

TESTAMENTARY SYSTEM.

case may require,) which the testator or intestate might have commenced and prosecuted, except actions of slander, and for injuries or torts done to the person; and they shall also be liable to be sued in any court of law or equity, (as the case may require,) in any action (except as aforesaid,) which might have been maintained against the deceased; and they shall be entitled to, or be answerable for costs, in the same manner as the deceased would have been; and they shall be allowed for the same in their accounts; provided the court awarding costs against them shall certify that there were probable grounds for instituting, prosecuting or defending, the action on which a judgment or decree shall have been given against them.

7. In no action against an executor or administrator shall he be compelled to put in special bail.

8. As in pleading it is extremely difficult for executors and administrators, as well as the opposite parties, to guard against error or mistake, which may operate unjustly against them, in no action, brought against an executor or administrator, shall it be necessary for him to plead *plene administravit*, or any thing relative to the assets, or for the plaintiff or plaintiffs to reply to such plea; provided nevertheless, that any executor or administrator, sued in chancery, may be compelled, as usual, to say in his answer, whether or not he hath assets to answer all just claims against the deceased; and provided also, that if the said executor or administrator shall answer that he hath not assets as aforesaid, the proceedings shall be as they are at present; that is to say, an account may be taken of the assets under the direction of the court.

9. And if the verdict of the jury on the issue joined be against the executor or administrator, or if he shall be willing to confess judgment, and the debt or damages which the deceased (if he or she were alive) ought to pay, be ascertained by verdict, or confession or otherwise, the court, before whom the action was brought, shall thereupon assess the sum which the executor or administrator ought to pay, regard being had to the amount of assets in his hands, and the debts due to other persons; and if it shall appear to the said court that there are assets to discharge all just claims against the deceased, the judgment shall be for the whole debt or damages found by the jury, or confessed, or otherwise ascertained, and costs; and if it shall appear to the court that there are not assets to discharge all such just claims, the judgment shall be for such sum only as bears a just proportion to the amount of the debt, or damages and costs, regard being had to the amount of all the just claims, and of the assets; that is to say, as the amount of all the said claims shall be to the assets, so shall the amount of the said debt, or damages and costs, be to the sum required, for which judgment is to be given.

10. And in no case shall the court proceed to assess as aforesaid, and to pass such judgment against an executor or administrator, until the time limited by law, or by the orphans court, for the executor or administrator to pass his account shall have expired; provided, that the said executor or administrator shall make oath, (or affirmation, as the case may require,) that he hath not assets to discharge all such just claims; and the account settled by the orphans court, in which the debt or damages sued for ought to be stated, shall be evidence to shew the amount of assets and claims; and the court before whom the suit is brought against the executor or administrator for the recovery of a debt or damages, shall have power, when the real debt or damages are ascertained, to refer the matter to an auditor, to ascertain the sum for which judgment shall be given; and in case the judgment shall be for a sum inferior to the real debt, or damages and costs, it shall go on and say, "that the plaintiff be entitled to such further sum as the court shall hereafter assess on discovery of further assets in the hands of the defendant;" and the court, at any time afterwards, when applied to by the plaintiff, on three days notice to the defendant or his attorney, may assess and give judgment for such further proportionable sum as the plaintiff shall appear entitled to, regard being had as aforesaid to the amount of the debt, and of other claims;