

An. Code, sec. 255. 1904, sec. 254. 1888, sec. 250. 1798, ch. 101, sub-ch. 15, sec. 17. 1886, ch. 498.

264. On such plenary proceeding, all the depositions shall be taken in writing and recorded, and, if either party require it, the court shall direct an issue or issues to be made up and sent to any court of law convenient for trying the same, and the issues shall be tried in the said court of law as soon as convenient, without any continuance longer than may be necessary to procure the attendance of witnesses; and the power of the court of law and the proceedings thereto relative shall be as directed by law respecting the trial of issues, and the orphans' court shall give judgment or decree upon the bill and answer and depositions or the finding of the jury, and may in all cases of contest award costs, in their discretion, and compel payment by attachment and fine, or by attachment and sequestration, or by *feri facias*.

Issues.

This section does not require orphans' court to send issues to a court of law for a determination of questions such as reopening of an account for alleged improper allowances, when that investigation is being made under a plenary proceeding and parties had elected to try question before orphans' court. See notes to sec. 254. *McAvoy v. Renehan*, 116 Md. 336.

Purpose of this section. The duty of orphans' court to make up and transmit issues when required is imperative, and findings of court of law are final and must be made effective by orphans' court. *Price v. Taylor*, 21 Md. 363. And see *Pleasants v. McKenney*, 109 Md. 277; *Keene v. Corse*, 80 Md. 23; *Sumwalt v. Sumwalt*, 52 Md. 346; *Worthington v. Ridgely*, 52 Md. 355; *Waters v. Waters*, 26 Md. 72; *Humes v. Shillington*, 22 Md. 358; *Cook v. Carr*, 20 Md. 410; *Warford v. Colvin*, 14 Md. 552; *Pegg v. Warford*, 4 Md. 396; *Cooke v. Cooke*, 29 Md. 552.

Where issues have been tried and a verdict rendered, other persons (though not parties to first case) are not entitled to issues involving substantially same questions. *McCambridge v. Walraven*, 88 Md. 380; *Pleasants v. McKenney*, 109 Md. 277; *Worthington v. Gittings*, 56 Md. 548; *Sumwalt v. Sumwalt*, 52 Md. 346; *Worthington v. Ridgely*, 52 Md. 355; *Pegg v. Warford*, 4 Md. 394; *Warford v. Van Sickle*, 4 Md. 399. *Cf. Munnikhuisen v. Magraw*, 35 Md. 280.

The dismissal of one set of issues before trial in a court of law is not a bar to subsequent issues. *Levy v. Levy*, 28 Md. 29; *Price v. Moore*, 21 Md. 373. And see *Price v. Taylor*, 21 Md. 363.

Only such questions of fact as are properly in issue between parties may become subjects of issues. Duty of the orphans' court before issues are sent. *Bridge v. Dillard*, 104 Md. 421; *Williamson v. Montgomery*, 40 Md. 378; *Smith v. Young*, 5 Gill, 197.

There can be no modification of issues after they have been sent from the orphans' court. *Cook v. Carr*, 20 Md. 410.

Issues presuppose a plenary proceeding—see notes to sec. 263. *Hubbard v. Barcus*, 38 Md. 172.

Issues are required to be granted only in cases where orphans' court itself has power to determine question involved. *Fowler v. Brady*, 110 Md. 209.

Issues should not be granted upon the propriety of the allowance of a counsel fee. *Maynadier v. Armstrong*, 98 Md. 178; *Miller v. Gehr*, 91 Md. 714.

As to when issues will be granted or refused, see *Bridge v. Dillard*, 104 Md. 421; *Maynadier v. Armstrong*, 98 Md. 178; *Miller v. Gehr*, 91 Md. 714; *Williamson v. Montgomery*, 40 Md. 378; *Redman v. Chance*, 32 Md. 54; *Humes v. Shillington*, 22 Md. 358; *Barroll v. Reading*, 5 H. & J. 176.

Costs, counsel fees, etc.

Where issues are sent to a court of law, latter court does not enter the judgment for costs, but such costs are certified to orphans' court which has power to enter proper judgment and enforce payment of costs. *Levy v. Levy*, 28 Md. 29; *Brown v. Johns*, 62 Md. 333; *Johns v. Hodges*, 60 Md. 229; *Browne v. Browne*, 22 Md. 116.