall have the effect of a judicial sale as to the discharge of liens, but the court may decree a sale or exchange freed and discharged from the lien of any mortgage otherwise preserved from discharge by existing law, if the holder of such mortgage shall consent by writing filed in the proceeding. No such sale, mortgage, exchange, or conveyance shall be prejudiced by the terms of any will or codicil thereafter probated or by the subsequent revocation of the letters of the personal representative who made the sale, mortgage, exchange, or conveyance if the person dealing with the personal representative did so in good faith.

Comment. This section is based in part on Sections 16(o), 16(p) and 30 of the 1917 Act. It is consistent with Section 520. Sales under court decree by fiduciaries subject to the Orphans' Court have had different effects as to the discharge of liens. All public or private sales in partition have the effect of judicial sales: O. C. Partition Act, Section 26. Sales under testamentary powers do not discharge liens of record except that sales under 28(c) of the 1917 Act have the effect of judicial sales: *New Castle v. Whaley*, 102 Pa. Super. 492. Public or private sales for the payment of debts have the effect of judicial sales as to the discharge of liens: Fid. Act of 1917, Section 16(o).

SECTION 548. Collateral Attack.—No decree entered pursuant to this act shall be subject to collateral attack on account of any irregularity if the court which entered it had jurisdiction to do so.

Comment. See Orphans' Court Act of 1917, Section 2.

SECTION 549. Record of Proceedings; County Where Real Estate Lies.—Certified copies of proceedings of any court of the Commonwealth relating to or affecting the real estate of any decedent may be recorded in the office for the recording of deeds in any county in which the real estate lies.

ARTICLE VI.

PROPERTY RIGHTS AND OBLIGATIONS OF ESTATES OF DECEDENTS.

A. Abatement, Survival and Control of Actions.

SECTION 601. Actions Which Survive.—All causes of action or proceedings, real or personal, except actions for slander or libel, shall survive the death of the plaintiff or of the defendant, or the death of one or more joint plaintiffs or defendants.

Comment. This is intended to replace subsections (a), (c), (d), and (e) of Section 35 of the 1917 Act.

SECTION 602. *Substitution of Personal Representative in Pending Action or Proceedings.*—

(a) *Voluntary Substitution.* The personal representative of a deceased party to a pending action or proceeding may become a party thereto by filing of record a statement of the material facts on which the right to substitution is based.

Comment. This is based on Rule 2352(a) of the Rules of Civil Procedure governing substitution of parties, as recommended by the Procedural Rules Committee and Section 35(f) of the 1917 Act.

(b) *Compulsory Substitution.* If the personal representative does not voluntarily become a party, the prothonotary or clerk of the court, as the case may be, upon the praecipe of an adverse party setting forth the material facts, shall enter a rule upon the personal representative to show cause why he should not be substituted as a party.

Comment. This is based on Rule 2352(b) of the Rules of Civil Procedure governing substitution of parties, as recommended by the Procedural Rules Committee and Section 35(g) of the 1917 Act.

(c) *Service of Rule.* The rule shall be served by the sheriff in the same manner as a writ of summons in *assumpsit*. If the personal representative resides in any other county of the Commonwealth, the rule may be served by a duly deputized sheriff of that county. If the personal representative cannot be so served, and if the subject of the action or proceeding is property located within the Commonwealth, the personal representative shall be served by sending him a copy of the rule, by registered mail, directed to his last known address, or if no such address is known and an affidavit to that effect is filed, then by publication in such manner as the court in which the action or proceeding is pending, by general rule or special order, shall direct.

Comment. This is based on Rule 2353 of the Rules of Civil Procedure governing substitution of parties, as recommended by the Procedural Rules Committee. It replaces Section 35(h) of the 1917 Act, and the Act of 1923, P. L. 150, 20 PS 779. Cf. Section 307(b).

(d) *Status of Personal Representative; Continuance.* If the personal representative voluntarily becomes a party to the action or proceeding, or if the rule upon him is made absolute, he shall have all the rights and liabilities of a party to the action or proceeding. The court may order such continuances and extensions as may be necessary to afford him a reasonable opportunity to appear and prosecute or defend the action or proceeding.

Comment. This is based on Rule 2354 of the Rules of Civil Procedure governing substitution of parties, as recommended by the Procedural Rules Committee.

SECTION 603. *Action By or Against Personal Representative.*—An action or proceeding to enforce any right or liability which survives a decedent may be brought by or against his personal representative alone or with other parties as though the decedent were alive.

Comment. This is based on Section 35(b) of the 1917 Act.

SECTION 604. *Death or Removal of Fiduciary.*—An action or proceeding to which a fiduciary is a party is not abated by his death or resignation or by the termination of his authority. The successor of the fiduciary may be substituted in the action or proceeding in the same manner as the personal representative of a deceased party.

Comment. This is based on Section 35(i) of the 1917 Act.

SECTION 605. *Abatement of Action for Failure to Take Out Letters.*—If a plaintiff or petitioner in any action or proceeding now pending or hereafter brought dies and a personal representative is not appointed within one year after a suggestion of such death is filed in the action or proceeding, any defendant or respondent may petition the court to abate the action as to the cause of action of the decedent. Copies of the petition shall be served upon the executor named in the will, if known to the defendant, and otherwise upon all known next of kin entitled to letters of administration. The court shall abate the action as to the cause of action of the decedent if the delay in taking out letters is not reasonably explained.

Comment. This is based on Section 35(k) of the 1917 Act.

SECTION 606. *Limitations Against Debt Due Estate.*—Failure or delay in taking out letters testamentary or of administration shall not affect the operation of any statute of limitations applicable to a debt or liability owed the estate of a decedent.

Comment. This is based on Section 36 of the 1917 Act.

SECTION 607. *Execution on Judgments.*—

(a) *When Prohibited.* No execution shall issue against, nor shall any levy be made upon, any real or personal property of the estate of a decedent by virtue of a judgment against him or his personal representative unless—

(1) agreed to by the personal representative in a writing filed in the action or proceeding; or,

(2) approved by the orphans' court of the county in which letters testamentary or of administration have been granted, or if none have been granted, then of the county in which the principal or family residence of the decedent was located. The court may require the giving of notice to the personal representative and to parties in interest or may waive all notice.

(b) *When Allowed.* The restrictions of subsection (a) shall not apply to actions or proceedings to enforce mortgages, ground rents, pledges, or conditional sales on real or personal property.

Comment. This is based in part on Section 15 (i) of the 1917 Act.

B. Claims; Charges; Rights of Creditors.

SECTION 611. *Liens and Charges Existing at Death not Impaired.*—Nothing in this article shall be construed as impairing any lien or charge on real or personal estate of the decedent which existed at his death.

Comment. This is consistent with existing law and is included herein to avoid any possible indication that the rights of lien creditors will be impaired by death.

SECTION 612. *Judgments Which Are Liens at Death.*—Any judgment which at the decedent's death was a lien on real estate then owned by him or on real estate which he had conveyed by deed not recorded during his life shall continue to bind the real estate for five years from the inception or last revival of the lien or for one year from the decedent's death, whichever shall be longer, although the judgment be not revived after his death. During this period, the judgment shall rank according to its priority at the time of death, and after this period, it shall not continue to be a lien on the real estate, unless revived. Any judgment against the decedent which is a lien on real estate aliened by him may be revived by an action of scire facias brought against the decedent, but before any judgment shall be entered thereon, the personal representative shall be made a party defendant and served with process in the action.

Comment. The language of this section is based on the language of Section 15(g) of the 1917 Act. The only change other than changes of style is that the period of the automatic extension of the lien of a judgment is reduced from five years to one year. It is thought that one year gives the creditor sufficient time to protect his interest. This will avoid the possibility of a judgment being a lien for almost ten years without any action being taken by the judgment creditor. For example, under existing law, if the judgment creditor dies after the expiration of four years and eleven months from the time the judgment was last revived, it is automatically revived for another five years, giving a total of almost ten years.

SECTION 613. Statutes of Limitations; Claims Not Barred at Death.—The death of a person shall not stop the running of the statute of limitations applicable to any claim against him, but a claim which otherwise would be barred within one year after the death of the decedent shall not be barred until the expiration of one year after his death.

Comment. This is based on Section 35(b) of the 1917 Act.

SECTION 614. Notice of Claim.—

(a) *Written Notice.* Written notice of any claim against a decedent given to the personal representative or his attorney of record before the claim is barred shall toll the statute of limitations.

Comment. Creditors who fail to give notice of their claims will not be entitled to written notice of the filing of an account as provided for in Section 703. The personal representative can make distribution after one year from the grant of letters without responsibility to creditors who have not given notice of their claims. See Section 732, *infra*.

(b) *Acts Equivalent to Written Notice.* Any of the following acts by a claimant shall be equivalent to the giving of written notice of a claim to the personal representative:

(1) Instituting proceedings to compel the filing of an account;

(2) Bringing an action against the personal representative in any court having jurisdiction of the claim and having the writ or pleading duly served on the personal representative;

(3) Substituting the personal representative as a defendant in an action pending against the decedent;

(4) Receiving a written acknowledgment by the personal representative or his attorney of record of the existence of the claim.

Comment. It seems advisable to specify exactly what shall constitute written notice of the claim to the personal representative. The best procedure in all cases is for the claimant to secure a written acknowledgment from the personal representative of notice of the claim. However, the requirement of written acknowledgment is not considered advisable. If this requirement were made, a claimant might lose his right merely because the personal representative failed to acknowledge his notice in writing. In each of the four instances listed notice of the claim will be brought to the attention of the personal representative.

SECTION 615. Limitation Upon Claims.—All claims against the decedent, subject only to the provisions of *sections 611 and

* "section" in original.

612, shall become unenforceable after one year from the decedent's death against a bona fide grantee of, or holder of a lien on, real property of the decedent who has acquired his interest for value from or through those entitled to the property by will or by intestacy, either—

(1) More than one year after the death of the decedent and when no letters issued in the Commonwealth upon the decedent's estate were in effect; or,

(2) Within such year if no letters upon the decedent's estate have been issued in the Commonwealth during that year.

Nothing in this section shall be construed to limit the right of a personal representative subsequently appointed to recover from the heir or devisee the value of property so sold or encumbered.

Comment. This section is intended to make title to real property freely alienable after one year where (1) no letters are granted or (2) there is a vacancy in letters. Where no personal representative is appointed for a period of one year, the creditor should look only to the heir, devisee or next of kin for the payment of his claim. When the heir or devisee has sold or encumbered the property, the personal representative subsequently appointed could call upon him to account for the proceeds of the sale or lien.

It is to be noted that claims of all types, other than claims of the United States, are barred. Special mention is made in these comments of claims of the United States to place all parties on notice that Pennsylvania laws cannot affect such claims. Claims of the Commonwealth and its political subdivisions are considered the same as other claims.

SECTION 616. *Failure to Present Claim at Audit.*—If any claimant whose claim is not reported to the court by the personal representative as an admitted claim shall fail to present it at the call for audit or confirmation, he shall not be entitled to receive any share of the real and personal estate distributed pursuant to such audit or confirmation, whether the estate of the decedent be solvent or insolvent.

Comment. This is based on Section 49(d) of the 1917 Act. It is to be noted that if the claim is not otherwise barred it may be presented at an audit of a subsequent accounting. No attempt is made to provide for equalization of distribution when a claim is first presented at a subsequent audit. It is believed that this is best left to development by case law. The word "claimant" rather than "creditor" is employed to include persons claiming on a tort as well as those claiming under contract.

SECTION 617. *Claims Not Due—Certain to Become Due.*—Upon satisfactory proof or admission of a claim which is not due but is certain to become due, the court may provide for payment by one of the following methods:

(1) Awarding the present value of the claim, as agreed to by the claimant and the personal representative;

(2) Ordering the personal representative to retain or pay into the court sufficient assets to pay on maturity of the claim the whole amount then due, or a proportionate amount in case of insolvency.

Comment. This is in accordance with existing practice. It is believed that its inclusion in statutory law may encourage settlements which otherwise would not be attempted. It supplants section 15(b) of the 1917 Act.

SECTION 618. *Claims Not Certain to Become Due.*—Upon satisfactory proof or admission of a claim which may or may not become due at a future time, the court may provide for payment by one of the following methods:

(1) Awarding the present value of the claim, as agreed to by the claimant and the personal representative;

(2) Ordering the personal representative to distribute the estate but to retain or pay into court sufficient assets to pay the claim, or a proportionate amount in case of insolvency, if and when it becomes absolute;

(3) Making such other provision for the disposition or satisfaction of the claim as shall be equitable.

Comment. This section has no counterpart in the 1917 Act. However, it is consistent with existing practice. As under Section 617, it may encourage settlement of numerous troublesome situations which arise in connection with contingent claims.

SECTION 619. *Claims Subject to Litigation in Other Courts.*—When any claim not proved in the orphans' court is being litigated in any other court, State or Federal, having jurisdiction thereof, the court may make such provision for the disposition or satisfaction of the claim as shall be equitable.

Comment. This section, which has no counterpart in the 1917 Act, is declaratory of existing law. See *Com. v. Easton Trust Co.*, 347 Pa. 162; *Thompson's Est.*, 130 Pa. Super. 263, and other cases cited in Vol. I, Hunter's Orphans' Court Commonplace Book, page 292. This gives the orphans' court the opportunity in its discretion to postpone final distribution where advisable or to make final distribution where the claim, in justice to other interested persons, should be presented in the orphans' court. The court, in addition to using its discretion as to whether any fund will be withheld, will exercise a discretion as to the amount to be withheld.

SECTION 620. *Specific Performance of Contracts.*—

(a) *Application to Court.* If any person makes a legally binding agreement to purchase or sell real or personal estate

and dies before its consummation, his personal representative shall have power to consummate it, but if he does not do so, the court, on the application of any party in interest and after such notice and with such security, if any, as it may direct, in its discretion, may order specific performance of the agreement if it would have been enforced specifically had the decedent not died.

Comment. This is based on Section 18(a) of the 1917 Act.

As now written this subsection applies to personal as well as to real estate. This may be important and prevent irreparable harm as where the decedent agreed to purchase or sell the controlling shares in a close corporation. The notice is such as the court shall direct and not "to the persons interested" as in the 1917 Act. In most instances the personal representative can properly represent the interests of all persons concerned in the estate. Provision is made for the giving of security in the discretion of the court. This is included to make certain that provision is made for additional bond to be given by the personal representative whose original bond does not cover the proceeds of the property. See Section 541.

(b) *Execution and Effect of Deed or Transfer.* Any necessary deed or transfer shall be executed by the personal representative or by such other person as the court shall direct. The title of any purchaser under an agreement in which the decedent was the vendor shall be the same as though the decedent had conveyed or transferred such property in his lifetime.

Comment. This is based on Section 18(d) of the 1917 Act.

(c) *Indexing in Judgment Index.* When any petition for specific performance of an agreement to purchase or sell real estate is filed, the prothonotary of the court of common pleas where the real estate or any part of it lies, upon the receipt of a certificate of such fact by the clerk of the court where the petition was filed, shall enter the petition upon the judgment index against the defendants and shall certify it as *lis pendens* in any certificate of search which he is required to make by virtue of his office.

Comment. This is based on Section 18(c) of the 1917 Act.

SECTION 621. *Proceeding Against Personal Representative.*—Any proceeding may be brought against a personal representative or the surety on his bond in the county where his letters have been granted, and if the personal representative or surety does not reside in that county, process may be served on either of them personally, or as follows—

(1) *When Resident of Another County.* By a duly deputized sheriff of any other county of the Commonwealth in which he shall be found.

(2) *When a Nonresident of the Commonwealth.* By the sheriff of the county where letters have been granted sending, by registered mail, return receipt requested, a true and attested copy of the process to the Secretary of the Commonwealth, accompanied by the fee prescribed by law, and to the personal representative or surety at his last known address, with an endorsement thereon showing that service has been so made upon the Secretary of the Commonwealth.

Comment. This is based in part on Section 37 of the 1917 Act. See also Section 307 and comments thereto.

SECTION .622. Classification and Order of Payment.—If the applicable assets of the estate are insufficient to pay all proper charges and claims in full, the personal representative, subject to any preference given by law to claims due the United States, shall pay them in the following order, without priority as between claims of the same class:

- (1) The costs of administration;
- (2) The family exemption;
- (3) The costs of the decedent's funeral and burial, and the costs of medicines furnished to him within six months of his death, of medical or nursing services performed for him within that time, and of services performed for him by any of his employees within that time;
- (4) The cost of a gravemarker;
- (5) Rents for the occupancy of the decedent's residence for six months immediately prior to his death;
- (6) All other claims, including claims by the Commonwealth.

Comment. This is based on Section 13 of the 1917 Act.

This section differs from the 1917 Act in the following respects:

1. Administration expenses and family exemption are included as the first item in accordance with existing case law.

2. The items in clause (3) are limited to services rendered and medicines furnished within six months immediately prior to the decedent's death, thereby avoiding the difficulty of determining what is the "last illness".

3. The word "*employees*" rather than "*servants*" is employed to avoid the restriction to menial servant: Cf. *Ex Parte Meason*, 5 Binn. 167.

4. Expenses for a gravemarker are included as a separate item so that they will not be given a prior position as administration or funeral expenses or omitted in their entirety in an insolvent estate: cf. *Krewson's Est.*, 37 D. & C. 555.

5. The Commonwealth's claim is not subordinated to those of general creditors. Under the 1917 Act the Commonwealth's claim, if enforced before

death, is given priority, but if delayed until death, is subordinated: See report of the Pennsylvania Bar Association Committee in the Pennsylvania Bar Association Quarterly, June 1941, page 300. See also *Newton Est.*, 354 Pa. 146, as an example of existing confusion.

6. The implication of Section 13 (b) of the 1917 Act that some creditors could force payment of their claims within six months is removed.

SECTION 623. *Notice to Commonwealth and Political Subdivisions.*—When the Commonwealth or a political subdivision thereof has a claim for maintaining in an institution a person who has died in the institution, the personal representative, within three months after the grant of letters, shall give notice thereof to the Department of Revenue or to the proper officer of such political subdivision, as the case may be.

Comment. This section is suggested by the requirements of the Act of 1915, P. L. 661, as amended, 71 PS 1782.

ARTICLE VII.

ACCOUNTING AND DISTRIBUTION IN DECEDENTS' ESTATES.

A. Accounts.

SECTION 701. *Accounting Required.*—Except as otherwise provided in this act, every personal representative shall file an account of his administration at the expiration of six months from the grant of letters or when directed to do so by the court, and may be cited to file an account at any time after the expiration of that period. Unless it is directed by the court, no account shall be filed within six months of the grant of original letters.

Comment. This is based on Sections 46(a) and 49(a) of the 1917 Act. See also Section 6, Rule 4 of the Supreme Court Rules. Until the Register of Wills Act is amended to provide for an automatic advertising of the grant of letters, the filing of accounts should be delayed until 6 months have elapsed since the first complete advertisement of the grant of letters.

SECTION 702. *Where Filed.*—The account of the personal representative shall be filed in the office of the register.

Comment. This is based on Section 6(5) of the Supreme Court Rules.

SECTION 703. *Notice to Parties in Interest.*—The personal representative shall give written notice of the filing of his account and of its call for audit or confirmation to every unpaid claimant who has given written notice of his claim to the personal representative or his attorney of record, and to every other person

known to the accountant to have an interest in the estate as beneficiary, heir, or next of kin.

Comment. This is similar to Section 6(3) of the Supreme Court Rules and differs from Section 46(c) of the 1917 Act in that notice must be given to beneficiaries and next of kin regardless of whether they have given written notice of their claims. This section does not qualify Section 616. While it sets forth the duties of the personal representative it does not relieve the creditor of the duty to make his unpaid claim known to the court or auditor before the audit or confirmation of the account.

SECTION 704. *Representation of Parties in Interest.*—Persons interested in the estate as beneficiary, heir, or next of kin, if minors or otherwise legally incompetent, and possible unborn or unascertained persons, when not already represented by a fiduciary, may be represented in an accounting by a guardian or trustee ad litem, if the court deems it necessary. The court may dispense with the appointment of a guardian or trustee ad litem for a person legally incompetent, unborn, or unascertained, when there is a living person sui juris having a similar interest, or when such person is or would be issue of a living ancestor sui juris and interested in the estate whose interest is not adverse to his. If the whereabouts of any beneficiary or next of kin is unknown, or if there is doubt as to his existence, the court shall make such provision for service of notice and representation in the accounting as it deems proper.

Comment. This is based largely on Section 9 of the Uniform Trustees Accounting Act. See Sections 59(j)5 and 59(k) of the 1917 Act.

B. Audits.

SECTION 711. *Audits in Counties Having Separate Orphans' Court.*—In any county having a separate orphans' court, the account of a personal representative shall be examined and audited by the court without expense to the parties, except when all parties in interest in a pending proceeding shall nominate an auditor whom the court may in its discretion appoint.

Comment. This is similar to the language of Section 47(b) of the 1917 Act which in turn is taken largely from Article V, Section 22, of the Pennsylvania Constitution.

SECTION 712. *Audits in Counties Having No Separate Orphans' *Court.*—In any county having no separate orphans' court, the account of a personal representative shall be confirmed by the court or by the clerk, as local rules shall prescribe, if no objections are presented within a time fixed by general rule of court. If any party in interest shall object to the account, or shall

* "Courts" in original.

request its reference to an auditor, the court, in its discretion, may appoint an auditor.

Comment. This is substantially the same as Section 47(c) of the 1917 Act. It is to be noted that Section 712 calls for an automatic confirmation by the court. There is no provision as in the 1917 Act for an examination by the court. Accounts can be audited in open court in counties where rules of court provide for such a practice, even though there is no separate orphans' court.

SECTION 713. *Statement of Proposed Distribution.*—A personal representative filing an account shall file a statement of proposed distribution or a request that distribution be determined by the court or by an auditor, as local rules may prescribe. The statement of proposed distribution shall be in such form, and such notice thereof shall be given by advertisement or otherwise, and objections thereto may be made, as local rules prescribe.

Comment. This is substantially in accord with the language of Section 6(9) of the Supreme Court Rules.

SECTION 714. *Confirmation of Account and Approval of Proposed Distribution.*—No account shall be confirmed, or statement of proposed distribution approved, until an adjudication or a decree of distribution is filed in conformity with local rules by the court or by the clerk of the court, expressly confirming the account or approving the statement of proposed distribution and specifying or indicating by reference to the statement of proposed distribution the names of the persons to whom the balance available for distribution is awarded and the amount or share awarded to each.

Comment. This is based on Section 6(11) of the Supreme Court Rules.

C. Review.

SECTION 721. *Rehearing; Relief Granted.*—If any party in interest shall, within five years after the final confirmation of any account of a personal representative, file a petition to review any part of the account, or of an auditor's report, or of the adjudication, or of any decree of distribution, setting forth specifically alleged errors therein, the court shall give such relief as equity and justice shall require: Provided, That this section shall not authorize review as to any property distributed by the personal representative in accordance with a decree of court before the filing of the petition. The court or master considering the petition may include in his adjudication or report findings of fact and of law as to the entire controversy, in pursuance of which a final order may be made.

Comment. This takes the place of Section 48 of the 1917 Act. The last sentence of Section 721 is new. It is intended to avoid the cumbersome duplication of evidence when a review is granted.

D. Distribution.

SECTION 731. *Estates Not Exceeding One Thousand Dollars.*—When the gross real and personal estate of a decedent does not exceed the value of one thousand dollars, the personal representative, after the expiration of one year from the grant of letters, may present his petition to the court with an annexed account showing the administration and proper distribution of the estate. Thereupon, the court, upon satisfactory proof of notice to all known parties in interest, may order the discharge of the personal representative and his sureties from future liability, without the expense of proceedings as in a formal account. The court may discharge only the surety from future liability, and may allow the personal representative to continue without surety upon condition that no further assets shall come into the possession of the personal representative until he files another bond, with sufficient surety, as required by the register.

Comment. This is based on Section 49(c) of the 1917 Act. The last sentence is substantially the same as the second sentence of Section 333. Since one year has gone by, there can be no question of the rights of unknown creditors. When satisfactory notice has not been given previously to persons having a possible interest, the court's final decree can be delayed until the expiration of a period specially fixed by the court. If greater detail of procedure is desired, it should be set forth in local rules. This section differs from Section 202 of this Act in that it applies to real as well as personal property and is available only when a personal representative has been appointed. Also, a distribution made hereunder is final.

SECTION 732. *At Risk of Personal Representative.*—A personal representative, at his own risk and without the filing, audit or confirmation of his account, may, after one year from the grant of letters, distribute personal property or real estate without liability to any claimant against the decedent who has not given notice of his claim as provided by this act, and, except on liens of record existing at the time of death, no claimant who has not given such notice shall have any claim as to the property so distributed.

Comment. This is based in part on Section 49(b) of the 1917 Act. It recognizes the rule of *Ray's Estate*, 345 Pa. 210, and applies it to real as well as personal property. In addition, it is now clear that the non-diligent creditor has no rights against the distributee or the distributed property. The one-year period is measured from the grant of letters because it was contemplated that the grant of letters would be automatically advertised by the register within a short period after they were granted. House Bill

700 which would have amended the Register of Wills Act to accomplish this result failed of enactment in the 1949 session of the legislature. Until such legislation is enacted, distribution should be delayed until one year after the first complete advertisement of grant of letters.

SECTION 733. *Award Upon Final Confirmation of Account.*

—A personal representative shall be relieved of liability with respect to all real and personal estate distributed in conformity with a decree of court or in accordance with rule of court after confirmation of an account. In making any such distribution, the personal representative shall not be entitled to demand refunding bonds from the distributees, except as provided by this act or as directed by the court.

Comment. This is based on Section 49(b) of the 1917 Act. See Section 1203 of this Act for an instance where the court may require a refunding bond.

SECTION 734. *Distribution in Kind.*—The court, for cause shown, may order the estate to be distributed in kind to the parties in interest, including fiduciaries. In such case, when there are two or more distributees, distribution may be made of undivided interests in real or personal estate or the personal representative or a distributee may request the court to divide, partition and allot the property, or to direct the sale of the property. If such a request is made, the court, after such notice as it shall direct, shall fairly divide, partition and allot the property among the distributees in proportion to their respective interests, or the court may direct the personal representative to sell at a sale confined to the distributees, or at a private or public sale not so confined, any property which cannot be so divided, partitioned or allotted.

Comment. This is based on Sections 32 and 49(e)1 of the 1917 Act.

It is considered advisable to give the court a broad discretionary power to (1) decree distribution in accordance with a schedule of distribution approved by all interested persons; or (2) award undivided interests in assets if that seems advisable and no distributee objects, or (3) award distribution in kind by allotting the entire ownership of particular assets at valuations to designated distributees or by dividing them even though the distribution so made does not meet with the approval of all distributees, or (4) direct a private auction among the distributees, or (5) direct an auction (either public or private) not restricted to the distributees. It is thought that in most instances the personal representative will be able to work out a distribution in kind which will not be subject to objection by a distributee, or that he will reduce the estate to cash for distribution in advance of audit. It is not the purpose of this section to relieve the personal representative of his obligation to reduce the estate to a condition that will make for easy distribution, consistent with the interest of the distributees. However, there are numerous instances where, in the interest of the distributees (either because

of sentimental value or because of lack of market for its sale or because estate assets should remain productive) it is advisable to make distribution in kind. The procedure suggested should eliminate the necessity for any involved proceeding for the partition of real estate. No detailed procedure has been set forth for dividing, partitioning and allotting real estate. It is believed that such procedure can best be handled by special order or by rule of court. The court's authority either to allot or to direct a sale gives a broad discretion which is needed if justice is to be done in a particular case without undue expense or delay. Cf. the Act of 1927, P. L. 460, 12 PS 1791, providing for partition of personal property.

SECTION 735. *Delivery of Possession of Real Estate.*—Upon application of any party in interest and after such notice as the court shall direct, the court may order the personal representative to deliver to any distributee possession of any real estate to which he is entitled, provided that claimants and other distributees are not prejudiced thereby. The personal representative shall cease to be responsible for the maintenance of such real estate unless and until possession of it is returned to him with his consent or by order of court. The court, at any time prior to a final decree approving the distribution, may order the distributee to return the possession of any such real estate to the personal representative or may require the distributee to give security for the rents or rental value pending a decree of distribution.

Comment. This section applies when it is to the interest of all concerned that the real estate be under the early management of the person or persons who eventually will receive it in distribution. There is nothing to prevent the personal representative and parties in interest from accomplishing the same results subject to possible surcharge without the benefit of a court decree. By proceeding under this section possibility of surcharge will be avoided. It will also be possible for a distributee to force a personal representative to make early distribution to him.

SECTION 736. *Recording and Registering Decrees Awarding Real Estate.*—A certified copy of every adjudication or decree awarding real estate or an appropriate excerpt from either of them shall be recorded, at the expense of the estate, in the deed book in the office of the recorder of deeds of each county where the real estate so awarded lies, shall be indexed by the recorder in the grantor's index under the name of the decedent and in the grantee's index under the name of the distributee, and shall be registered in the survey bureau or with the proper authorities empowered to keep a register of real estate in the county: Provided, That no adjudication or decree awarding real estate subject to the payment of any sum by the distributee shall be recorded or registered unless there is offered for recording, concurrently therewith, written evidence of the payment of such sum.

Comment. This is similar to Section 10(f) of the Intestate Act of 1947.

It is not considered necessary to provide that the court sign a separate decree as to each item of real estate or to provide for the wording of the award of real estate in the adjudication or in the schedule. Presumably the real estate will be described as in the inventory. Cf. *Hunter v. McKlveen et al.*, 361 Pa. 479. The exact procedure can be covered by rule of court.

E. Rights of Distributees.

SECTION 751. *Order of Abatement.*—

(a) *General Rules.* Except as otherwise provided by the will, if the assets are insufficient to pay all claimants and distributees in full, the shares of distributees, without distinction between real and personal estate, shall have priority of distribution in the following order :

(1) Property specifically devised or bequeathed to or for the benefit of the surviving spouse;

(2) Property specifically devised or bequeathed to or for the benefit of the decedent's issue;

(3) Property specifically devised or bequeathed to or for the benefit of other distributees;

(4) Property disposed of by will in the form of a general bequest of cash, stocks or bonds;

(5) Property disposed of by general devise or bequest and not included in a residuary clause;

(6) Property devised or bequeathed in a residuary clause;

(7) Property not disposed of by the will.

(b) *Demonstrative Legacies.* Property out of which a demonstrative legacy is primarily to be paid shall be deemed to be specifically devised or bequeathed to the extent of such demonstrative legacy.

Comment. This section replaces Section 20 of the 1917 Act which is misleading and incomplete. Subsection (a) to a large extent is declaratory of existing case law. The greatest change is that it eliminates any distinction between real and personal property. Clauses (1) and (2) are intended to clarify the confusion which arises where a legacy is given to a widow or for maintenance of a child. See *Hunter's Orphans' Court Commonplace Book*, page 743.

SECTION 752. *Contribution.*—The court may make orders of contribution among legatees or devisees to accomplish an abatement in accordance with the provisions of section 751, and

may determine whether the amount thereof shall be paid before distribution or shall constitute a lien on particular property which is distributed.

Comment. This is believed to be in accordance with existing case law. Many of the difficulties occasioned by the fact that real estate has not heretofore been administered will be avoided: Cf. *Knecht's Ap.*, 71 Pa. 333; *Mellon's Ap.*, 46 Pa. 165.

SECTION 753. *Interest or Income on Distributive Shares.*—

(a) *Pecuniary Legacy.* A pecuniary legacy bequeathed in trust shall bear interest at the rate of three per centum per annum from the death of the decedent until the payment of the legacy, and when not in trust shall bear interest at the rate of three per centum per annum from one year after the death of the decedent until the payment of the legacy.

Comment. This preserves the distinction between legacies in trust and those given outright. While the language of Section 21 of the 1917 Act was probably intended to eliminate any distinction, it probably exists even after the 1939 amendment: Cf. *Bands Est.*, 103 Pa. Super. 553.

(b) *Specific Legacy or Devise.* A specific legatee or devisee shall be entitled to the net income from property given to him accrued from the date of the death of the decedent.

Comment. This subsection has no statutory precedent but is in accord with existing case law.

(c) *Demonstrative Legacy.* A demonstrative legacy shall bear interest from the death of the decedent until the payment of the legacy at the rate earned by the property out of which it is primarily payable, and to the extent that it is not paid from that source, shall bear interest at the rate of three per centum per annum from one year after the death of the decedent until the payment of the legacy.

Comment. Section 21 of the 1917 Act made no special provision for demonstrative legacies. Since a demonstrative legacy is a specific legacy to the extent that it is paid out of the assets on which it is charged, it seems proper that it bear interest at the rate earned by such asset until it is paid: Cf. *Douds' Est.*, 145 Pa. Super. 73.

(d) *Residuary Legacy or Devise.* All income from real and personal estate earned during the period of administration and not payable to others shall be distributed pro rata among the income beneficiaries of any trust created out of the residuary estate and the other persons entitled to the residuary estate.

Comment. There is no statutory precedent for this section. However, it follows the usual practice of having the persons entitled to the income

of the residuary estate receive the income gains or bear the income burdens during the period of administration, and in not restricting their income to income on the net share ultimately received by them. Any other rule is very difficult of application: Cf. Restatement Trusts, Section 234, comment g; 33 Va. L. R. 368; 158 A. L. R. 441. Since income is distributable to "income beneficiaries" we avoid any possible claim that any part of it should be capitalized: Cf. *Bennett's Est.*, 29 Dist. 148.

(e) *Future Date.* A legacy payable at a future date, unless earlier set aside as a separate trust, shall not begin to bear interest or income until the date fixed for payment or delivery.

Comment. This subsection, together with subsection (f) is intended to eliminate any distinction which may now exist depending on the relationship of the testator to the legatee: Cf. *Senderowitz Est.*, 22 Leh. 389; "*Unless earlier set aside as a separate trust*" is intended to preserve existing case law under which the court in certain cases finds from the circumstances that it was intended that the legacy be set aside as a segregated trust for the immediate benefit of the legatee, although principal is not to be paid until a future date: Cf. *Mereto's Est.*, 311 Pa. 374; *Yost's Est.*, 134 Pa. 426.

(f) *Relationship.* Interest or income shall be paid on distributive shares with no distinction because of the relationship of the distributee to the decedent.

Comment. This is a fundamental change from Section 21 of the 1917 Act and is made to simplify the rules to be applied.

(g) *Testamentary Provisions.* All rules set forth in this section are subject to the provisions of the decedent's will.

Comment. Like Section 21 of the 1917 Act, this subsection preserves the right of a testator to control the payment of interest and income.

SECTION 754. *Liability of Personal Representative for Interest.*—A personal representative who has committed a breach of duty with respect to estate assets shall, in the discretion of the court, be liable for interest, not exceeding the legal rate on such assets.

Comment. This is based on Section 44 of the 1917 Act.

SECTION 755. *Transcripts of Balances Due by Personal Representative.* —

(a) *Filing in Common Pleas.* The prothonotary of any court of common pleas shall, on demand of any party in interest, file and docket a certified transcript or extract from the record showing that an orphans' court has adjudged an amount to be due by a personal representative, and such transcript or extract shall constitute a judgment against the personal representative from the time of its filing with the same effect as if it had been obtained

in an action in the court of common pleas. If the amount adjudged to be due by the personal representative shall be increased or decreased on appeal, the prothonotary shall, if the decree of the appellate court is certified to him, change his records accordingly, and if the appellate court has increased the amount, the excess shall constitute a judgment against the personal representative from the time when the records are so changed.

(b) *Satisfaction and Discharge.* If the orphans' court shall order the personal representative to be relieved from any such judgment, the prothonotary shall, on demand of any party in interest, enter on his records a certified copy of such order, which shall operate as a satisfaction of the judgment.

Comment. This is based on Section 51 of the 1917 Act.

SECTION 756. *Determination of Title to Decedent's Interest in Real Estate.*—When a person shall die leaving an interest in real estate within the Commonwealth and no letters testamentary or of administration have been granted on the estate of the decedent in the Commonwealth, and one year has expired since the decedent's death, or if a personal representative has been appointed and has not filed his account within six years of the death of the decedent, any person claiming an interest in the real estate as or through an heir or devisee of the decedent may present a petition to establish title thereto in the orphans' court of the county where letters testamentary or of administration have been granted, or should no letters have been granted, then of the county within which was the family or principal residence of the decedent. If the decedent was a nonresident of the Commonwealth, the petition may be presented in the orphans' court of any county wherein any of the real estate shall lie. The court, aided if necessary by the report of a master, may enter its decree nisi adjudging that the title to the decedent's interest in the real estate is in such person or persons as the court shall determine. Notice of the decree nisi shall be given to creditors and other parties in interest, by advertisement and otherwise, as the court shall direct. If no exception to the decree is filed within three months, it shall be confirmed absolutely, free of all decedent's debts not then liens of record, and regardless of the provisions of any testamentary writing of the decedent thereafter probated. A certified copy of the decree shall be recorded in the office of the recorder of deeds of each county where real estate included in the decree shall lie, shall be indexed by the recorder in the grantor's index under the name of the decedent

and in the grantee's index under the name of each distributee, and shall be registered in the survey bureau or with the proper authorities empowered to keep a register of real estate in the county.

Comment. This is based on Section 11 of the Intestate Act of 1947 and on the Act of 1883, P. L. 131, which was repealed by the Intestate Act of 1917.

ARTICLE VIII.

LEGACIES, ANNUITIES, AND OTHER CHARGES.

SECTION 801. *Enforcement of Payment*—When a sum of money is charged upon real or personal property by will, inter vivos trust or decree, and has become payable, the court having jurisdiction of the estate or trust, upon petition of a party in interest and after notice to all persons liable for its payment and to the owner of the property charged, may enter a decree directing payment by the person liable, and in default of payment, may direct the fiduciary or a trustee to be appointed to sell the property charged, or so much of it as shall be necessary, upon such terms and security as the court shall direct, in which event the proceeds of the sale shall be distributed under the direction of the court as in other cases of judicial sales, to the persons legally entitled to receive them.

Comment. This is based on Section 25 of the 1917 Act.

SECTION 802. *Discharge of Portion of Property from Charges Payable in the Future*.—When a sum of money is charged upon real or personal property by will, inter vivos trust or decree, and is payable at a future date, the court having jurisdiction of the estate or trust, upon petition of a party in interest and after such notice as it shall direct, aided by the report of a master if necessary, or at the audit of any accounting, may enter a decree not contrary to any express provision in the will or trust instrument, exonerating and discharging such portion of the real and personal property charged as to it may seem beyond the amount requisite for providing a sufficient continuing security for the payment of the charge, or may direct that excess income be accumulated for the further protection of the charge, or be distributed to the persons entitled thereto. When an annuity is not restricted by the will or trust instrument to the income of the property charged with its payment, the court

may authorize the payment of the annuity from the principal of the property set apart to secure its payment, should income at any time prove insufficient.

Comment. This is based on Section 26 of the 1917 Act.

SECTION 803. *Discharge of Property from Lien of Charge.*—

(a) *Payment Into Court.* When real or personal property by will, inter vivos trust or decree is subject to a charge which has become payable, the court which has jurisdiction of the estate or trust, upon petition of a party in interest and after such notice as it shall direct, shall enter a decree fixing the amount of the charge then payable, and directing that it be paid into court and that upon such payment the property shall be discharged from so much of the charge as shall be paid into court. When the amount of the charge does not appear as a matter of record, the court, by appointment of a master or by investigation in open court, may ascertain and fix the amount. A certified copy of every decree relieving real property of the lien of a charge shall be recorded in the deed book in the office of the recorder of deeds of each county where the real estate shall lie, and shall be indexed by the recorder in the grantor's index under the name of the decedent or settlor, as the case may be, and in the grantee's index under the name of the owner of the land: Provided, That no conditional decree shall be recorded unless there is offered for recording, concurrently therewith, written evidence of compliance with the condition.

Comment. This is based on Section 27 of the 1917 Act.

(b) *Distribution of Moneys Paid Into Court.* Any money paid into court under the provisions of this section, subject to the laws of the Commonwealth relating to the payment of unclaimed funds into the State Treasury without escheat, shall remain there until the court, on petition of a party in interest and after such notice as it shall direct, aided by the report of a master if necessary, shall direct distribution to the persons entitled. The court may, in its discretion, appoint an auditor to make such distribution.

Comment. This is based on Section 27(d) of the 1917 Act.

SECTION 804. *Presumption of Payment Release or Extinguishment.*—

(a) *Lapse of Twenty Years.* When (1) for twenty years after the same or any part thereof becomes due, no payment

has been made on account of a dower, recognizance, legacy, annuity instalment, or other charge, created by will, inter vivos trust or court decree, upon real property; or, (2) no proceeding has been brought or no written acknowledgment of the existence thereof or no written promise to pay the same has been made within such period by the owner or owners of the property subject to the charge, a release or extinguishment thereof shall be presumed, and the charge shall thereafter be irrecoverable.

(b) *Perpetuation of Evidence.* The evidence of any such payment or written acknowledgment or promise may be perpetuated by recording it in the office of the recorder of deeds of the county or counties in which the real property bound by the charge is situate. The recorder of deeds shall index such evidence in the grantor's index under the name of the record owner or owners of the real property and in the grantee's index under the name of the owner or owners of the charge.

(c) *Renewal of Evidence Every Twenty Years.* If such evidence of the charge is so recorded and indexed within the said period of twenty years, it shall remain a charge on the real property for a period of twenty years from the time of indexing and no longer: Provided, That such evidence may be renewed within successive periods of twenty years, as often as necessary.

(d) *Irrecoverable After Twenty Years.* If such evidence does not appear of record and is not indexed as herein provided within a period of twenty years or within the periods provided for a renewal thereof, then said dower, recognizance, legacy, annuity instalment, or other charge shall be irrecoverable from any purchaser, mortgagee, or other lien creditor.

(e) *Retroactive Application.* The owner of any such charge which would be barred by the provisions of this act may, at any time prior to the expiration of two years from the effective date of this act, in the manner herein prescribed, record such evidence made within twenty-one years prior to the effective date of this act and cause it to be duly indexed against the owner or owners of the real property bound thereby, which recording and indexing, if renewed within the periods prescribed in this act, shall prevent such charge from being barred hereby.

Comment. Section 804 is based upon an Act proposed by the Real Estate Section of the Pa. Bar Association, as reported in the June 1948 issue of the Pa. Bar Association Quarterly, page 380. Cf. Act 512 of 1949.

ARTICLE IX.

TRUST ESTATES.

A. Appointment of Trustees.

SECTION 901. *To Fill Vacancy.*—The court, after such notice to parties in interest as it shall direct, may appoint a trustee to fill a vacancy in the office of trustee, subject to the provisions, if any, of the trust instrument.

Comment. This is based on Section 56 of the 1917 Act which in separate subsections provides for appointment of trustees to fill a partial or entire vacancy. Section 901 is intended to cover both contingencies and apply to an initial vacancy as well as to one occurring during administration, and to inter vivos as well as to testamentary trusts. The requirement for "such notice to parties in interest as it shall direct" is intended to preserve existing case law as illustrated by *McCaskey's Est.*, 293 Pa. 497, 307 Pa. 172, and *Zerbey Est.*, 356 Pa. 2. Consideration must be given to nominees suggested by parties in interest, but nevertheless the court is not bound by the suggestions in all cases.

SECTION 902. *Nonresident Trustee.*—If a trustee is or becomes a nonresident of the Commonwealth, the acceptance of the trusteeship or the act of becoming a nonresident, as the case may be, shall constitute the Secretary of the Commonwealth his attorney-in-fact upon whom service of process and notices may be made as to all causes of action relating to the trust estate.

Comment. This is based on Section 307(b).

SECTION 903. *Resident Co-trustee.*—When no trustee shall be a resident of the Commonwealth, the court, after such notice as it shall direct, may appoint one or more additional trustees resident within the Commonwealth to serve with the nonresident trustee or trustees.

Comment. This is based on Section 57(b) of the 1917 Act.

B. Bond of Trustees.

SECTION 911. *Necessity, Form and Amount.*—

(a) *When Required.* Except as hereinafter provided, the court, in its discretion, may require any trustee, whether or not a resident of the Commonwealth, to execute and file a bond which shall be in the name of the Commonwealth, with sufficient surety, in such amount as the court considers necessary having regard to the value of the personal estate in the control of the trustee.

(b) *When Not Required.*

(1) *When Named in or Provided for in Trust Instrument.*

No bond shall be required of a trustee, whether or not a resident of the Commonwealth, who is named in or whose appointment is to be made in a manner specified by the trust instrument, unless such instrument requires a bond or the court, for cause shown, deems it advisable.

(2) *Corporate Trustee.* No bond shall be required of a bank and trust company or trust company incorporated in the Commonwealth, or of a national bank having its principal office in the Commonwealth, unless the court, for cause shown, deems it advisable.

(c) *Condition.* The bond shall be conditioned in the following form:

(1) *When One Trustee.* The condition of this obligation is, that if the said trustee shall well and truly administer the trust according to law, this obligation shall be void; but otherwise, it shall remain in force.

(2) *When Two or More Trustees.* The condition of this obligation is, that if the said trustees or any of them shall well and truly administer the trust according to law, this obligation shall be void as to the trustee or trustees who shall so administer the trust; but otherwise, it shall remain in force.

Comment. Subsections (a) and (c) are based on Section 321 of this Act. Subsection (b) is suggested by Section 323.

SECTION 912. *Requiring or Changing Amount of Bond.*—

The court, for cause shown, and after such notice, if any, as it shall direct, may require a surety bond, or increase or decrease the amount of an existing bond, or require more or less security therefor.

Comment. This is based on Section 324.

C. Removal and Discharge.

SECTION 921. *Grounds and Procedure.*—The grounds and the procedure for the removal or discharge of a trustee and his surety and the effect of such removal or discharge shall be the same as are set forth in this act relating to the removal and discharge of a personal representative and his surety, with regard to the following:

- (1) Grounds for removal, as in section 331;
- (2) Procedure for and effect of removal, as in section 332;
- (3) Discharge of trustee and surety, as in section 333.

Comment. An analysis of Sections 331-333 will show that the word "trustee" could be substituted in every place where the words "personal representative" appear. However, in Section 332, the words "the court may direct the grant of new letters testamentary or of administration by the register" would of course be superfluous. This is not considered to be a reason for restating the provisions of Sections 331-333.

D. Powers, Duties and Liabilities of Trustees.

SECTION 931. *Possession of Real and Personal Property.*—Except as otherwise provided in the trust instrument, the trustee, until it is distributed or sold, shall have the right to and shall take possession of, maintain and administer each real and personal asset of the trust, collect the rents and income from it, and make all reasonable expenditures necessary to preserve it. He shall also have the right to maintain any action with respect to real or personal property of the trust.

Comment. This is based on Section 501. The right of the trustee is not restricted to the period of the continuance of the trust. This is left open for case law inasmuch as in certain circumstances it is advisable for the trustee to act for interested persons even though the expressed term of the trust may have expired. Cf. *Crump's Est.*, 2 Dist. 478; *Thaw Est.*, 163 Pa. Superior Ct. 484.

SECTION 932. *Abandonment of Property.*—When any property is so burdensome or is so encumbered or is in such condition that it is of no value to the trust, the trustee may abandon it. When such property cannot be abandoned without transfer of title to another or without a formal renunciation, the court may authorize the trustee to transfer or renounce it without consideration if it shall find that this will be for the best interests of the trust.

Comment. This should be compared with Section 502. Title is clearly in the trustee, and the trustee cannot merely renounce his right to administer as in Section 502.

SECTION 933. *Liability Insurance.*—The trustee, at the expense of the trust, may protect himself, his employees and the beneficiaries by insurance from liability to third persons arising from the administration of the trust.

Comment. This is based on Section 503.

SECTION 934. *Continuation of Business.*—The court, aided by the report of a master if necessary, may authorize the trustee to continue any business held in the trust and in doing so the court, for cause shown, may disregard the provisions of the trust instrument. The order may be with or without notice. If prior

notice is not given to all parties in interest, it shall be given within five days after the order or within such extended time as the court, for cause shown, shall allow. Any party in interest may, at any time, petition the court to revoke or modify the order. The order may provide—

(1) For the conduct of the business, by the trustee alone or jointly with others, or, unless restricted by the terms of the trust instrument, as a corporation to be formed;

(2) The extent of the liability of the trust or any part thereof, or of the trustee, for obligations incurred in the continuation of the business;

(3) Whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the trust set aside for use in the business or to the trust as a whole;

(4) The period of time the business may be conducted; and

(5) Such other regulations including accountings, as the court shall deem advisable.

Comment. This is based on Section 504.

SECTION 935. *Incorporation of Business.*—After notice to all parties in interest, aided by the report of a master if necessary, the court, unless restricted by the terms of the trust instrument, may authorize the trustee alone or jointly with others, to organize a corporation to carry on a business held in the trust, whether the business is owned solely by the trust or with others, and may contribute for stock of the corporation, as capital, all or part of the property of the trust which was invested in the business at the time the business was acquired by the trust.

Comment. This is based on Section 505.

SECTION 936. *Claims *Against Co-trustee.*—When one of two or more trustees shall be individually liable to the trust, the other or others shall take any legal action against him necessary to protect the trust.

Comment. This is based on Section 507.

SECTION 937. *Proceeding Against Trustee.*—Any proceeding may be brought against a trustee or the surety on his bond in the county of the court having jurisdiction of the trust, and if he does not reside in that county, process may be served on him personally, or as follows:

*“Agains” in original.

(1) *When Resident of Another County.* By a duly deputized sheriff of any other county of the Commonwealth in which he shall be found;

(2) *When a Nonresident of the Commonwealth.* By the sheriff of the county of the court having jurisdiction of the trust sending, by registered mail, return receipt requested, a true and attested copy of the process to the Secretary of the Commonwealth, accompanied by the fee prescribed by law, and to the trustee or surety at his last known address, with an endorsement thereon showing that service has been so made upon the Secretary of the Commonwealth.

Comment. This is based on Section 621.

SECTION 938. *Revival of Judgments Against Trustee.*—When the trust estate holds a judgment which is a lien on real estate owned by a trustee individually, any party in interest may suggest his interest in the judgment upon the record thereof and bring an appropriate action to revive it and to continue its lien. Any judgment so revived shall remain for the use of all parties in interest.

Comment. This is based on Section 508.

SECTION 939. *Liability of Trustee on Contracts.*—Unless he expressly contracts otherwise, in writing, a trustee shall not be personally liable on any written contract hereafter entered into which is within his authority as trustee and discloses that he is contracting as trustee of a named trust. Any action on such a contract shall be brought against the trustee in his fiduciary capacity only, or against his successor in such capacity, and execution upon any judgment obtained therein shall be had only against property of the trust.

Comment. This is based on Section 522.

SECTION 940. *Investments.*—Except as otherwise provided by the trust instrument, the powers and duties of trustees in making, retaining and managing investments shall be as prescribed by law generally for fiduciaries.

Comment. See Section 506 and Act No. 544 of May 26, 1949, entitled the Fiduciaries Investment Act of 1949.

SECTION 941. *Power of Attorney.*—A trustee may convey real estate, transfer title to personal estate, or perform any other act of administration by an attorney or attorneys-in-fact: Provided, That this *provision shall not authorize him to delegate the

* "provisions" in original.

exercise of any discretionary power, except as authorized by the trust instrument.

Comment. This is based on Section 509.

SECTION 942. *Voting Stock by Proxy.*—The trustees or a majority of them, either in person or by proxy, may vote stock owned by the trust.

Comment. This is based on Section 510.

SECTION 943. *Nominee Registration; Corporate Fiduciary as Attorney-in-fact.*—

(a) *Corporate Trustee.* A bank and trust company or a trust company incorporated in the Commonwealth, or a national bank with trust powers having its principal office in the Commonwealth, may keep investments or fractional interests in investments held by it, either as sole trustee or as co-trustee, in the name or names of the trustees or in the name of a nominee of the corporate trustee: Provided, the consent thereto of the co-trustees, if any, is obtained: And provided further, That all such investments shall be so designated upon the records of the corporate trustee that the trust to which they belong shall appear clearly at all times.

(b) *Individual Trustee.* A trustee serving jointly with a bank and trust company or a trust company incorporated in the Commonwealth, or with a national bank having its principal office in the Commonwealth, may authorize or consent to the corporate trustee having exclusive custody of the assets of the trust and to the holding of such investments in the name of a nominee of such corporate trustee, to the same extent and subject to the same requirements that the corporate trustee, if it were the sole trustee, would be authorized to hold such investments in the name of its nominee.

(c) *Corporate Fiduciary as Attorney-in-Fact.* An individual trustee may employ a bank and trust company or a trust company incorporated in the Commonwealth, or a national bank with trust powers having its principal office in the Commonwealth, to act as his attorney-in-fact in the performance of ministerial duties, including the safe-keeping of trust assets, and such attorney-in-fact, when so acting, may be authorized to hold such investments in the name of its nominee to the same extent and subject to the same requirements that such attorney-in-fact, if it were the trustee, would be authorized to hold such investments in the name of its nominee.

Comment. This is based on Section 511.

SECTION 944. *Acceptance of Deed in Lieu of Foreclosure.*

—The trustee may take for the trust from the owner of property encumbered by a mortgage owned by the trust, a deed in lieu of foreclosure, in which event the real estate shall be considered personalty to the same extent as though title had been acquired by foreclosure at sheriff's sale. Any deed or deeds heretofore so accepted are hereby made valid in accordance with the provisions hereof.

Comment. This is based on Section 512.

SECTION 945. *Compromise of Controversies.*—Whenever it shall be proposed to compromise or settle any claim, whether in suit or not, by or against a trust, or to compromise or settle any question or dispute concerning the validity or construction of any will or trust instrument, or the distribution of all or any part of any trust, or any controversy affecting any trust, the court, on petition of the trustee or by any party in interest setting forth all the facts and circumstances, and after such notice as the court shall direct, aided if necessary by the report of a master, may enter a decree authorizing the compromise or settlement to be made.

Comment. This is based on Section 513.

SECTION 946. *When Trustee Dies or Becomes Incompetent.*

—The fiduciary of the estate of a deceased or incompetent trustee by reason of such position shall not succeed to the administration of, or have the right to possess, any asset of a trust which was being administered by the deceased or incompetent trustee, except to protect it pending its delivery to the person entitled to it. The account of the deceased or incompetent trustee may be filed by the fiduciary of his estate and it shall be filed if the court shall so direct.

Comment. This is based on Sections 514 and 515.

SECTION 947. *Substituted or Succeeding Trustee.*—A substituted or succeeding trustee, except as otherwise provided by the trust instrument, shall have all the powers, duties and liabilities of the original trustee. He shall have the power to recover the assets of the trust from his predecessor in administration or from the fiduciary of such predecessor and, except as otherwise provided by the trust instrument, shall stand in the predecessor's stead for all purposes, except that he shall not be personally liable for the acts of his predecessor.

Comment. This is based on Sections 516 and 517.

SECTION 948. *Surviving or Remaining Trustees.*—Surviving or remaining trustees shall have all the powers of the original trustees, unless otherwise provided by the trust instrument.

Comment. This is based on Section 518.

SECTION 949. *Disagreement Among Trustees.*—

(a) *Decision of Majority.* If a dispute shall arise among trustees, the decision of the majority shall control unless otherwise provided by the trust instrument. A dissenting trustee shall join with the majority to carry out a majority decision requiring affirmative action and may be ordered to do so by the court. A dissenting trustee shall not be liable for the consequences of any majority decision even though he joins in carrying it out, if his dissent is expressed promptly to all the other co-trustees: Provided, That liability for failure to join in administering the trust or to prevent a breach of trust may not be thus avoided.

Comment. This is based on Section 519(a). See Section 105(2) for effective date.

(b) *When No Majority.* When a dispute shall arise among trustees as to the exercise or non-exercise of any of their powers and there shall be no agreement of a majority of them, unless otherwise provided by the trust instrument, the court, upon petition filed by any of the trustees or by any party in interest, aided if necessary by the report of a master, in its discretion, may direct the exercise or non-exercise of the power as the court shall deem for the best interest of the trust.

Comment. This is based on Section 519(b). See Section 105(2) for the effective date.

SECTION 950. *Effect of Removal, or of Probate of Later Will or Codicil.*—No act of administration performed by a testamentary trustee in good faith shall be impeached by the subsequent revocation of the probate of the will from which he derives his authority, or by the subsequent probate of a later will or of a codicil, or by the subsequent dismissal of the trustee: Provided, That regardless of the good or bad faith of the testamentary trustee, no person who deals in good faith with a testamentary trustee shall be prejudiced by the subsequent occurrence of any of these contingencies.

Comment. This is based on Section 520.

SECTION 951. *Inherent Powers and Duties.*—Except as otherwise provided in this act, nothing in this act shall be construed to limit the inherent powers and duties of a trustee.

Comment. This is based on Section 523.

E. Sales, Pledges, Mortgages, Leases, Options and Exchanges.

SECTION 961. *Power to Sell.*—Except as otherwise provided by the trust instrument, the trustee, for any purpose of administration or distribution, may sell, at public or private sale, any real or personal property of the trust. When the trustee has been required to give bond, no proceeds of real estate shall be paid to him until the court has made an order excusing him from entering additional security or requiring additional security, and in the latter event, only after he has entered the additional security.

Comment. This is based on Section 541. The words “*for any purpose of administration or distribution*” are included to make it clear that the power when required continues beyond the expressed term of the trust. Cf. *Thaw Est.*, 163 Pa. Superior Ct. 484. See Section 105(2) for the effective date.

SECTION 962. *Power to Lease.*—Except as otherwise provided by the trust instrument, the trustee may lease any real or personal property of the trust for a term not exceeding five years after its execution, unless a longer term is approved by the court.

Comment. This is suggested by Section 542 of this Act and Section 31 of the 1917 Act.

SECTION 963. *Order of Court.*—When the trustee is not authorized to do so by this act or is denied the power to do so by the trust instrument or when it is advisable that the sale have the effect of a judicial sale, he may sell, for any purpose of administration or distribution, any real or personal property of the trust, at public or private sale, or may pledge, mortgage, lease, or exchange any such property, or grant an option for the sale, lease, or exchange of any such property, under order of the court, upon such terms and upon such security and after such notice as the court shall direct, whenever the court shall find that such sale, pledge, mortgage, lease, exchange, or option is for the best interests of the trust.

Comment. This is based on Section 543. See Section 105(2) for the effective date.

SECTION 964. *Power in the Trust Instrument.*—A power given in the trust instrument to sell, unless expressly restricted, shall include the power to sell at public or private sale or to mortgage for any purpose of administration or distribution, but shall not include the right to grant an option without court order. A private sale may be made, with court approval, under the provi-

sions of this act, although the trust instrument has directed a public sale. A power given in the instrument to sell, pledge, mortgage, lease, or exchange, or to grant an option for a purchase, lease, or exchange of property of the trust not given to any person by name or description shall be deemed to have been given to the trustee and may be exercised without court approval. When the trustee has been required to give bond, no proceeds of real estate shall be paid to him until the court has made an order excusing him from entering additional security or requiring additional security, and in the latter event, only after he has entered the additional security.

Comment. This is suggested by Section 544.

SECTION 965. *Restraint of Sale.*—The court, on its own motion or upon application of any party in interest, in its discretion, may restrain a trustee from making any sale under an authority not given by the trust instrument or from carrying out any contract of sale made by him under an authority not so given. The order may be conditioned upon the applicant giving bond for the protection of parties in interest who may be prejudiced thereby. The order shall be void as against a bona fide grantee of, or holder of a lien on, real estate unless the decree restraining the sale, or *a duplicate original or certified copy thereof, is recorded in the deed book in the office of the recorder of deeds in the county in which the real estate lies, before the recording or entering of the instrument or lien under which such grantee or lienholder claims.

Comment. This is suggested by Section 545.

SECTION 966. *Purchase by Trustee.*—In addition to any right conferred by the trust instrument, the trustee, in his individual capacity, may bid for, purchase, take a mortgage on, lease, or take by exchange, real or personal property belonging to the trust, subject, however, to the approval of the court, and under such terms and conditions and after such reasonable notice to parties in interest as it shall direct. When the purchaser, mortgagee, or lessee is the sole trustee, the court may make an order directing its clerk to execute a deed or other appropriate instrument to him.

Comment. This is suggested by Section 546.

SECTION 967. *Title of Purchaser.*—If the trustee has given such bond, if any, as shall be required in accordance with this act, any sale, pledge, mortgage, or exchange by a trustee, whether

* "a" omitted in original.

pursuant to a decree or to the exercise of a power conferred by the trust instrument or of a power under this act, shall pass the full title of the trust therein, unless otherwise specified. Persons dealing with the trustee shall have no obligation to see to the proper application of the cash or other assets given in exchange for the property of the trust. Any sale or exchange by a trustee pursuant to a decree under section 963 shall have the effect of a judicial sale as to the discharge of liens, but the court may decree a sale or exchange freed and discharged from the lien of any mortgage otherwise preserved from discharge by existing law, if the holder of such mortgage shall consent by writing filed in the proceeding. No such sale, mortgage, exchange, or conveyance shall be prejudiced by the subsequent dismissal of the trustee nor shall any such sale, mortgage, exchange, or conveyance by a testamentary trustee be prejudiced by the terms of any will or codicil thereafter probated, if the person dealing with the trustee did so in good faith.

Comment. This is suggested by Section 547.

SECTION 968. *Collateral Attack.*—No decree entered pursuant to this act shall be subject to collateral attack on account of any irregularity if the court which entered it had jurisdiction to do so.

Comment. This section is suggested by Section 548.

SECTION 969. *Record of Proceedings; County Where Real Estate Lies.*—Certified copies of proceedings of any court of the Commonwealth relating to or affecting the real estate of any trust may be recorded in the office of the recorder of deeds in any county in which the real estate lies.

Comment. This is suggested by Section 549.

F. Accounts; Audits; Reviews; Distribution.

SECTION 981. *When Account Filed.*—A trustee shall file an account of his administration at the termination of the trust and may file an account at any other time. The court may direct him to file an account at any time.

Comment. This is suggested in part by Section 701 of this Act and by Section 46(g) of the 1917 Act.

SECTION 982. *Where Accounts Filed.*—All accounts of trustees shall be filed in the office of the clerk.

Comment. This is based on Section 6(6) of the Supreme Court Rules. The "clerk" would of course be the clerk of the orphans' court of the county where the trust has a situs. See Sections 102 and 702.

SECTION 983. *Notice, Audits, Reviews and Distribution.*—The provisions concerning accounts, audits, reviews, distributions and rights of distributees in trust estates shall be the same as those set forth in this act for the administration of a decedent's estate, with regard to the following:

ACCOUNTS.

- (1) Notice to parties in interest, as in section 703;
- (2) Representation of parties in interest, as in section 704.

AUDITS.

- (3) Audits in counties having a separate orphans' court, as in section 711;
- (4) Audits in counties having no separate orphans' court, as in section 712;
- (5) Statement of proposed distribution, as in section 713;
- (6) Confirmation of accounts and approval of proposed distribution, as in section 714.

REVIEWS.

- (7) Rehearing—Relief granted, as in section 721.

DISTRIBUTION.

- (8) Award upon final confirmation of account, as in section 733;
- (9) Distribution in kind, as in section 734;
- (10) Recording and registering decrees *awarding real estate, as in section 736.

RIGHTS OF DISTRIBUTEES.

- (11) Liability for interest, as in section 754;
- (12) Transcripts of balances due, as in section 755.

Comment. It is considered inadvisable to rewrite the sections referred to. A substitution of the word "*trustee*" for "personal representative" and "*trust*" for "decedent's estate" in the sections referred to will accomplish the desired interpretation.

* "including" in original.

SECTION 984. *Disposition of Minor's Income.*—Except as otherwise provided by the trust instrument, the trustee with the approval of the court, may pay income distributable to a minor beneficiary for whose estate no guardian has been appointed directly to the minor, or expend and apply it for his maintenance or education.

Comment. There is no statutory precedent for this section, but many trust instruments give this power to the trustee. In many instances the power can be used to avoid the expense of a guardianship. The requirement of court approval provides a reasonable safeguard. See Section 105(2) for the effective date.

G. Separation and Combination of Trusts.

SECTION 991. *Separate Trusts.*—The court, for cause shown and with the consent of all parties in interest, may divide a trust into two or more separate trusts.

Comment. This section is suggested in part by Section 56(c) of the 1917 Act. It may serve a useful purpose in making it possible for different investment policies to be followed for different groups of beneficiaries whose needs are different. For example, one group because of substantial income from other sources may be better served by investment in low interest tax free bonds. Also administrative difficulties may be reduced where there is a right to invade principal, and where frequent accountings are required because of changes of status of income beneficiaries. Section 991 is contrary to *Lockhart's Est.*, 306 Pa. 394, 405, and *Laucks Est.*, 358 Pa. 369, which indicate that the whole principal must be kept intact "since it cannot be said that a share of income from the entire estate is not more valuable than the income from a proportional share of the principal." It is to be noted that the division can occur only when all parties in interest consent. Those not able to consent could be represented by guardians or by trustees ad litem.

SECTION 992. *Combination of Trusts.*—Whenever the trust instrument provides for the creation of separate trusts, the court for cause shown and with the consent of all parties in interest, may authorize the trusts to be combined.

Comment. This section has no statutory precedent. It should be compared with Section 9 of the Estates Act of 1947.

ARTICLE X.

MINORS.

A. Small Estates.

SECTION 1001. *When Guardian Unnecessary.*—When the entire real and personal estate, wherever located, of a resident or nonresident minor has a net value of one thousand dollars or

less, all or any part of it may be received and held or disposed of by the minor, or by the parent or other person maintaining the minor, without the appointment of a guardian or the entry of security, in any of the following circumstances:

(1) *Award from Decedent's Estate or Trust.* When the court having jurisdiction of a decedent's estate or of a trust in awarding the interest of the minor shall so direct;

(2) *Interest in Real Estate.* When the court having jurisdiction to direct the sale or mortgage of real estate in which the minor has an interest shall so direct as to the minor's interest in the real estate;

(3) *Other Circumstances.* In all other circumstances, when the court which would have had jurisdiction to appoint a guardian of the estate of the minor shall so direct.

Comment. This section is suggested in part by Section 59(d) of the 1917 Act, as last amended in 1939, P. L. 710. In addition to increasing the amount to \$1,000, clause (3) should make it possible to dispose of amounts of \$1,000 or less arising from bank accounts, insurance proceeds and other sources where the fund is not already before the court. The size of the minor's estate would be a necessary allegation in every petition under this section. "Net value" has been used to avoid saying "proceeds of real estate less mortgages, commissions, attorneys' fees, court costs, etc." It is the amount to be received by the minor which is important. This section is not intended to affect the provisions of Sections 902 or 904 of the Banking Code of 1933. See Section 1401(c) (2) of this Act.

SECTION 1002. *Power of Natural Guardian.*—The court may authorize or direct the parent or other person maintaining the minor to execute as natural guardian, any receipt, deed, mortgage, or other appropriate instrument necessary to carry out a decree entered under section 1001, and, in such event, may require the deposit of money in a savings account or the care of securities in any manner considered by the court to be for the best interests of the minor. The decree so made, except as the court shall expressly provide otherwise, shall constitute sufficient authority to all transfer agents, registrars and others dealing with property of the minor to recognize the persons named therein as entitled to receive the property, and shall in all respects have the same force and effect as an instrument executed by a duly appointed guardian under court decree.

Comment. This is suggested in part by Section 202. Except where the court decree provides otherwise, the parent or other person acting for the minor will not be accountable as trustee for funds received in behalf of the minor. Thus, the title to the property so received, regardless of whether it

is cash, will be in the person receiving the property for the minor. The provision for a conditional court decree is in case it may be advisable that the minor's funds be deposited in a savings account or other investment, conditioned that the fund may not be withdrawn until the minor attains the age of 21 years or upon prior order of the court. This practice has been followed with success in Philadelphia County.

B. Appointment of Guardian.

SECTION 1011. *County of Appointment.*—

(a) *Resident Minor.* A guardian of the person or of the estate of a minor may be appointed by the court of the county in which the minor resides.

Comment. This is based on Section 59(a) of the 1917 Act.

(b) *Nonresident Minor.* A guardian of the estate within the Commonwealth of a minor residing outside the Commonwealth may be appointed by the court of the county having jurisdiction of a decedent's estate or of a trust from which the minor's estate is derived. When the nonresident minor's estate is derived otherwise than from a decedent's estate or a trust, a guardian may be appointed by the court of any county where an asset of the minor's estate is located.

Comment. This is suggested by Section 59(e) of the 1917 Act.

(c) *Exclusiveness of Appointment.* When a court has appointed a guardian of a minor's estate pursuant to subsections (a) or (b), no other court shall appoint a similar guardian for the minor within the Commonwealth.

Comment. It is intended that the first court-appointed guardian shall not be interfered with by the appointment of a guardian by another court within the Commonwealth. There would, of course, be only one guardian of the person within the Commonwealth.

SECTION 1012. *Persons Not Qualified to be Appointed by the Court.*—The court shall not appoint as guardian of the estate of a minor any person who is—

- (1) Under twenty-one years of age;
- (2) A corporation not authorized to act as fiduciary in the Commonwealth;
- (3) A personal representative or a trustee of an estate in which the minor is interested;
- (4) A parent of the minor.

Comment. Clauses 1 and 2 are identical with clauses 1 and 2 of Section 306. Clause 3 is suggested by Section 59(c) and clause 4 by Section 59(d) of the 1917 Act.

SECTION 1013. *Persons Preferred in Appointment.*—A person of the same religious persuasion as the parents of the minor shall be preferred as guardian of his person. A person nominated by a minor over the age of fourteen, if found by the court to be qualified and suitable, shall be preferred as guardian of his person or estate.

Comment. Preference for persons of the same religious faith is suggested by Section 59(b) of the 1917 Act, and the right of the minor to nominate a guardian by Sections 59(a) and 59(e) of the 1917 Act. It is thought advisable to make it clear that the minor may nominate a guardian, but that this nomination cannot control the action of the court over the appointment. Under the language of Section 1013, it is not intended that minors over 14 must necessarily appear in court, or that they shall have the right, except for cause shown, to seek the removal of a guardian and the appointment of another after they attain the age of fourteen.

SECTION 1014. *Nonresident Guardian.*—When a guardian is or becomes a nonresident of the Commonwealth, the acceptance of his appointment or the act of becoming a nonresident, as the case may be, shall constitute the Secretary of the Commonwealth his attorney-in-fact upon whom service of process and notices may be made as to all causes of action relating to the minor's estate.

Comment. This is based on Sections 307(b) and 902.

C. Bond.

SECTION 1021. *Necessity, Form and Amount.*—Except as hereinafter provided, every guardian of the estate of a minor shall execute and file a bond which shall be in the name of the Commonwealth, with sufficient surety, in such amount as the court considers necessary, having regard to the value of the personal estate which will come into the control of the guardian, and conditioned in the following form:

(1) *When One Guardian.* The condition of this obligation is, that if the said guardian shall well and truly administer the estate according to law, this obligation shall be void; but otherwise, it shall remain in force.

(2) *When Two or More Guardians.* The condition of this obligation is, that if the said guardians or any of them shall well and truly administer the estate according to law, this obligation shall be void as to the guardian or guardians who shall so administer the estate; but otherwise, it shall remain in force.

Comment. This is similar to the provisions of Sections 321 and 911 relating to bonds of personal representatives and trustees. Under Section

59(g) of the 1917 Act, the giving of a bond is made discretionary with the Orphans' Court "*whenever they may deem it proper*". As now written, a bond will be required in all circumstances except as provided otherwise in Section 1022.

SECTION 1022. *When Bond Not Required.*—

(a) *Guardian Named in Conveyance.* No bond shall be required of a guardian appointed by or in accordance with the terms of a will, inter vivos instrument, or insurance contract as to the property derived by the minor from such instrument, unless it is required by the conveyance, or unless the court, for cause shown, deems it advisable.

Comment. This section is suggested by Section 323(b) and Section 911(b). The only guardians of the estate not appointed by the court are testamentary guardians appointed under Section 18(b) of the Wills Act of 1947, and guardians appointed pursuant to the Act of 1945, P. L. 253.

(b) *Corporate Guardian.* No bond shall be required of a bank and trust company or of a trust company incorporated in the Commonwealth, or of a national bank having its principal office in the Commonwealth, unless the court, for cause shown, deems it advisable.

Comment. This is based on Sections 323(a) and 911(b).

(c) *Nonresident Corporation.* A nonresident corporation or a national bank having its principal office out of the Commonwealth, otherwise qualified to act as guardian, in the discretion of the court, may be excused from giving bond.

Comment. This is suggested by Section 323(a).

(d) *Other Cases.* In all other cases, the court may dispense with the requirement of a bond when, for cause shown, it finds that no bond is necessary.

Comment. This subsection is included to encourage practices such as that now followed in Philadelphia County where the guardian is excused from giving a bond when he deposits the minor's funds in a savings account or with a federally insured association, conditioned that the fund may not be withdrawn until the minor attains the age of 21 or upon prior order of court.

SECTION 1023. *Requiring or Changing Amount of Bond.*—The court, for cause shown, and after such notice, if any, as it shall direct, may require a surety bond, or increase or decrease the amount of an existing bond, or require more or less security therefor.

Comment. This is based on Sections 324 and 912.

D. Removal and Discharge.

SECTION 1031. *Grounds and Procedure.*—The grounds and the procedure for the removal or discharge of a guardian and his surety and the effect of such removal or discharge shall be the same as are set forth in this act relating to the removal and discharge of a personal representative and his surety, with regard to the following:

- (1) Grounds for removal, as in section 331;
- (2) Procedure for and effect of removal, as in section 332;
- (3) Discharge of guardian and surety, as in section 333.

Comment. This is suggested by Section 921 of this Act, and Section 52(a) of the 1917 Act.

E. Powers, Duties and Liabilities—In General.

SECTION 1041. *Possession of Real and Personal Property.*—The guardian of the estate of a minor appointed by the court until it is distributed or sold shall have the right to, and shall take possession of, maintain and administer, each real and personal asset of the minor to which his appointment extends, collect the rents and income from it, and make all reasonable expenditures necessary to preserve it. He shall also have the right to maintain any action with respect to such real or personal property of the minor.

Comment. This is suggested by Section 931 of this Act.

SECTION 1042. *Inventory.*—Every guardian, within three months after real or personal estate of his ward comes into his possession, shall verify by oath and file with the clerk, (1) an inventory and appraisal of such personal estate, (2) a statement of such real estate, and (3) a statement of any real or personal estate which he expects to acquire thereafter.

Comment. This is based on Section 59(h) of the 1917 Act. Cf. Section 401 of this Act.

SECTION 1043. *Those Identical with Trustees.*—The provisions concerning the powers, duties and liabilities of a guardian appointed by the court shall be the same as those set forth in this act for the administration of a trust estate, with regard to the following:

- (1) Abandonment of property, as in section 932;
- (2) Liability insurance, as in section 933;

- (3) Continuation of business, as in section 934;
- (4) Incorporation of business, as in section 935;
- (5) Claims against co-guardian, as in section 936;
- (6) Proceedings against guardian, as in section 937;
- (7) Revival of judgment against guardian, as in section 938;
- (8) Liability of guardian on contracts, as in section 939;
- (9) Investments, as in section 940;
- (10) Power of attorney, as in section 941;
- (11) Voting stock by proxy, as in section 942;
- (12) Nominee Registration: Corporate Fiduciary as attorney-in-fact, as in section 943;
- (13) Acceptance of deed in lieu of foreclosure, as in section 944;
- (14) Compromise of controversies, as in section 945;
- (15) When guardian dies or becomes incompetent, as in section 946;
- (16) Surviving or remaining guardian, as in section 948;
- (17) Disagreement of guardians, as in section 949.

Comment. A substitution of "guardian" for "trustee" and "minor's estate" for "trust" in the sections referred to will accomplish the desired interpretation.

SECTION 1044. *Inherent Powers and Duties.*—Except as otherwise provided in this act, nothing in this act shall be construed to limit the inherent powers and duties of a guardian.

Comment. This is based on Section 951. It is not included by cross-reference in Section 1043 because we wish to give guardians the inherent powers of guardians not the inherent powers of trustees.

SECTION 1045. *Guardian Named in Conveyance.*—

(a) *In General.* The powers, duties and liabilities of a guardian not appointed by the court as to property of the minor to which his appointment lawfully extends shall be the same as the powers, duties and liabilities of a court appointed guardian, except as the instrument making the appointment shall provide otherwise.

Comment. This subsection has no statutory precedent. Neither the Wills Act of 1947 nor the Act of 1945 P. L. 253, gives any indication of the powers of such guardians. See Section 105(3) for the effective date.

(b) *Substituted or Succeeding Guardian.* A substituted or succeeding guardian, except as otherwise provided by the instrument, if any, appointing the original guardian, in addition to the powers of a guardian appointed by the court, shall have all the powers, duties and liabilities of the original guardian. He shall have the power to recover the assets of the minor from his predecessor in administration or from the fiduciary of such predecessor and, except as otherwise provided in an applicable instrument, shall stand in the predecessor's stead for all purposes, except that he shall not be personally liable for the acts of his predecessor.

Comment. This is based on Section 947.

(c) *Effect of Removal, or of Probate of Later Will or Codicil.* No act of administration performed by a testamentary guardian in good faith shall be impeached by the subsequent revocation of the probate of the will from which he derives his authority, or by the subsequent probate of a later will or of a codicil, or by the subsequent dismissal of the guardian: Provided, That regardless of the good or bad faith of the testamentary guardian, no person who deals in good faith with a testamentary guardian shall be prejudiced by the subsequent occurrence of any of these contingencies.

Comment. This is based on Section 950.

F. Sales, Pledges, Mortgages, Leases, Options and Exchanges.

SECTION 1061. *Power to Sell Personal Property.*—A guardian appointed by the court may sell, at public or private sale, any personal property of the minor.

Comment. This is suggested by Sections 541 and 961. However, it omits the power to sell real estate because it is believed there should be an approval of such sales by the court when there may be no one sui juris sufficiently interested to object to an improper sale in behalf of the minor.

SECTION 1062. *Power to Lease.*—A guardian appointed by the court may lease any real or personal property of the minor. Unless a longer term is approved by the court, the lease shall not extend beyond the date when the minor, if living, will attain his majority, nor for more than five years after the date it is executed.

Comment. This is suggested by Sections 542 and 962. The limit of five years expiring before majority is taken from Section 31 of the 1917 Act.

SECTION 1063. *Order of Court.*—A guardian appointed by the court may, for any purpose of administration or distribution, sell, pledge, mortgage, lease, or exchange any real or personal property of the minor, at public or private sale, or grant an option for the sale, lease, or exchange of any such property under order of the court, upon such terms and upon such security and after such notice as the court shall direct, whenever the court shall find that such sale, pledge, mortgage, lease, exchange, or option is for the best interests of the minor.

Comment. This is suggested by Sections 543 and 963.

SECTION 1064. *Restraint of Sale.*—The court, on its own motion or upon application of the minor or of anyone in behalf of the minor, in its discretion may restrain a guardian appointed by the court from selling or carrying out any contract of sale of any personal property of the minor. The order may be conditioned upon the applicant giving bond for the protection of the minor's estate.

Comment. This is suggested by Sections 545 and 965.

SECTION 1065. *Purchase by Guardian.*—A guardian appointed by the court, in his individual capacity, may bid for, purchase, take a mortgage on, lease, or take by exchange, real or personal property belonging to the minor, subject, however, to the approval of the court, and under such terms and conditions and after such reasonable notice to the minor or to persons having an interest in the welfare of the minor as the court shall direct. When the purchaser, mortgagee, or lessee is the sole guardian, the court may make an order directing its clerk to execute a deed or other appropriate instrument to him.

Comment. This is suggested by Sections 546 and 966.

SECTION 1066. *Title of Purchaser.*—If the guardian has given the bond, if any, required in accordance with this act, any sale, pledge, mortgage, or exchange by him, whether pursuant to a decree or to a power under this act, shall pass the full title of the minor therein, unless otherwise specified. Persons dealing with the guardian shall have no obligation to see to the proper application of the cash or other assets given in exchange for the property of the minor. Any sale or exchange by a guardian pursuant to a decree under section 1063 shall have the effect of a judicial sale as to the discharge of liens, but the court may decree a sale or exchange freed and discharged from the lien of any mortgage otherwise preserved from dis-

charge by existing law, if the holder of such mortgage shall consent by writing filed in the proceeding. No such sale, mortgage, exchange, or conveyance shall be prejudiced by the subsequent dismissal of the guardian, nor shall any such sale, mortgage, exchange, or conveyance by a testamentary guardian be prejudiced by the terms of any will or codicil thereafter probated, if the person dealing with the guardian did so in good faith.

Comment. This is suggested by Section 967.

SECTION 1067. *Collateral Attack.*—No decree entered pursuant to this act shall be subject to collateral attack on account of any irregularity if the court which entered it had jurisdiction to do so.

Comment. This is suggested by Sections 548 and 968.

SECTION 1068. *Record of Proceedings; County Where Real Estate Lies.*—Certified copies of proceedings of any court of the Commonwealth relating to or affecting the real estate of any minor may be recorded in the office of the recorder of deeds in any county in which the real estate lies.

Comment. This is suggested by Sections 549 and 969.

G. Accounts, Audits, Reviews, Distribution.

SECTION 1081. *When Accounting Filed.*—A guardian shall file an account of his administration promptly at the termination of his guardianship, or at such earlier time or times as shall be directed or authorized by the court.

Comment. This should be compared with Sections 701 and 981.

SECTION 1082. *Where Accounts Filed.*—All accounts of guardians shall be filed in the office of the clerk.

Comment. This is suggested by Section 982. This eliminates the distinctions which have applied depending on the size of the estate, whether it is an interim or final account and whether the minor or guardian has died. Cf. Pa. Supreme Court Orphans' Court Rules, Sections 6(5) and 6(6).

SECTION 1083. *Notice, Audits, Reviews and Distribution.*—The provisions concerning accounts, audits, reviews, distribution and rights of distributees in a minor's estate shall be the same as those designated in section 983 for the administration of a trust estate.

Comment. Section 983 is not the end of the trail, and reference must be made from it to the sections dealing with decedents' estates. Nevertheless, it is believed that this inconvenience is more than balanced by the advantage

of knowing that the powers and duties of guardians and trustees are identical within this sphere.

SECTION 1084. *Distributions for Support and Education.*—All income received by a guardian of the estate of a minor, in the exercise of a reasonable discretion, may be expended in the care, maintenance and education of the minor without the necessity of court approval. The court, for cause shown, may authorize or direct the payment or application of any or all of the income or principal of the estate of a minor for the care, maintenance or education of the minor, his spouse or children, or for the reasonable funeral expenses of the minor's spouse, child or indigent parent. In proper cases, the court may order payment of amounts directly to the ward for his maintenance or for incidental expenses and may ratify payments made for these purposes.

Comment. This section is based on Section 59(i) of the 1917 Act. It differs in that it provides expressly for the expenditure of income without prior approval. It should be noted that payments from income are not restricted to income from assets in the care and management of the guardian. Thus, income received from a trust fund could be expended without prior court approval. The right to expend income and principal funds is made dependent on all the circumstances without any reference to the financial ability of the parents. The right to use funds for the spouse or children of the minor is included in case a minor marries and it is obvious that the funds are being used for the family unit. This does not apply to parents when the minor is wealthy and the parents are in need. In such circumstance the order for maintenance of the parent would have to be secured in another court. The reference to funeral expenses changes the rule of *O'Leary Est.*, 352 Pa. 254, and *Long Est.*, 352 Pa. 257, where the Supreme Court refused such an allowance.

SECTION 1085. *Notice to Guardian or Guardian Ad Litem.*—The guardian of the estate of a minor shall be given notice of proceedings affecting the interest of his ward in any property to which his appointment extends, in the same manner as is provided for notice to persons of full age having similar interests. If the minor has no guardian authorized to act for him in respect to the interest involved, the court in which the proceedings are pending, upon petition or on its own motion, may appoint a guardian ad litem for the minor, to whom the required notice can be given. Nothing herein shall be construed to require the appointment of a guardian ad litem to represent the interest of a minor in an estate unless the court, upon petition or on its own motion, shall consider such appointment to be advisable. The court may dispense with the appointment of a guardian ad litem when there is a living person sui juris having a

similar interest, or where the minor is issue of a living ancestor sui juris interested in the estate whose interest is not adverse to that of the minor.

Comment. This is based on Section 59 (k) of the 1917 Act. The language is intended to make it possible for a guardian appointed by will, by trust inter vivos or by insurance contract to represent the interest of the minor in the property coming from that source while the general guardian will represent all other interests. This should be compared with Section 704 and with Section 12(4) (a) of the Supreme Court Rules. See *Hall's Est.*, 36 D. & C. 582, for a discussion of the possible effect of the failure to appoint a guardian ad litem where distribution is being made by the accountant to himself in another fiduciary capacity.

SECTION 1086. *Death of Minor.*—Upon the audit of the account of the guardian of a person who has died during minority, the auditing judge or auditor passing on the account, in his discretion, may award distribution to those entitled to receive the minor's property, unless the estate is, or is likely to be, involved in litigation making it advisable to distribute the balance to a personal representative of the minor's estate.

Comment. This is based on the Act of 1931, P. L. 556, 20 PS 872.

ARTICLE XI.

FOREIGN FIDUCIARIES.

A. Powers and Duties.

SECTION 1101. *In General.*—A foreign fiduciary may institute proceedings in the Commonwealth (subject to the conditions and limitations imposed on nonresident suitors generally) and may exercise all the other powers of a similar local fiduciary, but a foreign personal representative shall have no such power when there is an administration in the Commonwealth. Except in the case of stock transfers, for which special provision is made in section 1102, the maintenance of a proceeding or the exercise of any other power by a foreign fiduciary shall be subject to the following additional conditions and limitations:

Comment. This is based on Section 2 of the Uniform Powers of Foreign Representatives Act. The basis of Section 1101 is the reverse of that expressed in Section 58 of the 1917 Act. The 1917 Act lists the powers granted. Section 1101 gives general powers and then lists the limitations on the general powers.

(1) *Copy of Appointment.* The foreign fiduciary shall file with the said register an exemplified copy of his appointment or other qualification in the foreign jurisdiction, together with an

exemplified copy of the will or other instrument, if any, in pursuance of which he has been appointed or qualified and when he is an executor, administrator c. t. a., testamentary trustee, or testamentary guardian, and any of his powers are to be exercised with respect to Pennsylvania real estate, he shall file an exemplified copy of the probate proceedings in the foreign jurisdiction which must show that the will has been proved in the manner required in the Commonwealth for a will of a Pennsylvania decedent.

Comment. This is based on Section 58(c) of the 1917 Act.

(2) *Affidavit.* The foreign fiduciary shall execute and file an affidavit with the register of the county where the power is to be exercised or the proceeding is instituted or the property concerning which the power is to be exercised is located, stating that after diligent search and inquiry, the estate of which he is fiduciary is not, to his knowledge or so far as he has been able to discover, indebted to any person in the Commonwealth, and that he will not exercise any power which he would not be permitted to exercise in the jurisdiction of his appointment. The affidavit shall be attached to the copy of appointment.

Comment. This is suggested by Section 58(c) of the 1917 Act. It is to be noted that if there is property in 67 different counties, the affidavit would have to be filed with the registers in all of the counties.

(3) *Time Limitation.* When the foreign fiduciary is a personal representative or a trustee under the will of a nonresident decedent, he shall not exercise any of his powers within the Commonwealth for one month after the decedent's death.

Comment. This is a new requirement but it was thought that Pennsylvania creditors should have a limited time to take out ancillary letters, particularly since real estate may be sold and the proceeds removed from the Commonwealth within a year of decedent's death. It is also important that there be a waiting period when the question of the decedent's domicile may be in doubt.

(4) *Taxes.* When the foreign fiduciary exercises a power to sell or mortgage any Pennsylvania real estate, all taxes due thereon to the Commonwealth or to any subdivision thereof must be paid or provided for.

Comment. This is analogous to the requirement of a waiver from the Department of Revenue before the transfer of stock.

SECTION 1102. *Stock Transfers.*—When there is no administration in the Commonwealth, a foreign fiduciary, upon submission of a certificate of his appointment, issued or verified within

one month of the time it is to be acted upon, may transfer stock of a Pennsylvania corporation standing in the name of a decedent or foreign fiduciary in the same manner as a similar local fiduciary, and shall not be required to comply with the conditions and limitations of section 1101.

Comment. This section liberalizes existing Pennsylvania law with respect to stock transfers by foreign fiduciaries.

SECTION 1103. *Service of Process.*—The acceptance by a foreign fiduciary of the privilege extended by the laws of the Commonwealth of exercising any of his powers within the Commonwealth shall constitute the Secretary of the Commonwealth his attorney-in-fact upon whom service of process and notices may be made in any suit or proceeding instituted in the courts of the Commonwealth arising out of, or by reason of, the exercise of any of his powers or the performance or non-performance of any of his duties as such fiduciary.

Comment. This is suggested by the Act of 1929, P. L. 1721, 75 PS 1201, as amended. The procedure for the service of process is not set forth. This would be in accordance with the Rules of Civil Procedure 2076, et seq., and Section 621 hereof.

SECTION 1104. *Proof of Authority in Court Proceedings.*—Upon commencing any proceeding in any court of the Commonwealth, the foreign fiduciary, in addition to the requirements of section 1101, shall file with the court in which the proceeding is commenced, an exemplified copy of his official bond, if he has given a bond. If the court believes that he should furnish security or additional security in the Commonwealth or in the domiciliary jurisdiction, it may, at any time, order the action or proceeding stayed until sufficient security is furnished.

Comment. This is based on Section 3 of the Uniform Act. Section 1104 differs from the Uniform Act in not confining the bond to be given to the domiciliary jurisdiction. Thus, it is broad enough to enable the court to require bond for costs, and it may enable the court to prevent nuisance actions.

SECTION 1105. *Effect of Local Proceedings.*—No person who, before receiving actual notice of local administration or of application therefor, has changed his position by relying on the powers granted to foreign fiduciaries by this act shall be prejudiced by reason of the application for or grant of local administration.

Comment. This is suggested in part by Section 5 of the Uniform Powers of Foreign Representatives Act.

B. Distributions to Foreign Fiduciaries.

SECTION 1111. *To Foreign Personal Representative.*—

When a share of an estate administered in the Commonwealth is distributable to a deceased nonresident creditor or other distributee, the court may award it to his domiciliary personal representative or to some other person performing the function of a personal representative, unless it shall appear that the rights of any resident of the Commonwealth may be adversely affected or the court shall determine that for any reason ancillary administration within the Commonwealth is advisable.

Comment. This is intended to replace Section 58(f) of the 1917 Act. It is believed that the general language of Section 1111 is to be preferred. Circumstances vary substantially, especially when a distributee is a resident of a foreign country.

SECTION 1112. *To Foreign Trustee, Guardian or Committee.*—When a share of an estate administered in the Commonwealth is distributable to a nonresident minor, a trustee subject to the jurisdiction of a foreign court, or a nonresident incompetent, the court may award it to the guardian or committee of the nonresident appointed in the foreign jurisdiction, or to such trustee: Provided, That the court shall be satisfied, in all cases where an applicable will or trust instrument does not direct distribution to the foreign guardian, committee or trustee, that adequate security or other protection has been provided in the domiciliary jurisdiction by the domiciliary law for the protection of the persons beneficially interested in the share so awarded.

Comment. The requirements of this section are not as strict as Section 58(g) of the 1917 Act.

C. Transfer of Administration.

SECTION 1121. *Award to Foreign Guardian When Minor Becomes a Nonresident.*—When the minor for whose estate a guardian has been appointed by the court is or becomes a nonresident of the Commonwealth, the court, upon satisfactory proof that it will be for the best interests of the minor and that no rights of a resident of the Commonwealth will be adversely affected and that removal of the property will not conflict with any limitations upon the right of the minor to such property, may direct the locally appointed guardian to transfer the assets of the minor within his control to a duly qualified guardian or guardians in the jurisdiction where the minor resides.

Comment. There is no statutory precedent for this section. It is suggested in part by Section 58(h) of the 1917 Act dealing with the removal of a trust to another jurisdiction which is omitted from this revised Act.

ARTICLE XII.

ABSENTEES AND PRESUMED DECEDENTS.

SECTION 1201. *Proof of Death.*—

(a) *Finding of Death.* When a person domiciled in the Commonwealth disappears and is absent from his place of residence without being heard of after diligent inquiry, the court of the county where he last resided, aided by the report of a master if necessary, upon the petition of any party in interest, and, if a trustee has been appointed for the absentee, at any time during the trusteeship, may make a finding and decree that the absentee is dead and of the date of his death, provided the notice required by section 1204 has been given to the absentee.

Comment. This subsection will be supplemented by existing case law.

(b) *Presumption from Absence.* When the death of a person or the date thereof is in issue, his unexplained absence from his last known place of residence and the fact that he has been unheard of for seven years may be a sufficient ground for finding that he died seven years after he was last heard of.

Comment. This sets forth the rule of existing case law recognized in Section 6 of the 1917 Act.

(c) *Exposure to Specific Peril.* The fact that an absentee was exposed to a specific peril of death may be a sufficient ground for finding that he died less than seven years after he was last heard of.

Comment. This is based on existing case law, and on Section 1 of the Act of 1945, P. L. 187 as amended in 1947, P. L. 267, 51 PS 630, dealing with the effect of a finding of presumed death under the Federal Missing Persons Act.

(d) *Competency of Witnesses.* All persons shall be competent to testify concerning the death or disappearance of an absentee regardless of relationship by marriage to him or of interest in his estate.

Comment. This is suggested by Sections 6(c) and 60(a-2) of the 1917 Act.

SECTION 1202. *Trustee for Absentee.*—

(a) *Appointment.* When a person domiciled or having property in the Commonwealth disappears and is absent from his last known place of residence for a period of one year without being heard of after diligent inquiry, the court of the county

where the absentee last resided or, if a nonresident, the court of the county where any of his property shall be located, aided by the report of a master if necessary, upon the petition of any person who would be a party in interest were the absentee deceased or of any insurer or creditor of the absentee, after notice as provided in section 1204, upon good cause being shown, may find that the absentee's property requires protection and that he was last heard of on a date certain and may appoint a trustee to take charge of his estate. The absentee shall be made a party to the proceeding and any other person who would have an interest in the property of the absentee were he deceased, upon direction of the court, may be made a party to the proceeding. The above period of one year may be shortened in the discretion of the court.

Comment. This is based on Section 3(1) of the Uniform Absence as Evidence of Death and Absentee's Property Act, and Section 60(a) of the 1917 Act as amended in 1943, P. L. 839.

(b) *Bonds, Powers, Duties and Liabilities.* A trustee for an absentee shall give such bond, shall be removed and discharged, and, except as otherwise expressly provided, shall have the same powers, duties and liabilities in the administration of the absentee's real and personal estate as are provided in this act with respect to a guardian in the administration of a minor's estate and, in addition, shall have the right to pay premiums on policies of insurance insuring the life of the absentee and, with the approval of the court, to pay or expend and apply so much of the absentee's property or the income therefrom, as may be necessary for the support of anyone whom the absentee, if living, would be under a legal duty to support, or for the education of his minor children. He shall not have the power to sell or dispose of any asset of the estate or to enter into any lease without prior court approval.

Comment. This is based on Section 3(2) of the Uniform Act and Section 60(b) of the 1917 Act. There is no change in policy. It is only a question of the mechanics to be employed. Since the situation in a guardianship of a minor is so closely analogous, the cross-reference will avoid confusion.

(c) *Temporary Trustee.* Upon the filing of a petition for the appointment of a trustee for an absentee, the court, if it finds it necessary to protect the property of the absentee, may appoint a temporary trustee to take charge of it and to conserve it, in the manner directed by the court, pending a hearing on the petition. The temporary trustee shall give such bond as the

court shall require. Should a permanent trustee be appointed, the temporary trustee shall deliver to the permanent trustee all property of the absentee in his possession, less such as may be necessary to cover his expenses and compensation, as allowed by the court, shall file his final account, and upon its confirmation may be discharged. Should the petition for a permanent trustee be denied, the court shall make appropriate orders for the disposition of the property.

Comment. This is based on Section 3(3) of the Uniform Act. It has no precedent in the 1917 Act but seems to be a justified addition.

SECTION 1203. *Distribution of Property of Absentee.*—

Upon the entry of a decree establishing the death of a person domiciled in the Commonwealth, based in whole or in part upon his absence from his place of residence, the real and personal property of the absentee shall be administered by his personal representative as in the case of other decedents. However, the personal representative shall make no distribution of such property to the persons entitled thereto by will or by intestacy, nor shall such persons acquire indefeasible title thereto, except under decree of court. The court, in awarding distribution, shall require that a refunding bond, with or without security and in such form and amount as the court shall direct, shall be executed by each distributee and filed with the clerk. The bond shall be conditioned that, if it shall later be established that the absentee was in fact alive at the time of distribution, the distributee upon demand will return the property received by him or, if it has been disposed of, will make such restitution therefor as the court shall deem equitable. Should a distributee not execute the bond, the court shall appoint a trustee to receive and hold his share until further order of the court.

Comment. The provision for giving refunding bonds is in accord with Section 6 of the 1917 Act. Since the personal representative can administer the estate in the same manner as in the case of any decedent and the giving of the bond required by this section can be without security, the administration of such an estate should not be unduly burdensome and the precautions taken can be enlarged or reduced depending upon the circumstances.

SECTION 1204. *Notice to Absentee.*—The Court, if satisfied concerning the interest of the petitioner, shall cause to be advertised in a newspaper of general circulation in the county of the absentee's last known residence and in the legal journal, if any, designated by rule of court for the publication of legal notices, once a week for four successive weeks, and to be otherwise

advertised as the court according to the circumstances of the case shall deem advisable, the fact of such application, together with notice that on a specified day, which shall be at least two weeks after the last appearance of any such advertisement, the court, or a master appointed by the court for that purpose, will hear evidence concerning the alleged absence, including the circumstances and duration thereof.

Comment. This is based on Section 6 of the 1917 Act and Section 4 of the Uniform Act, both of which require four weeks' notice. Due to possible constitutional objections no exception in the requirements is made for smaller estates. Cf. *Cunnius v. Reading School District*, 206 Pa. 469, affirmed 198 U. S. 458.

SECTION 1205. Search for Absentee.—The court, on its own motion or upon the application of any party in interest, may direct the trustee to search for the absentee in any manner which the court shall deem appropriate, or may appoint a master, investigator or appropriate agency to do so. The expenses of such a search shall be paid out of the property of the absentee.

Comment. This is suggested by Section 5 of the Uniform Act.

ARTICLE XIII.

SURETIES.

A. Rights in Administration.

SECTION 1301. Agreement Concerning Deposit of Assets.—A fiduciary may agree with his surety for the deposit of any or all moneys or other assets of the estate with a bank or bank and trust company or other depository approved by the court, if such deposit is otherwise proper, on such terms as to prevent the withdrawal of such moneys or other assets without the written consent of the surety, or on order of the court made on such notice to the surety as the court may direct.

Comment. There is no statutory precedent for this section. It is included herein to give statutory recognition to an existing practice which is considered to be sound.

SECTION 1302. Notice.—Except as otherwise provided by contract, the surety of every fiduciary shall be entitled to written notice by the fiduciary of all accountings and of other court proceedings in which the fiduciary is a party. The fiduciary's failure to give the notice hereby required shall not affect the rights or remedies of claimants and other parties in interest against the surety.

Comment. This section has no statutory precedent. It is included in fairness to the surety who may be found liable where he had no knowledge of the proceedings and thus no chance to make a defense.

SECTION 1303. *Participation in Administration.*—The surety of a fiduciary may intervene in any proceeding which may affect the liability of the fiduciary and shall have the right to except to and appeal from any action which may affect the fiduciary's liability. When the court has finally determined the liability of the fiduciary, the surety shall not be permitted thereafter to deny such liability in any proceeding to determine or enforce his individual liability, whether or not he received notice of the proceedings which established the liability of the fiduciary.

Comment. It is believed that this section is declaratory of existing law: Cf. *Garber v. Com.*, 7 Pa. 265. It has no statutory precedent in Pennsylvania.

SECTION 1304. *Information from Fiduciary—Accounting.*—Upon the application of his surety, every fiduciary shall make available to him his complete files and records relating to the administration of the estate. The surety shall have the same right as a party in interest to enforce the filing of a court accounting and the performance of any duty of the fiduciary's office.

Comment. This is based in part upon Section 55 of the 1917 Act.

SECTION 1305. *Release of Surety Before Discharge of Fiduciary.*—For good cause, the court, upon the petition of any surety of a fiduciary, may order the surety's release and require the fiduciary to procure a new surety. In such case, the original surety shall remain liable for all breaches of the obligation of the bond occurring prior to the execution of the bond by the new surety and his approval by the court, but not for breaches thereafter.

Comment. This is based in part on Section 54(c) of the 1917 Act.

B. Enforcement of Bond.

SECTION 1311. *Suits on Bonds.*—Any bond of a fiduciary shall be in the name of the Commonwealth for the use of those interested in the estate. Suit may be brought thereon by any person interested therein, as provided by law.

Comment. This is based on Section 9(a) of the 1917 Act. As under the 1917 Act, suit would be under Section 6 of the Act of June 14, 1836, P. L. 637, 8 PS 111, et seq.

SECTION 1312. *Nonresident Surety.*—If a surety is or becomes a nonresident of the Commonwealth, the execution of the

bond of a fiduciary or the act of becoming a nonresident, as the case may be, shall constitute the Secretary of the Commonwealth his attorney-in-fact upon whom service of process may be made as to all causes of action relating to the administration of the estate or the surety's liability on the bond.

Comment. This is based on Sections 307(b), 902, and 1014 of this Act.

ARTICLE XIV.

REPEALER.

SECTION 1401. (a) *Specific Repeals.*—The following acts and parts of acts and all amendments of each are hereby repealed except as respectively indicated:

(1) The act, approved the seventh day of June, one thousand nine hundred and seventeen (Pamphlet Laws 447), entitled, as amended "An act relating to the administration and distribution of the estates of decedents and of minors, and of trust estates; including the appointment, bonds, rights, powers, duties, liabilities, accounts, discharge and removal of executors, administrators, guardians, and trustees, herein designated as fiduciaries; the administration and distribution of the estates of presumed decedents; widow's and children's exemptions; debts of decedents, rents of real estate as assets for payment thereof, the lien thereof, sales and mortgages of real estate for the payment thereof, judgments and executions therefor, and the discharge of real estate from the lien thereof, contracts of decedents for the sale or purchase of real estate; legacies, including legacies charged on land; the discharge of residuary estates and of real estate from the lien of legacies and other charges; the appraisal of real estate devised at a valuation; the ascertainment of the curtilage of dwelling houses or other buildings devised; the abatement and survival of actions, and the substitution of executors and administrators therein, the survival of causes of action and suits thereupon by or against fiduciaries; investments by fiduciaries; the organization of corporations to carry on the business of decedents; the audit and review of accounts of fiduciaries; refunding bonds; transcripts to the court of common pleas of balances due by fiduciaries; the rights, powers, and liabilities of nonresident and foreign fiduciaries; the appointment, bonds, rights, powers, duties, and liabilities of trustees *durante absentia*; the recording and registration of decrees, reports and other proceedings, and the fees therefor, appeals in

certain cases; and, also, generally dealing with the jurisdiction, powers, and procedure of the orphans' court in all matters relating to fiduciaries concerned with the estates of decedents", absolutely, with the following exceptions:

(i) Section 10, on the advertisement of grant of letters; section 24, on the jurisdiction of the orphans' court for collection of legacies; section 41, on investments by fiduciaries; section 46(b), on the appointment of examiners; section 46(d), on the register's duties concerning the transmission and advertising of accounts and the expenses thereof; section 46(g), on the jurisdiction of the orphans' court over trustees and of the accounts thereof; section 46(i), on notice of filing of trustees' accounts; section 47(a), on rules of court concerning audits; and section 48.1, on apportionment of taxes.

Comment. These sections will be revoked when supplanted by other legislation. Section 41 has been repealed by the Fiduciaries Investment Act of 1949.

(ii) All provisions thereof as applied to the estates of decedents dying before the effective date of this act.

Comment. See Section 105.

(iii) All provisions thereof applying to trust estates and minors when, in the instances listed in clauses (2) and (3) of section 105 hereof, existing laws are to remain in full force and effect.

(2) The act, approved the twenty-seventh day of April, one thousand nine hundred and twenty-seven (Pamphlet Laws 475), entitled "An act requiring nonresidents to appoint a local attorney-in-fact before taking out letters testamentary or of administration," absolutely, except as applied to appointments made upon the granting of letters in the estate of a decedent dying before the effective date of this act.

Comment. This is supplied by Section 307(b).

(3) The act, approved the twelfth day of June, one thousand nine hundred and thirty-one (Pamphlet Laws 556), entitled "An act relating to the settlement of the estates of deceased minors," absolutely, except as applied to estates of minors dying before the effective date of this act.

Comment. This is supplied by Section 1086.

(4) The act, approved the twenty-fourth day of June, one thousand nine hundred and thirty-nine (Pamphlet Laws 871),

entitled "An act defining the liability of persons signing instruments in writing in a fiduciary capacity, regulating actions on such instruments and execution on judgments obtained in such actions, and excepting certain actions from the provisions of said act," so far as it relates to written instruments of fiduciaries subject to the jurisdiction of the orphans' court, but not so far as it relates to written instruments executed prior to the effective date of this act or to written instruments of personal representatives of decedents dying before the effective date of this act.

Comment. This is supplied in part by Sections 522, 939, and 1043. The Act of 1939, P. L. 871, will remain effective for fiduciaries subject to the common pleas and for existing testamentary and irrevocable trusts: See Section 105.

(b) *General Repeal.* All other acts and parts of acts inconsistent herewith are hereby repealed.

(c) *Saving Clause.* This act shall not repeal or modify any of the provisions of the following acts or parts of acts or any of their amendments:

(1) The act, approved the thirty-first day of May, one thousand nine hundred and twenty-three (Pamphlet Laws 468), entitled "An act concerning liability for participation in breaches of fiduciary obligations, and to make uniform the law with reference thereto."

(2) Sections 902 and 904 of the act, approved the fifteenth day of May, one thousand nine hundred and thirty-three (Pamphlet Laws 624), entitled "An act relating to the business of banking, and to the exercise of fiduciary powers by corporations; providing for the organization of corporations with fiduciary powers, and of banking corporations, with or without fiduciary powers, including the conversion of National banks into State banks, and for the licensing of private bankers; defining the rights, powers, duties, liabilities, and immunities of such corporations, of existent corporations authorized to engage in a banking business, with or without fiduciary powers, of private bankers, and of the officers, directors, trustees, shareholders, attorneys, and other employes of all such corporations or private bankers, or of affiliated corporations, associations, or persons; restricting the exercise of banking powers by any other corporation, association, or person, and of fiduciary powers by any other corporation; conferring powers and imposing duties upon the courts, prothonotaries, recorders of deeds, and certain State

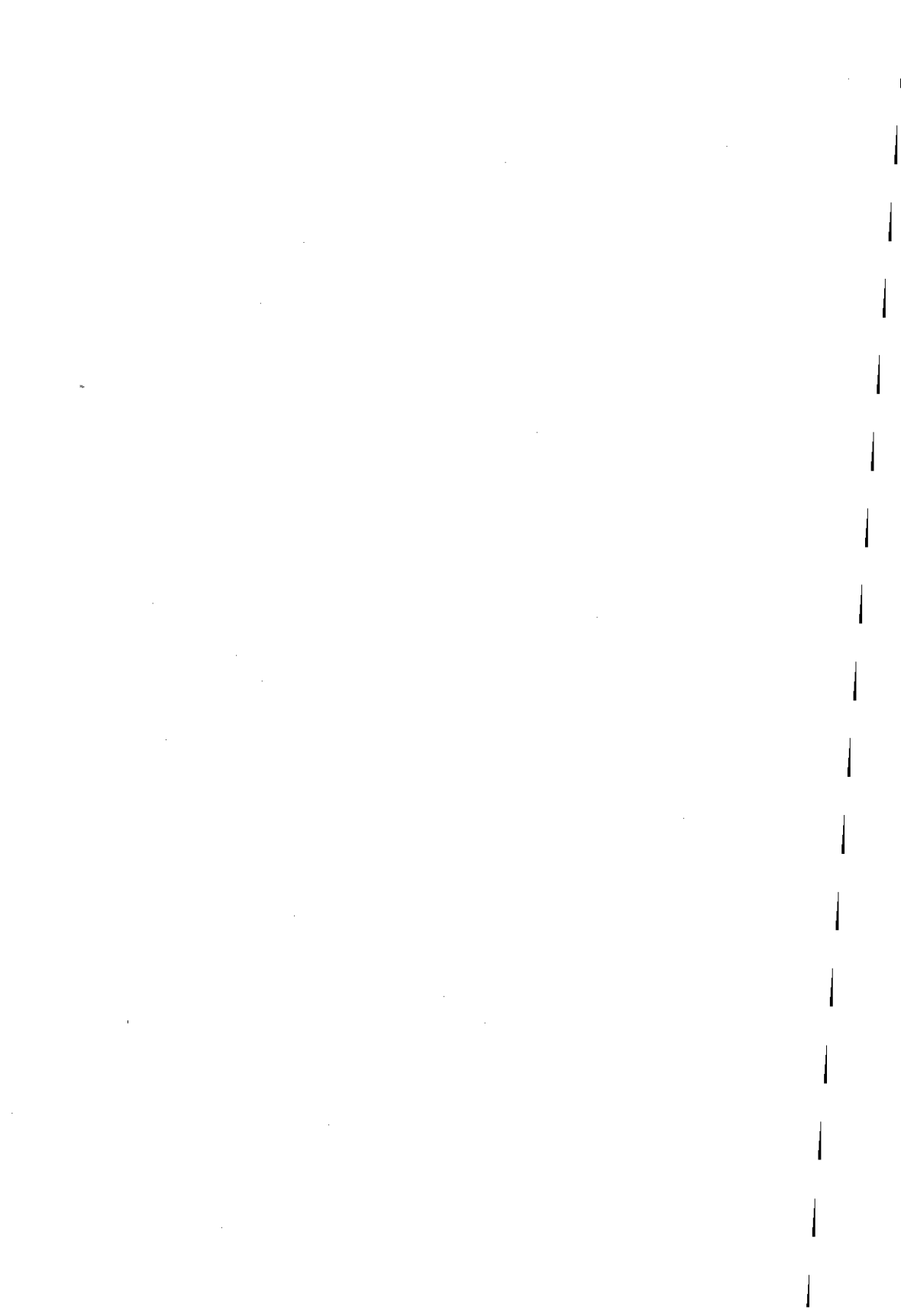
departments, commissions, and officers; imposing penalties; and repealing certain acts and parts of acts.”

(3) The act, approved the twentieth day of March, one thousand nine hundred forty-two (Pamphlet Laws 13), entitled “An act to provide relief in cases where fiduciaries are in military service; authorizing the court to appoint a substituted fiduciary pro tem in such cases or to allow the remaining fiduciaries to act; authorizing security to be entered by and compensation paid to such substituted fiduciaries pro tem, and regulating the powers and liabilities of the fiduciary in military service and of the substituted fiduciary pro tem.”

(4) The act, approved the tenth day of April, one thousand nine hundred and forty-five (Pamphlet Laws 187), entitled “An act to provide for the receiving, as evidence in any court, office, or other place in this State, official findings, records, reports or certified copies thereof, of death, presumed death, missing, or other status issued by the Secretaries of War and Navy, and other Federal officers and employees”, or its amendment.

Approved the 18th day April, A. D. 1949.

JAMES H. DUFF.



HISTORY OF FIDUCIARIES INVESTMENT ACT OF 1949

House Bill No. 798

Introduced by the Honorable Thomas H. Lee

In the House

Referred to the Committee on Judiciary, March 2.

Reported as committed, March 8.

Passed First Reading, March 9.

Passed Second Reading, March 21.

Passed Third Reading and final passage, March 22 (206-0).

†House concurred in Senate Amendments, April 27 (207-0).

In the Senate

Referred to the Committee on Judiciary General, March 23.

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Approved by the Governor, May 26, 1949

Act No. 544

† Amendments were made only to conform to original text.

FIDUCIARIES INVESTMENT ACT OF 1949

No. 544

AN ACT

Concerning the investment powers and duties of guardians, committees, trustees, and other fiduciaries, except personal representatives, and prescribing the nature and kind of investments which may be made and retained by such fiduciaries.

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The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

SECTION 1. *Definition of Fiduciary.*—The term “fiduciary” as used in this act shall include guardians, committees, trustees, and other fiduciaries, whether domiciliary or ancillary, subject to the jurisdiction of the orphans’ or common pleas court of any county of the Commonwealth, but shall not include a personal representative.

Comment. See section 506 of the Fiduciaries Act of 1949 for investment powers of personal representatives.

SECTION 2. *Authorized Investments.*—Subject only to the provisions of the trust instrument, if any, a fiduciary may accept, hold, invest in, and retain, any of the investments authorized by this act, and shall not be liable for loss on such investments so long as he exercises due care and prudence in the performance of his duties in regard to them. “Legal investment” or “authorized investment” or words of similar import used in a trust instrument shall be construed to mean any investment authorized by this act.

Comment. This is based on clauses (a) and (b) of section 41(a)1(17) and section 41(a)3 of the Fiduciaries Act of 1917.

SECTION 3. *Government Obligations.*—Obligations of the following governmental bodies shall be authorized investments:

(1) *United States.* Obligations of the United States or the United States Treasury or those for the payment of which the faith and credit of the United States is pledged, including obligations of the District of Columbia.

(2) *Pennsylvania.* Obligations of the Commonwealth of Pennsylvania or those for the payment of which the faith and credit of the Commonwealth is pledged.

(3) *State and Local Government.* Obligations of any commonwealth or state of the United States, or any county, city, borough, town, township, school district, institution district, or other political subdivision, having the power to levy taxes, of any such commonwealth or state: Provided, That the faith and credit of such commonwealth, state, or political subdivision

thereof, is pledged for the payment of said obligations: And provided further, That at the date of the investment in such obligations, such commonwealth, state, or political subdivision, is not in default in the payment of any part of the principal or interest owing by it upon any part of its funded indebtedness.

Comment. This is based on clauses 1, 2, and 3 of section 41(a)1 of the Fiduciaries Act of 1917. Compare also Fiduciaries Act of 1917, section 41(a)2, and the Act of 1935, P. L. 540, section 3.

SECTION 4. *Obligations of Federal Organizations.*—Obligations of the following organizations constituted under the laws of the United States shall be authorized investments:

(1) *National Housing Administration.* Obligations issued pursuant to any housing act of the United States heretofore or hereafter enacted, but only if fully and unconditionally guaranteed as to principal and interest by the United States.

Comment. This is based on section 41(a)1(9) of the Fiduciaries Act of 1917. The United States Code cites three acts relating to national housing as follows:

National Housing Act, June 27, 1934, c. 847, 48 Stat. 1246 (12 U. S. C. A. 1701).

National Housing Act Amendments of 1938—Act of February 3, 1938, c. 13 section 1, 52 Stat. 8 (12 U. S. C. A. 1701a).

National Housing Act Amendments of 1942—May 26, 1942, c. 319, section 15, 56 Stat. 305 (12 U. S. C. A. 1701b).

They provide for two kinds of debentures, each to be signed by the Administrator, one the obligation of the Housing Insurance Fund (12 U. S. C. A. 1713(i)) and the other the obligation of the War Housing Insurance Fund: 12 U. S. C. A. 1739(d). Each kind of debenture "shall be fully and unconditionally guaranteed as to principal and interest by the United States, and such guaranty shall be expressed on the face of the debentures."

(2) *Federal Land Banks.* Obligations of any Federal land bank and consolidated obligations, being the joint and several obligations of all Federal land banks, issued pursuant to the Act of Congress of July seventeenth, one thousand nine hundred sixteen (39 Stat. 380), and its amendments and supplements heretofore or hereafter enacted.

Comment. This is based on section 41(a)1(10) of the Fiduciaries Act of 1917.

These bonds are not guaranteed as to principal or interest by the United States. 12 U. S. C. A. 941 provides: "Farm-loan bonds issued under the provisions of this chapter by Federal land banks or joint-stock land banks shall be a lawful investment for all fiduciary and trust funds, and may be accepted as security for all public deposits."

(3) *Federal Home Loan Banks.* Obligations of any Federal home loan bank and consolidated obligations, being the joint and several obligations of all Federal home loan banks, issued pursuant to the Act of Congress of July twenty-second, one thousand nine hundred thirty-two (47 Stat. 725), and its amendments and supplements heretofore or hereafter enacted.

Comment. This is based on section 41(a)1(13) of the Fiduciaries Act of 1917. See Act of Congress, July 22, 1932, 12 U. S. C. A. 1421.

(4) *Federal Intermediate Credit Banks.* Consolidated obligations, being the joint and several obligations of all Federal intermediate credit banks, issued pursuant to the Act of Congress of March fourth, one thousand nine hundred twenty-three (42 Stat. 1456), and its amendments and supplements heretofore or hereafter enacted.

Comment. This is based on section 41(a)1(12) of the Fiduciaries Act of 1917. This section authorizes only consolidated debentures and not the debenture of any one bank. Authority to each bank to issue debentures is in 12 U. S. C. A. 1041, and consolidated debentures in 1044.

SECTION 5. *Obligations of Pennsylvania Governmental Organizations.*—Obligations of the following Pennsylvania governmental organizations shall be authorized investments:

(1) *General State Authority and Other State Authorities.* Obligations issued by the General State Authority and other authorities created by the General Assembly of the Commonwealth of Pennsylvania, for the payment of which the faith and credit of the authority is pledged.

Comment. Prior to its abolition by Act of 1945, P. L. 641, obligations of the General State Authority were legal investments: Act of 1937, P. L. 1037. The General State Authority was recreated by Act 34 of 1949. Obligations of the Public School Building Authority (24 PS 791.1) come within the provisions of this clause: cf. Act 142 of 1949.

(2) *Housing Authorities.* Obligations of any housing authority issued pursuant to the laws of the Commonwealth relating to the creation or operation of housing authorities.

Comment. This is based on section 41(a)1(15) of the Fiduciaries Act of 1917. See Act of 1937, P. L. 955, 35 PS 1541.

(3) *Municipality Authorities.* Obligations of any municipal authority issued pursuant to the laws of the Commonwealth relating to the creation or operation of municipality authorities, if the obligations are not in default and if, for the period of five fiscal years next preceding the date of acquisition, the income of such authority available for fixed charges has averaged not less

than one and one-fifth times its average annual fixed charges of such obligations over the life of such obligations. As used in this clause, the term "income available for fixed charges" shall mean income after deducting operating and maintenance expenses, and, unless the obligations are payable in serial, annual maturities, or are supported by annual sinking fund payments, depreciation, but excluding extraordinary non-recurring items of income or expenses; and the term "fixed charges" shall include principal, both maturity and sinking fund, and interest on bonded debt. In computing such income available for fixed charges for the purposes of this section, the income so available of any corporation acquired by any municipality authority may be included, such income to be calculated as though such corporation had been operated by a municipality authority and an equivalent amount of bonded debt were outstanding.

The eligibility for investment purposes of obligations of each project of a municipality authority shall be separately considered hereunder.

Comment. This is almost identical with section 41(a)1(18.1) of the Fiduciaries Act of 1917, added by the Act of June 5, 1947, P. L. 411.

(4) *Delaware River Joint Commission.* Obligations of the Delaware River Joint Commission issued pursuant to the act of June twelfth, one thousand nine hundred thirty-one (Pamphlet Laws 575), and its amendments and supplements heretofore or hereafter enacted.

Comment. This is based on the Act of 1931, P. L. 575, Article 10, 36 PS 3503.

(5) *Delaware River Joint Toll Bridge Commission.* Obligations of the Delaware River Joint Toll Bridge Commission issued pursuant to the act of June twenty-fifth, one thousand nine hundred thirty-one (Pamphlet Laws 1352), and its amendments and supplements heretofore or hereafter enacted.

Comment. This is based on the Act of 1931, P. L. 1352, Article 7, 36 PS 3401.

(6) *Delaware Tunnel Board.* Obligations issued by or with the approval of the Delaware Tunnel Board pursuant to the act of July eighth, one thousand nine hundred forty-seven (Pamphlet Laws 1452), and its amendments and supplements heretofore or hereafter enacted.

Comment. This is based on the Act of 1947, P. L. 1452, section 10, 36 PS 3570.

(7) *Pennsylvania Turnpike Commission.* Obligations of the Pennsylvania Turnpike Commission issued pursuant to (a) the

act of May twenty-first, one thousand nine hundred thirty-seven (Pamphlet Laws 774), (b) the Pennsylvania Turnpike Philadelphia Extension Act of May sixteenth, one thousand nine hundred forty (1941 Pamphlet Laws 949), and (c) the Western Pennsylvania Turnpike Extension Act of June eleventh, one thousand nine hundred forty-one (Pamphlet Laws 101), and the amendments and supplements of each heretofore or hereafter enacted.

Comment. This is based on language in the three acts to which reference is made. Those acts are: Act of 1937, P. L. 774, section 8, 36 PS §625h; Act of 1940, P. L. (1941) 949, section 11, 36 PS §653j; and Act of 1941, P. L. 101, section 11, 36 PS §654j. Obligations issued pursuant to the Pennsylvania Turnpike Scranton Extension Act by the express terms thereof are also authorized investments: Act 302 of 1949.

(8) *Pennsylvania Parkway Commission.* Obligations of the Pennsylvania Parkway Commission issued pursuant to the act of July sixteenth, one thousand nine hundred forty-one (Pamphlet Laws 386), and its amendments and supplements heretofore or hereafter enacted.

Comment. This is based on section 9 of the Act of July 16, 1941, P. L. 386, 36 PS 655.9.

SECTION 6. Corporate Bonds.—Any fixed interest-bearing obligation, including bonds, notes, debentures, and car trust certificates, issued, guaranteed, or assumed by, a corporation organized under the laws of the United States, of any commonwealth or state thereof, or of the District of Columbia, shall be an authorized investment if—

(1) purchased in the exercise of that degree of judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income to be derived therefrom as well as the probable safety of their capital;

(2) either the issuing corporation or a guaranteeing or assuming corporation has earned a net profit in eight of the preceding ten fiscal years, as reflected in its statements; and

(3) either the issuing corporation or an assuming corporation has not defaulted in the payment of principal or interest on any of its outstanding funded indebtedness during the preceding ten fiscal years.

When a corporation has acquired a substantial part of its property, within ten years immediately preceding such invest-

ment, by consolidation or merger or by the purchase of a substantial part of the property of any other corporation or corporations, the earnings of the predecessor or constituent corporations shall be consolidated so as to ascertain whether the requirements of this section have been satisfied.

“Corporation” as used in this section shall include a voluntary association, a joint-stock association or company, a business trust, a Massachusetts trust, a common-law trust, and any other organization organized and existing for any lawful purpose and which, like a corporation, continues to exist notwithstanding changes in the personnel of its members or participants, and conducts its affairs through a committee, a board, or some other group acting in a representative capacity.

Comment. This is similar to section 41(a)1(7) of the Fiduciaries Act of 1917. The definition of corporation is borrowed largely from regulations of the Commissioner under the Internal Revenue Code relating to the taxation of such organizations as though they were corporations. The word “corporation” has been defined in the building and loan code, the banking code, and for tax purposes in a number of different ways.

SECTION 7. *Mortgages.*—One or more bonds or other obligations secured by one or more mortgages shall be an authorized investment if—

(1) *Insured by Federal Housing Administrator.* Insured by the Federal Housing Administrator pursuant to the National Housing Act of June twenty-seventh, one thousand nine hundred thirty-four (48 Stat. 1246), and its amendments and supplements heretofore or hereafter enacted; or

Comment. This is based on section 41(a)1(8) of the Fiduciaries Act of 1917. See National Housing Act of June 27, 1934, 12 U. S. C. A. 1701.

(2) *Guaranteed or Insured Under Federal Servicemen's Readjustment Act.* Guaranteed or insured under the Federal Servicemen's Readjustment Act of June twenty-second, one thousand nine hundred forty-four (58 Stat. 284), and its amendments and supplements heretofore or hereafter enacted: Provided, That at the date of acquisition the guaranty shall be in an amount not less than one-third of the sum invested, or, if an insured mortgage, the insurance shall be in an amount not less than fifteen per centum thereof; or

Comment. This is based on section 41(a)1(18.1) of the Fiduciaries Act of 1917, added by amendment of May 31, 1947, P. L. 350, 20 PS 801. For Federal Servicemen's Readjustment Act of 1944, see 38 U. S. C. A. 693.

(3) *Other Mortgages.* At the date of the acquisition or of any extension of the mortgage it shall meet the following requirements:

(i) Contain an unconditional promise to pay the principal of and interest upon obligations which it secures;

(ii) Be a first lien upon improved real estate situated within the Commonwealth, including improved farm lands, prior to all other liens except the lien of taxes previously levied or assessed but not then payable and except taxes then due or payable or delinquent for the payment of which taxes provision is made in the mortgage settlement;

(iii) The unpaid principal amount of the obligations shall not exceed two-thirds of the fair value of the real estate as fixed by two persons familiar with real estate values in the vicinity who shall have actually inspected it and shall so certify in a written appraisal preserved among the records of the fiduciary;

(iv) The principal debt evidenced by the obligations shall be payable in not more than five years after the date of acquisition by the fiduciary, or be amortized within a period of not exceeding twenty years from the date of the acquisition in installments totalling in each year not less than three per centum thereof;

(v) All interest has been paid in full to the next preceding interest payment date;

(vi) Nothing in this clause (3) shall be construed to be a limitation upon the power of a fiduciary to accept a purchase money obligation in exchange for an asset of the estate or trust upon such terms and conditions and with such security as shall be reasonable under the circumstances.

Comment. This is based on section 41(a)1(4) and section 41(a)1(17d) of the Fiduciaries Act of 1917. Paragraph (vi) is included to make it clear clause (3) cannot be construed to apply to purchase money obligations. As redrafted this clause includes the definition of "fair value" of real estate for appraisal purposes and gives no concern to the original condition of the mortgage.

SECTION 8. *Fractional Interest in Mortgages.*—A fractional interest in an obligation naming the fiduciary as the obligee, secured by one or more mortgages, shall be an authorized investment for an estate of which the fiduciary is sole fiduciary or co-fiduciary, if the whole of the obligation would be an authorized investment under the provisions of section seven of this act. Appraisalment of the real estate subject to the lien of such mort-

gage or mortgages need not be made concurrently with the acquisition of such fractional interest if an appraisalment has been made within three years immediately preceding the acquisition, in accordance with the requirements of clause (3) of section seven of this act, and if a person qualified at the time of the acquisition to serve as an appraiser of the real estate shall certify, in a writing to be preserved among the fiduciary's records, that at the date of the acquisition the unpaid principal amount of the obligation does not exceed two-thirds of the fair value of the real estate.

Comment. This is based on section 41(a)1(6) of the Fiduciaries Act of 1917. No provision is made for investment in fractional interests in stocks and bonds. Such investment does not seem to be feasible. Provision for investment in common trust funds or mortgage investment funds is found in section 13.

SECTION 9. *Stocks.*—

(a) *Preferred Stock.* Preferred stock of any corporation organized under the laws of the United States or of any commonwealth or state thereof, or of the District of Columbia, shall be an authorized investment if—

(1) purchased in the exercise of that degree of judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income to be derived therefrom as well as the probable safety of their capital;

(2) the corporation issuing the stock has earned a net profit in eight of the preceding ten fiscal years, as reflected in its statements, and during each of the preceding ten fiscal years has paid dividends in the specified amounts upon all its preferred stock, if any, outstanding during such year; and

(3) listed or traded (or if unlisted or not entitled to trading privileges, shall be eligible for listing, and application for such listing shall have been made) on the New York Stock Exchange or any other exchange approved by the Secretary of Banking.

When a corporation has acquired a substantial part of its property, within ten years immediately preceding the investment, by consolidation or merger or by the purchase of a substantial part of the property of any other corporation or corporations, the earnings of the predecessor or constituent corporations shall be consolidated so as to ascertain whether the requirements of this section have been satisfied.

“Corporation” as used in this section shall include a voluntary association, a joint-stock association or company, a business trust, a Massachusetts trust, a common-law trust, and any other organization organized and existing for any lawful purpose and which, like a corporation, continues to exist notwithstanding changes in the personnel of its members or participants, and conducts its affairs through a committee, a board, or some other group acting in a representative capacity.

Comment. This is similar to section 41(a)1(16) of the Fiduciaries Act of 1917. As to the definition of “corporation”, see comment to section 6 of this act.

(b) *Shares Insured by Federal Savings and Loan Insurance Corporation.* Shares of any building and loan association incorporated under the laws of the Commonwealth, or of any Federal savings and loan association incorporated under the laws of the United States shall be an authorized investment if the withdrawal or repurchase value thereof is insured by the Federal Savings and Loan Insurance Corporation pursuant to the act of Congress of June twenty-seventh, one thousand nine hundred thirty-four (48 Stat. 1255), and its supplements and amendments heretofore or hereafter enacted.

Comment. This is almost identical with section 41(a)1(14) of the Fiduciaries Act of 1917. For Federal Savings and Loan Insurance Corporation Act of June 27, 1934, see 12 U. S. C. A. 1724.

SECTION 10. *Real Estate.*—Real estate located in Pennsylvania, other than ground rents, shall be an authorized investment if the court, upon petition, aided if necessary by the report of a master, and being of the opinion that the investment will be for the advantage of the estate and that no change will be made in the course of succession by the investment, shall direct such investment.

Comment. This is based on section 41(a)2 of the Fiduciaries Act of 1917.

SECTION 11. *Ground Rent.*—A ground rent secured upon unencumbered improved real estate located within the Commonwealth shall be an authorized investment if the reserved annual rent, capitalized at the rate of five per centum per annum, shall not exceed two-thirds of the fair value of the real estate out of which it issues, determined by appraisal, as in the case of mortgages.

Comment. This is based on section 41(a)1(5) of the Fiduciaries Act of 1917.

SECTION 12. *Interest-Bearing Deposit.*—An interest-bearing deposit in any bank, bank and trust company, savings bank, or national banking association, located within the Commonwealth, shall be an authorized investment if—

(1) not in the commercial department of a corporate fiduciary of the estate or trust to which the funds belong;

(2) the maturity date or the permissible date of withdrawal does not exceed one year from the date of the deposit or any renewal thereof; and

(3) the aggregate of such deposits does not exceed one thousand five hundred dollars.

Comment. This is based on section 41(a)1(11) of the Fiduciaries Act of 1917.

SECTION 13. *Common Trust Fund and Mortgage Investment Fund.*—Any corporate fiduciary and its co-fiduciary if any, may invest in—

(1) *Common Trust Fund.* A common trust fund containing only investments authorized for fiduciaries, established and maintained by the corporate fiduciary in conformity with the laws of the Commonwealth and of the United States; and

(2) *Mortgage Investment Fund.* A mortgage investment fund containing only mortgages and other investments authorized for fiduciaries, established and maintained by the corporate fiduciary in conformity with the laws of the Commonwealth and of the United States.

Comment. This takes the place of the portion of section 41(a)1(6) of the Fiduciaries Act of 1917 which was omitted in section 8 of this act.

SECTION 14. *Retention of Unauthorized Investments.*—A fiduciary may retain without liability for resulting loss any asset received in kind, even though it is not an authorized investment, provided he exercises due care and prudence in the disposition or retention of any such nonlegal investment.

Comment. This is based on section 41(a)1(17c) of the Fiduciaries Act of 1917. See section 49(e) (2) of the Fiduciaries Act of 1917.

SECTION 15. *Life Insurance Building and Loan Shares, and Similar Assets.*—A fiduciary receiving in kind a contract of life insurance, stock in a building and loan association, or any similar asset providing for periodic payments, may retain it and continue to make the periodic payments and otherwise comply

with the provisions thereof without liability for resulting loss so long as he, in the exercise of due care and prudence, shall consider advisable under the circumstances.

Comment. This is new. See, however, the Act of 1929, P. L. 149, which was held unconstitutional by Judge Trimble in Solomon's Petition, 77 P. L. J. 545. The constitutional prohibition contained in Article III, §22 of the Pennsylvania Constitution has not been an impediment to such legislation since the amendment of November 7, 1933.

SECTION 16. *Investments Which Become Unauthorized.*—

A fiduciary may retain without liability for resulting loss any investment which was authorized when received or made although such investment no longer qualifies as an authorized investment, provided he exercises due care and prudence in the disposition or retention of any such nonlegal investment.

Comment. This is based on section 41(a)1(17c) and section 41(a)3 of the Fiduciaries Act of 1917.

SECTION 17. *Court Direction.*—A fiduciary appointed by the court and not acting under a trust instrument, in addition to or in place of the investments authorized by this act, may make and retain without liability for resulting loss, such investments as the court, upon petition of the fiduciary or of any party in interest, and after such notice as it shall direct, aided by the report of a master if necessary, shall authorize or direct, subject only to such conditions and limitations as shall be fixed by the court in the decree authorizing or directing the investment.

Comment. This is based on section 34 of the Act of 1836, P. L. 589, 50 PS 755; cf. section 41(a)2 of the Fiduciaries Act of 1917.

SECTION 18. *Directions of Testator or Settlor.*—The testator or settlor in the instrument establishing a trust may prescribe the powers, duties and liabilities of the fiduciary regarding the investment or non-investment of principal and income and the acquisition, by purchase or otherwise, retention, and disposition, by sale or otherwise, of any property which, at any time or by reason of any circumstance, shall come into his control; and whenever any such provision shall conflict with this act, such provision shall control notwithstanding this act. In the absence, however, of an express restriction to the contrary in the trust instrument, the fiduciary may invest in any investment authorized by this act.

Comment. There is no statutory precedent for this section. However, it is declaratory of existing case law. The last sentence is intended to make it possible for the fiduciary to invest in investments authorized by this act, even though the trust instrument indicates that other investments shall be made.

SECTION 19. *Severability.*—If any provision of this act or the application thereof to any person or circumstances is held invalid, the remainder of this act and the application of such provision to other persons or circumstances shall not be affected thereby, and to this end the provisions of this act are declared to be severable.

Comment. This is identical with section 18 of the Estates Act of 1947.

SECTION 20. *Short Title.*—This act shall be known and may be cited as the “Fiduciaries Investment Act of 1949.”

SECTION 21. *Repealer.*—The following acts and parts of acts and all amendments of each are hereby repealed as respectively indicated:

(1) Section thirty-four of the act, approved the thirteenth day of June, one thousand eight hundred thirty-six (Pamphlet Laws 589), entitled “An act relating to lunatics and habitual drunkards,” absolutely.

(2) Section forty-one of the act, approved the seventh day of June, one thousand nine hundred seventeen (Pamphlet Laws 447), entitled, as amended, “An act relating to the administration and distribution of the estates of decedents and of minors, and of trust estates; including the appointment, bonds, rights, powers, duties, liabilities, accounts, discharge and removal of executors, administrators, guardians, and trustees, herein designated as fiduciaries; the administration and distribution of the estates of presumed decedents; widow’s and children’s exemptions; debts of decedents, rents of real estate as assets for payment thereof, the lien thereof, sales and mortgages of real estate for the payment thereof, judgments and executions therefor, and the discharge of real estate from the lien thereof; contracts of decedents for the sale or purchase of real estate; legacies, including legacies charged on land; the discharge of residuary estates and of real estate from the lien of legacies and other charges; the appraisal of real estate devised at a valuation; the ascertainment of the curtilage of dwelling houses or other buildings devised; the abatement and survival of actions, and the substitution of executors and administrators therein; the survival of causes of action and suits thereupon by or against fiduciaries; investments by fiduciaries; the organization of corporations to carry on the business of decedents; the audit and review of accounts of fiduciaries; refunding bonds; transcripts to the court of

common pleas of balances due by fiduciaries; the rights, powers, and liabilities of nonresident and foreign fiduciaries; the appointment, bonds, rights, powers, duties, and liabilities of trustees *durante absentia*; the recording and registration of decrees, reports and other proceedings, and the fees therefor; appeals in certain cases; and, also, generally dealing with the jurisdiction, powers, and procedure of the orphans' court in all matters relating to fiduciaries concerned with the estates of decedents," absolutely.

(3) The act, approved the twenty-seventh day of December, one thousand nine hundred thirty-three (Pamphlet Laws 111, 1933-34), entitled "An act making home loan bonds issued by the Federal Home Owners' Loan Corporation legal investments for trust funds and other purposes in certain cases," absolutely.

(4) The act, approved the second day of July, one thousand nine hundred thirty-five (Pamphlet Laws 540), entitled "An act defining the term "fiduciary"; prescribing the nature and kind of investments which may be made by such fiduciaries; validating certain investments heretofore made by such fiduciaries; and repealing acts and parts of acts inconsistent herewith," absolutely.

(5) The act, approved the second day of June, one thousand nine hundred thirty-seven (Pamphlet Laws 1183), entitled "An act providing that investment in shares of Federal Savings and Loan Associations or shares of other institutions, insured under the Federal Savings and Loan Insurance Corporation, shall be legal investments for certain corporations and certain funds," insofar as it applies to fiduciaries as defined in this act.

SECTION 22. *Effective Date.*—The provisions of this act shall become effective upon final enactment and shall apply to all investments thereafter held or acquired by fiduciaries.

Approved the 26th day of May, A. D. 1949.

JAMES H. DUFF.