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## THE LAW OF WILLS AS CONSTRUED BY ILLINOIS COURTS

By

HON. WILLIAM L. SPRINGER\*

Some years ago a young lawyer was arguing a case before a circuit judge in downstate Illinois as to whether or not a minor was obligated to support indigent relatives from his own estate. He started by reviewing the law from early England, thru Colonial days, thru the Northwest Ordinance and finally the law of Illinois.

After this had gone on for a couple of hours the judge looked down and said rather caustically, "I beg your pardon, sir, but have you read the case in point on this matter in the latest advance sheets?"

The young lawyer looked rather startled and said, "Your honor, I've read and reread on this case for the past five weeks and only got down to 98 Illinois a few days ago."

The judge replied, "Then, young man, you started at the wrong end."

In many ways a review of the history and decisions of the construction of wills in Illinois has shown to the writer that a beginning with the end<sup>1</sup> would have some merit.<sup>1</sup> The remedies to be pointed out later in this article could be a proper beginning. Like the latest "who-done-it" a start could be had from the corpse, with a flash back to the beginning, and a gradually unravelling of the mysteries of the succession of property in Illinois. The most complicated "who-done-it" can have nothing on some phases of the history of the construction of wills and many a deceased probably rests easier in not knowing what his offspring will have to do to secure his inheritance if his forbearer slipped a notch on the execution of his will or put too many "wherefors" instead of not enough "so thats."

The writer has no desire to be facetious—no more than is necessary to liven up an issue which due to its early origin has become moss covered with both decision and dicta. There is no more fascinating story of human nature than the long history of the law of wills, nor any more perfect example of the tenaciousness with which men and courts have guarded the succession of property. And even the eagerness with which twentieth century embryo lawyers approach the

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The author acknowledges the able assistance of Forrest B. Gore, Esq., of the Champaign County Bar.

<sup>1</sup>Cite Cornell Law Quarterly, Vol. 32, Page 378.

problem of inheritance is one of the marvels of law. In such a law practice do all of them see the fortune and stability of the successful counsellor and attorney. Few of them realize the catacombs of doubt into which they are being thrown by the intricate decisions handed down by courts jealous of their prerogatives in the handling of inheritances. With such a thought in mind and knowing the suspicion which would be thrown upon a lawyer suggesting a decision before briefing the law, we reverse our field and lay before the reader a chronological story of the background of the construction of wills in Illinois. In the end perhaps the reader may agree that the remedies later set out are plausible as well as acceptable under a judicial system such as is found in Illinois.

### INTRODUCTION

The history of wills and testaments is as old as the law of inheritable property. Wills were known to the English law previous to the Norman Conquest. The introduction of military tenures limited the power of disposition so that no estate in lands greater than for a term of years could be devised. But the ecclesiastical courts invented uses which were devised freely, and chancery compelled their execution. Thus litigation in reference to wills early became the subject of equity jurisdiction. When the Statute of Uses annexed the possession to the use and executed it, the uses became no longer devisable and the statute of 32 Henry VIII gave a limited power of disposition of real property by will,<sup>1a</sup> a striking incident in the struggle to secure the alienability of real property. Long before a limited power of disposition over personalty had been secured by *magna charta*.<sup>2</sup> Notwithstanding the great antiquity of wills and testaments, strangely enough they are entirely the creatures of statutory enactment.<sup>3</sup>

### CONSTRUCTION AND INTERPRETATION

The development of the law of wills and testaments has been largely marked out by litigation involving the construction of the will. No branch of the law presents greater difficulty in fixing definite rules to lead to correct conclusions.<sup>4</sup> Long ago Lord Coke declared,

"wills and the construction of them do more perplex a man than any other learning and to make a certain construction of them exceed the art of jurisprudence."<sup>5</sup>

Limited jurisdiction is conferred by statute to construe wills affecting realty in a direct proceeding where equitable rights are involved,<sup>6</sup> but the power should

<sup>1a</sup>2 Blackstone Com. 372, 373.

<sup>2</sup>4 Blackstone Com. 422.

<sup>3</sup>2 Blackstone Com. 13; *Storrs vs. Hospital* (1900) 180 Ill. 368; There the term "will" as used in sec. 10 of chap. 39 (1939) of our statutes had the usual legal significance of that term, and meant, not written paper but the intention of will of the testator as expressed in the instrument. *Peet vs. Peet* (1907) 229 Ill. 346; 1 Redfield on Wills 3rd Ed. Chap. 2 Sec. 1.

<sup>4</sup>*Jones and Cunningham Practice* 4th Ed. Sec. 1234.

<sup>5</sup>*Roberts vs. Roberts* 2 Bulst 130.

<sup>6</sup>*Smith-Hurd Rev. Stat.* (1923) Chap. 22 Sec. 5.

not be exercised where nothing but legal titles are involved<sup>7</sup> or where the will is neither ambiguous nor uncertain and there is no equitable estate to be protected or equitable right to be enforced.<sup>8</sup>

The difficulties in the problem are largely due to the fact that the construction of a will arises *indirectly*, as in a bill for partition,<sup>9</sup> creditors bill,<sup>10</sup> bill for direction in the execution of a trust,<sup>11</sup> report of trustees,<sup>12</sup> bill to quiet title,<sup>13</sup> final report of executor,<sup>14</sup> suit to compel specific performance of the sale of realty,<sup>15</sup> or similar situations affecting the enjoyment or disposition of the property devised. Apart from the construction of wills within the peculiar province of equity, because of the subject matter involved or historical reasons, a court of law has as much jurisdiction as equity. Save only the limited jurisdiction arising from definite statutory enactment the jurisdiction to construe a will arises only when necessary to sustain a cause of action or defense.<sup>16</sup> Construction then in the law of wills involves the ascertaining and determining the testator's intention as expressed in the will and its application to existing facts and circumstances with which such intention deals.<sup>17</sup> Cases involving the construction of wills are thus found in every compartment of the law of property with the result, as one writer remarks,

"the necessary liberality of the law in construing wills has opened the flood gates of legal chaos."<sup>18</sup>

The problem of construction is not peculiar to the modern practice. Blackstone treats it at length.<sup>19</sup> Lord Kenyon discusses the difficulty and mentions the case of Sir J. Bland, who added at the close of his will that he had disposed of his estate in so clear a manner that it was impossible for any lawyer to doubt about it, yet when a contest of this will later came before Lord Hardwicke, he remarked that he was utterly at a loss to conjecture the intention of the testator and "wished he could find some ground on which to found a conjecture."<sup>20</sup>

<sup>7</sup>Miller vs. Rowan (1911) 256 Ill. 296.

<sup>8</sup>Carlberg vs. State Savings Bank (1924) 312 Ill. 181; Buckner vs. Carr (1922) 302 Ill. 378.

<sup>9</sup>Downing vs. Grigsby (1912) 251 Ill. 568; Cassem vs. Prindle (1913) 258 Ill. 11.

<sup>10</sup>Linn vs. Dowling (1905) 216 Ill. 40.

<sup>11</sup>Northern Trust Co. vs. Wheaton (1911) 249 Ill. 606; Hitchcock vs. Board of Home Missions (1913) 259 Ill. 288.

<sup>12</sup>Jordan vs. Jordan (1916) 274 Ill. 251.

<sup>13</sup>If by claimant in possession of improved property or out of possession of unimproved or unoccupied property. Chapman vs. Cheney ( ) 191 Ill. 574; Parson vs. Miller ( ) 189 Ill. 107; but see Mansfield vs. Mansfield ( ) 203 Ill. 92; Remainderman may file bill while life tenant is in possession. 32 Cyc. 1337 (1906); Ewing vs. Barnes ( ) 156 Ill. 61; Strawbridge vs. Strawbridge ( ) 220 Ill. 61.

<sup>14</sup>Teator vs. Salander (1922) 305 Ill. 17; Hudnall vs. Ham (1898) 172 Ill. 76.

<sup>15</sup>Ashby vs. McKinlock (1915) 271 Ill. 254.

<sup>16</sup>Equity Jurisdiction to Construe Wills 6 Ill. Law Rev. 486.

<sup>17</sup>Page Wills Sec. 457; Phayer vs. Kennedy (1897) 169 Ill. 360.

<sup>18</sup>Horner Estates Sec. 100, quoting O'Hara on Construction of Wills 27.

<sup>19</sup>2 Blackstone Com. 378, 490.

<sup>20</sup>Small vs. Allen 8 T.R. 497.

The approach of the problem by English courts is best characterized by the words of Blackstone,

"the construction must be favorable, and as near the minds and apparent intents of the parties *as the rules of law will permit*."<sup>21</sup>

This policy has developed a system of construction which is predicated on giving effect to technical words and rules of law and has evolved rules which down to the present time are rather faithfully followed and render the problem a bit simpler. Redfield cites some twenty-four that are followed when possible, as helps toward reaching the intent of the testator.<sup>22</sup> Other branches of English law have felt this influence so far as the construction of the will is concerned, especially the law of evidence in such cases.<sup>23</sup>

American courts for the most part, and particularly in Illinois regard the intention of the testator as the "pole star" by which the courts must be guided and directed.<sup>24</sup> Where an intention of the testator is apparent from inspection of the entire will, and the consideration of relevant facts and circumstances all rules must yield if the intent does not offend against public policy or some positive rule of law.<sup>25</sup> The court cannot guess the intention which the testator would have expressed had he been definite,<sup>26</sup> but will consider all the circumstances surrounding the testator to give effect to the intent expressed.<sup>27</sup> Vesting of estates is favored and in doubtful cases the first taker will be given a fee simple.<sup>28</sup> The law favors the heir and will give that construction which makes the distribution conform as nearly as possible to the general rules of inheritance.<sup>29</sup> All words and parts of the will is to be given effect if possible.<sup>31</sup> Greater latitude is allowed in the construction of a will than a deed.<sup>32</sup> There is ever present a strong presumption that the testator intends to dispose of his entire estate and not to die intestate as to any portion of his property.<sup>33</sup> Such are the important rules of *policy* considered by the Illinois courts. It is doubt-

<sup>21</sup>2 Blackstone Com. 279.

<sup>22</sup>Redfield Wills 4th Ed. Vol. Page 425 et seq.

<sup>23</sup>See Wigam's famous seven propositions giving rules concerning admission of extrinsic evidence in aid of interpretation of wills. Woerner Administration 3rd Ed. Sec. 421.

<sup>24</sup>Engelthaler vs. Engelthaler (1902) 196 Ill. 230; Williams vs. Williams (1901) 189 Ill. 500; Gee vs. Gee (1903) 107 Ill. App. 317.

<sup>25</sup>O'Hara vs. Johnson (1916) 273 Ill. 458; DesBoeuf vs. DesBoeuf (1916) 274 Ill. 594; Gravy vs. Shinn (1920) 293 Ill. 573; Himmel vs. Himmel (1920) 294 Ill. 557.

<sup>26</sup>Schmidt vs. Schmidt (1920) 296 Ill. 570.

<sup>27</sup>Bradford vs. Andrew (1923) 308 Ill. 458; Boyle vs. Moore (1921) 299 Ill. 571; Abraham vs. Sanders (1916) 274 Ill. 453.

<sup>28</sup>Romer vs. Romer (1921) 300 Ill. 355; Meins vs. Meins (1919) 288 Ill. 463; Wilce vs. Van Aden (1911) 248 Ill. 358.

<sup>29</sup>Smith vs. Garber (1918) 286 Ill. 67.

<sup>30</sup>Smith vs. Dellitt (1911) 249 Ill. 113; Spatz vs. Paulos (1918) 285 Ill. 82; Degrees vs. Brydon (1916) 275 Ill. 530.

<sup>31</sup>Heisen vs. Ellis (1910) 247 Ill. 418.

<sup>32</sup>Tucker vs. Tucker (1923) 308 Ill. 371; Fairview lodge vs. Gaddis (1921) 296 Ill. 570.

<sup>33</sup>Watts vs. Killam (1921) 300 Ill. 242; Walker vs. Walker (1918) 283 Ill. 11.

ful if there is but one *rule of construction*, viz., to give effect to the intent of the testator. Judicial construction is the process of applying natural methods in finding and weighing evidence to discover the fact of intention.<sup>34</sup>

No branch of our law gives so little heed to precedents. Due to the fact that the provisions of will are as varied as the inclination of different testators and the further fact that the question of construction usually arises indirectly in cases involving all branches of property law, the decision can only apply to the facts and circumstances of the particular case. Precedents therefore have but little weight.<sup>35</sup> It must necessarily follow that the problem of construction must be worked out from a consideration of general principles. The execution, publication, probate, and interpretation of the will must all be considered in the light of the rules of policy to determine the effect of a specific devise of property in Illinois.

### EARLY PROBATE COURTS

The probate of the will gives it validity. In the early law there was nothing corresponding to probate of a will devising real property. When the testator died leaving a valid will it immediately went into force without formality and whenever a freehold was claimed the original will must be produced. It was the evidence to sustain the right claimed when the question was raised in a collateral proceeding.<sup>36</sup> Thus the validity of the will might be attacked any number of times and the will might have numerous constructions in different actions in different courts. So great was the jealousy of the common law with regard to ecclesiastical jurisdiction that neither an exemplification under the great seal nor the probate under the seal of the ecclesiastical court could be admitted as secondary evidence.<sup>37</sup>

At ecclesiastical law testaments bequeathing personalty were required to be probated after the death of the testator as prerequisite to their taking effect.<sup>38</sup> No testamentary disposition affecting personalty could be established or disputed in any but the ecclesiastical or manorial court.<sup>39</sup> They were not courts of record and their decrees were not conclusive as those of the common law courts.<sup>40</sup> Due to the fact that the tenure of the feudatory was no property in the true sense of the difference in the manner of treating the devise of realty and the bequest of personalty was to be expected,<sup>41</sup> and must be kept in mind if we are to understand artificial distinctions which appear in the administration of estates even

<sup>34</sup>Peet vs. Peet (1907) 229 Ill. 346.

<sup>35</sup>Black vs. Jones (1914) 264 Ill. 458; O'Hara vs. Johnson (1916) 273 Ill. 458; Ward vs. Cav-  
erly (1817) 276 Ill. 416.

<sup>36</sup>Page Wills Sec. 312.

<sup>37</sup>Adam Ejectment 290 4th Ed., citing Ash vs. Calvert 2 Champ. 387.

<sup>38</sup>Page Wills Sec. 312.

<sup>39</sup>Woerner Administration 3rd Ed. Sec. 215.

<sup>40</sup>Ward vs. Vickers (1802) (N. C.) 2 Hayw. 164; 31 Y.L.J. 105, 106.

<sup>41</sup>Woerner Administration 3rd Ed. Sec. 13 et seq.

at the present time. The executor of an estate must be an officer of the court organized for the purpose of aiding and controlling administration.<sup>42</sup> The court having jurisdiction over the administration of the testator's estate must secure the disposition of the property as he would have done if living. The functions of such a tribunal, it is evident, have a *ministerial* element added. Due in part to this fact the development of these courts have shown a gradual but steady separation from the common law and chancery courts and have resulted at the present time in a practical recognition of probate jurisdiction as a separate and independent branch of the law achieving for itself a sphere *sui generis*, based upon and determined to a large extent by its own inherent principles.<sup>43</sup> In England the probate act of 1857 expressly abolished the distinction between wills and testaments and created a court of probate where the probate of both was required.<sup>44</sup>

### ILLINOIS COURTS

The statute of 32 Henry VIII and succeeding English statutes were never adopted in Illinois.<sup>45</sup> The Ordinance of 1787 for the government of the Northwest territory provided for making wills until the governor and judges adopted laws.<sup>46</sup> The Illinois legislature in 1829 enacted our first wills act. It provided for disposition of afteracquired property,<sup>47</sup> and applied both to real and personal property alike.<sup>48</sup> In 1872 a new act was passed<sup>49</sup> made necessary by the passage of the married woman's act of 1861. Probate of a will, under the territorial act of 1807, was required to be made by a solemn oath or affirmation of two or more credible witnesses, or by other legal proof before the clerk of the court of common pleas. Under the law of 1819 two witnesses were required to the will, who should declare on oath or affirmation, that they were present, and saw the testator sign the will, and in each others presence, and that the testator was of sound mind and judgment. By the act of 1821 a court of probate was established and vested with all the powers then possessed by the court of common pleas.<sup>50</sup> The constitution of 1848 established county courts and provided that their jurisdiction should extend to all probate matters<sup>51</sup> and the constitution of 1870<sup>52</sup> declared they should be courts of record and have original jurisdiction in all matters of probate, settlement of estates, appointment of guardians and the settlement of their accounts. This constitution also provided for the establishment

<sup>42</sup>Woerner Administration 3rd Ed. Sec. 10.

<sup>43</sup>Woerner 3rd Ed. Sec. 11.

<sup>44</sup>Statutes 20 & 21 Victoria C. 77.

<sup>45</sup>Horner Estates Sec. 39.

<sup>46</sup>Ordinances N. W. Territory 1787. Par. 2.

<sup>47</sup>Willis vs. Watson (1843) 4 Scam. 66, Peters vs. Spillman (1857) 18 Ill. 573.

<sup>48</sup>Rev. Stat. 1829, 191.

<sup>49</sup>Rev. Stat. 1874, 1101.

<sup>50</sup>Gerguson vs. Hunter (1845) 2 Gilman 657.

<sup>51</sup>Const. 1848 Art. 5. Sec. 1.

<sup>52</sup>Const. 1870 Art. 6 Sec. 1.

by the legislature of probate courts in certain counties, having original jurisdiction over probate matters and the settlement of the estates of deceased persons.<sup>53</sup> Their jurisdiction is not exclusive in all probate matters.<sup>54</sup> The statute more particularly describes the powers of these courts.<sup>55</sup>

### JURISDICTION OF THE PROBATE COURTS

The authority to establish probate courts was exercised by the passage of the act of 1877, under which the probate court of Cook County was first brought into existence. The act provided that the probate court should have original jurisdiction in all matters of probate, that the process, practice and pleading shall be the same as those now provided or which may hereafter be enacted concerning the administration of estates.<sup>56</sup> Prior to 1877 county courts were vested by law with jurisdiction in all matters pertaining to guardians and the settlement of the estate of deceased persons. The act of 1877<sup>57</sup> establishing probate courts in certain counties transferred this jurisdiction to the probate courts, and all matters pending were transferred to such probate courts and they were given jurisdiction to complete all unfinished business in relation thereto, but the jurisdiction was retained by county courts in counties where the probate court was not established.<sup>58</sup>

### CONSTRUCTION OF THE COURT STATUTES

We consider now the jurisdiction of these courts as conferred by the various statutes in the light of the construction placed on them by our supreme court. It has been held that the legislature is without power to cut down the jurisdiction conferred by the constitution.<sup>59</sup> The constitution embraces every species of jurisdiction ordinarily exercised by courts of probate.<sup>60</sup> Probate courts are of limited jurisdiction but while acting within the scope of their authority it has been held as in the case of the county courts also, that they are not exercising an inferior jurisdiction,<sup>61</sup> but as to matters within their sphere they are courts of general jurisdiction.<sup>62</sup> Liberal intendments are given in construing the statutes when the jurisdiction of these courts is considered in matters of guardianship. "All probate

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<sup>53</sup>Const. 1170 Art. 6 Sec. 1.

<sup>54</sup>Sod vs. Moderwell (1882) 104 Ill. 64.

<sup>55</sup>Hurds Stat. Chap. 57 Par. 93.

<sup>56</sup>In the matter of Storey (1887) 120 Ill. 244.

<sup>57</sup>1 Starr & Curtis Stat. 718.

<sup>58</sup>The people vs. Seelye (1892) 140 Ill. 191.

<sup>59</sup>Klokke vs. Dodge (1882) 103 Ill. 137.

<sup>60</sup>Winch vs. Tobin (1883) 107 Ill. 212; Ure vs. Ure (1906) 223 Ill. 464; Beatty vs. Ogg (1905) 214 Ill. 34; Mo. Riv. Tel. Co. vs. Nat. Bank (1874) 74 Ill. 217.

<sup>61</sup>People vs. Seelye (1892) 140 Ill. 191.

<sup>62</sup>Ford vs. Ford (1905) 117 App. 502.



matters" as used in the statute and the constitution are to be used in the broadest and most general sense.

"The constitution does not undertake to define all the particular powers which the court may exercise. It marks out their general jurisdiction, and if in the bestowal by the legislature of any special power, there be not palpable incongruity with the constitution, the legislative will may be deferred to. We need not scan words with critical nicety, to see whether in strict precision of language the legislative definition of probate matters may have been accurate."<sup>63</sup>

Again, these words concerning administration matters,

"The legislature in a very marked manner has established a policy to facilitate the speedy settlement of estates and the prompt distribution of funds to creditors and distributees. This has been repeatedly recognized by this court. Moreover public policy demands that such construction to the law should be given, if practicable, and such rules of procedure established, as will most nearly effect a realization of the full value of the estate of the decedent. In this respect the legislative policy is again strikingly manifest in the many provisions of law giving the court supervision of sales, requiring publication and notice, permitting sales on credit, requiring valuation, and like provisions."<sup>64</sup>

In another case the supreme court said,

"the county court although of limited jurisdiction, is not strictly speaking of inferior jurisdiction. It is a court of record and has a general jurisdiction of unlimited extent over a particular class of subjects; and when acting within that sphere is as general as that of the circuit court. When therefore it is adjudicating upon the administration of estates over which it has general jurisdiction, as liberal intendments will be granted in its favor as will be extended to the circuit courts; and it is not necessary that all the facts and circumstances which justify its action should appear affirmatively on the face of the proceedings."<sup>65</sup>

In commenting upon this language in a later case it was said,

"it has been frequently approved and so far as we now recall in the decisions of this court never questioned. Upon the faith of its correctness property rights have been acquired which it would be justly unjust to disturb."<sup>66</sup>

<sup>63</sup>Winch vs. Tobin (1883) 107 Ill. 212.

<sup>64</sup>Wheeler vs. Wheeler (1890) 134 Ill. 522.

<sup>65</sup>Propst vs. Meadow (1851) 13 Ill. 169; Callon vs. Jacksonville (1893) 147 Ill. 113. Horner Estates Sec. 73.

<sup>66</sup>Bostwick vs. Skinner (1875) 80 Ill. 148; Pike vs. Chicago (1895) 155 Ill. 660; Housh vs. People (1872) 66 Ill. 178; Moffitt vs. Moffitt (1873) 69 Ill. 243; Von Ketler vs. Johnson (1870) 57 Ill. 169; Fecht vs. Freeman (1912) 251 Ill. 97; Saloman vs. Wincox (104 Ill. App. 277.)

When however the legislature sought to confer on the probate court jurisdiction over *testamentary trusts* the liberal intendments were disregarded and notwithstanding the incongruity of recognizing in Illinois the distinction between real and personal property resulting in English law because of the feudatory, the court held the act unconstitutional though suggesting it would be otherwise as to the county courts but for the fact that the legislature could not be presumed to have intended to confer such jurisdiction on the county courts alone.<sup>67</sup> The common law distinction between the courts of probate and the courts of construction is maintained throughout the decisions in Illinois and all liberal intendments vanish whenever it is sought to construe a will in a direct proceeding in a probate or county court. These courts can sell real estate to pay debts but not to pay legacies even though made a charge on the property by express terms of the will.<sup>68</sup>

### SPECIAL MATTERS

In view of the fact that provisions of wills are for the most part construed in indirect proceedings it is helpful to consider specific cases. The equity of redemption of a deceased mortgagor or grantor may be sold by the probate court to pay his debts.<sup>69</sup> The county court fixes the inheritance tax on a testate estate including contingent interests. It seems however that the judge is performing a ministerial duty rather than a judicial one and the determination is not an adjudication of the rights under the will.<sup>70</sup> The court will require an accounting of a surviving partner and preserve the property until such an accounting is had.<sup>71</sup> The widows award will be set off and provision made for its payment,<sup>72</sup> matters concerning dower will be settled,<sup>73</sup> the table of heirship determined.<sup>74</sup> The probate court may compel discovery of assets belonging to the estate of the deceased<sup>75</sup> or compel the executor to inventory<sup>76</sup> and account and distribute,<sup>77</sup> but it seems the court of probate has no power to render a judgment in favor of heirs and devisees against the executor for failure to pay over the distributive portion of their estate.<sup>78</sup> The court will determine whether gifts or grants were

<sup>67</sup>Frackelton vs. Masters (1911) 249 Ill. 30; People vs. Jobush (1911) 165 App. 540; In re estate of Mortenson (1911) 248 Ill. 520.

<sup>68</sup>2 Ill. Law Bulletin 120.

<sup>69</sup>Kenley vs. Bryan (1884) 110 Ill. 652.

<sup>70</sup>Woerner Administration 3rd Ed. 329a; Volunteers of America vs. Pierce (1915) 267 Ill. 406.

<sup>71</sup>Smith Hurd Rev. Stat. Chap. 3 Sec. 87-90; Mettles vs. Warner (1911) 249 Ill. 321; Andrews vs. Stinson (1912) 254 Ill. 111.

<sup>72</sup>Lynch vs. Hickey (1883) 13 Ill. App. 139.

<sup>73</sup>Davenport vs. Farror (1834) 1 Scam. 314; Bennett vs. Bennett (1918) 282 Ill. 266.

<sup>74</sup>Sebree vs. Sebree (1920) 293 Ill. 228; Ford vs. Ford (1905) 117A. 503.

<sup>75</sup>Martin vs. Martin (1897) 170 Ill. 18; Dinsmoor vs. Bressler (1896) 164 Ill. 212; Hicks vs. Monaham (1918) 209 Ill. App. 516; Wade vs. Prichard (1873) 69 Ill. 280.

<sup>76</sup>Coffey vs. Coffey (1899) 179 Ill. 283; Heinreich vs. Harrigan (1919) 288 Ill. 170; Gulzow vs. Filwock (1917) 205 App. 366; Brown vs. Kamrerer (1916) 276 Ill. 69; Williams Executors 480.

<sup>77</sup>Woerner Administration 3rd Ed. Sec. 502, 536, 274, 561.

<sup>78</sup>Piggott vs. Ramey (1834) 1 Scam. 145. 356.

advancements,<sup>79</sup> whether the executor has done his duty and if not will discharge him.<sup>80</sup> Courts of probate have exclusive jurisdiction over personalty though practically none over the realty.<sup>81</sup> It determines the title of legatees.<sup>82</sup> Where real estate is converted into personalty under the doctrine of equitable conversion the probate court will treat it as personalty.<sup>83</sup> Questions arising in the course of administration are determined to the practical exclusion of courts of equity.<sup>84</sup> The courts of probate will hear and determine proceedings by guardians for the sale of real estate of their wards, will determine what writing or writings constitutes the will,<sup>85</sup> whether it was properly executed,<sup>87</sup> what degree of mental capacity is necessary and whether the testator possessed such capacity,<sup>88</sup> whether spoiliations have been fraudulently or innocently made in a will,<sup>89</sup> whether a lost or destroyed will will be valid and what its terms were.<sup>90</sup>

### SALE OF REAL ESTATE TO PAY DEBTS

In Illinois realty is treated the same as personalty in the law of descent in determining who the heirs are to be<sup>91</sup> but the real estate of which a person dies seised descends directly to the heirs or devisees.<sup>92</sup> Section 101 of the Administration Act, passed in 1887,<sup>93</sup> confers jurisdiction on the probate court to do whatever is necessary to effectuate the sale of real estate to pay debts. Previously it could only act on the title or claim to the estate as it found it and could only sell whatever title or claim which the deceased had.<sup>94</sup> Since the statute the court may remove clouds and determine and dispose of adverse claims<sup>95</sup> so as to give the purchaser a clear title. The full extent of the jurisdiction thus conferred is hard to determine. Courts of equity had theretofore authorized the mortgage of real estate to raise money to pay debts of deceased persons, but it would seem that where the jurisdiction over the estates of deceased persons is confided to the probate courts with power to determine questions of title and to make a sale thereof the power of courts of equity would thereby be excluded,<sup>96</sup> unless some other matter of unusual nature brought the

<sup>79</sup> *Marshal vs. Coleman* (1900) 187 Ill. 556.

<sup>80</sup> *Heustis vs. Johnson* (1876) 84 Ill. 61.

<sup>81</sup> *Ferguson vs. Hunter* (1845) 2 Gilman 657.

<sup>82</sup> *Durham vs. Field* (1888) 30 Ill. App. 122.

<sup>83</sup> *Greenwood vs. Greenwood* (1899) 178 Ill. 387.

<sup>84</sup> *Goodman vs. Kopperl* (1897) 169 Ill. 136.

<sup>85</sup> *Schouler Executors Sec. 85; Lasier vs. Wright* (1922) 304 Ill. 131.

<sup>87</sup> *Coleman vs. Marshall* (1914) 263 Ill. 330.

<sup>88</sup> *Baddeley vs. Watkins* (1920) 293 Ill. 294.

<sup>89</sup> *Mather vs. Minard* (1913) 260 Ill. 175.

<sup>90</sup> *Mather vs. Minard supra.*

<sup>91</sup> *Smith Hurd Rev. Stat. Chap. 39-1.*

<sup>92</sup> *Emmerson vs. Merrit* (1911) 249 Ill. 538.

<sup>93</sup> *Smith Hurd Rev. Stat. Chap. 3-101.*

<sup>94</sup> *Harding vs. LeMoyné* (1885) 114 Ill. 65.

<sup>95</sup> *Hoyt vs. Northrup* (1912) 256 Ill. 604; *Schuttler vs. Quinlan* (1914) 263 Ill. 637; *Verdun vs. Barr* (1912) 253 Ill. 120.

<sup>96</sup> *Woerner Administration 3rd. Ed. Sec. 345.*

entire administration into the court of equity. A recent case indicates that the jurisdiction thus conferred is somewhat limited to settling disputes as to title in proceedings to sell real estate and that general chancery jurisdiction so as to settle all questions that might arise in a chancery court was not conferred by the act.<sup>97</sup>

### JURISDICTION OF EQUITY

The several circuit courts in this state have the same jurisdiction in chancery which the court of chancery in England has except where its jurisdiction is limited by express statute, or by necessary implication, as where some other court is vested with exclusive jurisdiction over the particular matter. The same practice prevails as in the English courts except where changed by statute.<sup>98</sup>

The statute provides that after the probate of the will any person interested may within nine months file a petition to contest the will<sup>99</sup>. There must first be an order admitting the will to probate<sup>100</sup> and while the jurisdiction is statutory the court may exercise the jurisdiction conferred by the statute.<sup>101</sup> The statute does not deprive the chancery court of any equitable powers it had before.<sup>102</sup> The grounds upon which the will may be contested are not restricted and any ground which will invalidate the will if established may be the basis of a contest.<sup>103</sup> Provision is also made to appeal to the circuit court if probate is denied and the question of admitting the will to probate is there tried *de novo*.<sup>104</sup> Here the proponent may introduce any evidence competent to establish the will in chancery,<sup>105</sup> the proceedings however are of the same character as in the probate court.<sup>106</sup>

An amendment to the chancery act in 1911<sup>107</sup> provided that such courts may hear and determine bills to construe wills notwithstanding no trusts or question of trusts are involved therein. Previous to this time it was not proper to exercise the power (though equity had always had such power) where no trusts were involved.<sup>108</sup> If purely legal titles were involved equity would not assume jurisdiction.<sup>109</sup> The amendment has been held to require some ambiguity or

<sup>97</sup>Hannah vs. Mainshausen (1921) 299 Ill. 525.

<sup>98</sup>Mahar vs. O'Hara (1847) Gilman 426.

<sup>99</sup>Smith Hurd Rev. Stat. Chap. 148-7.

<sup>100</sup>Dowling vs. Gilliland (1916) 275 Ill. 76.

<sup>101</sup>Stevens vs. Colison (1911) 249 Ill. 225.

<sup>102</sup>Anderson vs. Anderson (1920) 293 Ill. 565.

<sup>103</sup>Dowling vs. Gilliland *supra*.

<sup>104</sup>Smith Hurd Rev. Stat. Chap. 148-13.

<sup>105</sup>Beck vs. Lash (1922) 303 Ill. 549; *In re will of Simon* (1914) 266 Ill. 304; *Norton vs. Goodwine* (1924) 310 Ill. 490.

<sup>106</sup>Sebree vs. Sebree (1920) 293 Ill. 228; *St. Mary's Home vs. Dodge* (1913) 257 Ill. 519; *Britton vs. Davis* (1916) 273 Ill. 31.

<sup>107</sup>Smith Hurd Rev. Stat. Chap. 22-50; See complete history of Illinois courts with reference to the contest of wills in *Dibble vs. Winter* (1910) 247 Ill. 243.

<sup>108</sup>*Wakefield vs. Wakefield* (1912) 256 Ill. 296; *Poll vs. Cash* (1908) 234 Ill. 53; *Strawn vs. Jacksonville Academy* (1909) 240 Ill. 111.

<sup>109</sup>4 Ill. Law Rev. 431; *Struber vs. Belsey* (1875) 79 Ill. 307.

uncertainty in the will itself and if it does not exist in fact, jurisdiction cannot be conferred by an averment in the bill that the will is ambiguous or uncertain.<sup>110</sup>

Chancery has always taken jurisdiction where any trust matter was involved.<sup>111</sup> A bill will not lie to construe a will with reference to matters solely within the jurisdiction of the probate court,<sup>112</sup> nor can a creditor of an estate maintain a bill unless his claim has been allowed in the probate court and some special reason exists why that court cannot afford complete relief.<sup>113</sup> Jurisdiction to determine homestead rights lies wholly with courts of equity.<sup>114</sup>

Wills are brought into equity and are given a definite construction in a great many cases where the equity jurisdiction over the subject matter has been established. There is perhaps but one exception to the power of equity courts to exercise their usual jurisdiction. Judge Story says fraud in obtaining probate of a will is the only exception to the concurrent jurisdiction of chancery powers, although he finds it not easy to discern the grounds upon which this exception stands in point of reason or principle, although it is clearly settled by authority.<sup>115</sup>

#### EQUITABLE JURISDICTION OF THE PROBATE COURTS

Much discussion is found in the cases concerning the equitable jurisdiction of the county and probate courts, a consideration of which discloses some apparent inconsistencies. On the one hand the court says,

"evidently the legislature has attempted to give general chancery powers",<sup>116</sup>

while in a later case,

"the chancery powers of the probate court are not extended beyond the narrowest limits consistent with the statute."

On careful examination however the cases are reconciled for the most part if we distinguish between the *extent* and the *nature* of the jurisdiction exercised by the probate courts. The extent or the sphere of the jurisdiction is fixed by the constitution and the statutes.<sup>118</sup> Whenever within the scope of jurisdiction confided

<sup>110</sup>McCarty vs. McCarty (1916) 275 Ill. 573.

<sup>111</sup>Frackelton vs. Masters (1911) 249 Ill. 3.

<sup>112</sup>Kolb vs. Landes (1917) 277 Ill. 440; Lorenz vs. Miller (1915) 267 Ill. 230.

<sup>113</sup>Goodman vs. Kipperl (1897) 169 Ill. 136.

<sup>114</sup>Utes vs. Utes (1913) 260 Ill. 362.

<sup>115</sup>Story Equity Jur. Sec. 440; Luther vs. Luther (1887) 122 Ill. 558; But see Phippips vs. Benfield (1911) 249 Ill. 139, dictum,

"We are not prepared to say that a case might not arise upon proper averment and proof, which would authorize a court of chancery to enter a decree enjoining a defendant from causing a will to be probated when its jurisdiction to enter such decree was not challenged."

<sup>116</sup>Clayton vs. Clayton (1911) 250 Ill. 433; See note 4 Ill. Law Quarterly 140.

<sup>118</sup>Andrews vs. Stinson (1912) 254 Ill. 111.

to probate courts the relief to be administered involves the application of equitable principles their powers are commensurate with the necessity demanding their exercise whether legal or equitable in their nature.<sup>119</sup> All probate matters are equitable in their nature but the jurisdiction conferred by the wills acts is statutory.<sup>120</sup> In matters of administration these courts have general and unlimited jurisdiction and may exercise an equitable jurisdiction adapted to their organization and modes of procedure,<sup>121</sup> and they may adopt the forms of equitable proceedings.<sup>122</sup> The proceeding under the statute by the testator to sell lands to pay the debts of the testator is not a chancery proceeding but the court proceeds as chancery.<sup>123</sup> Equitable relief is granted in the settlement of the accounts of executors<sup>124</sup> in allowance of claims,<sup>125</sup> in compelling disclosure of assets,<sup>126</sup> and to enforce by summary process orders entered for the delivery to the administration of property wrongfully withheld.<sup>127</sup> In fact the court has and exercises equitable powers in all matters touching the administration of the estate.<sup>128</sup> When engaged in settling guardian's accounts the probate court is practically a court of equity.<sup>129</sup> Under its equitable powers the probate court may order that an insane surviving husband, for the best interest of his estate, shall elect to renounce a provision in his wife's will made in lieu of dower, and if the conservator of the insane person refuses so to elect the court may appoint a *guardian ad litem* to make the election.<sup>130</sup>

The county courts do not have equitable jurisdiction where third parties are to be brought in, and copartnerships, or other complicated and conflicting interests are to be adjusted<sup>131</sup> although they will supervise the settlement of the partnership estate by the surviving partner.<sup>132</sup> If a testator in his will appoints his executor to be a trustee it is as if different persons had been appointed to each office. A court of equity cannot remove him from the executorship but if the office of trustee is separate and independent from the office of executor, a court of equity may remove him as trustee and leave him to act as executor, or

<sup>119</sup>Chapman vs. American Surety Co., (1913) 261 Ill. 594; Woerner Administration 3rd Ed. Sec. 149.

<sup>120</sup>Smith Hurd Rev. Stat. Chap. 148-2; 21; Walker vs. Cook 294 Ill. 294.

<sup>121</sup>Gulzow vs. Fillwock (1917) 205 Ill. App. 366.

<sup>122</sup>Martin vs. Martin (1897) 170 Ill. 18; Sebree vs. Sebree (1920) 293 Ill. 228.

<sup>123</sup>Moline Water Bower and Manufacturing Co., vs. Webster (1861) 26 Ill. 234; Akin vs. Akin (1915) 268 Ill. 324.

<sup>124</sup>Wadsworth vs. Connell (1882) 104 Ill. 370.

<sup>125</sup>Dixon vs. Buell (1859) 21 Ill. 202; Schlink vs. Maxton (1894) 153 Ill. 447.

<sup>126</sup>Hicks vs. Monahan (1918) 209 Ill. App. 516; Kepple vs. Crabb (1909) 152 Ill. App. 149; Martin vs. Martin (1897) 170 Ill. 18.

<sup>127</sup>Hicks vs. Monahan, *Supra*.

<sup>128</sup>Esmond vs. Esmond (1910) 154 Ill. App., 11 and case cited.

<sup>129</sup>Bond vs. Lockwood (1864) — Ill. 212; Klokke vs. Dodge (1882) 103 Ill. 35; People vs. Seely (1922) 140 Ill. 191.

<sup>130</sup>Davis vs. Mather (1923) 309 Ill. 284.

<sup>131</sup>Pahlman vs. Graves (1861) 26 Ill. 406.

<sup>132</sup>Smith Hurd Rev. Stat. Chap. 3-85-89.

if he has completed his duties as executor and is holding the estate simply as trustee, a court of equity may remove him.<sup>133</sup>

It thus appears that probate and county courts possess no original chancery powers, yet within the scope of the jurisdiction conferred upon them, their powers are confined neither to legal nor to equitable rules, but are to be measured by the statutory grant alone.<sup>134</sup>

### OVERLAPPING JURISDICTION

We have seen that the statutes define the limits of probate jurisdiction. It must be remembered however that the separation of the probate jurisdiction from the common law and chancery courts and its recognition as a distinct and separate branch of the law has been a gradual development, which cannot be fully understood apart from its historical distinctions.

Courts of equity have always been loathe to surrender a jurisdiction once acquired. Pomeroy says it is admitted by the later as well as the earlier cases in Illinois that equity retains a general jurisdiction over administrations, concurrent with, but paramount to that possessed by the probate courts, and the only practical question is when will the jurisdiction be exercised.<sup>135</sup> The earlier decisions allowed its exercise somewhat more freely than is done by the later ones. They seem to have permitted a resort to equity in the first instance instead of to the probate court for the purpose of accounting and final settlement, without any special ground alleged, and also for the purpose of reexamining and correcting a settlement made by the probate court with which a party was dissatisfied. The more recent cases while fully admitting the existence of this jurisdiction have repeatedly declared the rule to be that courts of equity will not exercise jurisdiction over the administration of estates except in extraordinary cases. Some special reason must be shown why the administration should be taken from the probate court.<sup>136</sup> Gross mismanagement of an estate by the executor, both as to real and personal property, and a breach of trust as to the sale of the real estate are grounds for equitable interference at the instance of creditors whose rights have been prejudiced by the misconduct.<sup>137</sup> The county court in the exercise of its equitable jurisdiction may grant equitable relief in many cases and may adjudicate most of the questions arising during the administration. But it has often been held in this state that courts of equity have a paramount jurisdiction in cases of administration and settlement of estates. Courts of chancery may in the exercise of their general jurisdiction take upon themselves

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<sup>133</sup>Wylie vs. Bushnell (1917) 277 Ill. 484.

<sup>134</sup>McCall vs. Lee (1887) 120 Ill. 261.

<sup>135</sup>Pomeroy Eq. Jur. Vol. 3, Sec. 3.

<sup>136</sup>Goodman vs. Kopperl (1896) 67 Ill. App. 42; Shepard vs. Speer (1892) 140 Ill. 238; Strauss vs. Phillipps (1901) 189 Ill. 9.

<sup>137</sup>Elting vs. First National Bank (1898) 173 Ill. 368.

the administration, and thus in the case of a particular estate, supersede the jurisdiction of the probate court. Where they do this for any reason, they will take the whole of the administration into their hands.<sup>138</sup> But equity will never set aside the judgments of the probate court.<sup>139</sup>

Concurrent and cumulative remedies are not forbidden. A petition to set aside the order probating the will does not abate on filing a bill in chancery to set aside the probate. If the petition to set aside the probate fails then the case begun by the filing of the bill in chancery may proceed. The proceeding in the county court is to a large extent a proceeding *in rem* and has reference to the execution of the will which is a matter for the determination of the court. The proceeding in chancery tries an issue of fact and calls for the intervention of a jury and partakes of the nature of a proceeding *in personam*.<sup>140</sup>

### THE PROBATE OF THE WILL

A will takes its legal validity from its probate, that is, the certification by the court clothed with authority for such purpose, that it has been executed, attested, and published as required by law and that the testator was of sound and disposing mind. Without such proof it is not a will in the legal sense.<sup>141</sup> At common law without the *consent* of the probate court no other court can take notice of the rights of representation to personal property, and that wills devising real estate must be proved in the common law courts.

It is no part of the proceeding on probate to construe or interpret the will or any of its provisions, or to distinguish between valid and void, rational and impossible dispositions; if the will be properly executed and proven it must be admitted to probate although it contain not a single provision capable of execution, or valid under the law. Hence the probate does not establish the validity or effect of any of its provisions, this is to be determined by the courts of construction, when some question arises requiring their interposition.<sup>142</sup> The probate is a judicial act establishing the validity of the will and its proper execution,<sup>143</sup> the act of taking the proof and its execution was early held to be a ministerial and not a judicial act.<sup>144</sup> The proceeding is a trial or action at law.<sup>145</sup> The statute regulates the procedure.<sup>146</sup>

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<sup>138</sup>Elting vs. First National Bank, *supra*.

<sup>139</sup>Jones & Cunningham Practice 4th Ed. Sec. 9.

<sup>140</sup>Wright vs. Simpson (1902) 200 Ill. 63; Am. & Eng. Enc. of Law, 1st Ed. P. 549; McNulta vs. Lockridge (1891) 137 Ill. 270; Simon Probate Practice, Sec. 132.

<sup>141</sup>Woerner Administration 3rd Ed. Sec. 213.

<sup>142</sup>Woerner Administration 3rd Ed. Sec. 228.

<sup>143</sup>Simpson vs. Anderson (1922) 305 Ill. 172.

<sup>144</sup>Gerguson vs. Hunter (1845) 2 Gilman 657.

<sup>145</sup>Simpson vs. Simpson (1916) 273 Ill. 90.

<sup>146</sup>Smith Hurd Rev. Stat. Chap. 148-21.



There are two kinds of probate in the ecclesiastical law; probate "in the common form" and probate "in the solemn form" or *per testes*. Probate in the common form was an *ex parte* proceeding with notice to the next of kin, while probate in the solemn form was a proceeding upon citation to all persons interested, and upon full proof by witnesses for and against the will.<sup>147</sup> Since the Act of 1897 a proceeding to probate a will in Illinois is *inter partes* and notice is required.<sup>148</sup> Previous to 1909 the proceeding to probate a will had been in the nature of a proceeding *in rem*<sup>149</sup> but the statute made the proceeding *inter partes* and the method of acquiring jurisdiction is that the parties shall be given notice.<sup>150</sup> It is not strictly an adversary proceeding however, as interested parties, although notified and appearing have no right to introduce evidence to defeat the will but must resort to a bill in chancery to do so, and there the proponents of the will, notwithstanding the probate, still have the burden of proving its execution and validity.<sup>151</sup>

### JUDGMENTS OF THE PROBATE COURT

The constitutional provision of giving full faith and credit to judicial proceedings in other states includes proceedings in probate courts, and requires that such be given the faith and credit which they have by law and usage in the courts of the state where the proceedings are held.<sup>152</sup> It is well settled that the probate of the will cannot be attacked in a collateral proceeding, as a bill for partition,<sup>153</sup> or a bill to construe a will,<sup>154</sup> and is *prima facie* valid until it is set aside.<sup>155</sup> The judgment allowing or disallowing the probate of any will is final and conclusive unless reversed on appeal, but where probate is denied because of the existence of a later will such judgment is not conclusive if the later will is set aside.<sup>156</sup> The judgment however does not become conclusive so as to bar a contest until the time given by statute for beginning such action has expired.<sup>157</sup> On the appeal to the circuit court to set aside the order of probate the question whether the order was properly entered on the showing made, or was based on evidence that was incompetent or insufficient, or whether based on any evidence whatever, is not a subject of inquiry.<sup>158</sup> The trial is *de novo* and the sole ques-

<sup>147</sup>Page Wills Sec. 312.

<sup>148</sup>Walker vs. Cook (1920) 294 Ill. 294.

<sup>149</sup>In the matter of Storey (1887) 120 Ill. 244.

<sup>150</sup>Mosser vs. Flake (1913) 258 Ill. 233.

<sup>151</sup>Pratt vs. Hawley (1921) 297 Ill. 244. Objection in the probate court to the probate or on appeal from the probate court, must be confined to the formal execution of the will and cannot include the issues of sanity and undue influence. The latter issues must be tried in chancery. Clausenius vs. Clausenius (1899) 179 Ill. 545.

<sup>152</sup>Pratt vs. Hawley (1921) 297 Ill. 244.

<sup>153</sup>Wetmore vs. Henry (1913) 259 Ill. 80.

<sup>154</sup>Slick vs. Brooks (1912) 253 Ill. 58.

<sup>155</sup>Smith vs. Smith (1897) 168 Ill. 488.

<sup>156</sup>Adams vs. First M. E. Church (1911) 251 Ill. 268.

<sup>157</sup>Smith Hurd Rev. Stat. Chap. 148-7; Dowling vs. Gilliland (1916) 275 Ill. 76.

<sup>158</sup>Hutchinson vs. Hutchinson (1911) 250 Ill. 170.

tion is, as before, whether the instrument offered is in fact the will of the testator,<sup>159</sup> and so a finding in a decree that a person died testate, even upon proper proof showing probate of the will, it not *res adjudicata* in a subsequent proceeding to contest the same,<sup>160</sup> but it will be presumed that the judge of the probate court performed his duty in all matters touching the probate.<sup>161</sup> A judgment denying probate without the proper appointment of a *guardian ad litem* to represent minor devisees is not void since the judge may waive the appointment if it appears unnecessary to protect the interests of the minor.<sup>162</sup> Where the court finds that the instrument offered for probate is the last will and testament and admits it to probate the finding effects a revocation of a former will previously probated, even though *there was no formal revocation of the first probate*.<sup>163</sup> This holding seems to limit the doctrine that the probate cannot be collaterally attacked in its application to proceedings in the same tribunal.

A court of chancery is competent to grant relief against judgments obtained in the county court by fraud (except fraud in probating a will as noted *supra*)<sup>164</sup> and this whether the judgment be voidable or void.<sup>165</sup> So a judgment rendered by a county court against an estate through the fraud and collusion of the executor and the party holding the alleged claim in the form of a void judgment of a foreign state, may be set aside in equity at the instance of third parties whose rights are prejudiced thereby.<sup>166</sup> An order of the probate court finding the heirship in an estate is, in an appeal to the circuit court from a *subsequent* order of the probate court in that estate, *prima facie* evidence of the facts found, but it may be contradicted in such appeal by evidence overcoming the presumption.<sup>167</sup> A non resident son was not estopped by a decree of the Illinois court finding his brother and sisters to be his heirs, from raising the question in another proceeding.<sup>168</sup>

Until an estate has been completely administered any previous order entered therein may be directly attacked in the same court when application is made for another order which involves a further step in the administration.<sup>169</sup> An order

<sup>159</sup>Smith Hurd Rev. Stat. Chap. 148-6, 7.

<sup>160</sup>Kelly vs. Kelly (1918) 285 Ill. 72.

<sup>161</sup>Kersy vs. Lovell (1921) 299 Ill. 611.

<sup>162</sup>Simpson vs. Simpson (1916) 273 Ill. 90.

<sup>163</sup>Speer vs. Josephans (1916) 274 Ill. 237; Woerner Administration 3rd Ed. Sec. 204. Balsewicz vs. R. R. Co., (1909) 240 Ill. 238; An order appointing a special administrator to collect without revoking the letters of a duly qualified and acting executor, is void, although under Sec. 72 of the Administration act, an administrator pro tem may be appointed to defend, without revoking letters, when the regular administrator or executor has filed a claim against the estate. Day vs. Bullen (1907) 226 Ill. 72.

<sup>164</sup>Propst vs. Meadows (1851) 13 Ill. 157.

<sup>165</sup>Nelson vs. Rockwell (1853) 14 Ill. 175.

<sup>166</sup>Elting vs. First National Bank (1898) 173 Ill. 368.

<sup>167</sup>Ford vs. Ford (1905) 117 Ill. App. 502.

<sup>168</sup>Mosier vs. Osborn (1918) 284 Ill. 141; See criticism of this case in 32 Harvard Law Rev. 79.

<sup>169</sup>Ford vs. Ford (1905) 117 Ill. App. 502.

approving an executor's report and declaring the estate closed has the effect only of closing the account up to the time the report is approved<sup>170</sup> and is void as to the unsettled portion of the estate<sup>171</sup> and does not work a discharge of the executor, nor settle the estate;<sup>172</sup> other assets may be realized and new liabilities incurred involving a continuance of duty and responsibility.<sup>173</sup> The approval of the report of the executor is a judicial act and when made and entered according to law is conclusive on all parties before the court,<sup>174</sup> but if the order be made without notice to those entitled thereto it is competent for the court to set it aside at a subsequent term.<sup>175</sup> Wherein a party is cited to reach property in his possession belonging to the estate<sup>176</sup> and denies the possession of the same, and after trial is discharged by the court, such discharge will be a bar to any recovery in another action in respect to the same property.<sup>177</sup> Irregular matters in the proceedings and sale of real estate to pay debts, as issuing the deed before the approval of the sale, which are cured by the order approving the sale, cannot be raised to defeat titles of innocent purchasers in possession.<sup>178</sup> The purchase by an executor at the sale of real estate belonging to his testator is fraudulent *per se* and creditors whose claims against the estate have been allowed may maintain a bill in equity to set the sale aside, notwithstanding its approval by the probate court.<sup>179</sup>

The law affords a large measure of protection to the executor or administrator while proceeding under the orders of the court. He is in the full sense an officer of the court which is organized and has jurisdiction for the special purpose of aiding and controlling him in the administration.<sup>180</sup> Even though the will and the proceedings thereunder be later set aside by due course of law and the letters revoked, the acts of the executor after probate are valid never the less.<sup>181</sup> So where the discovery and probate of a will revokes letters of administration the various acts done and performed under the first grant of letters are binding until set aside in a direct proceeding. The court having jurisdiction of the person and the subject matter, its act is not void in granting letters even

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<sup>170</sup>Starr vs. Willoughby (1909) 218 Ill. 485.

<sup>171</sup>Maguire vs. City of Mecomb (1920) 293 Ill. 441.

<sup>172</sup>Atherson vs. Huges (1911) 249 Ill. 317; Where a will directs an executor to sell land as soon as possible after the testator's decease and distribute the proceeds, an order of the court declaring the estate settled and discharging the executor, before he has sold the land does not revoke his power to make the sale. Starr vs. Willoughby (1905) 218 Ill. 485.

<sup>173</sup>Fraser vs. Fraser (1909) 149 App. 186.

<sup>174</sup>Frank vs. People (1893) 147 Ill. 206.

<sup>175</sup>Long vs. Thompson (1871) 60 Ill. 27.

<sup>176</sup>Smith Hurd Rev. Stat. Chap. 148-90.

<sup>177</sup>Wade vs. Pritchard (1873) 69 Ill. 280.

<sup>178</sup>Verdun vs. Barr (1912) 253 Ill. 120.

<sup>179</sup>Elting vs. First National Bank (1898) 173 Ill. 368.

<sup>180</sup>Woerner Administration 3rd Ed. Sec. 10.

<sup>181</sup>Smith vs. Smith (1897) 168 Ill. 488.

though it may have proceeded erroneously.<sup>182</sup> Letters granted on one supposed to be dead can be impeached collaterally by proof that the supposed decedent is in fact alive.<sup>183</sup>

While county and probate courts are of limited jurisdiction they have under the statutes in Illinois, the power within the limits of the jurisdiction conferred upon them to enforce certain of their decrees and orders by chancery practice.<sup>184</sup> Where a person refuses to comply with a proper order to disclose assets belonging to the estate the court may commit such person to jail<sup>185</sup> and if an executor fails or refuses to comply with an order requiring him to make payment the remedy is by attachment for contempt.<sup>186</sup>

### APPEALS

The right of appeal from decisions of the probate court rests solely on statutory provisions and unless these are complied with the right cannot be available.<sup>187</sup> Under the statute an appeal lies from any final order to the circuit courts where the matter shall be tried *de novo*.<sup>188</sup> Appeals in will cases lie from the final orders of the circuit courts to the supreme or appellate courts as in other matters.<sup>189</sup> An appeal lies to the circuit court from an order of the probate court setting aside a table of heirship,<sup>190</sup> for errors in ruling on evidence,<sup>191</sup> from dismissing without prejudice a petition to determine homestead rights (the probate court never having jurisdiction of this matter),<sup>192</sup> from allowing or refusing probate of a will.<sup>193</sup> In a proceeding to sell real estate to pay debts where the controversy relates to controverted titles, the appeal lies directly to the supreme court. Questions relating to a claim in any amount, or concerning the removal of an administrator or executor on appeal go to the circuit court. The same is true of all probate and administrative matters save only the sale of real estate and those go on direct appeal to the appellate or the supreme court "as in other civil cases in courts of record."<sup>194</sup>

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<sup>182</sup>Shephard vs. Rhodes (1871) 60 Ill. 301.

<sup>183</sup>Woerner Administration 3rd Ed. Sec. 211; Scott vs. McNeal (1893) 154 U. S. 34; Donovan vs. Major (1912) 253 Ill. 179.

<sup>184</sup>Hicks vs. Monahan (1918) 209 Ill. App. 516.

<sup>185</sup>Smith Hurd Rev. Stat. Chap. 3-81, 82.

<sup>186</sup>Piggot vs. Ramey (1834) 1 Scam. 145.

<sup>187</sup>Woerner Administration 3rd Ed. Sec. 543.

<sup>188</sup>Smith Hurd Rev. Stat. Chap. 126; Wood vs. Johnson (1883) 13 Ill. App. 548.

<sup>189</sup>Morris vs. Morris (1882) 112 Ill. 68.

<sup>190</sup>Sebree vs. Sebree (1920) 293 Ill. 228.

<sup>191</sup>Blair vs. Sennett (1890) 134 Ill. 78.

<sup>192</sup>Utes vs. Utes (1913) 260 Ill. 362.

<sup>193</sup>Quirk vs. Pierson (1919).

<sup>194</sup>Smith Hurd Rev. Stat. Chap. 3, Sec. 219 (1945).

## EXTRINSIC EVIDENCE IN WILLS CASES

Whenever the problem of construction arises whether directly or indirectly perplexing evidence questions arise. The Illinois cases present many conflicts in this field. It has been remarked that the Illinois court is obliged to give effect to every intention which the will if properly expounded, expresses. It follows that evidence which in its nature and effect is simply explanatory of *what the testator has written* may be admitted but none is admissible which in its nature and effect is applicable to the purpose merely of showing what he intended to have written. Illinois cases seem to have disregarded the distinction between a latent and patent ambiguity and admit the light of extrinsic circumstance in both. It is often said that a mistake in a will cannot be corrected. The cases establish that no new matter can be brought into the will by parole evidence, upon which the will is silent and this however apparent the intention of the testator may be. Judge Horner emphasizes the importance of distinguishing between the interpretation of the will and the reformation of the will. Mistakes are in fact corrected by the former. Courts constantly construe ambiguous instruments. If property has been misdescribed the court will strike out the erroneous description and if the will is then intelligible it will be interpreted by the court of construction. Extrinsic evidence is never admissible to supply a word omitted by the testator, or by the scrivener, or to show that the word or phrase was written into the will by mistake. No good reason appears why it should not be permissible to introduce the same evidence for the purpose of reforming a will to correct an obvious mistake as would be admitted in the case of an agreement in writing touching any other matter. Especially is this true when we remember the particular anxiety of the courts to determine and follow the intent of the testator. The lack of jurisdiction to reform mistakes in wills present more complexity and gives rise to greater confusion than any other single problem of construction.

## SUMMARY

The development of probate jurisdiction has been hindered by historical influences which should have no influence in Illinois today. Our probate and county courts have been given large jurisdiction in all probate matters except wills, but in respect to them judicial construction, has cut down the limits of the jurisdiction as marked out by the constitution and the statutes. The discussion in the cases concerning the jurisdiction of the county and probate courts can only be understood by relating much of it to the *nature* instead of the *extent* thereof. The appeal to the circuit court with its trial *de novo* contributes to the increase of litigation. The new trial on the question of probate of the will in the circuit court delays administration. The liberal powers given these courts in the matter of the sale of real estate to pay debts have been properly exer-

cised and have made this part of administration the most satisfactory. The present system does not give titles arising under a will the certainty the law seeks to secure for them in other fields. Questions of construction for the most part arise in indirect proceedings and frequently many years after the estate is settled. The probate and the distribution of the property at the close of a proper administration should carry with it a determination of the questions which at some later time will quite probably be litigated.

From a purely academic point of view our county and probate courts have no power to construe a will, but as a practical matter in many cases they do just this. Many final orders of these courts turn on the construction and interpretation of matters in the will, concerning powers of the executor, whether equitable conversion was intended, etc., and if not appealed from these become final orders. When the county court fixes the inheritance tax on a contingent interest it matters little to the devisee who is to pay the tax whether the court has performed a *ministerial* or a judicial duty. For this purpose at least the will has been given a construction. When an executor sells property under a power of sale in a will and makes a distribution and his final report is approved it matters little to the devisee that in order to avoid a construction of a devise of reality, equitable conversion is considered to have taken place and the devise was not a devise at all but a legacy. What he is interested to know and what the law ought to tell him is must he pay the tax and may he keep the money? When the will is admitted to probate the order vests a free hold estate in the devisees under the will. True it *may* be divested in a direct proceeding, or in any number of collateral proceedings, and at most any time thereafter, perhaps years hence but in a certain limited sense the title has been established by the mere fact of probate.

Our statute has changed the matter of probate from a proceeding *in rem* to one *in personam*. Notice must be given to all who may by any chance ever be interested in the will. The attorney who files the petition for probate must construe the will in every case. No good reason appears why the court should not, as a part of the administration determine all questions of construction so as to give the distributees the interest contemplated by the will, without the probability of further litigation. If a construction of the will is necessary to determine a matter relating to administration, the circuit court will not, and the probate court may not construe it. Present litigation provides no method for the construction of a will which is not uncertain or ambiguous on its face and involves only legal titles, but leaves the interest of the devisee to be questioned in some indirect proceeding that may arise years afterward.

## REMEDIES

In view of the fact that the whole matter of wills is of statutory origin, the remedy for the situation suggests itself. The right to contest a will is not a vested one, nor is the right to appeal from orders of the county and probate courts to the circuit court with a trial de novo. The legislature could abrogate all the provisions of the statute involving will contests.

1. The county court should be given unlimited jurisdiction in all probate matters as contemplated by the constitution.
2. The county court should be given concurrent jurisdiction with the circuit court over testamentary trusts.

These further remedies are suggested as aids to the problems of construction:

3. The county court should be given concurrent jurisdiction with the circuit court by a special enactment to correct mistakes in wills and given effect to the established intent of the testator.
4. Appeals from the county courts should be allowed on all final orders to the appellate or Supreme court and the provision for appeal and trial de novo in the circuit court should be repealed.
5. Wigam's seven propositions should be given legislative sanction and thus settle many evidence questions.

The Supreme Court has already implied that concurrent jurisdiction over testamentary trusts may be conferred on county courts. The Constitution of 1870 provided that the legislature *may* provide for probate courts. A statute was required to effect the provision. An interesting question is presented whether the legislature could repeal this act. All other remedies could be provided by statute.

Questions of construction could be raised on the pleadings in the county court and the final settlement of the estate would be an adjudication of the title the devisee held. The procedure would be simpler and certain, and litigation very much reduced.