order of the Court indicating the matter in issue, on oath, publicity, the right to cross-examine, and a penal responsibility. It may, therefore, be as confidently relied on as testimony taken in any other way; being in no manner open to the strong objections to that kind of *ex parte*, affidavit evidence, to which the Court of Chancery of England allows itself to resort, for the determination of some of *the most delicate and important cases that are brought before it. *Wellesley* v. *The Duke of Beaufort*, 3 *Cond. Chan. Rep.* 1; *Park's His. Co, Chan.* 441. It is upon these grounds, that I think this mode of taking testimony deserves the continued sanction, approbation, and protection of this tribunal. *Winder* v. *Diffenderffer, order*, 4 *May*, 1829, *post.* **86**

The testimony taken under the order of the 21st of February, 1828, before a justice of the peace, has therefore, been brought in according to the regular course of the Court.

The will of the late William Duncan, it appears, has been proved and recorded, according to the Act of Assembly, which declares, "that it shall and may be lawful for the Judge of Probate of Wills to take the probate, or cause to be proved any last will or testament within this Province, although the same concerns titles of lands;" 1715, *ch.* 39, *s.* 2; which for this purpose is still in full force. A probate so made of a will devising real estate, it has always been held, is at least *prima facie* evidence of its validity; *Carroll's Lessee* v. *Llewellin*, 1 *H. & McH.* 162; *Smith's Lessee* v. *Steele*, 1 *H. & McH.* 419; *Massey* v. *Massey*, 4 *H. & J.* 142; *Darby* v. *Mayer*, 10 *Wheat.* 465; *Since so expressly declared by* 1831, *ch.* 315, *s.* 1; and there being in this case, no allegation or evidence, which, so far questions the validity of this will, as to throw the burden of sustaining its verity upon the plaintiffs; and these infant defendants as well as the plaintiffs claiming under it, the certified copy offered must be considered as sufficient, for all the purposes for which it is produced.

From the pleadings and proofs it is very clear, that this will cannot be so construed, as to authorize a sale of the real estate for *the purpose of raising or securing the payment of this annuity; nor can it be construed to give the plaintiff Anna Maria an estate for life, or any other lesser estate in the lands charged with the payment of the annuity. These infant devisees could only take this estate subject to the charge upon it, and the annual rents and profits, as it is now shown, so far exceed the annuity in amount as to demonstrate, that it is much to their benefit so to take it. And consequently, all their property, in respect to this large amount of assets thus placed in their hands, and which they have taken, must be held liable for the payment of this annuity. **87**

For the arrears which accrued since the death of the testator, and were left unpaid by Deborah Duncan, the late guardian of these infants, her sureties as guardian, if she gave any, or her