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JURISDICTION OF THE ORPHANS' COURT

R. M. REMICK*

To the practitioner in the Orphans' Court, whether active or casual, nothing is of more importance than an accurate knowledge of the scope, or conversely, the limits, of its jurisdiction.

From the founding of the province by the Royal Charter of Charles II, March 4, 1682, such jurisdiction has been in effect. Originally the Court was referred to as the "Court of Orphans," but in all subsequent Acts under its present title "Orphans' Court."

As was said by Mr. Justice Sergeant:

"It is probable, that both the name and jurisdiction of this court were borrowed from the Court of Orphans of the city of London,

\* Member of the Philadelphia Bar; practiced exclusively in the Orphans' Court since 1918; author of PENNSYLVANIA ORPHANS' COURT PRACTICE.

1In the Charter it was provided:

"And our further will and pleasure is, that the Laws for regulating and governing of Propertie, within the said Province, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and Chattells, and likewise as to felonies, shall bee and continue the same as they shall bee for the time being, by the general course of the Law in our Kingdome of England, untill the said Lawes shall be altered by the said William Penn, his heires or assignes, and by the freemen of the said Province, their Delegates or Deputies, or the greater part of them."

2In the 188th law passed in May, 1688 cited in 3 Sm. L. 134.

3As was said by the late Judge Gest of Philadelphia County in Feil's Adoption, 6 D. & C. 529, in referring to adoption cases:

"Notwithstanding its name, the Orphans' Court is not a court of orphans or a children's court or a court of domestic relations, as some may ignorantly suppose. It has nothing to do with children as such. It deals with the estates of decedents and the fiduciaries entrusted with them and the estates of minors and their guardians. It is an estate court, or better, a fiduciaries' court; its proper province is the contest of wills and their construction, the settlement of decedents' estates and the appointment, supervision and control of fiduciaries and the like subjects. When this court appoints guardians for minor children it establishes a fiduciary relation, but the care of minors and the supervision of their welfare are foreign to our duties.

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"It should be remarked that it has been the policy of this Commonwealth from colonial days to limit the functions of this court to the settlement of estates and the control and appointment of fiduciaries. The specialization thereby afforded to the court has enabled it the better and more expeditiously to distribute estates among creditors, heirs and legatees. Every one in the State eventually becomes either a decedent, heir, legatee or creditor, and, hence, it is of the utmost importance to the whole community that the work of this court should be handled with accuracy and expedition rather than that there should be added to its functions the granting of petitions for adoption; a jurisdiction very foreign to the specialization mapped out by the public policy of this Commonwealth.

"Furthermore, the importance of maintaining this specialization will be the better appreciated when it is remembered that all the vast assets in this State, potentially pass through this court every generation."

4In Wimmer's App., 1 Wh. 95, 102 (1835).
which had the care and guardianship of children of deceased citizens of London, in their minority, and could compel executors to file inventories, and give security for their estates."

Prior to 1832 "the beginnings of the Orphans' Court were very feeble."

It had been noted:

"Nothing so much requires legislative attention as the proceedings in the Orphans' Courts, for as sure as we descend into our graves so sure into this court we must come; and the man would be a real public benefactor who would devise set forms and furnish directions in conducting the vast business in these courts, where every day we find so deplorable a system of confusion."

To remedy this situation the Legislature in 1830\(^7\) authorized the Governor to appoint three persons as Commissioners "to revise, collate and digest all such public acts and statutes of the civil code of this State and all such British Statutes in force in this State as are general and permanent in their nature."

These Commissioners subsequently reported a large number of draft acts, five of which, relating to our present subject, were substantially adopted by the Legislature.\(^8\)

The codifiers of 1830:

"felt very sensibly the difficulties of their task. 'The peculiar structure of the court,' say they, 'its extensive but ill-defined sphere of jurisdiction, the magnitude of the interests upon which it operates, the uncertainty of the code of law by which it is regulated, and its equally uncertain and insufficient practice and process, serve to surround with difficulties every attempt to frame a regular system for it. '

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\(^5\)Wimmer's App., 1 Wh. 95, 102 (1835).

"In the early period of the Orphans' Court in this state, it occupied a low place in the judicial system; and even in the first quarter of this century, its decrees could be set aside collaterally." Agnew, J. in Mussleman's App., 65 Pa. 480, 485.

\(^6\)By Judge Duncan in 1824 in McPherson v. Cunliffe, 11 S. & R. 422. With respect to this decision it was said in 1870:

"It was not until the able and exhaustive opinion of Judge Duncan, delivered in 1824 in McPherson v. Cunliffe, of 11 S. & R. 422, which settled the proper position of the Orphans' Court, that it reached its true dignity, and the way was prepared for the revision of the Orphans' Court system, its jurisdiction, powers and practice, contained in the Acts of 29th March 1832, 24th of February 1834, and 16th of June 1836. Under these laws, the Orphans' Court came up to the full measure of a court of record, standing upon an equality with the others. At first, the true extent of the work was not perceived, especially by those who disliked to unlearn what they knew, and who took with difficulty to a new system. But its powers have grown clearer to the professional vision, and its utility increased in appreciation." Agnew, J. in Mussleman's App., 65 Pa. 480, 485.

\(^7\)By joint Resolution No. 9 of March 23, 1830 (P. L. 408).

In accordance with this resolution the then Governor, the Honorable George Wolf, appointed William Rawle, Thomas I. Wharton and Joel Jones as such Commissioners.


By their work, after a hundred and fifty years order was created out of chaos.

The acts then adopted with more than two hundred others amendatory thereof or supplementary thereto served for over eighty years as the basis of our law of decedents' estates and kindred subjects until in 1917 there were passed the acts now in force. These were the culmination of the work of a Commission appointed by the Governor in 1915.10

Since its inception the Orphans' Court 11 has been denominated a "Court of Record" with "all the qualities and incidents of a court of record at common law."12

Its jurisdiction, however, is "limited by the terms of the statutes"13 by which it was created and under which it continues to function.14

"It is possessed of chancery powers, and can proceed, according to chancery practice . . . in the administration of its appropriate duties." But, while in this sense the orphans' court is a court of equity, the limitations upon its chancery powers are clearly marked. "The chancery jurisdiction is the model, and contains the principles most congenial to this institution, and the legislature have in very many instances sanctioned and enjoined the application of these principles to proceedings in the orphans' court . . . The orphans' court is sometimes called a court of limited jurisdiction. This is true, if regard be had to the derivation of its powers, for it possesses none inherently, and exercises such only as are conferred by or implied from legislation; and it is true also as to the subjects of its jurisdiction, for these are set down in the statutes."15

This viewpoint has been even more strongly and clearly expressed: 16

"Although the orphans' court has been called a court of equity, in respect to the few subjects within its jurisdiction, the ancillary powers of such a court have not been given to it. It is a special tribunal for specific cases; and its resemblance to a court of equity consists in its practice of proceeding by petition and

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10(P. L. 177) consisting of the late Judge John Marshall Gest, George E. Alter, Esq., and the Hon. Thomas J. Baldrige, now of the Superior Court.
11Act of March 27, 1713, 1 Sm. L. 81, Sec. 1.
12Act of March 29, 1832, P.L. 190, Sec. 1, which was re-enacted in the present Orphans' Court Act of 1917, P. L. 363, Sec. 2. Jones' Est., 28 D. & C. 657, 659 (Lackawanna Co.).
13Jones' Est., 28 D. & C. 657, 659.
14"Any warrant for its action must be found in the language of the statutes which create and define its powers". Mains' Est., 322 Pa. 243, 246, citing Willard's App., 65 Pa. 337, 340. A flagrant case of an attempt to broaden such jurisdiction is illustrated in Mains' Est., 322 Pa. 243 where the court said (p. 247):
"A casual reading of this petition discloses that what petitioner seeks is a discovery, an accounting, a declaration of rights of various parties and, as accessory thereto, a determination of many and varied conflicting facts. To these may be added orders for reconveyances and the avoidance of outstanding deeds to land. One would search in vain for any grant of such power to the orphans' court in the statutes of this State. The relief sought can be granted only by a court of full equitable powers, and we cannot include within the jurisdiction of the orphans' court what has hitherto been conceded to be without."
answer containing the substance, but not the technical subtleties and nice distinctions of a bill in equity; by which, however, justice is obtained more conveniently and as certainly as in courts of equity, purely so-called . . . The orphans' court . . . has not the general powers of a court of equity . . .”

"and in Anderson's Law Dictionary, 815, a 'probate court' is defined as, 'A court exercising jurisdiction over the estates of deceased persons, possessing, as to personal assets, nearly all the powers formerly exercised by the courts of chancery and the Ecclesiastical Courts of England . . . Other names are "orphans" and "surrogate" courts.'"17

All this shows very clearly that "the orphans' court, within the sphere of its jurisdiction, is a court of equity"18 and "has all the powers of a court of equity."19

The numerous decisions to this effect are buttressed by the very terms of the Act of Assembly20 which provides:

"The supreme and superior courts of this commonwealth shall, in all cases of appeal from the definitive sentence or decree of the orphans' court, hear, try and determine the same as to right and justice may belong, and decree according to the equity thereof; and may refer the same to auditors when, in their discretion, they may think proper."

Equity courts "decide in each case as equity and good conscience require, so that exact justice, as nearly as this is possible in human affairs, may be done to all parties in interest. This, indeed, is said to be the justification for the existence of such courts."21

In truth it may be added that this phase of practice so often emphasized and applied by both lower and appellate courts affords one of the most gratifying elements in the treatment of such litigation as may fall within its province.

Proceeding from the general to the specific, it is to be noted that the original jurisdiction of the orphans' court is now based on one of four22 fundamental facts, that is, the death of a person, the minority of a ward, the creation of a trust by deed *inter vivos*, and the adoption of one person by another. In the case of a decedent the jurisdiction attaches at the moment of death, subject only to such matters as may be purely within the scope of the jurisdiction and power of the register of wills.23

All matters relating to jurisdiction are now embodied in the Orphans'
Court Act of 191724 and particularly Section 9 thereof which provides:

"The jurisdiction of the several orphans' courts, whether separate or otherwise, shall extend to and embrace:25

(a) The appointment, control, removal and discharge of the guardians of minors,26 and the settlement of their accounts."27

The next succeeding section of the act was recommended by the Commissioners as being declaratory of the existing law. It relates to

"The appointment 28 of trustees for any persons interested in the real or personal estate of any decedent, and the control, removal,29 discharge30 and settlement of the accounts31 of trustees so appointed and of testamentary trustees, whether the testamentary trustees be appointed nominatum or virtue officii."

Under Section 15 of the Act of June 14, 1836, P.L. 628, it had been held that the Court of Common Pleas had jurisdiction concurrent with that of the Orphans' Court in all cases of testamentary trusts where the fiduciary powers were conferred upon trustees nominatum.32 This act so far as it related to testamentary trustees was repealed33 and it has now been specifically provided that:

"All trustees who are subject to the jurisdiction of the Orphans' court shall file their accounts in the court appointing them or, in the case of testamentary trustees, in the orphans' court of the county where the will is or shall be probated. The orphans' court shall have exclusive jurisdiction of the accounts of all trustees appointed by such court, and of all testamentary trustees, whether

24P.L. 363.
25Such jurisdiction once acquired and exercised will not be divested by subsequent legislation, unless such a result is required by the words of the statute. Patterson's Est., 89 P.L.J. 169, 41 D. & C. 136.
26The provisions of the Act are amplified in Section 59 of the Fiduciaries Act. This jurisdiction is in most instances exclusive in the Orphans' Court of the county in which the minor resides when the guardian is first appointed. Mintzer's Est., 13 Pa. C.C. 465, 2 Dist. 584. Residence governs, not domicile but "when an infant has no parent the law remits him to his domicile of origin." Id. and see Jacoby's Est., 47 Pa. C.C. 183, 28 Dist. 7.

Such jurisdiction is exclusive. Lewis v. Browning, 111 Pa. 493. But it exists only as to acts occurring during minority. Evans' Est., 11 Pa. C.C. 324, 1 Dist. 453. It does not apply to "non-resident alien dependents" who take under the Act of June 2, 1915, P.L. 736. Pawelezyk's Est., 75 P.L.J. 881. And see Dolan v. Pitts. Coal Co., 66 P.L.J. 241, 27 Dist. 877. The Orphans' Court of the county in which a testamentary guardian is domiciled has jurisdiction to require him to account no matter where the will was probated. Rively's Est., 7 Del. 522.
27As to this the Commissioners of 1915 said:

"This and most of the following clauses of this section are founded upon Section 19 of the Act of June 16, 1836, P.L. 792, 3 Purd. 3362-9. The changes and additions are noted under the particular clauses.

"Section 19 of the Act of 1836 supplied Section 4 of the Act of March 29, 1832, P.L. 190, and enlarged the jurisdiction there given.

"In the present clause, the provisions of Section 6 of the Act of May 19, 1874, P.L. 207, 3 Purd. 3369, have been incorporated, omitting, however, the reference to 'registers' courts.'"

28For procedure, see Sec. 56 of Fiduciaries Act.
29For procedure, see Sec. 55 of Fiduciaries Act.
30For procedure, see Sec. 52 of Fiduciaries Act.
31For procedure, see Sec. 46 of Fiduciaries Act.
32See Wilson v. Bd. of Dirs. of City Trusts, 324 Pa. 545, 549, and 20 P.S. Pg. 361, n. 9.
33By Sec. 63 of the Fiduciaries Act.
such trusts are vested in executors or administrators virtute officii or in trustees named in the will.”

Where the decedent was a resident, few if any questions have arisen.

Where, however, the decedent was a non-resident and his will was originally probated in another state or county, differences of opinion have arisen.

Some courts have refused to audit such accounts because of lack of jurisdiction; others have accepted jurisdiction where no party in interest objected and there were no peculiar circumstances precluding an authoritative and binding disposition of the questions involved. This would seem to be the more proper ruling under the general theory that a court having jurisdiction to compel a trustee to account has equal jurisdiction over an account filed by such a fiduciary voluntarily.

Seemingly the clause in the present act saving jurisdiction to the Court of Common Pleas applied only to cases where accounts had been filed in that court and were still pending when the new act was passed. Hence the Orphans’ Court has taken jurisdiction of a subsequent account where a prior account had been filed in the Common Pleas and the audit thereof long since completed.

In 1879 a new sphere of jurisdiction was opened to the Orphans’ Court in the appointment of trustees for persons “absent from his or her usual place of abode . . . for the space of one year” whose whereabouts have been unknown during such period. This act was construed by our Supreme Court in 1885:

“The appointment of a trustee, durante absentia, imports no more than that the fact has been made known to the court, in the form and manner prescribed by law, that the alleged absentee has been absent from his usual place of abode, that his whereabouts have not been known for a period of at least one year, and that he has left an estate, without any person to take charge of it. It adjudicates nothing as to his being alive or dead, for that is precisely what is not known, and nothing as to his estate; it makes no provision for notice, and is therefore a proceeding purely ex parte in its character. Although alleged to have an estate, the absentee may, in fact, have none; those who claim adversely are not made parties, and cannot therefore be concluded by the decree. Whether or not he has an estate may, in this case, depend upon the date of his death. He may therefore be fairly supposed to have an estate when he has none, to be alive when he is dead, or dead when, in fact, he is alive. The proceeding is therefore wholly under the control and direction of the court, and the final disposition of the

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84By Sec. 46 (g) of the Fiduciaries Act with a clause saving jurisdiction to the Common Pleas: “in cases of trustees who have filed their accounts in such courts before the approval of this act, and cases of substituted testamentary trustees appointed by any court of common pleas before the approval of this act.”

85See Stahler’s Est., 55 Montg. 229.


88Esterly’s App., 109 Pa. 222.
trust estate must, of necessity, depend upon the development of the truth as to the cause of the absence."

As against any prior acts the jurisdiction of the Orphans' Court was held to be exclusive\textsuperscript{39} and a bill against such a trustee for an accounting in the Common Pleas did not lie.

This act was a forerunner of subsequent legislation\textsuperscript{40} relating to procedure in the Orphans' Court with reference to the estates of presumed decedents.

An administrator appointed after procedure under these latter acts has the right to take in distribution as against a trustee \textit{durante absentia} appointed under the Act of 1879.\textsuperscript{41}

Jurisdiction was continued by the Act of 1917:

"The appointment of trustees for absent persons, the control, removal and discharge of trustees so appointed, and the settlement of their accounts."

And in conformity therewith the prior statutes were re-enacted but with slight changes.\textsuperscript{42}

So far no confusion had arisen.

However, the same Legislature forty days later\textsuperscript{43} and without any reference to its former enactment conferred almost precisely similar jurisdiction upon the Court of Common Pleas.

Each act leaves something to be desired. The first does not specifically empower the trustee to make sale of real estate. The latter covers only residents of this state. One of the acts should be properly amended in which case the other should be repealed.

To the writer it would seem that procedure in the Orphans' Court would be more compatible with the existing law, as that court already, under Section 6 of the Fiduciaries Act, has complete jurisdiction of all matters connected with the estates of presumed decedents, and apparently the theory of the Legislature covering the appointment of a trustee \textit{durante absentia} is to take in this period of six years which elapses between the one year's disappearance and the seven years after which a decree of presumed death can be entered. Having jurisdiction of the one, it should assume that of the other.

The succeeding clause of the act is almost literally a re-enactment of prior statutory provisions relating to

"The control,\textsuperscript{44} removal\textsuperscript{45} and discharge\textsuperscript{46} of executors and administrators, deriving their authority from the register of the respective county and the settlement of their accounts."\textsuperscript{47}

\textsuperscript{39}Jones v. Lerch, 18 Dist. 1059 (Berks Co.).
\textsuperscript{40}Acts of June 24, 1885, P.L. 155 and May 28, 1913, P.L. 369 now embodied in Sec. 6 of the Fiduciaries Act of 1917.
\textsuperscript{41}Ziegler's Est., 25 Pa. C.C. 611 (Lancaster Co.).
\textsuperscript{42}In Sec. 60 of the Fiduciaries Act of 1917.
\textsuperscript{43}By the Act of July 17, 1917, P.L. 1033.
\textsuperscript{44}As provided under clause (p) of this Section of the Act as amended.
\textsuperscript{45}For procedure, see Sec. 55 of the Fiduciaries Act.
\textsuperscript{46}For procedure, see Sec. 52 of the Fiduciaries Act.
\textsuperscript{47}For procedure, see Sec. 46-7-8 of the Fiduciaries Act.
Despite this clear and unequivocal language, numerous attempts were made prior to the present law\(^4\) to interfere by suits at law or in equity with the settlement of decedents' estates over which the Orphans' Court had exclusive jurisdiction and supervision. As against prior statutes, the importance of the present act is the addition of the word "control":

"But, whatever may have been the situation prior to 1917, it cannot now be doubted that the Orphans' Court has full jurisdiction to control an executor. "The word "control" in clause (d), section 9, is new; it was not in statutes relating to or defining the jurisdiction of the Orphans' Court in force prior to 1917, and if, prior to 1917, there was any doubt as to the power of that court, that doubt is now completely removed. And, since it is a word conferring jurisdiction, it must be given its widest meaning, embracing not only the power to restrain but also the power to direct acts."\(^9\)

Intimately connected with the settlement of accounts is\(^5\)

"The distribution\(^6\) of the assets and surplusage of the estates of decedents\(^2\) among creditors\(^5\) and others interested:\(^5\)

Except for the omission of certain unimportant words this is a re-enactment of the existing law.\(^5\)

Most often, however, has there arisen the question as to which of several courts has jurisdiction over "assets" that are in dispute. How is it to be determined whether certain bonds, stocks, bank accounts, items of furniture and the like really belonged to the decedent when he died, or on the other hand, to another? While both parties to the controversy are living, the remedy is apt, either by replevin in the Court of Common Pleas or through the instrumentality of a bill in equity. Is such remedy changed or such jurisdiction ousted by the death of one of the parties? Innumerable questions have been raised on this point in one court or the other, and thereunder there has arisen most frequently in the first instance the question as to which court has jurisdiction.

The underlying principles applied in the answer to such questions seem clearly to indicate that the criterion is, was the property in question in the possession or control of the decedent at the time of his death either actually or by necessary inference as a matter of law,\(^6\) or is the person in possession or control

\(^4\)Sec. 9 (d) of the Orphans' Court Act of 1917.
\(^5\)Kelley v. McGurl, 27 Sch. 209, 13 D. & C. 350, and cases there cited.
\(^6\)As provided in clause (e) of Sec. 9 of the Orphans' Court Act.
\(^7\)As provided under Sec. 49-50-51 of the Fiduciaries Act.
\(^8\)The court cannot settle disputes between living persons. Walkinshaw's Est., 11 West. 1.
\(^9\)As to the distinction between the respective jurisdictions of the Common Pleas and Orphans' Court see DeLisio's Est., 24 D. & C. 169 and cases there cited.

So far as actually making claim is concerned its jurisdiction is concurrent. Ohio v. Union Tr. Co. 137 Pa. Super. 75.

\(^*\)Either under the Intestate Act of 1917, P.L. 429 or the Wills Act, P.L. 403.
\(^\)Clause III of Sec. 19 of the Act of June 16, 1836, P. L. 784.
of such asset subject to the process of the court? In such case jurisdiction is clearly in the Orphans’ Court. Otherwise it is in the Common Pleas.

In Keyser’s Estate, our Supreme Court, in an opinion by Mr. Justice Maxey, analyzed the previous decisions, and summarized the applicable principles governing the jurisdiction of the orphans’ court where title to personal property is in dispute; saying: "(1) The preliminary question for consideration is where the possession of the disputed property was at the time of the decedent’s death and thereafter, up to the time of hearing. (2) If the property was in the decedent’s possession, either actually or presumptively, at the time of his death, or thereafter at any time came into the possession of his personal representative, as part of the estate for purposes of administration and ultimate distribution, the jurisdiction of the orphans’ court attaches and it may decree or award the disposition thereof, subject to the procedural rule next to be stated. (3) If upon a hearing it so appears, yet a substantial dispute as to title or ownership is shown to exist between the rival claimants, the orphans’ court has no power to try and determine this question, but may submit the issue to the court of common pleas for a trial by jury, under the power conferred by the Act of June 7, 1917, P.L. 363, sec. 21 (a); the verdict so found, where certified to the orphans’ court, may then become the basis of a decree by that court settling the controversy. (4) If, however, the property in dispute was not in decedent’s possession at the time of his death, and did not thereafter come into the hands of his personal representative, the orphans’ court is without power to determine title or ownership disputed by a third party claiming the property as his own. In such case the executor or administrator must bring an action at law or in equity in the court of common pleas against the party in possession."

The asset having been in the possession of the decedent at the time of his death, the jurisdiction of the Orphans’ Court is exclusive regardless of who subsequently may hold it. Its authority is complete and it may make any orders, either affirmative or negative (as in the nature of injunctions) necessary to accomplish the proper disposition of the case and distribution of the subject matter.

"Its process is plastic, and its power is only limited by the necessities of the case, and by its duty to administer equity in accordance

67Mauser v. Mauser, 326 Pa. 257; Slagle’s Est., 335 Pa. 552.
68Under Sections 9 (e) and (p) of the Act of June 7, 1917, P.L. 363 as amended.
69Tyson v. Rittenhouse, 186 Pa. 137, 142; See Slagle’s Est., 335 Pa. 552, 559.
71329 Pa. 514, 518.
72Now, probably, by a jury of its own under the Act of July 1, 1937, P.L. 2665.
74Mauser v. Mauser, 326 Pa. 257.
75Under Sec. 16 of the Orphans’ Court Act of 1917.
with established rules. In such case it needs no other court to finish its work."\(^6\)

The next five clauses in the Act relate to matters involving either in whole or in part, real estate or the title thereto.

The first affects only executors and administrators and provides for:

"(f) The sale of real estate of decedents for payment of their debts."\(^67\)

This provision has no reference to and is separate and apart from the jurisdiction of the court over sales made in the exercise of a testamentary power.\(^68\)

To cover other situations relating to real estate, the Commission recommended and the Legislature passed the next two clauses:

"(g) The disposition of the title to real estate of decedents and of persons disabled from dealing therewith in order to render the same freely alienable and productive to the living owners thereof."\(^69\)

Jurisdiction as between the several courts is clearly set forth in the provisions of the Revised Price Act:\(^70\)

"The orphans' court, in all cases where real estate, or a ground rent issuing thereout, shall be or shall have been acquired by descent or last will, partly by deed and partly by descent or last will, or by purchase by a trustee, executor or guardian, and in all other cases the court of common pleas of each county of this commonwealth, shall have jurisdiction with respect to real estate situate within the county, and in the cases hereinafter specified, to authorize or confirm the various transactions thereupon outlined at length in the cases specifically thereafter referred to.\(^71\)

"(h) The partition of the real estate of decedents among

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\(^{67}\) Sec. 9 of the Orphans' Court Act of 1917, which is an amendment of Clause IV of Section 19 of the Act of June 16, 1836, P.L. 792, 3 Purd. 3366 (o-w), which reads, "The sale of real estates of decedents." Other sales than those for payment of debts are covered by clauses (g) and (h).

\(^{68}\) For procedure, see Sec. 16 of the Fiduciaries Act which is based on Sec. 20 of the Act of February 24, 1834, P.L. 670 and Sec. 21 of the Act of April 19, 1794, 3 Sm. L. 143.

\(^{69}\) As to which, see Sec. 28 of the Fiduciaries Act.

\(^{61}\) Introduced to cover the provisions of the Revised Price Act of 1917, P.L. 388 which reenacted with certain modifications the old Price Act of April 18, 1853, P.L. 503, which was drafted in great part by the late Eli Kirk Price, Esq. for the Commission appointed for the purpose by the Act of May 4, 1852, P.L. 638. As to the old Act it has been said: "The design of this act was to facilitate the transmission of titles, to make real property available for commercial and business uses, to encourage and promote improvement, and thereby to stimulate trade and develop the resources of the state; and it has no reference to or necessary connection with the administration of decedents' estates: Spencer v. Jennings, 123 Pa. 184. The object of the act is not to settle questions of title, but to transmit a title unincumbered by contingent or other interests: Hower's App., 55 Pa. 337."

\(^{71}\) In Sec. 1.

\(^{71}\) In Sec. 2, as amended.
the parties entitled thereto, the valuation of such real estate, and the sale thereof for the purpose of distribution."

Jurisdiction is, however, concurrent with that of the Common Pleas as the Partition Act provides:

"The orphans' court of each county of this commonwealth shall have jurisdiction, but not exclusive jurisdiction, in the partition and valuation of real estate, within the county, of any decedent, testate or intestate, whether such decedent was at the time of his death seized or possessed of such real estate solely or as tenant in common or joint owner with any other person or persons, and whether or not the surviving spouse of such decedent shall elect to take against his or her will, and notwithstanding there may be a limitation of an estate or interest in the premises or some part thereof, to a person or persons not in existence; and several undivided interests in any premises, derived from different ancestors by descent or devise, may be parted or valued in one proceeding in said court: Provided, That such court shall not have such jurisdiction during the continuance of any life estate in the whole of such real estate."

Jurisdiction is also conferred to bring about:

"(i) The specific execution of contracts made by decedents to sell and convey any real estate of which such decedent shall die seized, and of contracts made by decedents to purchase any real estate:"

This does not give the court jurisdiction over all contracts, generally, but is limited to those affecting real estate.

Once acquired, however, such jurisdiction covers all powers necessary to carry out the actual contract including the incidental power of reformation of

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72Introduced to cover the provisions of the Orphans' Court Partition Act of 1917, P.L. 337 into which the Commission gathered, modified and harmonized the numerous and complicated provisions of the former statutes.

73"Both the orphans' court and the common pleas have jurisdiction to entertain partition proceedings, and where two actions are brought in different courts, the one which first acquires control of the controversy will retain it to the exclusion of the other." Doyle's Est., 291 Pa. 263.

"As the petitioner herself has selected the court of common pleas, in equity, to partition the real estate, and as this equity proceeding is still pending and undetermined, the orphans' court may not act upon any matter which is the subject of that proceeding. In the orphans' court, where a partition fund is properly before the court for distribution, that tribunal has exclusive jurisdiction to decide all questions necessary thereto. Dickinson's Est., 148 Pa. 142. The court of common pleas, in equity, having assumed jurisdiction in entertaining the partition suit, will dispose of the entire controversy, including the relief now sought by the petitioner." Celenza's Est., 17 D. & C. 319. However, no jurisdiction can be given to the court by agreement of the parties if it does not as a matter of law actually have jurisdiction. Garvey's Est., 37 Lack. 7.

74"In Sec. 1 of the Act of 1917. By the amendment of June 24, 1939, P.L. 707 the above provisions were extended to include "the interests of the heirs of a deceased co-tenant and of the surviving co-tenant."

75This is Clause VI of Section 19 of the Act of 1836, amended so as to include contracts for the purchase of real estate.

Such jurisdiction is exclusive. Mellinger's Est., 334 Pa. 180, rev'd. 46 Lanc. 147.

For procedure, see Sec. 18 of the Fiduciaries Act.

the contract in suit. But where equitable rights of others are concerned which require the exercise of broad powers of jurisdiction beyond the limited powers of equity of the Orphans' Court which are confined entirely by statute, the Orphans' Court has no jurisdiction.

"(j) Proceedings for the collection or enforcement of payment or delivery of all legacies, whether pecuniary, specific or otherwise, and whether charged on real estate or not."

As to this, under the old act, it was said:

"The exclusiveness of its jurisdiction and the conclusiveness of its decrees have been placed, by the Acts of Assembly and the decisions of this court, upon a foundation which cannot be shaken. If there be anything besides death which is not to be doubted it is that the Orphans' Court alone has authority to ascertain the amount of a decedent's property and order its distribution among those entitled to it."

And later:

"The result of the authorities seems to be that as to the claims of distributees and legatees that jurisdiction of the Orphans' Court is exclusive and that of the Common Pleas is ousted, while as to creditors, the right to proceed by a common law action for the determination of their claims is concurrent with the right to proceed in the Orphans' Court. But in order to obtain any part of the fund in the hands of the executor or administrator they must proceed in the Orphans' Court which alone has the power to distribute the estate."

To cover branches of jurisdiction under the new Fiduciaries Act, the Commissioners recommended and the Legislature enacted a provision covering:

"(k) Proceedings for the discharge of real estate of decedents from the lien of debts of decedents, and for the discharge of real and personal estate from the liens of legacies, annuities, and debts."

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77Mellinger's Est., 334 Pa. 180, rev'g. 46 Lanc. 147.
78It has control over the lien of judgments against such real estate and of his unsecured debts. Emig's Est., Eppley's Pet'n (No. 2), 54 York 122.
80As was said in this case by Hughes, P.J. specially presiding: "This petition and the prayers which accompanied it are of a character which can be addressed only to a court having complete and plenary equity jurisdiction, and we find nothing in the acts of assembly which confer such on the orphans' court or which give it authority to proceed in the manner requested. While that court is often characterized as having the powers of a court of equity, nevertheless, these do not extend beyond the subjects which the court is authorized by statute to handle in the first instance."
81This does not confer jurisdiction of cases arising between a legatee and a stranger to the estate. Spangler's Est., 11 D. & C. 79.
82This is Clause VII of Section 19 of the Act of 1836, extended so as to cover specific legacies and legacies charged on land.
83For procedure as to real estate, see Sec. 25 of the Fiduciaries Act.
84For procedure, see Secs. 15 and 16 of Fiduciaries Act.
The broadest provisions of the Act was a verbatim re-enactment of prior legislation:

"(1) All cases within their respective counties, wherein executors, administrators, guardians or trustees may be possessed of or are in any way accountable for any real or personal estate of a decedent."

It will be noted that this covers all fiduciaries amenable to the Orphans' Court; all assets, real or personal, of an estate and those not only in their possession but for which they may be accountable, and finally all cases which may arise concerning them. "Language could not be broader."

It is not strange that this clause of the statute has been one of those most frequently applied where real questions of jurisdiction have arisen.

Whatever doubt there might have been as to the exclusiveness of the jurisdiction of the Orphans' Court over testamentary trustees was finally settled in 1936. There then arose in Philadelphia County a question as to the right of a member of the Board of City Trusts which has control over charitable trusts whose charge or administration is vested in the City to compel the submission of their records for inspection, examination and audit. Many testamentary trusts were involved (particularly that under the will of Stephen Girard) and in a few cases (about one-third of one per cent. in amount) trusts inter vivos.

There was a question as to which court had jurisdiction and in fact whether any court could grant the prayer for relief on the facts averred.

The court decided in no uncertain terms that it had authority to see to it that relief should be granted, and said:

"By common law, statutes and, to a certain extent, the Constitution, the field of jurisdiction has been built within the orphan's court over trust estates created by will. There should be no divided authority or power, as it weakens the ultimate object to be attained and one court alone should be responsible. No other court or body should be permitted to meddle with their control unless it be by express, definite and positive enactment by the legislature. As has been stated, the power of the orphans' court has grown extensively, modelled after a court

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85For procedure, see Sec. 27 of Fiduciaries Act.
86Clause VIII of Sec. 19 of the Act of 1836.
88In Brown's Appeal, 12 Pa. 333 where doubt was caused by the language used in the 15th Section of the Act of June 14, 1836, the court said (p. 336): "The object of the Act was to give power to the Common Pleas and not take it from the Orphans' Court." And later (p. 338): "The difference between a trust given nominativo and ratione officii to executors, is a nice and subtle one, and hardly ever apparent to common scriveners, or to men who make their own wills inops concilii. It is for the interest of society that there should be one tribunal to which parties can resort without being perplexed with such abstruse distinctions. And such, we think, upon deliberate review, was the intent of the legislature."
89Under the Act of June 30, 1869, P.L. 1276.
90In Wilson v. Board of City Trusts, 324 Pa. 345.
of chancery with similar means to regulate and enforce its decrees and orders. Within its appointed sphere the jurisdiction of the orphans' court is complete and exclusive. It continues as long as the trust res is administered by the trustee, and ends when that res is delivered to the beneficiary or the ones entitled thereto by will.

"Having settled the problem as to what court has control as to all trusts created by will, we next consider trusts inter vivos. Such trusts were within the exclusive control of the court of common pleas until the Act of June 26, 1931, P.L. 1384, amending Section 9 of the Act of 1917, P.L. 363. Two paragraphs were added to Section 9, increasing the jurisdiction of the orphans' court: (n), which gave control over the accounts of trusts inter vivos; (o), the control of life insurance trusts. We held that the purpose of these sections was to create concurrent jurisdiction in the orphans' court and common pleas over trusts inter vivos. As to these trusts the court assuming jurisdiction has control and jurisdiction may be lodged in either court. All trusts created by wills are within the exclusive jurisdiction of the orphans' court and trusts inter vivos may fall within the jurisdiction of the two courts."

Acting under its "broad powers under the Act of 1836 to modify, reverse and amend decrees, as well as pursuant to the Act of 1722, 1 Sm. L., Sec. 13, conferring the powers of the Court of King's Bench" it transferred the entire record to the Orphans' Court of Philadelphia County with appropriate orders for the issuance of process to accomplish the desired result. The case is still pending there.

It would serve but unduly to prolong treatment of this subject to consider all of the manifold cases that have arisen and been decided under this section of the Act, interesting though many of them are.

As declaratory of the existing law, the Commissioners suggested and the Legislature adopted a clause covering:

"(m) All appeals from the orders or decrees of the register of wills of their respective counties, and all proceedings removed from said registers by certification."

Prior to September 1, 1931, jurisdiction over trusts inter vivos was exclusively in the Court of Common Pleas. By an Act of Assembly effective as of that date there were added two additional clauses to the Orphans' Court Act extending jurisdiction to:

"(n) The control, removal, discharge, and settlement of accounts of trustees of trusts inter vivos;

"(o) The control, removal, discharge, and settlement of accounts of trustees of life insurance trusts, whether taking effect

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91 See 20 P.S. Sec. 2252 and Vol. 3 old Purdon's Digest 3368-9.
92 As provided under Sec. 20 (d) and Sec. 21 of the Register of Wills Act of 1917, P.L. 415.
93 As provided under Secs. 8 and 18 of the same Act.
94 Wilson v. Board of City Trusts, 324 Pa. 545, 552.
95 Act of June 26, 1931, P.L. 1384.
during the lifetime or at or after the death of the insured or settlor."

The new act contained no clause repealing prior legislation and it was therefore held that the jurisdiction of the two courts was concurrent and whichever first acquired jurisdiction retained it to the exclusion of the other. 96

The right to control gave the right to construe or reform if necessary without requiring the parties to resort to a bill in equity in the Common Pleas; 97 also, in the case of fraud and the like to revoke. 98

The right of removal was not extended so as to apply to directors of a charitable corporation organized as directed under the provisions of a will where no actual trust was established. 99

Nor does it confer advisory jurisdiction over such a corporation or its board of directors. 1

Its scope has been strictly limited.

"The expression 'trust inter vivos' is capable of including all kinds of trusts except those created by testament. But when we read the words in the light of the history of our jurisdiction we cannot believe that this expression was meant to give to this court concurrent jurisdiction with the common pleas over the whole subject of nontestamentary trusts. The orphans' court has special experience in dealing with the problems that arise under wills; and deeds of trust, which are coming more and more into use, present much the same problems. Whether our jurisdiction is to be confined to trusts arising by deed or other written instrument inter vivos, it is not necessary to decide. We do think, however, that such jurisdiction is not to be extended to trusts which arise by operation of law." 92

In comparing the new act with the former 3 the qualifying phrase "inter vivos," was found to be controlling:

"From this it may well be reasoned that, when the Act of 1931 added the qualifying words 'inter vivos,' it was thereby intended to limit the concurrent jurisdiction conferred, to such trusts only as might be identified as 'inter vivos trusts.' That jurisdiction over all nontestamentary trusts was not intended to be granted would appear also from the fact that the amending Act of 1931 by separate paragraph (o) gives jurisdiction in express terms over "The control, removal, discharge, and settlement of accounts of trustees of life insurance trusts, whether taking effect during the lifetime or at or after the death of the insured or settlor; . . . Had the legislature by subdivision (n) intended to cover all types of nontestamentary trusts such separate provision for life insurance trusts would have been unnecessary.

97Comly's Est., 16 D. & C. 336.
11n re Wanamaker Institute, 36 D. & C. 406.
2Shaffer's Est., 21 D. & C. 90; In re Steif, 32 D. & C. 289.
3That of June 16, 1936, P.L. 784, Sec. 13.
"What then is meant by the term 'trusts inter vivos'? In *In re Trust of Bailey and Regar, 29 D. & C. 215,* at page 218, Judge Stearne of this court said, 'the term "inter vivos" is a Latin expression meaning "between living persons,"' and continues; 'Whether or not the wording of the act as quoted is broad enough to include trusts set up by other than individuals, i.e. corporations, partnership firms, trade associations, etc. . . . a question which he deemed unnecessary to decide in that case. In *Reading National Bank & Trust Company's Account, 22 D. & C. 654,* Judge Marx of the Berks County Orphans' Court expresses the opinion that the purpose of the amending Act of 1931, extending jurisdiction of the orphans' court to include 'trusts inter vivos,' was to give that tribunal jurisdiction over all dispositions of property in trust, whether by will effective at death or by agreement or deed effective in the donor's lifetime, since both forms of disposition are subject to the same rules of interpretation and construction and normally give rise to the same problems. He then held it did not confer jurisdiction over the account of the trustee for the holders of bonds secured by an individual's mortgage.

"All the decisions of this court that have so far construed the amendment of 1931 have respected, even though they have not clearly defined, the limitation imposed by the phrase 'trusts inter vivos.' 4

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"The orphans' courts of other counties have indicated a like disinclination to extend the amendment of 1931 beyond its express terms, and have refused to take jurisdiction." 5

It is not required that the trust be in writing. 6

The same rule follows as in testamentary trusts that while unlimited within its scope the jurisdiction of the Orphans' Court is confined to what is expressly given by the statute or necessarily implied. 7

But few questions have arisen as to territorial jurisdiction in the case of testamentary trusts. As to residents it is always in the county where the will is probated. Under deeds of trust inter vivos, however, the situation differs materially. Quite frequently the settlor resides in an entirely different place from

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5In the following cases: *Miller's Est., 39 D. & C. 141* (Lancaster Co.) agency created by letter of attorney; *Leinenbach's Petition, 24 D. & C. 433* (Schuylkill Co.) and *Musser's Account, 39 D. & C. 475* (Lancaster Co.), assignments for benefit of creditors; *Sullivan's Petition 34 D. & C. 154* (Berks Co.), agreement transferring to a trust company styled 'trustee agent and attorney' a participation mortgage and defining the respective rights and powers of the parties in interest: *Alleged Trust Inter Vivos of Jernigan et al., 55 Montg. 231,* deposit of money in escrow against default in a husband's bond given to support the wife. While it is true that jurisdiction was taken by the Berks County Orphans' Court in *Keppelman's Est., 27 Berks 299,* for the purpose of appointing a substituted trustee of a mortgage pool, this was apparently done only because the orphans' court already had jurisdiction of the trust res in that the trustee was also fiduciary of many trust estates (under the jurisdiction of the court) whose funds were invested in that particular mortgage pool.
6If sufficiently proved by parol testimony. *Tober's Est., 82 P.L.J. 91.*
7*Keppelman's Est., supra.*
that of the trustee. In such case it is the court of the county where the trustee
resides, or, if a corporation, has its place of business, that has jurisdiction.8

In passing from the specific to the general, the Commissioners concluded
their "outline of jurisdiction" by providing:

"The exercise of all other powers needful to the doing of
anything which is or may be hereafter required or permitted to be
done in said court, whether incidental to the powers hereinbefore
enumerated or in addition thereto.

"And such jurisdiction shall be exercised under the limita-
tions, and in the manner provided by law."9

This would seem to dispel any lingering doubt either as to the breadth or
depth of the powers of the court once it has properly acquired jurisdiction in
any proceeding brought before it.

While almost entirely ungermane to the jurisdiction of the Orphans'

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8 As held by Gearhart, P.J. in Cassone's Est., 14 Leh. 175, 19 D. & C. 272, where he said:

"It will be observed that section 9 of the Orphans' Court Act is merely an outline of
the jurisdiction conferred. The details are supplied by the Fiduciaries Act and cognate
legislation. The Act of 1931 outlines the jurisdiction of the orphans' court with reference
to trusts inter vivos and life insurance trusts, but nowhere, so far as we are able to discover,
is there legislation supplying the details as to how, when, and where this new jurisdiction
is to be exercised.

"A search of the reports has not revealed an instance where our courts have passed
on the matter."

9 Originally clause (n) now (p) of Sec. 9 of the Act, as to which the Commissioners said:

"The first sentence of this clause is new, and is intended to remove any doubt as to
the interpretation of this section when compared with the language of the other acts relating
to the specific branches of the jurisdiction, and to obviate the necessity of amending this
section in case of any future grant of new jurisdiction to the court."
Court,\textsuperscript{10} the Legislature\textsuperscript{11} further burdened that court with proceedings in adoption cases relating either to minors or adults.

The residence of the petitioner who is "desirous of adopting any person" governs with respect to the court having jurisdiction thereof.\textsuperscript{12}

As enlarging the court's powers but not extending them\textsuperscript{13} and in line with the efforts of the National Conference of Commissioners on Uniform State Laws, our own Legislature adopted and passed\textsuperscript{14} the "Uniform Declaratory Judgments Act."\textsuperscript{15}

Though not mentioned by name\textsuperscript{16} the Orphans' Court is given express and primary jurisdiction:

"(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

"(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

"(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings."

Rarely, indeed, has any act caused more controversy in the courts, both nisi prius and appellate. This has not been over the question as to which court has jurisdiction,\textsuperscript{17} but, admitting the right, would the court assume it?

"In all jurisdictions where declaratory judgment practice obtains, the rule is established that it is a matter of judicial discretion.

\textsuperscript{10}Gest, J. in Feil's Adp'n, 6 D. & C. 529.

\textsuperscript{11}By the Act of April 4, 1925, P.L. 127.

\textsuperscript{12}Such jurisdiction is concurrent, at least as respects Philadelphia County, with that of the Municipal Court. McCann's Adp'n., 104 Pa. Super. 196.

\textsuperscript{13}Act repealed as respects Counties of the first class by Act of June 5, 1941, P.L. 93.


\textsuperscript{15}The Act is constitutional. Kariher's Pet'n. (No. 1), 284 Pa. 455.

\textsuperscript{16}Sec. 1 provides:

"Section 1. Scope.—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

\textsuperscript{17}Held to be in Common Pleas in Kariher's Pet'n. (No. 1), 284 Pa. 455.

Keller, P.J. in Long et al. v. Uhl, et al., 8 D. & C. 671 (Centre County), decided that a proceeding under the Uniform Declaratory Judgments Act where plaintiff claimed under a deed or deeds, the Common Pleas, rather than the Orphans' Court, had jurisdiction, although the case involved the proper construction of a will.

Hirt, J., in Nagle's Est., 8 Erie 225, 9 D. & C. 392, (Erie County), held that the Orphans' Court has no jurisdiction to determine the validity of a post-nuptial agreement between decedent and his wife, where the agreement is in no way involved in the distribution of the estate or other matter over which the court has jurisdiction.

Reno, P.J. in Heist v. Citizens Tr. Co., Gdn., 12 Leh. 333, held that only the Common Pleas had jurisdiction to enforce a contract inter vivos and dismissed the petition for the further reason that all proper parties had not been joined.
whether or not jurisdiction will be taken of any particular case.\textsuperscript{18}

While it has been said that

"Procedure by declaratory judgment is peculiarly appropriate to the orphans' court, vested as it is with supervisory powers over the administration of decedents' estates,"\textsuperscript{19}
in very few cases has jurisdiction been assumed.\textsuperscript{20} In many more it has been declined.\textsuperscript{21}

In less than a year after its passage, the first case\textsuperscript{22} to arise under the Act in Philadelphia County came before the Orphans' Court of that jurisdiction on a petition to determine the validity of a lease which depended upon whether or not a testamentary power of appointment had been properly exercised. It fell to the lot of the late Judge Gest to write the opinion for the court en banc. That learned jurist in determining that jurisdiction should not be assumed outlined his own ideas of the statute in no uncertain words:

"The Uniform Declaratory Judgments Act is an innovation

\textsuperscript{18}Moschzisker, C. J. in Kariher's Pet'n. (No. 1), 284 Pa. 455.
\textsuperscript{19}Cryan's Est., 301 Pa. 386.
\textsuperscript{20}In Snively's Est., 4 D. & C. 405 (Dauph. Co.) effect of widow's election.
\textsuperscript{21}In List's Est., (Butler Co) those entitled to corpus of residuary estate. Reversed on the merits in 283 Pa. 255: "There was no necessity for resorting (to the statute),—it should not have been employed."
\textsuperscript{22}In Merten's Est., 15 Erie 379, title to a piano.
\textsuperscript{23}In Morris v. Morris, 13 D. & C. 634 (Greene Co.) and Johnson's Est., 15 D. & C.
\textsuperscript{24}347 (Crawford Co.) as a matter of practical help.
\textsuperscript{25}In Senft's Pet'n., 44 York 177, 15 D. & C. 792,—right of inheritance by an adopted child.
\textsuperscript{26}In Fletcher's Est., 103 Pa. Super. 69 (Allegheny Co.)—interest in real estate.
\textsuperscript{27}In Musser's Est., 47 Lane. 239—sufficiency of election to take a devise.
\textsuperscript{28}In Duff's Est., 4 D. & C. 314 (Phila. Co.)—validity of a lease dependent upon proper exercise of testamentary power of appointment.
\textsuperscript{29}In Brumagin's Pet'n., 6 Erie 192, 6 D. & C. 431—ascertainment of title acquired by a devisee.
\textsuperscript{30}In Schoen's Pet'n., 20 Sch. 142, 21 Sch. 304, 6 D. & C. 256—construction of a codicil, defective notice to parties.
\textsuperscript{31}In Wilhelm's Est., 19 North. 378—construction of will with respect to a power of consumption.
\textsuperscript{32}In Follweiller's Est., 11 Leb. 198, 6 D. & C. 757—construction of a residuary bequest as properly determinable at audit of executor's account.
\textsuperscript{33}In Lichty's Est., 39 Lanc. 327—construction of a will.
\textsuperscript{34}In Freeman's Est., 7 D. & C. 289 (Phila. Co.)—by a professional trustee for aid and advice with respect to its duties.
\textsuperscript{35}In Sedor's Est., 24 Luz. 167—for construction of a will.
\textsuperscript{36}In Dempsey's Est., 288 Pa. 458; Myers' Est., 10 D. & C. 291; Hum's Est., 24 D. & C.
\textsuperscript{37}73; Moore's Est., 14 Erie 190, 18 D. & C. 37; Jones' Est., 30 Berks 159—all on the point that the matter at issue could properly be decided by an account and audit.
\textsuperscript{38}In Strauss' Est., 16 D. & C. 231 (Phila. Co.) (aff'd. in 307 Pa. 454); Sterrett's Est.,
\textsuperscript{39}300 Pa. 116; Stoey's Est., 34 Dauph. 63; Capital Bk. & Tr. Co.'s Pet'n., 336 Pa. 108 (Dauph.
\textsuperscript{40}Co.); Lochrie's Est., 340 Pa. 145 (Somerset Co.)—future rights involved.
\textsuperscript{41}In Laughlin's Est., 103 Pa. Super. 409 (aff'd. 14 D. & C. 670, Phila. Co.); Bergman
\textsuperscript{42}v. Gross, 329 Pa. 67 (Crawford Co.); Jamison's Est., 36 D. & C. 37 (Phila. Co.)—because other apt remedies were available.
\textsuperscript{44}Duff's Est., 4 D. & C. 315.
in our jurisprudence, as heretofore it has always been considered requisite in our legal procedure that the courts should be called upon to decide only those questions which arise in actual litigation. The legislature, however, in its last session, has adopted this Uniform Declaratory Judgments Act, which follows similar procedure or identical acts in some foreign jurisdictions and in several states of this Union. And we note that in sections 12 and 15 the legislature, having declared its purpose to be remedial, has enjoined the courts to construe and administer the act liberally and to interpret and construe it so as to effectuate its general purpose, viz., to make uniform the law of those states which enact it and harmonize, as far as possible, with Federal laws and regulations on the subject of declaratory judgments. How far this latter injunction may be within the province of the legislature we need not consider at the present time, but we may remark it is difficult to see why, in matters of legal procedure, it is desirable for us to assimilate the practice in Pennsylvania to that of Kansas or Florida, however appropriate such uniformity may be with respect to negotiable instruments, warehouse receipts and the like. For some purposes it may be desirable to dress in ready-made uniforms, but it is better for most men to be measured for their clothing and have their coats cut to suit their individual requirements.

"We deem it proper in this, the first case presented to us under this new statute, to consider its provisions somewhat at length. From our examination, we are of opinion, in the first place, that the act is clearly not intended to permit, much less require, the courts to answer abstract propositions of law or moot questions which are merely academic. This much appears to be conceded by every one. Nor do we think that it is intended to confer on the courts that jurisdiction to advise fiduciaries in the discharge of their duties, which, although it may obtain in some states, has never been allowed in Pennsylvania. A mere advisory opinion upon an abstract question is obviously not a judgment at all. The act contemplates the solution of a real controversy between adverse parties. In the third place, we are of opinion that the act, which is professedly remedial, should not be held to operate where the evil intended to be remedied does not exist.

* * * *

"In the fourth place, and this particularly affects our decision of the present case, we are of opinion that the act was not intended to extend or in any wise affect the jurisdiction of this court so as to bring within it cases or a class of cases not previously cognizable here. In the very first line of its 1st section the act distinctly refers to the respective jurisdictions of the courts, and there is nothing whatever in any section of it to confer any jurisdiction on the Orphans' Court which previously belonged to the Common Pleas, and, indeed, if there were, this act would be unconstitutional, inasmuch as its title would be defective."
Argument in favor of the act in appropriate proceedings was soon to follow:

"No doubt many other instances could be cited where we in Pennsylvania are today, and have been for many years, indulging in declaratory judgments; the present legislation simply makes that practice more extensive. When this latter fact is realized, the whole argument as to the act's imposing on the courts something new, in the nature of a nonjudicial function, fails; for the statute before us merely presents the extension of a long and well established judicial function, previously enjoyed to a considerable extent in this State, of declaring the law which governs a given condition of facts so as to make the controversy covered by these facts res judicata, albeit in many cases no execution may be called for, and even though the action was started before damages were actually inflicted or before danger thereof was imminent."

But the limitations were clearly defined in that:

"a proceeding to obtain such a judgment will not be entertained where the court lacks jurisdiction of the subject-matter involved * * *; or where another statutory remedy has been specially provided for the character of case in hand * * *; and that jurisdiction will never be assumed unless the tribunal appealed to is satisfied that an actual controversy, or the ripening seeds of one, exists between parties, all of whom are sui juris and before the court, and that the declaration sought will be a practical help in ending the controversy: * * * Moreover, in a declaratory judgment proceeding the court will not decide future rights in anticipation of an event which may not happen, but, just as in the ordinary executory action, it will wait until the event actually takes place, unless special circumstances appear which warrant an immediate decision, as, for instance, where present rights depend on the declaration sought by plaintiff; and even then such rights will not be determined unless all parties concerned in their adjudication are present and ready to proceed with the case (see section 11, of the act), so that the judgment rendered will make the issues involved res judicata in the full sense of that term * * *

"In our opinion the Uniform Declaratory Judgments Act is a constitutional piece of legislation, which, within proper limits, can be made of real use." (Emphasis supplied.)

Regardless, however, of the very evident intent of the legislature, the general opinion in the majority of the courts has coincided with that of Stewart, P.J. of Northampton County:

"It is our personal hope that if the act is held to be constitutional, the higher courts will enjoin upon courts not to take jurisdiction under it except in very plain cases."

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24 In Wilhelm's Est., 19 North. 378 (1924).
That opinion on the subject is still deeply divided has been but recently demonstrated.\textsuperscript{28}

Time alone will determine the length to which the courts will go in accepting jurisdiction under the exigencies of circumstances pressed upon them by counsel on behalf of litigants in quest of relief. As in the past, it will no doubt depend on the individual predilections of the judge of first instance.

Having in mind the present scope of the jurisdiction of the Orphans' Court thus reviewed, it would seem reasonable to believe that no further attempt will be made to enlarge the field of its duties though, in its continued advance from a position of lowly confusion to one of extreme importance, we can but hope that every occasion will be taken to broaden and more clearly define its jurisdiction.


Oct. 15, 1942 

\textsuperscript{28}In Moore v. Moore, 344 Pa. 324 (Jan. 29, 1942) where the Court of Common Pleas of Philadelphia County was reversed in refusing jurisdiction. Opinion by Schaffer, C.J. Dissenting opinion, by J.J. Maxey and Drew.