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THE POWER OF A COURT OF EQUITY TO GIVE RELIEF FROM DECREES OF THE PROBATE COURT

GEORGE S. STANSELL

ONE seldom, if ever, nowadays, hears of the filing of a bill in equity for relief against a will for fraud after the statutory period for contest has elapsed. Certainly the appearance of such cases in the courts of last resort is extremely rare. Whether this is because the world is becoming better, or the lawyer more careful, cannot be positively asserted. It is to be doubted if either suggestion furnishes the correct explanation. In view of the comparatively short statutes of limitations upon appeals and contests from probate, seldom more than a year, and in some jurisdictions as short as six months, it seems likely that there is a genuine need for such a remedy. It seems probable that the correct explanation lies in the general belief prevalent among lawyers and commentators that such a remedy does not exist, and the resulting reluctance to attempt untrodden paths. It is the purpose here to investigate the fallacies underlying this belief, and to demonstrate under what circumstances such relief may be granted, and what form such relief should take.

In approaching the principal question, that of jurisdiction, one must remember that the testament, as we know it, and the procedure of probate, was developed not in the common law courts but in the ecclesiastical courts administering the cannon law. The will, which took form as a testament *pro salute animae,* was never with-

drawn from the regulation and control of these courts. Glanvil tells us that in his day jurisdiction in cases of disputed wills belonged to the ecclesiastical courts.[1] Selden states that during the reign of Henry II, with its incessant struggle between church and state, no claim to such jurisdiction was ever made by the king's courts.[2] Holdsworth pointedly observes: "Once admit that the ecclesiastical courts have jurisdiction to decide cases of disputed wills, and a jurisdiction to grant probate will soon follow."[3] It did follow. The statute of *Circumspecte agatis,*[4] and the more important one of *Articuli cleri,*[5] although in most respects settling the struggle for jurisdiction in favor of the king's courts, and limiting the powers of the ecclesiastical courts, nevertheless abandoned entirely and absolutely to the ecclesiastical courts all jurisdiction over testamentary and intestate succession to personal property.[6]

However, as late as the eighteenth century the power of a court of chancery to set aside wills fraudulently obtained was still an open question. In 1664, in *Roberts* v. *Wynn,*[7] the court of chancery, although confessing itself greatly moved by the equities and justice of a bill for relief against a fraudulently obtained will, despite its having retained jurisdiction for some time in the hope of granting relief, and even though bidden by the House of Lords to render justice in the matter regardless of precedent, dismissed the bill, because it was unable to find precedent for relief and was unwilling to create one. This case makes no mention of a decision rendered twenty-five years earlier, in which the court of chancery, in passing upon the validity of a will of land, attacked on the ground of undue influence and fraud, without stating the nature of the relief sought or given, declared itself to be

[1] VII, 8. *Placitum de testamentis coram judice ecclesiastico.*
[2] Original of the Ecclesiastical Jurisdiction of Testaments, Chap. 1.
[3] History of English Law, I, 625.
[4] 13 Edward I, St. 4.
[5] 9 Edward II, St. 1.
[6] Holdsworth, op. cit., 587.
[7] 1 Ch. Rep. 236, 21 Eng. Rep. 560 (1664).

"of opinion that the said will was a very inofficious will, seeking to prefer strangers before name and blood."[8]

In 1700 the court declared that a will as well as a deed might be set aside for fraud and circumvention.[9] In 1715 the court held that a will though valid at law might be set aside in equity.[10] In 1725, however, the court held that there was a "difference betwixt a *deed* and a *will* gained from a weak man and upon misrepresentation or fraud; for if a *will* be gained from a weak man, and by false representation, this is not a sufficient reason to set it aside in equity . . . but where a *deed* (which is not revocable as a will) is gained from a weak man upon a misrepresentation and without any valuable consideration, the same ought to be set aside in equity."[11]

The question was ultimately settled by the House of Lords in 1727 in the case of *Kerrich* v. *Bransby*.[12] The rule was laid down that a court of equity may not entertain jurisdiction of a bill to set aside a will or the probate thereof. The reason assigned was the sufficiency of the relief available in the probate court in matters of personal property, and in the law courts in matters of real property. Justice McLean of the United States Supreme Court, in a leading case,[13] comments upon the position taken as follows:

[8] Maundy v. Maundy, 1 Ch. Rep. 123, 21 Eng Rep. 526 (1639).

[9] Welby v. Thornagh, Prec. Ch. 123, 24 Eng. Rep. 59 (1700): "The Court was clear of opinion, that a will as well as a deed may be set aside in this court for fraud and circumvention, but that no such thing was made out in this case; but the heir insisting on it, it was directed to an issue *divisavit vel non*, and the bills to be retained in the meantime. . . ."

[10] Goss v. Tracy, 1 P. Wms. 287, 24 Eng. Rep. 392 (1725): "In like manner, if A had devised his lands to his mother in fee, and afterwards J. S. the defendant, had told A the testator, and not the mother (as in the principal case), that the will was a void will for want of its being well guarded; and that he would make another will for the testator, that should be effectually guarded; and accordingly he had made another will for the testator, whereby the estate had been devised to the mother for *life only*, the remainder to J. S. (the defendant) in fee; this would be a good will in law, if attested pursuant to the act of parliament, but would be set aside in equity for the fraud; but as to the evidence of the testator's being *non compos*, that is entirely at law, and to be tried there."

[11] James v. Greaves, 2 P. Wms. 270, 24 Eng. Rep. 726 (1725).

[12] 7 Bro. P. C. 437, 3 Eng. Rep. 284 (1727).

[13] Gaines v. Chew, 43 U. S. (2 How.) 619, 11 L. Ed. 402 (1844).

In cases of fraud, equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign any very satisfactory reason for this exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal is the only one that can be given.

Nothing seems more axiomatic in the law today than that the jurisdiction of the probate court is of exclusive character.[14] There is not a single modern case which denies this principle. Almost without exception the decisions acquiesce in it as fundamental, even though the relief rendered in some of the cases may seem in effect to reduce such acquiescense to lip service only.

To this general rule there are certain well recognized exceptions.[15] Courts and commentators alike agree that equity may give relief where fraud has prevented a will from being made,[16] or where the revocation of a will has been prevented by fraud,[17] or where a name is inserted fraudulently in a will in place of the intended devisee or legatee,[18] or where a devisee or legatee takes the prop-

[14] No account is taken here, of course, of statutory proceedings in equity in the nature of will contests or appeals from probate. For the purposes of the present discussion, probate proceeding may be considered as embracing not only probate proper, but also such supplementary equitable machinery as statute may provide. Until all such has been exhausted, there is no need of equitable relief in the sense used in this paper.

[15] Perry, Trusts and Trustees (7th ed., 1929), sec. 182.

[16] Nanney v. Williams, 22 Beav. 451, 52 Eng. Rep. 1182 (1856); Dowd v. Tucker, 41 Conn. 197 (1874); Williams v. Fitch, 18 N. Y. 546 (1859). Williams v. Fitch is an action of assumpsit at law, and not in equity. There the court held that where the trustee of a fund to which he would succeed in case of intestacy prevents the making of a will in favor of a third party by promising to hold the fund for the benefit of the intended legatee, the latter may recover its value as money had and received to his use.

[17] Dowd v. Tucker, 41 Conn. 197 (1874). In this case an aunt of the respondent, with whom she lived and to whom by her will she had given all her property, upon her death bed desired to change her will, and give a certain piece of real estate to a niece, and had a codicil prepared for that purpose. Before signing the codicil she wished to secure the consent of the respondent to the change and had him called in for that purpose. After hearing her, he replied that she was weak and that she need not trouble herself to sign the codicil, but that he would deed the property to the niece and carry out her wishes. After her death the respondent refused to convey to the niece. Equity held him a trustee for the niece.

[18] Marriot v. Marriot, 1 Str. 666, 93 Eng. Rep. 770 (1725).

erty charged with an oral trust,[19] or where the fraud in respect to the will is merely part of a course of fraud which comes within the purvey of equity upon independent grounds.[20]

There is, however, another group of cases, more important than any of those enumerated, in which equity may grant relief—those in which a will is probated by accident or mistake, or the probate is procured by fraud. In respect to the availability of equitable relief in these cases, the decisions and authorities are not in accord. Certain distinguished writers upon the subject appear either not to have appreciated fully the doctrine of the English case of *Barnesly* v. *Powel*,[21] or to have assumed that its principle has been swept away by the cases enunciating the general rule.[22]

It is with this important group of cases which follows the doctrine first pronounced in *Barnesly* v. *Powel* that the present paper is principally intended to deal. Since the cases in which a will is probated through accident or mistake are rare as compared with those in which probate has been obtained by fraud, and since the circumstances in the former type of case are by their nature more likely to admit of review in the same court than are those in the latter, the first class will be disregarded and attention concentrated on a consideration of those cases where probate has been obtained by fraud.[23] The general

[19] Church v. Ruland, 64 Pa. St. 432 (1870); Williams v. Vreeland, 29 N. J. Eq. 417 (1878); Dowd v. Tucker, 41 Conn. 197 (1874); Williams v. Fitch, 18 N. Y. 546 (1859).

[20] Nanney v. Williams, 22 Beav. 52 (1856); Sumner v. Staton, 151 N. C. 198, 65 S. E. 902 (1909). In Sumner v. Staton, the court held that, where the grantee in deeds procured by fraud was also the sole residuary legatee and executor under a will procured by the same means to fortify his title, a court of equity had complete power to annul the deeds and declare him a trustee for the testator's next of kin, since a proceeding to contest the will could not cancel the deeds and give complete relief.

[21] 1 Ves. Sr. 284, 27 Eng. Rep. 1034 (1749).

[22] Perry, op. cit., sec. 182; Joseph Warren, 41 Harv. L. Rev. 309 (1928), and cases cited.

[23] For an interesting case of equitable relief against a decree of distribution ordered by mistake, see In re Walker's Estate, 160 Cal. 547, 117 P. 510, 36 L. R. A. (N. S.) 89 (1911). Justice Henshaw, delivering the majority opinion said: "The sanctity and immunity of a decree of distribution which has become final attaches to the decree itself, and not to those who under it may have derived an unconscionable advantage through fraud, accident, or mistake. Such questions the probate court does not possess the requisite machinery to try."

principle of this group of cases is stated by Mr. Pomeroy: "Where a probate is obtained by fraud, equity may declare the executor or the other person deriving title under it, a trustee for the party defrauded."[24]

The decision in *Barnesly* v. *Powel* was handed down by Lord Hardwicke in the Court of Chancery in 1749. The case has been much cited, its facts frequently misstated,[25] and its principles often misunderstood. It is therefore fitting that it should be stated at some length.

Barnesly filed a bill in equity against Powel and another to obtain relief against the probate of a forged will, under which the defendant Powel was named as executor. Barnesly, a man of weak mind and will, subsequently adjudged a lunatic, was next of kin of the deceased. Powel induced Barnesly to execute a deed agreeing to do whatsoever Powel might require of him in respect to the decedent's estate. By means of this deed and through fraud and imposition Powel induced Barnesly to sign a proxy consenting to the probate of the forged will. The estate consisted of both realty and personalty. Barnesly had already determined the title to the realty at law in an action of ejectment, in which the jury found the will a forgery, and declared title in him. The subject of the present bill is the personal estate.

The court held that it had no authority to set aside the probate of a will, but that it might act *in personam* to enjoin the beneficiaries from taking advantage thereof. The court allowed the defendants a fortnight's time in which to consent to revocation of the fraudulent probate, and to propound a former valid will under which Powel was also a beneficiary; or upon failure to do so within the time allotted, both defendants should stand charged as constructive trustees for the benefit of the plaintiff. The court declared expressly that the mere fact that the will was a forgery was not sufficient to justify equitable relief; that it was the fraud involved in the probate of the will that sustained the jurisdiction of the court.

[24] Equity Jurisprudence, II, 418, sec. 919.

[25] E.g. Seeds v. Seeds, 116 Ohio St. 144, 156 N. E. 193 (1927), where "one of the inducements to probate was a forged proxy of the next of kin."

The general principle enunciated in *Barnesly* v. *Powel* is cited with approval in two leading United States Supreme Court cases: *Gaines* v. *Chew*[26] and *Broderick's Will*.[27] The principle is therein restated, in the former directly; in the latter, somewhat by implication.

The decision in *Gaines* v. *Chew* was handed down in 1844. The beneficiaries under a will executed in 1811 had fraudulently suppressed a will executed in 1813, and thereby obtained the probate of the earlier will. The beneficiaries under the later will filed this bill against the beneficiaries of the earlier will, praying to have them declared trustees for the complainants' benefit, for an accounting, and for general relief. The court sustained the bill as a bill of discovery—several interrogatories having been propounded—and retained jurisdiction to see that relief was given. The court summarizes the status of the bill:

> In order that the complainants may have the means of making, if they shall see fit, a formal application to the Probate Court, for the proof of the last will and the revocation of the first, having the answers of the executors, jurisdiction as to this matter may be sustained. And, indeed, circumstances may arise, on this part of the case, which shall require a more definite and efficient action by the Circuit Court. For if the Probate Court shall refuse to take jurisdiction, from a defect of power to bring the parties before it, lapse of time, or any other ground, and there shall be no remedy in the higher courts of the state, it may become the duty of the Circuit Court, having the parties before it, to require them to go before the Court of Probates, and consent to the proof of the will of 1813 and the revocation of that of 1811. And should this procedure fail to procure the requisite action on both wills, it will be a matter for grave consideration, whether the inherent powers of a court of chancery may not afford a remedy where the right is clear, by establishing the will of 1813.

In another part of the opinion the court uses the following language:

[26] 43 U. S. (2 How.) 619, 11 L. Ed. 402 (1844).
[27] 88 U. S. (21 Wall.) 503, 22 L. Ed. 599 (1874).

If the fraud shall be established against the executors, and a notice of the fraud by the other defendants, they must be considered, though the sales have the forms of law, as holding the property in trust for the complainants. . . . One man possesses himself wrongfully and fraudulently of the property of another; in equity, he holds such property in trust for the rightful owner.

Although the principle of *Barnesly* v. *Powel* appears strictly as dictum in the case of *Broderick's Will,* the principle being nowhere positively stated, it permeates the entire case and is constantly revealed by distinctions of law and fact. The complainants were heirs at law of the former Senator Broderick of California. They alleged that the will by virtue of which the defendants held the property in question was a forgery, that the defendants took with notice of the forgery which was open and notorious, that the complainants, because they lived in a remote district were ignorant of the death of Broderick, and consequently of the probate of the forged will, until after the statutory period for contest had elapsed. The court refused relief and dismissed the bill. The reasoning of the decision is interesting, scholarly, in places somewhat tenuous, and replete with implications. The court first reviews the English cases, including the decision of the House of Lords in *Kerrich* v. *Bransby* and quotes with approval from the California case of *California* v. *McGlynn.*[28]

Upon examining the decisions of the Supreme Court of the United States, and of the courts of the several states, it will be found that they have uniformly held that the principles established in England apply and govern cases arising under the probate laws of this country; and that in the United States, wherever the power to probate a will is given to a Probate or Surrogate's court, the decree of such court is final and conclusive, and not subject, except on appeal to a higher court, to be questioned in any other court, or be set aside or probated by the court of chancery on any ground.

However, the effect of this apparently strong language is substantially limited by the reasoning of the remainder

[28] 20 Cal. 233 (1862).

of the decision and the application of the law to the facts of the case. The court proceeds to discuss at some length the decision of *Gaines* v. *Chew,* and dwells with especial emphasis upon the implications made in the conclusion of the first paragraph heretofore quoted from that opinion. The court dissents from nothing in the opinion of *Gaines* v. *Chew.* Perhaps the most illuminating portion of the opinion in *Broderick's Will* is the application of the law to the facts. The following quotation is typical:

> It needs no argument to show, as it is perfectly apparent, that every objection to the will or the probate thereof could have been raised, if it was not raised, in the Probate Court during the proceedings instituted for proving the will, or at any time within a year after probate was granted. . . . What excuse have they for not appearing in the Probate Court, for example? None. No allegation is made that the notices were fraudulently suppressed, or that the death of Broderick was fraudulently concealed.

The implication here is clear that had there been fraud collateral or extrinsic to the probate proceeding, such as suppression of notices, or concealment of death, the court might have assumed jurisdiction. The headnotes of the case written by Mr. Justice Bradley, who wrote the opinion, make these implications explicit:

> 4. It seems that where the Courts of Probate have not jurisdiction, or where the period for its further exercise has expired, and no laches are attributable to the injured party, courts of equity will, without disturbing the operation of the will, interpose to give relief to parties injured by fraudulent or forged wills, against those who are in possession of the decedent's estate, or its proceeds *mala fides,* or without consideration.
>
> 5. But such relief will not be granted to parties who are in laches, as where from ignorance of the testator's death they made no effort to obtain relief until eight or nine years after the probate of his will.

The language of these headnotes has been adopted in various state decisions as representing the rule of the case, and cited with approval, notably in the Ohio

Supreme Court case of *Seeds* v. *Seeds*.[29]

Of the numerous state decisions supporting this principle, the Seeds case just mentioned and *Caldwell* v. *Taylor*,[30] are of especial interest.

The decision in *Caldwell* v. *Taylor* was rendered by the California Supreme Court late in 1933. The petition was filed for the purpose of charging the defendant as constructive trustee of property obtained under a will from the complainant's father. The petition, to which a demurrer was sustained in the lower courts, alleged, in substance, that the defendant, "a notorious woman who had been arrested many times for grossly immoral acts and for sundry misdemeanors and crimes," induced the complainant's father, Perry Moore Caldwell, while in an intoxicated and drugged condition to go through a marriage ceremony in Mexico; that prior to the purported marriage she had falsely represented to him that she was a single woman of good character and reputation; that after two weeks of cohabitation she induced him to go to a hospital for treatment of incurable cancer of the throat, from which he died two months later; that during this time she "so harassed, urged, cajoled, threatened, and nagged him" that he made the will in question; that the defendant prevented the complainant's visiting his father, but that the father did communicate to the complainant suspicions regarding defendant and a request to have her investigated; that prior to the probate of the will the complainant talked with the defendant and asked her directly what her name and marital status were prior to the time of her purported marriage to his father; that she represented to him that she was, on the day of said marriage, a widow, and that she had never been known by any other name than Lenore Fisher; that after the statutory period for contest of the will had elapsed, he discovered her police record under the name of Lenore Taylor, and that at the time of her purported marriage she had a husband living; that the misstate-

[29] 116 Ohio St. 444, 156 N. E. 193, 52 A. L. R. 761 (1927).

[30] 218 Cal. 471, 23 P. (2d) 758 (1933).

ments with reference to her real identity and her marital status were made by the defendant to the complainant with the intent and purpose of preventing the complainant from presenting a contest of said will. In reversing the judgment and ordering the lower court to overrule the demurrer, the court said:

> The jurisdiction of equity to afford appropriate relief from judgments generally and from orders and decrees in probate proceedings upon a showing of proper circumstances is well settled. . . . It has been specifically held that equitable relief may be granted against orders and decrees of a probate court, including a decree of distribution, and a decree probating a will.

The decision in *Seeds* v. *Seeds,* was rendered by the Ohio Supreme Court in 1927. The action was in equity, to declare a trust *ex maleficio,* for an accounting, and for further relief. In that case the petitioners were daughters of the principal defendant, James Seeds, and were minors at the time of the events complained of. The petition alleged that on the day prior to the death of Estella Seeds, mother of the petitioners and wife of principal defendant, James Seeds and one Ritter entered her room at the hospital while she was unconscious, and, no one being present in the room at the time except Seeds, Ritter, and the nurse, Seeds took her hand and made her mark for her at the end of the purported will; that the will was probated by the false and fraudulent testimony of James Seeds, Ritter, and another; that service of notice on the daughters was accepted by the defendant James Seeds; that no contest was filed on said will; that after his appointment as executor, Seeds misrepresented to the court the nature and value of the estate, and thereby obtained title to the same.

The Supreme Court reversed the order of the Court of Appeals which sustained judgment for the defendant. In holding the defendants constructive trustees for the benefit of the plaintiffs, after mentioning two statutory remedies provided by the Ohio Code, the court said:

> To these two remedies it is well settled that a third is added, viz., to declare a trust *ex maleficio* when the person who holds the

legal title has acquired the same by circumstances of fraud and circumvention whereby the court has been defrauded and imposed upon, and in such a case equity becomes the artificial conscience of the malefactor. Where a court has been induced by fraud and imposition to enter a decree which would not have been entered upon a full disclosure of fact, a court will fasten it upon the conscience of the owner of the legal title so as to convert him into a trustee for the benefit of the parties who have been defrauded and would have received the title under an honest disclosure of the facts.

To this decision Mr. Justice Jones, with Mr. Justice Matthias concurring, dissents, depending principally upon the decision of *Stowe* v. *Stowe*,[31] a Missouri case. In that case, the plaintiff sought to charge the defendants as trustees for the plaintiff's portion of his father's estate, on the grounds that his father's will, under which the defendants claimed, was procured by fraud and imposition, and that the testator had not the mental capacity to execute a will, and alleged that such will was admitted to probate during the plaintiff's minority, and that he did not learn of such facts and frauds until more than the statutory period of five years after attaining his majority. In holding that equity was without jurisdiction, the court said that

there has been one uniform course of decision in this state to the effect that courts of equity, under our laws, have no jurisdiction to set aside wills for fraud, but that jurisdiction is vested exclusively in the courts of law. The effort to confer jurisdiction on the equity side of the court, is an attempt to accomplish indirectly what the law will not permit to be done directly. The attempt to charge defendants as trustees is predicated upon the ground that Stowe's will was procured by fraud; that he was imposed upon; that he had not the mental capacity to execute a will. Each of these contentions was necessarily settled adversely to plaintiff by the probate of the will and the subsequent lapse of time which rendered that probate a finality.

Stowe v. *Stowe* appears to be clearly contrary to *Seeds* v.

[31] 140 Mo. 594, 41 S. W. 951 (1897).

Seeds. However, we shall see later whether it is actually irreconcilable in principle.

Assuming that equity has power to give relief from decrees of the probate court, under what circumstances, or upon what showing of facts should the court exercise such power? What, from a factual point of view, is the principle which excepts those cases in which equitable relief is justified from the operation of the general rule that equity may not entertain jurisdiction of a bill to set aside a will or probate thereof? The line of demarcation between these two classes of decisions is clearly indicated in the case of *Barnesly* v. *Powel* immediately following a reference to the general rule laid down in *Kerrich* v. *Bransby*:

> But there is a material difference between this court's taking on them to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the ecclesiastical court by his fraud, not upon the testator, but upon the person disinherited thereby, and claiming after the testator's death against it.

The difference is between fraud in obtaining a will and fraud in obtaining probate of a will. The fraud involved in obtaining a will is germane and intrinsic to the probate proceeding, and the finding of the probate court is, therefore, as to it *res judicata*. The fraud involved in obtaining the probate of a will is collateral and extrinsic, and in no sense adjudicated by the probate court. It is in fact a fraud upon the court itself.

Just what constitutes extrinsic as distinguished from intrinsic fraud? The leading case upon the subject is *United States* v. *Throckmorton*,[32] a bill by the government to set aside the confirmations of certain Mexican land grants. The general excellence and clarity of treatment of the principle there contained justify quoting at some length from the opinion. Two of the headnotes, written by Mr. Justice Miller, read as follows:

[32] 98 U. S. 61, 25 L. Ed. 93 (1878).

2. The frauds for which a bill in chancery will be sustained, to set aside a judgment or decree between the same parties, rendered by a court of competent jurisdiction, are frauds extrinsic or collateral to the matter tried by the first court and not a fraud which was in issue in that suit.

3. The cases in which such relief has been granted are those in which, by fraud or deception practiced on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit.

In the body of the opinion, the court cites as examples of extrinsic fraud, the keeping of an opponent away from court, a false promise of a compromise, keeping the defendant in ignorance of the suit, fraudulent assumption by an attorney to represent a party for the purpose of contriving at his defeat, and the "selling out" of a client's interest by an attorney regularly employed.

From the innumerable state cases upon the general subject of extrinsic fraud, a few illustrative ones may be cited. In the Connecticut case of *Pearce* v. *Olney*,[33] where the plaintiff, after having promised to dismiss a suit brought against the wrong party, nevertheless took judgment, equity gave relief. In *Wierich* v. *De Zoya*,[34] the Illinois court of equity relieved a garnishee, who before final judgment had paid over the fund to a third party upon instructions of one of the parties garnishing. In *De Louis* v. *Meek*,[35] the Iowa court granted relief where an appearance had been entered by an attorney without the party's consent. In *Smith* v. *Lowry*,[36] the New York

[33] 20 Conn. 544 (1850). Olney, known to Pearce to be acting as agent for the Norwich Foundry Company, contracted to buy iron of Pearce. Pearce commenced suit against Olney on the contract and duly served him with process in New York. Olney informed Pearce's attorney of the mistake and was informed that no further action would be taken on the suit until notice was given. The attorney appeared and took judgment against Olney. Later Pearce brought debt against Olney in Connecticut on the judgment. Olney filed the present bill to enjoin the action and the injunction was granted.

[34] 7 Ill. (2 Gilm.) 385 (1845). The fund in this case was a promissory note, of which defendant in the attachment was maker and McCormick payee. The note had been endorsed by McCormick to one Sherill to whom payment was made upon order of one of plaintiffs in the attachment.

[35] 2 Green (Iowa) 55 (1849).

[36] 1 Johns. Ch. (N. Y.) 320 (1814).

court refused relief where, the defendant being prevented from attending the trial because of public business, the plaintiff obtained a larger verdict by reason of having suborned a witness to perjury.

With the general distinction between intrinsic and extrinsic fraud in mind, let us review briefly the cases considered earlier. In *Barnesly* v. *Powel,* Lord Hardwicke particularly stressed the fact that relief was granted, not because of the forgery of the will but because of the fraud involved in obtaining its probate. The relief in *Gaines* v. *Chew* was granted not merely because a subsequent will had been overlooked, but rather because the beneficiaries of the earlier will had actually suppressed the later will, and had thereby practiced a fraud upon the probate court, in that they represented to that court that the will which they propounded was the last will and testament, whereas they were actually cognizant of the later will. In the case of *Broderick's Will,* the court refused to grant relief because there was no allegation of extrinsic fraud. The court points out that the complainants offer nothing as a ground for equitable relief which was not available in the hearing in the probate court, and as to which, consequently, that hearing must be conclusive. What could be more eloquent than these words of the court: "What excuse have they for not appearing in the Probate Court for example? None. No allegation is made that the notices were fraudulently suppressed, or that the death of Broderick was fraudulently concealed." In *Caldwell* v. *Taylor,* the court expressly relied upon the fraudulent misrepresentations of the defendant made to the plaintiff subsequent to the death of plaintiff's father as the basis for the relief granted. In *Seeds* v. *Seeds,* the court stated that equity may "declare a trust *ex maleficio* when the person who holds the legal title has acquired the same by circumstances of fraud and circumvention whereby the court has been defrauded and imposed upon."

Let us reconsider the apparently contrary decision of *Stowe* v. *Stowe* in the light of the distinction between

extrinsic and intrinsic fraud, and determine whether or not the case can be reconciled to *Seeds* v. *Seeds* upon the principle of that distinction. The similarity of facts is striking. In *Seeds* v. *Seeds* the signature of the complainants' mother was forged by the complainants' father. In *Stowe* v. *Stowe* the signature of the complainant's father was obtained through the fraud and imposition of the complainant's stepmother. The complainants in both cases were minors at the times of the events complained of. The statutes in Ohio and Missouri were very similar, both providing that the probate should be forever binding if not attacked within a given period, and saving a like period to minors after becoming of age.[37] In both cases, the facts were not discovered until after such periods had elapsed. There is, however, one striking difference in the facts of the two cases, and that a vital one. In *Seeds* v. *Seeds,* there was a fiduciary relationship between the complainants and the principal respondent, their father. He was their natural guardian, under a positive duty to protect their interests. He not only failed to discharge this duty, but actually accepted service of

[37] The Ohio statute, Gen. Code, sec. 10531, provides:

"If, within one year after probate had, no person interested appears and contests the validity of the will, the probate shall be forever binding, saving, however, to infants, and persons of unsound mind, or in captivity, the like period after the respective disabilities are removed."

The Missouri statute, Gen. Stat. Mo. 1865, p. 530, provides:

"Sec. 29. If any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and by petition to the circuit court of the county, contest the validity of the will, or pray to have a will proved which has been rejected, an issue shall be made up, whether the writing produced is the will of the testator or not, which shall be tried by a jury, or if neither party require a jury, by the court.

"Sec. 30. The verdict of the jury, or the finding and judgment of the court, shall be final, saving to the court the right of granting a new trial, as in other cases, and to either party to appeal, in matters of law, to the supreme court.

"Sec. 31. If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding, saving to infants, married women or persons of unsound mind, a like period of five years after their respective disabilities are removed."

Another ground of distinction between the two cases, and between Stowe v. Stowe and other cases of the like in general, may lie in the unusual length of the statutory period of contest, namely, five years. The language of the statute is so strong and the period such as almost to constitute a limitation even upon extrinsic fraud, and serve by analogy to define laches in equity. A rule refusing equitable relief under a five year statute would not be nearly so harsh as a similar rule under a one year statute—or a six months statute as in California.

process for them. The syllabus, written by the court, reads in part:

Where the fraudulent beneficiary is the husband of the decedent and the father of the next of kin, he stands in a fiduciary relation toward the next of kin, and this relationship imposes upon him the legal duty to protect their interests, and by reason of the violation of that duty he is created a trustee *ex maleficio.*

The breach of this fiduciary relationship constituted the extrinsic fraud upon which the court based its relief.

In the case of *Stowe* v. *Stowe,* on the other hand, no such fiduciary relationship existed, nor was there any averment or suggestion of it in the complaint. There was nowhere alleged in the entire bill any fact, act, or relationship which might constitute fraud collateral to the probate proceedings themselves. The only suggestion of the like was the bare statement that the defendants "fraudulently" obtained the probate of the will. This was at best a conclusion of law.

Mr. Joseph Warren, in a learned article upon the subject "Fraud, Undue Influence, and Mistake in Wills,"[38] comments briefly upon the principle of *Barnesly* v. *Powel,* and concludes that it is no longer operative:

Lord Hardwicke said that equity had jurisdiction in the case of a forged will, that is, where the fraud was not upon the testator but upon the next of kin. But the case of *Broderick's Will* has demonstrated the unsoundness of this view.

In the United States the early decisions in the state courts show no influence of *Barnesly* v. *Powel.* Yet the influence of the case flashed out for awhile in 1844 in *Gaines* v. *Chew.* . . .

Thirty years later, in *Broderick's Will,* there was a bill in equity to suppress a will, already probated, alleged to be forged. The Supreme Court referred to much of the talk in *Gaines* v. *Chew* as dicta, agreed *in toto* with the final decision in *Allen* v. *M'Pherson,*[39] said that in this case the probate court was entirely

[38] 41 Harv. L. Rev. 309 (1928). The section quoted is to be found on pages 314, 315, and 316.

[39] 1 H. L. Cas. 191, 9 Eng. Rep. 727 (1847). Allen v. M'Pherson is a leading English case upon the subject of equitable relief for fraud in wills, but actually does little more than affirm Kerrich v. Bransby. The gist of the facts and law are set out in the syllabus:

competent to do full justice among the parties, and dismissed the bill.

However, the discussion of the cases hereinbefore set out, together with the later decisions in *Seeds* v. *Seeds* and *Caldwell* v. *Taylor,* serve to refute Mr. Warren's conclusion. The absence of early decisions in the state courts showing the influence of *Barnesly* v. *Powel* is of but slight probative force. It must be remembered that *Barnesly* v. *Powel* offers an extraordinary remedy. Ordinary relief is suggested by Perry:

If, however, a will is probated by accident or mistake, or the probate is procured by fraud, the judgment may be reversed or modified by proceedings in the same court in the nature of a petition for a review or for a new trial.[40]

"A testator by his will and codicils gave R. A. large bequests, which he revoked by a final codicil, providing only a small weekly allowance for him during his life. The will and all the codicils having been admitted to probate, after litigation as to the last codicil in the Ecclesiastical Court, R. A. filed a bill in Chancery alleging that the testator had executed the last codicil under undue influence of the residuary legatee, and false representations made at her instance respecting R. A.'s character; and that he had not been permitted in the Ecclesiastical Court to take any objections to that codicil except such as affected the validity of the whole instrument; the bill therefore prayed that the executor or residuary legatee might be declared trustees or trustee for R. A. to the amount of the revoked bequests.

"Held, on demurrer, that the Court of Chancery had no jurisdiction in the matter (dissentientibus), Lord Cottenham (Chancellor) and Lord Langdale (M. R.) and that the proper course would have been an appeal to the Judicial Committee of the Privy Council against the sentence of the Ecclesiastical Court."

The actual holding is little more than that the complainant has mistaken his remedy, which should have been an appeal from the probate proceedings rather than a bill in equity. The fraud involved here is clearly intrinsic to the probate proceedings; there is no allegation of any fraud subsequent to testator's death.

Not even by way of dicta does the decision repudiate Barnesly v. Powel. Lord Lyndhurst, giving the majority view, notes that nothing in that case is contrary to the decision in the instant case:

"In the case of Barnesly v. Powel the probate was obtained by fraud, and Lord Hardwicke drew the distinction to which I have already adverted, between a fraud on the testator and a fraud practiced after his death in obtaining the probate. He thought, in the latter case, the court might declare the party a trustee. This he said, was a ground of jurisdiction in the Court distinct from the will itself. The distinction taken is decisive as to the opinion of Lord Hardwicke, that in a case like the present—a case of alleged fraud practiced upon the testator himself—the Court of Chancery could not take cognizance of the matter and apply a remedy by means of a trust."

[40] Op. cit., sec. 182.

The doctrine of *Barnesly* v. *Powel* is certainly not dictum in *Gaines* v. *Chew*. While it is true that the bill is sustained as one for discovery, the retention of jurisdiction is for the sole and express purpose of seeing that relief is given in respect to the will.

The characterization by the court in *Broderick's Will* of the "later expressions" of *Gaines* v. *Chew* as dicta is accurate as referring to the particular relief which the court of equity may give. The significant point in the case, and one which is in no sense dictum, is that the court retained jurisdiction of the bill to give relief in respect to the will beyond mere discovery.

Far from "demonstrating the unsoundness" of *Barnesly* v. *Powel,* the court in *Broderick's Will* carefully shows that its facts do not fall within the principle of that case—that there is no collateral or extrinsic fraud—that there was no suppression of notices or fraudulent concealment. Certainly the headnote statement of Mr. Justice Bradley, who wrote the opinion, should be virtually conclusive in respect to the intention and understanding of the court.

It is to be regretted that Mr. Warren did not have *Seeds* v. *Seeds* and *Caldwell* v. *Taylor* before him as he wrote.[41] Clearly the principle of *Barnesly* v. *Powel* is not dead. In his entire article, Mr. Warren did not cite a single case—and the present writer confidently believes there is none—where, in refusing equitable relief in the presence of facts which might raise a presumption or suggestion of extrinsic fraud, the court has not expressly rebutted such presumption.

The distinction between intrinsic and extrinsic fraud is the principle upon which all the cases can be reconciled. In the Washington case of *Krohn* v. *Hirsch,*[42] the court refused to give relief from a decree awarding all the property to the defendant, who, claiming to be the widow and sole heir of intestate, was appointed admin-

[41] The rehearing in Seeds v. Seeds was denied in April of 1927. Mr. Warren's article was published in January of 1928, but had evidently been written some months earlier, since it takes no account of that case.

[42] 81 Wash. 222, 142 P. 647 (1914).

istratrix of his estate, and, after having fully administered, duly petitioned the court to distribute the property remaining to her. Complainant was intestate's sister, which fact, however, defendant had denied in communications between them. The court held that the testimony of the defendant that she was the rightful distributee was intrinsic to the probate proceedings, and so furnished no grounds for relief.[43]

In another Washington case, *Davis* v. *Seavey*,[44] where a final decree of distribution under a will had been made, and the beneficiary under an alleged unprobated codicil had not objected for the statutory period of one year, the court refused relief to such beneficiary, stating that to justify such relief the fraud alleged on the part of the executrix must relate to preventing the claimant from appearing and setting up her claim.

In the Utah case of *Weyant* v. *Utah Savings and Trust Company*,[45] where the plaintiff's husband had eloped with another woman and lived under a fictitious name until his death, and the other woman had secured appointment as administratrix and probated his estate in the assumed name under representation that she was his wife, and thereby secured his property unknown to his real wife and children, the court held that the fraud practiced by the administratrix was extrinsic, and that equity would grant relief.

In the California case of *Sohler* v. *Sohler*,[46] where the widow of the testator fraudulently represented to the court that her son was also the testator's son, and thereby obtained for him a share in property devised to the testator's children, who were infants and represented only

[43] The court uses this language: "To us it is inconceivable that a party can be considered as holding in trust for his adversary property which has been awarded to him as against his adversary by a judgment rendered upon due notice in a proceeding instituted and carried on for the very purpose of determining the claims of each as against the other, to the property involved, in the absence of fraud, or some fact extrinsic of the merits of the controversy in issue, such as would avoid such judgment."

[44] 95 Wash. 57, 163 P. 35, Ann. Cas. 1918 D, 314 (1917).

[45] 54 Utah 181, 182 P. 189, 9 A. L. R. 1119 (1919).

[46] 135 Cal. 323, 67 P. 282 (1902).

by the executrix, the court held the son a trustee for the benefit of the minor children rightly entitled.

Assuming that the court has jurisdiction, and that a case justifying relief exists, what form should that relief take? The question is one that goes to the fundamentals of jurisdiction. The exclusiveness of the jurisdiction of the probate court cannot be overemphasized. It is primary and fundamental, and so treated by the courts. From this exclusiveness of jurisdiction flows one unescapable conclusion. The action of the court of equity in relieving against decrees of the probate court must be in the fullest sense *in personam.*[47] The relief granted must be such that it does not directly impair or impeach the actual decree of the probate court,[48] but treating the decree as valid, so readjusts the rights of the parties with relation thereto that property will not be unconscionably withheld or retained.[49] The parties may be enjoined from taking advantage of the decree of the probate court; the parties may be compelled by action of the court of equity to go before the probate court and perform certain acts, such as consenting to revocation of or reopening of the fraudulent probate proceedings; or the court may, without disturbing the decree of the probate court, give additional relief by way of declaring a constructive trust.

The cases already discussed fully sustain this position. In *Barnesly* v. *Powel,* the court held that it had no jurisdiction to set aside the probate of a will, but that it might enjoin the beneficiaries from taking advantage of it. It will be recalled that there the court gave relief in the alternative; the defendants might appear before the probate court and consent to the revocation of the probate of the forged will, and propound the genuine will, or upon

[47] Wonderly v. Lafayette County, 150 Mo. 635, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386 (1899). This was a bill filed in the state court to set aside a judgment obtained by fraud in the Federal courts.

[48] Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639 (1859); Kilheffer v. Herr, 17 Serg. and R. (Pa.) 319, 17 Am. Dec. 658 (1828).

[49] Eichoff v. Eichoff, 107 Cal. 42, 40 P. 24, 48 Am. St. Rep. 110 (1895); Blight v. Tobin, 7 T. B. Mon. (Ky.) 612, 18 Am. Dec. 219 (1828); Warren v. Union Bank of Rochester, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256 (1898); 15 R. C. L. 726 and cases there cited.

the passage of two weeks' time without such action having been taken, they should stand charged as constructive trustees for the benefit of the complainant.

It will be noted that in the case of *Gaines* v. *Chew,* in discussing the retention of jurisdiction of the matter by the Circuit Court, the Supreme Court suggested several possible remedies in order, the exhaustion or ineffectiveness of earlier ones presumably requisite to the availability of later ones: First, reopening of proceedings in the probate court; second, relief through higher state courts; third, consent of the parties to reopening the probate under compulsion of the court of equity; fourth, direct equitable relief—doubtless by means of constructive trust. This portion of *Gaines* v. *Chew* was quoted with approval in *Broderick's Will,* and so presumptively sanctioned. In *Caldwell* v. *Taylor* the court said:

Since the probate of a will is a matter exclusively within the jurisdiction of the probate court equity may not set aside the probate, but it may declare the beneficiary a trustee for those who have been defrauded. . . . And such character of relief is common. The judgment, order, or decree from the effect of which relief is sought cannot constitute a bar to equitable relief. A proceeding for equitable relief is not a collateral attack, and since its sole aim and purpose is to avoid the effect of said judgment, the doctrine of res adjudicata can have no application to such judgment.[50]

In *Seeds* v. *Seeds* relief is given by way of constructive trust. The court specifically repels any suggestion that the relief constitutes an attack upon the decree of the probate court as such:

This suit, not having been brought within the time limited, could not be maintained as a will contest. It does not follow that, because the effect of this suit, if successful, would result in a

[50] The court uses language of the same tenor in Weyant v. Utah Savings and Trust Company, already cited: "It may as well be stated here as anywhere else in this opinion that this court is also firmly committed to the doctrine that attacks like the one made in this case in the equity action, to which reference is made in the statement of facts, is a direct as contradistinguished from a collateral attack."

different course of devolution of the property, it must be regarded as a will contest.

In closing let us briefly summarize the law upon the subject. In general, the jurisdiction of the probate court is exclusive, and equity has no power to relieve against its decrees. An exception is made to this general rule in the case of a decree obtained by means of extrinsic fraud. Extrinsic fraud is some device, artifice, or deception practiced directly upon the unsuccessful party, whereby he has been prevented from exhibiting fully his case, and by reason of which there has never been a real contest before the court of the subject matter of the suit. Upon a showing of extrinsic fraud a court of equity may, without disturbing the decree of the probate court, give relief *in personam.* This relief may take the form of enjoining the parties from taking advantage of the decree, of compelling parties to resubmit the controversy to the probate court, or of declaring parties constructive trustees of the property acquired by the decree. Such relief does not constitute a collateral attack, but is an additional direct remedy.

In response to the objection to equitable relief against a final decree of the probate court expressed in the maxim, *Interest reipublicae, ut sit finis litium,* may we make a final quotation from *Seeds* v. *Seeds:*

> If it be said that the sanctity, the solemnity, and the finality of judgments and decrees of the courts will thereby be destroyed, it may be answered that fraud and imposition upon the courts have always been grounds for setting aside their judgments and decrees; that where decrees are entered by practice of fraud and imposition upon the courts, whereby certain persons have enriched themselves at the expense of others, it is the peculiar province of a court of chancery to right the wrong. The only protection to which the decrees and judgments of the courts are entitled is to be found in the quantum and character of proof which are necessary to be found in establishing a case of fraud and imposition.