Michigan Law Review

Volume 42 | Issue 6

1944

# THE ORGANIZATION OF THE PROBATE COURT IN AMERICA: I

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The writers are glad to acknowledge the assistance furnished by Miss Elizabeth Durfee, of the research staff of the University of Michigan Law School, in connection with the research incident to the preparation of this monograph.

THIS is a study of contemporary American legislation concerning probate courts, with particular reference to their jurisdiction over the probate of wills and the administration of estates of deceased persons.

By the term "probate courts" is meant all judicial tribunals which exercise such jurisdiction. As will subsequently appear, they are otherwise variously designated as surrogates' courts, orphans' courts, prerogative courts, courts of ordinary and county courts. In one state all the functions of probate and administration are exercised by courts of chancery. In other states, chancery has concurrent jurisdiction over many of these functions. Sometimes the register of probate exercises some of the functions of a probate court, while an orphans' or other court acts in other probate matters. Again, two separate courts may each exercise a part of the functions of a probate court. In one group of states, probate and administration is merely a separate function of the trial court of general jurisdiction or of its judge. But, regardless of its name, every tribunal which exercises jurisdiction over the probate of wills or the administration of decedents' estates, from its initiation to the time of final distribution, is within the scope of this study.

In view of the great influence of the English pattern in the formative period of American probate law, we shall begin with a brief survey of the English system of probating wills and administering the estates of deceased persons. This will be followed by a consideration of the types of American probate court organizations, the subject matter of their jurisdiction, and the personnel of these courts.

The subject of appellate procedure, as such, is not within the scope of this discussion, but will be considered only as it tends to indicate the character of original jurisdiction.

# I

## SOME SIGNIFICANT ASPECTS OF THE ENGLISH LAW OF DECEDENTS' ESTATES

### A. *Probate and Administration in England in the Eighteenth Century* [1]

It is not the purpose of this brief discussion of certain aspects of the English law of decedents' estates to give a complete account of the entire course of its development. Rather its object is merely to present enough of that development to explain the principal source from which American probate law was drawn. While doubtless there were borrowings at an earlier period,[2] the English probate law of the eighteenth century is so typical of that which existed for a century before that a consideration of its significant aspects will furnish us with an adequate picture of the well from which much of our probate legislation was drawn. Moreover, since there were few important changes in that law up to the legislation of 1857,[3] it is assumed that sources which describe the English probate system of the early half of the nineteenth century are equally pertinent to our study.

Matters pertaining to the administration of decedents' estates were dealt with in three kinds of tribunals, namely, the ecclesiastical courts, the common-law courts and chancery. Our study of English probate law will discuss the functions of these courts in that order.

#### 1. *Jurisdiction of the Ecclesiastical Courts*

The jurisdiction of the ecclesiastical courts has been classified under three general heads:[4] pecuniary causes, arising from "withholding

[1] In general on this period see the following: Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 (1943); REPPY AND TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION (1928); REPORT BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES (1832); LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION, 2d ed., 125-191 (1908); 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 625-630 (1922); MAITLAND, EQUITY, rev. ed., 248-276 (1936); WILLIAMS, EXECUTORS, 1st Am. ed., (1832); STORY, EQUITY JURISPRUDENCE, 1st ed. (1836); CONSET, THE PRACTICE OF THE SPIRITUAL OR ECCLESIASTICAL COURTS (1708); TOLLER, EXECUTORS AND ADMINISTRATORS, 2d Am. ed. (1824); BURN'S ECCLESIASTICAL LAW, 9th ed. by Phillimore (1842).

[2] See Atkinson, "The Development of the Massachusetts Probate System," 42 MICH. L. REV. 425 (1943).

[3] 20-21 Vict., c. 77 (1857).

[4] 3 BLACKST. COMM. *88, *89.

ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff"; matrimonial causes; and testamentary causes, including "the probate of wills, the granting of administrations, and the suing of legacies."[5] In matters relative to wills and administration, the jurisdiction of the ecclesiastical courts was limited to the disposition of personal property. As to the probate of wills and the granting of letters testamentary and letters of administration, their jurisdiction was exclusive.

It would not be helpful in this connection to set forth in detail a description of the bewildering varieties of ecclesiastical courts[6] having jurisdiction, original or appellate, such as the diocesan courts, the prerogative courts, the court of arches, the court of peculiars and the court of delegates. Suffice it to say that the original jurisdiction as to decedents' estates was, in general, exercised by consistory courts of the dioceses and the prerogative courts of Canterbury and York.[7] The judge of the consistory court was called the ordinary judge, or merely the ordinary.[8] The deputy of the judge of an ecclesiastical court was sometimes called the surrogate.[9]

The ecclesiastical courts were not courts of record.[10] Just precisely what is meant by a court of record is none too clear.[11] Probably at the present time its most important characteristic is its power to fine and imprison. But, as Professor Holdsworth says: "It is the infallibility of its formal record which is the earliest mark of a court of record."[12] Thus the decrees of an ecclesiastical court did not import the same infallibility as the judgment of the King's Bench. Moreover (and this may have had something to do with the conclusion that it was not a court of record) it did not proceed according to the common law.

[5] Id. *98.

[6] HOLDSWORTH, HISTORY OF ENGLISH LAW 598 (1922).

[7] 3 BLACKST. COMM. *97.

[8] 3 BURN'S ECCLESIASTICAL LAW, 9th ed. by Phillimore, 39 (1842).

[9] 3 BURN'S ECCLESIATICAL LAW, 9th ed. by Phillimore, 667 (1842); and see 3 STROUD'S JUDICIAL DICTIONARY, 2d ed., 1996 (1903) quoting from *Termes de la Ley* as follows: Surrogate "is he who is appointed in the stead of another, most commonly of a Bishop or his Chancellor."

[10] 1 BACON'S ABRIDGMENT, 5th ed., 558 (1786); 3 BLACKST. COMM. *67.

[11] 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 157 (1924); 3 BLACKST. COMM. *24; Stonex, "Courts of Record and Courts Not of Record," 31 CENTRAL L. J. 86 (1890).

[12] 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 158 (1924).

Rather, its procedures were evolved from the civil and canon law, as such strange terms as citation, libel or significavit might well indicate.[13]

When a person died testate, his executor could either have the will probated in common form (sometimes called noncontentious form) or in solemn form. If he chose to prove it in common form, the procedure was simple, indeed. No notice or process was issued to anyone. Strictly speaking, no actual evidence of the due execution of the will was required. The will was admitted to probate on the oath of the executor, which ordinarily amounted to nothing more than hearsay and opinion. According to Conset,[14] writing near the end of the seventeenth century, the oath was as follows:

> "You shall swear, that you believe this to be the last will and testament of the deceased, and that you will pay all the debts and legacies of the deceased, so far as the goods will extend, and law shall bind you; and that you will cause all the said goods to be apprized, and make a true and perfect inventory of the said goods, (at a day appointed by the judge, if none be then exhibited) and likewise a true and just account of the said goods, when you shall be thereto lawfully called. So help you God."

The will then at once being admitted to probate, letters testamentary were issued to the executor who proceeded to administer the personal estate of the testator.

At any time within thirty years the executor or some other interested party could have the will proved in solemn form. This was spoken of as the contentious procedure. Notice to interested parties was given by citation; [15] the attesting witnesses were called and testified as to the due execution of the will. The order admitting the will to probate was binding on all parties who appeared in the proceeding or who were cited.

Proceedings to administer the goods of a person who had died intestate were similar in form. They might be either with or without notice to interested parties. But Conset tells us that "if there is no widow or relict of the deceased (to whom the administration of the goods of the intestate ought to be of course) then the nearest of kindred, coming to obtain letters of administration, must first have a cita-

[13] In general as to procedure in an ecclesiastical court, see REPORT BY THE COMMISSIONERS TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES 14 (1832).

[14] CONSET, PRACTICE OF THE SPIRITUAL OR ECCLESIASTICAL COURTS, 3d ed., 12 (1708). The first edition was dated 1681.

[15] See note 13, supra.

tion against all and singular next of kindred of the deceased."[16] One method of requiring notice, which might be employed either in the case of a testate or of an intestate estate, was for an interested party to file a paper known as a caveat. This required notice to be given to the caveator before any further steps could be taken in the case. Thus the caveat might lead to the proof of the will in solemn form. It should also be noted that the caveat could be filed before any other proceedings had been taken with respect to the estate of the deceased.

After the issuance of letters, there might be little or nothing more in the way of judicial proceedings in the ecclesiastical court. It is true, a statute of the reign of Henry VIII[17] required the personal representative to render an inventory of the goods of the deceased. And the Statute of Distribution[18] required the administrator to give a bond to render an inventory and to account. But it appears that this was not always done.[19] Certainly there was no order of distribution such as is common in American probate courts today. The personal representative merely paid the debts and then distributed the residue to the legatees or next of kin.

It should be pointed out that, throughout its procedure, the ecclesiastical court conducted a case quite differently from a common-law court. Oral testimony was not heard at the trial but depositions were taken and were read by the judge previous to the hearing.[20] Orders of the court would ordinarily be enforced by excommunication only, or, if this be ineffective, chancery might be asked to issue an attachment so that the refractory party might be imprisoned until he obeyed the order of the court. Review of decisions of the ecclestiastical court was by appeal, not by writ of error, and the appellate court could re-examine questions of fact as well as of law and come to a decision de novo.[21]

One other feature of the procedure in the ecclesiastical courts with respect to decedents' estates should be noted. It appears that it was relatively easy to secure the revocation, in the ecclesiastical court of original jurisdiction, of an order admitting a will to probate or appoint-

[16] CONSET, PRACTICE OF THE SPIRITUAL OR ECCLESIASTICAL COURTS, 3d ed., 14 (1708).

[17] 21 Henry 8, c. 5, p. 167 (1529).

[18] 22-23 Car. 2, c. 10, p. 347 (1670).

[19] TOLLER, THE LAW OF EXECUTORS AND ADMINISTRATORS, 2d Am. ed., 249, 492 (1824); 2 WILLIAMS, EXECUTORS, 1st Am. ed., 1263-1265 (1832).

[20] REPORT BY THE COMMISSIONERS TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES 19 (1832).

[21] POUND, APPELLATE PROCEDURE IN CIVIL CASES 67-70 (1941).

ing an executor or administrator.[22] And even though the will had been proved in solemn form, this did not prevent a revocation of probate on a later hearing.[23]

### 2. *Jurisdiction of the Common-Law Courts*

As has already been indicated, the ecclesiastical court had no jurisdiction over devises of land. That was ordinarily a matter for the common-law courts.[24] This does not mean that wills of land were probated in the common-law court, for they were not. But, with respect to the land devised by it, a will was operative without any probate whatever. Title passed to the devisee immediately on the death of the testator, just as title passes to the grantee in a deed immediately upon its delivery. If a will disposed of both personalty and realty, the action of the ecclesiastical court, in admitting it to probate or in refusing to do so, did not determine whether the will was a valid devise of real estate. And, if a will disposed of real estate only, the ecclesiastical court had no jurisdiction to admit it to probate.[25] When an heir or devisee wished to test the validity of a devise of land, he brought some action to try title, such as ejectment or trespass. Even a judgment in such an action did not prevent further actions of ejectment or trespass in which the validity of the will might be adjudicated anew.

Contract actions which survived the death of the decedent could be brought in a court of common law, whether on behalf of or against the decedent.[26] The personal representative could sue and be sued in his representative capacity. Unless chancery interfered, a creditor of the decedent might recover judgment against the executor or administrator in a court of law which was enforceable only against the goods of the estate. Thus, the judgment would be "*de bonis testatoris.*"

In the case of a specific legacy,[27] such as a collection of silver plate or an oil painting, the executor must first "accept the legacy," that is perform some overt act indicating that the chattel was set aside for the legatee. Then title vested in the legatee and he could bring an appropriate action at law, such as replevin or trover, to assert his rights in it.

[22] 1 WILLIAMS, EXECUTORS, 1st Am. ed., 347, 359 (1832).

[23] 1 WILLIAMS, EXECUTORS, 1st Am. ed., 359 (1832).

[24] 2 PAGE, WILLS, 3d ed., § 563 (1941).

[25] In the Goods of John Bootle, L. R. 3 P. & D. 177 (1874).

[26] Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 at 118, 121 (1943); LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION, 2d ed., 166, 167 (1908).

[27] 2 WILLIAMS, EXECUTORS, 1st Am. ed., 843 ff. (1832).

If, however, the legacy was general[28]—that is a gift of a sum of money—there was apparently a difference of opinion as to whether an action of assumpsit at law was proper, but it was eventually determined that this could not be brought. The remedy was by action in the ecclesiastical court. And, if a legatee chose to file a bill to have the estate administered in chancery, he could secure a determination of his rights in that tribunal, regardless of the character of his legacy.[29]

Before concluding with the discussion of the function of the court of law something should be said about the use of the writ of prohibition. If a party to a proceeding in the ecclesiastical court thought that court had exceeded its jurisdiction, he might obtain a writ of prohibition in the common-law court.[30] Since it was conceded (to use the language of an early case) that the ecclesiastical courts "had but a lame jurisdiction,"[31] these writs must have been frequently issued. For example, the King's Bench had held that, after an inventory was exhibited, the ecclesiastical court could entertain no objections to it by a creditor.[32]

### 3. *Jurisdiction of Chancery*

While the writs of prohibition crippled the jurisdiction of the ecclesiastical courts, the common-law courts from which they issued had no machinery adapted to the administration of estates. The net result was that chancery, with its more flexible procedure, tended more and more to take over matters of administration. Though the will would be admitted to probate and the personal representative appointed by the ecclesiastical court, a creditor or distributee might file his bill to have the estate administered in chancery. This jurisdiction might be sought for the purpose of discovering assets, because a trust was involved, or, though no actual trust was involved, because the estate was regarded as a kind of trust fund and the personal representative as a kind of trustee.[33] But, for whatever reason jurisdiction was assumed, chancery

[28] Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 at 119 (1943).

[29] LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION, 2d ed., 154, 157 (1908).

[30] Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 at 117 (1943).

[31] Matthews v. Newby, 1 Vern. 133 at 134 (1682).

[32] See 2 WILLIAMS, EXECUTORS, 1st Am. ed., 644, 645 (1832) and cases cited therein.

[33] 1 STORY, EQUITY JURISPRUDENCE, 1st ed., §§ 530 et seq. (1836); LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION, 2d ed., Arts. VI and VII (1908); MAITLAND, EQUITY, rev. ed., 248-257 (1936).

ordinarily continued with the administration until it was complete. Notices to creditors were published; actions by creditors in common-law courts were enjoined; assets were brought in and distributed to creditors and legatees or next of kin.

And not only did chancery administer personalty of the decedent, but it might also take charge of some or all of his real estate. Thus, if a testator had devised his lands to his executor in trust for the payment of debts, or for the payment of debts and legacies, the court of equity would take charge of the land and administer it as directed by the testator.[34]

Chancery never assumed the jurisdiction to probate a will or to appoint an executor or administrator. But, as to all subsequent steps in the process of administration, it might take jurisdiction if an interested party filed a bill asking for it. The concurrent jurisdiction of the ecclesiastical courts continued, it is true; but the chancery procedure was regarded as so much more satisfactory that administration in equity became a common practice.

Moreover, the chancery court might find itself confronted with a question of the validity of a devise of land. The issue could arise merely incidentally in connection with some related matter. Or the parties might come into chancery solely for the purpose of establishing the will and having the heir enjoined from interfering with the enjoyment of the devisee. Story thus describes the procedure in these two situations:[35]

> "If the will is of real estate, and its validity is contested in the cause, the Court will, in like manner, direct its validity to be ascertained, either by directing an issue to be tried, or an action of ejectment to be brought at law; and will govern its own judgment by the final result. If the will is established in either case, a perpetual injunction may be decreed.
>
> "But, it is often the primary, though not the sole, object of a suit in Equity, brought by devisees and others in interest, to establish the validity of a will of real estate. . . . In such cases the jurisdiction, exercised by Courts of Equity, is somewhat analogous to that exercised in cases of Bills of Peace. . . . In every case of this sort, the Court will, unless the heir waives it, direct an issue of *devisavit vel non*, (as it is technically, though, according to Mr.

[34] Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 at 119 (1943).

[35] 2 STORY, EQUITY JURISPRUDENCE, 1st ed., 671 (1836).

> Woodeson, barbarously expressed,) to ascertain the validity of the will. . . . When, by this means upon a verdict the validity of the will is fully established, the Court will, by its decree, declare it to be well proved, and that it ought to be established, and will grant a perpetual injunction."

B. *Statutory Reform in English Probate Law and Administration*

In the first half of the nineteenth century there were various evidences of dissatisfaction with the existing system of probate as administered by the ecclesiastical courts. A commission appointed to inquire into the practice and jurisdiction of the ecclesiastical courts recommended a number of reforms in its report in 1832.[36] The Fourth Report of the Real Property Commissioners, filed in 1833, recommended the complete abolition of the jurisdiction of the ecclesiastical courts over testamentary matters.[37] In 1857 legislation was enacted which actually provided for this important change. A statute enacted in that year[38] established a court of probate presided over by a judge having "rank and precedence with the Puisne Judges of Her Majesty's Superior Courts of common law at Westminster." This court was designated as a court of record, and was vested with the voluntary and contentious jurisdiction in relation to the granting or revoking probate of wills and letters of administration. If a will disposed of both land and chattels, probate was made conclusive as to real estate just as it was with respect to chattels. It was provided, however, that the newly established court of probate should have no jurisdiction as to suits for legacies or for the distribution of residues. By the first Judicature Act,[39] enacted in 1873 and effective in 1875, most of the various courts were consolidated to form a single unified court known as the Supreme Court of Judicature. This was composed of two parts, the High Court of Justice and the Court of Appeal. The jurisdiction of the High Court of Justice included jurisdiction formerly exercised by the Probate Court and the High Court of Chancery, as well as the jurisdiction of other courts. For administrative convenience, the High Court was divided into the following divisions: the Chancery Division; the King's Bench Division; the Common Pleas Division; the Exchequer Division; the

[36] REPORT BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES (1832).

[37] FOURTH REPORT BY THE COMMISSIONERS TO INQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY 65 (1832).

[38] 20-21 Vict., c. 77, p. 423 (1857).

[39] 36-37 Vict., c. 66, p. 191 (1873).

Probate, Divorce and Admiralty Division. To the latter division was assigned the jurisdiction formerly belonging to the Probate Court.

The Land Transfer Act of 1897[40] provided that "Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate." It was further provided by the same enactment that the personal representative should hold title to and administer the real estate of the decedent.

The Supreme Court of Judicature Act of 1925, as amended,[41] provides for a High Court of Justice of three divisions, namely, the Chancery Division, consisting of the Lord Chancellor and six puisne judges; the King's Bench Division, consisting of the Lord Chief Justice and nineteen puisne judges; and the Probate, Divorce and Admiralty Division, consisting of a President and four puisne judges. A puisne judge of the High Court must be qualified by being a barrister of ten years standing. He receives a salary of £5000, except the Lord Chancellor, whose salary is £10,000 and the Lord Chief Justice, whose salary is £8,000. Judges of the Court of Appeal receive the same salaries as the Judges of the High Court.

Jurisdiction in the matter of decedents' estates is distributed among the three divisions of the High Court in much the same fashion as it was divided among the ecclesiastical courts, the court of chancery and the common-law courts, prior to the act of 1857. The Probate Division has exclusive jurisdiction of the probate of wills and the issuing of letters. Actions at law for or against the personal representative may be brought in the King's Bench Division. But administration may be had in chancery after letters are granted. In that case, actions at law against the personal representative would be stayed and creditors' rights would be settled in connection with the administration in equity. Appeals in matters of decedents' estates are taken from the High Court to the Court of Appeals just as in other matters.

There is a concurrent jurisdiction to admit to probate and grant letters in the county courts in the case of small estates,[42] but judicial statistics would seem to indicate that this has rarely been taken advantage of.[43]

[40] 60-61 Vict., c. 65, p. 184 (1897).

[41] 15-16 Geo. 5, c. 49, p. 1197 (1925); 25 Geo. 5, c. 2, p. 15 (1935); 1-2 Geo. 6, c. 2, p. 4 (1937); 1-2 Geo. 6, c. 67, p. 804 (1938); 4 HALSBURY, STATUTES OF ENGLAND 146 with amendments in 28 id. 33, 30 id. 129 and 31 id. 84.

[42] 24-25 Geo. 5, c. 53, §§ 60, 61, p. 531 (1934).

[43] CIVIL JUDICIAL STATISTICS, ENGLAND AND WALES, 1938, pp. 20, 21 (1939). This report shows that in 1938 there were 121 contentious probate actions tried and

It is, of course, inconceivable that five judges could handle, alone and unassisted, all the probate business for all the people of England. In fact, judicial statistics indicate that the great bulk of proceedings to admit wills to probate and for letters take the form of noncontentious proceedings and are heard before probate registrars.[44] This is, obviously, an administrative matter which does not require, in most cases, the actual personal supervision of the judge. But, of course, the judge and the registrar are both a part of the unified judicial system, and some judicial supervision is always possible where it is needed.

There are four probate registrars[45] assisted by a staff of clerks. In addition, there are sixteen groups of district registrars, with a chief registry in each group and certain subregistrars. To qualify as a probate registrar, one must be a practicing barrister or solicitor of ten years standing, or a district probate registrar of five years standing, or have served ten years as a clerk in the principal probate registry.

In considering the English system as a whole, one cannot fail to note the extensive changes that have taken place within the last hundred years. All matters of decedents' estates are now handled by one court. There is no possibility of conflicting rulings by different courts on questions of jurisdiction depriving a litigant of relief. This court is not an inferior court as was the ecclesiastical court, but is a court of general jurisdiction, whose judges receive a salary comparable to that of justices of the Supreme Court of the United States. The English system, however, distinguishes sharply between contentious and noncontentious business of the court. The latter being largely of an administrative character, is handled by probate registrars and their assistants. But if a contentious proceeding is necessary, either in the Chancery or the King's Bench Division, it may be heard by judges of the one great trial court of general jurisdiction of England.

The separation of jurisdiction between the Probate Division and the Chancery Division would seem still to be a mark of inefficiency. Indeed, in recent years there was an unsuccessful movement to transfer the probate of wills and granting of letters to the Chancery Division.[46] Nevertheless, since matters may be freely transferred from one division

258 motions heard by a judge. In noncontentious proceedings, in 1938, in the registries there were the following grants: 94,944 probates and letters of administration with the will annexed; 54,808 letters of administration.

[44] CIVIL JUDICIAL STATISTICS, ENGLAND AND WALES, 1938, p. 43 (1939).

[45] 8 HALSBURY, LAWS OF ENGLAND, "Courts," 2d ed., § 1320, p. 601 (1933).

[46] BUSINESS OF THE COURTS COMMITTEE, INTERIM REPORT (1933).

of the High Court to another, it would seem that procedural difficulties arising from this divided jurisdiction are not great.[47]

## II

## DEVELOPMENT OF AN AMERICAN COUNTERPART OF ENGLISH PROBATE JURISDICTION

### A. *The Transition Process*

We have traced thus far the evolution of probate courts in England from a system in which the complete administration of an estate could and frequently did require judicial proceedings in three courts to the modern organization under which probate business is handled in a single court—the High Court of Justice. We turn now to the establishment of probate courts in America. Some of the English historical influences are to be noted in the early development of our own probate court organizations. But mixed with these influences were some courageous attempts to establish one court possessing the combined powers of the English ecclesiastical, common-law, and chancery courts. The objective was a system under which an entire probate proceeding could be conducted and supervised, in one court, from the probate of a will and grant of letters to the final distribution of the estate. Due to variations in populations, community needs, considerations of expense, and natural local differences in opinion, different systems of probate courts have developed.

In very early colonial times testamentary jurisdiction was commonly given to the General Courts or vested in the governors and their councils. Somewhat later it was given to county or other trial courts as they were established, although the General Courts frequently continued to exercise some testamentary jurisdiction. By the middle of the seventeenth century numerous variations had developed in the colonies.[48]

In some instances the governor was made the ordinary, although it was common for him to commission deputies or surrogates to probate wills and grant letters, reserving to himself supervisory control over

[47] A large portion of probate business is handled in the Probate Division; and recourse to the chancery and King's Bench Divisions yet remains for certain contentious matters in the administration of decedents' estates. But all are in the same High Court of Justice.

[48] For a summary of these developments and variations, see POUND, ORGANIZATION OF COURTS 26-80 (1940).

their acts by way of appeal.[49] Orphans' courts were created in several states to include jurisdiction over executors and administrators as well as guardians.[50] Elsewhere probate jurisdiction was lodged in the established courts—superior courts in some places,[51] inferior courts in others.[52]

The first plan of having the governor appoint deputies or surrogates to probate wills and grant letters constituted but a slight departure from the practice of the English ecclesiastical courts. The creation of separate orphans' courts with many of the powers possessed by all three courts under the English system was a step in recognizing the need for a unification of the processes of probate and administration. And conferring this jurisdiction upon general trial courts already established served to unite probate jurisdiction with general judicial administration.

### B. *American Innovations*

In observing the evolution of probate courts in America, three aspects in their development are to be noted: the range of their powers, the scope of their jurisdiction, and the particular forms assumed by them.

The powers lodged in the various bodies, persons or courts were extremely limited in the early stages of probate development. In many cases they consisted merely of the power to probate wills and grant letters, following the practice of the ecclesiastical courts. Very gradually these powers were extended to include a needed control and super-

[49] Acts Passed by the General Assembly of the Colony of Georgia, 1755-1774, published by Jones, 5 (1881); THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH, edited by Brigham, 32 (1836); 1 Laws of New Hampshire, 1679-1702, edited by Batchellor, 206-207 (act of 1687) (1904); Acts and Laws of New Hampshire, 1696-1725, printed by Green, 101 (act of 1718) (1726); Acts and Laws of New Hampshire, printed by Fowle, 205-206 (act of 1771) (1771); Acts of the Province of New Jersey, printed by Bradford, 38 (act of 1713) (1732); 1 Laws of New York, 1691-1751, printed by Parker, 14-15 (act of 1692) (1752); Laws of North Carolina, edited by Potter, 112 (act of 1715) (1821); Acts and Laws of Rhode Island, printed by James Franklin, 5-7 (act of 1663) (1730); 7 Statutes at Large of South Carolina, edited by McCord, 172 (act of 1721).

[50] See notes 54-58 infra.

[51] See notes 68-70 infra.

[52] 2 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, 1665-1678, edited by Trumbull, 39 (act of 1666) (1852) (county courts); 1 Laws of New Hampshire, 1679-1702, edited by Batchellor, 206-207 (act of 1687) (1904); Complete Revisal of the Acts of Assembly of the Province of North Carolina, printed by Davis, 524-525 (act of 1773) (1773) (to probate wills, grant letters and determine controversies in intestate estates in matters not involving more than £50).

vision over executors and administrators in their administration of estates.[53] But the process of increasing powers of control in probate courts cannot yet be called complete in any state. All too often resort must be had to equity or common-law courts to sell land to pay debts, to partition land in connection with distribution, to contest wills, to construe them, or even to adjudicate contested claims against an estate.

In Pennsylvania,[54] Maryland,[55] Delaware,[56] Virginia[57] and New Jersey[58] separate orphans' courts were early established.

> "The idea was taken from the Court of Orphans of the city of London, which had the care and guardianship of children of deceased citizens of London in their minority, and could compel executors and guardians to file inventories, and give securities for their estates. . . . The Court of Orphans was one of the privileges of that free city; and that the people of Pennsylvania might enjoy the same protection, it was transplanted into our law, at first without any change of name, but afterwards called the Orphans' Court. The beginnings of this court were feeble. But it grew in importance with the increase of wealth and population, was recognised in our Constitution of 1776, and in each of our subsequent con-

[53] For substantiation of this development in particular states see opinion of Daly, J., in Brick's Estate, 15 Abb. Pr. 12 (N.Y. 1862); opinion of Werner, J., in Matter of Runk, 200 N.Y. 447, 452-456, 94 N.E. 363 (1911); REDFIELD, SURROGATES' COURTS IN NEW YORK, 4th ed., 1-17 (1890); Atkinson, "The Development of the Massachusetts Probate System," 42 MICH. L. REV. 425 (1943); opinion of Woodward, J., in Horner & Roberts v. Hasbrouck, 41 Pa. 169, 177-179 (1862); REPPY and TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, 174-177 (1928) (for New Jersey); 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., 478, 489 (1923).

[54] Act of 1713, in 1 Laws of Pennsylvania, 1700-1781, edited by Dallas, 98 (1797). See also Abridgment of Laws of Pennsylvania, 1700-1811, edited by Purdon, 407 (1811). This act reestablished orphans' courts which had been discontinued in Pennsylvania. Reference to their existence as early as 1693 may be found in 1 Charters and Acts of Assembly of the Province of Pennsylvania, printed by Miller, app., p. 9 (1762).

[55] Laws of Maryland, printed by Green, c. 8 (act of February, 1777); id. c. 9 (act of October, 1777) (1777).

[56] Act of 1721 in 1 Laws of Delaware, 1700-1797, printed by Samuel and John Adams, 87-94 (1797). Later references to orphans' courts in Delaware may be found in an act of 1742, in Laws of the Government of New-Castle, Kent, and Sussex upon Delaware, printed by B. Franklin, 273-282 (1751) entitled "An Act for the better Settling Intestates' Estates."

[57] For a statute providing for the annual holding of an orphans' court in Lunenburg County, Virginia, see Act of 1748 in 6 Statutes at Large of Virginia, edited by Hening, 210 (1819).

[58] Act of 1846. See Nixon's Digest of the Laws of New Jersey, 1709-1855, p. 550 (1855).

stitutions, and has been the subject of innumerable Acts of Assembly."[59]

Thus a jurisdiction over the persons and estates of minors came to include the administration of decedents' estates. Elsewhere guardianship and curatorship (or conservatorship, as it is sometimes called) has been appended to probate jurisdiction. And in many states there has been added adoption proceedings, change of name, solemnization of marriages, and even the granting of divorces. More closely connected with the administration of estates, the administration of state inheritance or transfer taxes, supervision of testamentary trusts, and more recently of inter vivos trusts, have been added. The extent of these superimposed functions will be discussed later.

From the summary already given it is apparent that there was no general agreement as to the form of tribunal for the administration of estates. This function, bestowed upon the town councils by Rhode Island, remains there to this day, although each council may elect a probate judge to preside in the local probate courts.[60] Probate judges are still appointed by the governor in New Hampshire,[61] following the early practice when the governor appointed commissioners to probate wills.[62] The surrogates in New York and New Jersey, originally appointed by the governor or prerogative court,[63] are now elected by the electors of each county.[64] In New York the extent of their powers and scope of their jurisdiction have been vastly increased. New Jersey, on the contrary, has restricted the surrogate to the probate of wills and grant of letters only when there is no contest;[65] in case of contest and in most other matters resort must be had to the orphans' or prerogative court.[66] The separate orphans' courts early established in Pennsylvania, Maryland and Delaware, and later in New Jersey, are still continued.[67]

[59] From the opinion of Woodward, J., in Horner & Roberts v. Hasbrouck, 41 Pa. 169 at 178 (1861).

[60] R.I. Gen. Laws Ann. (1938) c. 568, § 3.

[61] N.H. Const., arts. 46, 73.

[62] 1 Laws of New Hampshire, 1679-1702, edited by Batchellor, 206 (act of 1687) (1904).

[63] See Brick's Estate, 12 Abb. Pr. Rep. 12 at 24-28 (N.Y. 1862); and In the Matter of Coursen's Will, 4 N.J. Eq. 408 at 413-414 (1843).

[64] N.Y. Const., art. 6, § 13; N.J. Const., art. 7, § 2, par. 5.

[65] N.J. Rev. Stat. (1937) §§ 3:2-22, 3:7-5.1.

[66] N.J. Rev. Stat. (1937) §§ 3:2-22; 3:7-5.1; 3:7-23.1; 3:27 to 3:32; (Supp. 1941-43) 3:7-13.4; 3:7-13.5.

[67] Pa. Const., art. 5, § 22; Md. Const., art. 4, § 1; Del. Const., art. 4, §§ 1, 33; N.J. Rev. Stat. (1937) § 2:7-1.

And the separate probate courts established elsewhere have in the main persisted.

But significant innovations were launched in three states. As early as 1721 South Carolina conferred upon its county and precinct courts "full power to determine the right of administration of the estates of persons dying intestate . . . and also all disputes concerning wills and executorships, in as full and ample manner as the same have or might have been heretofore determined by any Governor, or Governor and Council."[68] In 1778 Georgia conferred jurisdiction upon its superior courts "to determine in all matters of dispute concerning the proving of wills and granting letters of administration."[69] In 1773 North Carolina conferred jurisdiction upon its superior courts in "all Suits and Matters relative to Legacies, filial Portions, Estates of Intestates."[70] Here in courts of general jurisdiction, compounded with civil and criminal jurisdiction, was the administration of estates. However, this plan of conferring powers of probate and administration upon courts of general jurisdiction was not to be permanent in any of these three states.[71] It remained for other states to initiate a movement which would unite probate jurisdiction with law and equity.

One minor phenomenon of consolidation occurred early, however, which has had an unfortunate effect upon probate courts. Under the stress of quantity of judicial business the establishment of inferior county courts with a limited civil and criminal jurisdiction was common. Probate powers were added to their jurisdiction in several states.[72] In thirteen states[73] at the present time probate matters come under the jurisdiction of county courts. Often these courts are presided over by

[68] 7 Statutes at Large of South Carolina, edited by McCord, 172 (Act of 1721) (1840).

[69] Digest of the Laws of Georgia to 1799, edited by Watkins, 226 (1800).

[70] Complete Revisal of all the Acts of Assembly of the Province of North Carolina, printed by Davis, 511 (1773). See also Laws of North Carolina, edited by Iredell, 296-297 (Act of 1777) (1791).

[71] In South Carolina the office of ordinary was established in 1799. See Acts of South Carolina, 1795-1804, printed by Faust, 315 (1808).

In Georgia probate powers were vested in a register of probate appointed by the legislature in each county beginning in 1777. Georgia Constitution of 1777, compiled by Marbury & Crawford, art. 52 (1802). See also REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN GEORGIA 153 (1938).

North Carolina conferred probate powers upon county courts in 1837. Laws of North Carolina, 1836-37, printed by Lemay, 55 (1837).

[72] POUND, ORGANIZATION OF COURTS 83-85, 137 (1940).

[73] Colorado, Florida, Illinois, Kentucky, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, West Virginia and Wisconsin.

judges who are untrained in law. As a consequence their decisions are usually reviewable on appeal by a trial de novo in courts of general jurisdiction. Certainly this fusion of probate courts with county courts has not produced any elevation of probate courts in the public esteem. On the contrary, it has undoubtedly been a factor in minimizing the importance of probate matters.

## III

## CLASSIFICATION OF AMERICAN PROBATE COURTS

### A. *Variations of Probate Court Organization in the Same State*

Before attempting a classification of present-day probate courts, it should be emphasized that the system of probate courts in several states is not unitary and hence not susceptible of a single classification. Under some systems two separate tribunals have been created to supervise the complete administration of an estate. In other states different kinds of tribunals exist in different counties of the same state for administering probate matters. Where either of these situations exist, each court or kind of court must be considered separately in the appraisal to follow, and may require one, two, or even three classifications for the probate courts of a single state.

#### 1. *Probate courts as single or multiple units*

In a number of states certain remnants of the tri-court system under the English ecclesiastical practice still persist. The New Jersey system suggests considerable early English influence. Its intricacies can only be appreciated by a detailed description. Three courts have probate jurisdiction: the surrogate's court, the orphans' court and the prerogative court. There is one prerogative court for the entire state presided over by the chancellor sitting as ordinary or surrogate general.[74] There is one surrogate in each county[75] and also one orphans' court in each county.[76] The surrogate is both the judge and clerk of his own court;[77] he is also clerk of the orphans' court.[78] The prerogative court has jurisdiction throughout the state to probate wills, grant letters and to hear

[74] N.J. Const., art. 6, § 4, par. 2.
[75] N.J. Rev. Stat. (1937) § 2:7-12.
[76] N.J. Rev. Stat. (1937) § 2:7-1.
[77] N.J. Rev. Stat (1937) § 2:31-4, 2:31-16.
[78] N.J. Rev. Stat. (1937) § 2:7-4.

and finally determine disputes that arise thereon.[79] The surrogate of each county also has power to probate wills and grant letters except when doubt appears on the face of a will or a caveat is filed against a will or a dispute or contest arises as to the existence of a will or the right to letters.[80] In any of these cases the matter is transferable to the orphans' court.[81] In general the orphans' courts have no original jurisdiction to probate wills or grant letters. Their sole jurisdiction to do so arises on *transfer* from the surrogate in case the matter is disputed or contested.[82] The orphans' courts also have power to grant allowances to widows and children pending a will contest,[83] to determine heirship of an intestate where real estate is involved,[84] to approve compromises of will contests or claims of the estate against a third person,[85] to order the sale of real estate for the payment of debts,[86] determine rights of beneficiaries under a will or of the next of kin in an estate,[87] and determine controversies respecting allowances of accounts.[88] In short, the jurisdiction of the surrogate is limited to the probate of wills and issuance of letters in nonadversary proceedings. The remainder of the administration is had in the orphans' court. The probate of a will may be either before the surrogate of the proper county or in the prerogative court.[89] Thus, if a proceeding is initiated before the local surrogate, the services of the orphans' court will certainly be required; but if a proceeding is initiated in the prerogative court in the first instance that court has power to conduct the entire proceeding.

In North Carolina there is a similar division of probate jurisdiction between the clerk of the superior court and the superior court itself. Indeed the clerk is himself a court[90] and handles most of the details of administration. However, in the case of a contest on probate of a will or grant of letters, the matter is transferred to the superior court

[79] N.J. Rev. Stat. (1937) § 3:1-1.
[80] N.J. Rev. Stat. (1937) §§ 3:2-22 and 3:7-5.1.
[81] Ibid.
[82] Ibid.
[83] N.J. Rev. Stat. (1937) § 3:2-29.
[84] N.J. Rev. Stat. (1937) §§ 3:4-1 to 3:4-3.
[85] N.J. Rev. Stat. (1937) § 3:15.
[86] N.J. Rev. Stat. (1937) § 3:25-23.
[87] N.J. Rev. Stat. (1937) §§ 3:26-2, 3:26-6.
[88] N.J. Rev. Stat. (1937) § 3:1-2.
[89] N.J. Rev. Stat. (Supp. 1938-40) § 3:2-3.
[90] N.C. Gen. Stat. Ann. (Michie, 1943) §§ 2-1, 28-1; Edwards v. Cobb, 95 N.C. 4 (1886). For a statement of the history of this allocation of probate jurisdiction see Hardy & Co. v. Turnage, 204 N.C. 538, 168 S.E. 823 (1933).

for the hearing.[91] The clerk may order the sale of personal property,[92] but resort must be had to the superior court for the sale of land.[93] Also the clerk has jurisdiction with respect to the inventory and accounting.[94] Much the same division of jurisdiction prevails in Virginia. The clerk, as well as the court, has power to probate wills and grant letters.[95] But any decision of the clerk may be appealed to the circuit court or its equivalent.[96] Probably the clerk does not have as much power as the clerk in North Carolina. It is sufficient to note, however, that in both of these states the clerk has judicial powers and shares with the court of general jurisdiction the control over the administration of estates. Likewise in Delaware the register of wills in each county has power to probate wills, grant letters, remove representatives, approve bonds, pass upon accounts and settlements of representatives and to grant discharges.[97] But a proceeding to sell land to pay debts must be had in the orphans' courts.[98] Pennsylvania also has a register in each county who has power to probate wills and grant letters.[99] Other matters in connection with the administration of an estate are handled in the orphans' court.[100]

The important thing to observe in all these cases is the division of jurisdiction between two tribunals. The first of these, variously called the surrogate, the register of wills, or the clerk, performs a function limited for the most part to the probate of wills and grant of letters; and, under the practice of some states, only when the matter is not contested. In other states, such as Delaware, the register of wills has quite broad powers, making it possible for most of the administration to be done under his supervision. The second of these tribunals, variously called the orphans', the superior, district, or circuit court, supervises the remainder of the administration and especially in matters

[91] N.C. Gen. Stat. Ann. (Michie, 1943) § 28-30.

[92] N.C. Gen. Stat. Ann. (Michie, 1943) §§ 28-73 to 28-80.

[93] N.C. Gen. Stat. Ann. (Michie, 1943) § 28-81.

[94] N.C. Gen. Stat. Ann. (Michie, 1943) §§ 28-50, 28-117, 28-118.

[95] Va. Code Ann. (Michie, 1942) §§ 5247, 5249.

[96] Va. Code Ann. (Michie, 1942) § 5249.

[97] Del. Rev. Code (1935) §§ 3799, 3804, 3807, 3811, 3813, 3844 and 3866.

[98] Del. Rev. Code (1935) c. 99. By means of appeal from the register's court, most other matters can be heard in the orphans' court. Del. Rev. Code (1935) §§ 3835, 3843; Del. Const., art. 4, § 34. But appeals from certain other matters lie directly to the superior court. Del. Rev. Code (1935) §§ 3827, 3866.

[99] Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 1861.

[100] Pa. Stat. Ann. (Purdon, 1930) tit. 20, §§ 2241 through 2254.

that are more likely to be contentious or involve more than ministerial functions.

In several other states the clerk of the probate court has power to admit wills to probate and grant letters on exceptional occasions,[101] such as in the absence of the judge or in vacation of the court, but these are regarded as extraordinary rather than ordinary powers.

### 2. *Different kinds of probate courts in the same state*

From the very beginning there was a tendency to establish a probate court in each county.[102] But variations in population and considerations of expense have led to the establishment of different kinds of probate courts within the same state.

In Indiana probate jurisdiction has been conferred upon the circuit courts of each county.[103] However, in Marion and Vanderburgh counties, two populous counties of the state, separate probate courts have been established to handle the administration of estates.[104] These probate courts are separate from the circuit courts of these counties but are fully coordinate with them.

In Oregon the county courts have been given probate jurisdiction;[105] but, in counties having a population of over 30,000, county courts have been abolished and county judges made circuit judges to preside over the "department of probate" in the circuit courts of those counties.[106] The probate courts in these larger counties are not unlike those in Indiana except that the former may be said to be an integral part of the court of general jurisdiction, rather than coordinate with it.

In New Mexico the district court has had concurrent jurisdiction with the probate court in all probate matters since 1941[107] and any estate of $2,000 or more may be "appealed" [transferred] to the district court.[108] Thus probate jurisdiction is optional in either of two courts.

In Alabama the probate court does not have exclusive jurisdiction. Administration in equity remains optional;[109] or a proceeding com-

[101] See discussion under VII B, infra.
[102] POUND, ORGANIZATION OF COURTS 136, 250 (1940).
[103] Ind. Stat. Ann. (Burns, 1933) § 4-303.
[104] Ind. Stat. Ann. (Burns, 1933) §§ 4-2901, 4-3001.
[105] Ore. Const., art. 7, § 12.
[106] Ore. Comp. Laws Ann. (1940) §§ 93-310, 13-206, 13-207, 13-209.
[107] N.M. Stat. Ann (1941) § 16-312.
[108] N.M. Stat. Ann. (1941) §§ 16-419, 16-420.
[109] Ala. Const., art. 6, § 149.

menced in the probate court may be removed to the circuit court.[110] Thus probate jurisdiction in Alabama is possible in any one of three courts, each of which has adequate and complete power to function.

In Tennessee probate jurisdiction is vested in the county courts composed of all the justices of the peace of the county.[111] Judicial powers are exercised by the chairman who is, in effect, the probate judge.[112] However, when no person has applied or can be procured to administer upon an estate, chancery has jurisdiction to appoint a representative after six months.[113] A proceeding to sell real estate may be had either in the county, the circuit, or the chancery court.[114] Appeals from the county court ordinarily lie to the circuit court,[115] but to the court of appeals or the supreme court if jurisdiction in the particular matter appealed from is concurrent with the circuit or chancery courts.[116]

In Vermont most appeals from the probate court go to the county court,[117] but an appeal on a question of law goes directly to the supreme court.[118] In this one respect the probate courts of Vermont require a double classification.

In Wisconsin probate jurisdiction has been vested in the county courts throughout the state.[119] The judges of these county courts, however, must be members of the bar except in counties having a population of less than 14,000 in which case they may be lay judges.[120] Appeals from county courts in counties having a population of more than 15,000 go directly to the supreme court and are heard upon the record of the proceedings below, but in counties having a population of 15,000 or less (of which there are some twelve counties) appeals lie to the circuit court and are heard de novo.[121]

Ohio provides for separate probate courts in each county, but counties of less than 60,000 population are authorized to "consolidate" their probate court with the local court of common pleas, such "consolidated

[110] Ala. Code Ann. (1940) tit. 13, §§ 138 through 144.
[111] Tenn. Code Ann. (Michie, 1938) §§ 10193, 10225.
[112] Tenn. Code Ann. (Michie, 1938) §§ 10202, 10204.
[113] Tenn. Code Ann. (Michie, 1938) § 8155.
[114] Tenn. Code Ann. (Michie, 1938) § 10226.
[115] Tenn. Code Ann. (Michie, 1938) §§ 9028, 9060.
[116] Tenn. Code Ann. (Michie, 1938) §§ 9029, 9059.
[117] Vt. Pub. Laws (1933) § 3002.
[118] Vt. Pub. Laws (1933) § 3001.
[119] Wis. Stat. (1943) § 253.01.
[120] Wis. Stat. (1943) § 253.02.
[121] Wis. Stat. (1943) § 324.01.

court" to be presided over by the judge of the common pleas court.[122] This does not operate to extinguish the probate court but merely to provide for a unified personnel.[123] Appeals from probate courts in Ohio go directly to a court of appeals, provided that a record has been made of the probate proceedings; but if a record has not been taken of the proceedings an appeal lies to the court of common pleas of that county, where there is a trial de novo.[124] It is a matter of common knowledge among lawyers in Ohio that parties avail themselves of this second trial in the common pleas courts in most cases. Where there has been a "consolidation" of the probate courts with common pleas courts, this may mean a trial de novo before the same judge—a useless and futile gesture, it would seem. But because of this variation in the method of appeal, the probate courts of Ohio occupy two positions in the hierarchy of courts.

A similar "consolidation" of courts exists also in New York and Pennsylvania. Separate surrogates' courts in New York and separate orphans' courts in Pennsylvania exist in every county.[125] But in counties of less than 40,000 population in New York the county judge also presides over the surrogate court of that county, whereas in counties having a larger population the legislature may provide for a separate surrogate.[126] Similarly in counties of not more than 150,000 population in Pennsylvania the common pleas judge presides over the orphans' court, but in larger counties the legislature must, and in any other county may, establish separate orphans' courts.[127] In both of these states the courts performing probate functions are distinct. The "consolidation," as in Ohio, is one of judicial personnel, prompted in each case by economical considerations in the less populous communities.

### B. *Norms to Be Applied in Analyzing American Probate Jurisdiction*

Up to this point we have considered the multiple character of probate court organization in some states and the variations of organization

[122] Ohio Const., art. 4, § 7; Ohio Gen. Code Ann. (Page, 1937) §§ 10501-4, 10501-47.

[123] State ex rel. Sattler v. Cahill, 122 Ohio St. 354, 171 N.E. 595 (1930).

[124] Ohio Gen. Code Ann. (Page, Supp. 1943) § 10501-56.

[125] N.Y. Const., art. 6, § 13; Pa. Const., art. 5, § 22.

[126] N.Y. Const., art. 6, § 13.

[127] Pa. Const., art. 5, § 22. As to the counties in which the legislature has established separate orphans' courts to be presided over by separate orphans' judges, see Pa. Stat. Ann. (Purdon, 1930) tit. 20, §§ 2083, 2641, 2661, 2681, 2701 and Pa. Stat. Ann. (Purdon, Supp. 1943) tit. 20, §§ 2706, 2723a, 2731.

in the same state. It is now our purpose to classify all probate court organizations on the basis of their most important characteristics. Before doing this, however, it is desirable to discuss the norms to be applied in making this classification.

Probate courts have been variously classified as courts of "limited," "inferior," "special and limited," "limited though not special," or "limited though not inferior" jurisdiction; and also as courts of "general," "superior" or "coordinate" jurisdiction.[128] These descriptives are not only inconsistent but are likely to represent but partial views. It is true that their predecessors, the ecclesiastical courts, were not courts of general jurisdiction.[129] Nor were they courts of record. Nevertheless, they were "courts," and their judgments were subject to recognition and obedience through the process of excommunication.[130] The establishment of probate courts in America was made without any such limitations on their powers.[131] Nevertheless, a number of reasons have contributed to their characterization as "inferior" in certain respects.

As will be seen from the discussion which follows, it is not easy to classify probate courts under our systems of court organization. By creating them and giving them power to probate wills and supervise the administration of estates, we have set off to them a specialized function. Because of this specialized task assigned to them, we have been inclined to call them courts of "special or limited jurisdiction," and, therefore, of "inferior jurisdiction."[132] Upon a little consideration, it will be seen that this conclusion is not warranted. In giving this jurisdiction to the probate courts, we have in the same process *not* given it to the general trial courts which we call "courts of general jurisdiction." In matters probate, therefore, probate courts truly have "general jurisdiction."

To courts of general jurisdiction, we have indulged a presumption in favor of the regularity of their proceedings and the validity of their judgments. No such presumption is made in the case of courts of in-

[128] See references cited in 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., 484 (1923); 1 CLEAVELAND, HEWITT and CLARK, PROBATE LAW AND PRACTICE OF CONNECTICUT 132 (1929).

[129] 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., § 140 (1923).

[130] 3 BLACKST. COMM. *101.

[131] 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., 481 (1923).

[132] For an early example of this type of reasoning, see Strouse v. Drennan, 41 Mo. 289 at 297 (1867).

ferior jurisdiction.[133] In actions at law, general trial courts have general jurisdiction. In probate matters it can equally be said that trial courts do not have, but that probate courts do have, general jurisdiction. In these respective fields, it should be clear that each court is a court of original jurisdiction, not superior or inferior in the first instance, as to any other court. Despite this seemingly simple statement, there has not been general agreement that a probate court is one of general jurisdiction within its field of operation. Indeed, the constitution of Missouri at one time provided that "inferior tribunals shall be established in each county for the transaction" of probate matters.[134] By the same constitution, they were also made courts of record. Despite the inferiority intended for them, it was held that "their jurisdiction pertaining to wills and administrators is general . . . and the same may be said of the circuit court; but their action, on subjects exclusively and originally confided to them, is entitled to the same weight as that of any other court of record."[135] Thus, despite the commands of the constitution, probate courts in Missouri were held courts of general jurisdiction within a defined sphere and their jurisdiction "as general as that of the circuit court." Accordingly, their proceedings and judgments operating upon subjects within a defined sphere were entitled to the same presumptions of regularity and validity as those of courts of general jurisdiction.

The inferior position accorded to probate courts historically has left its indelible mark upon the effect accorded to their proceedings. The rule was early developed that "inferior jurisdictions and special authorities, must show their jurisdiction, and must pursue their authority strictly."[136] The result has been that every stage of a probate proceeding must laboriously recite each fact upon which its jurisdiction is predicated. Otherwise a sale or judgment is void and is subject to collateral attack—a vulnerability well known to every title examiner. The resulting blemish upon land titles and consequent relitigation of all the matters supposedly concluded in the probate court are facts too well known to require comment. After this rule became well intrenched,

[133] For a concise summary of this doctrine and its origin, see I WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., § 143 (1923).

[134] Mo. Const. of 1820, art. 5, § 12.

[135] Johnson v. Beazley, 65 Mo. 250 at 256 (1877). See also Schultz v. Schultz, 10 Gratt. (51 Va.) 358, 377-379 (1853).

[136] Morrow v. Weed, 4 Iowa 79 at 124 (1856). This case contains an excellent statement of the foundations of this doctrine, its unfortunate consequences, and a resumé of the authorities at that date.

remedial measures were commenced. First probate courts were made courts of record. Then presumptions were made as to the regularity of their proceedings and validity of their judgments. The importance of these two steps cannot be overstated.

By statute in a number of states at the present time proceedings of probate courts are now accorded the same presumptions of regularity and validity as those of courts of general jurisdiction.[137] Elsewhere such a presumption has been made even in the absence of statute.[138]

[137] Ala. Code Ann. (1940) tit. 13, § 278; Idaho Code Ann. (1932) § 1-1203; Mass. Ann. Laws (Michie, 1932) c. 215, § 2; N.M. Stat. Ann. (1941) § 16-411; N.D. Comp. Laws Ann. (1913) § 8533; Pa. Stat. Ann. (Purdon, 1930) tit 20, § 2085; R.I. Gen. Laws Ann. (1938) c. 573, § 8; S.D. Code Ann. (1939) § 35.0105; Utah Code Ann. (1943) § 102-14-15.

[138] *Arizona.* Varnes v. White, 40 Ariz. 427 at 431, 12 P. (2d) 870 (1932);

*Arkansas.* Massey v. Doke, 123 Ark. 211, 185 S.W. 271 (1916); Graham v. Graham, 175 Ark. 530, 1 S.W. (2d) 16 (1927);

*California.* Luco v. Commercial Bank, 70 Cal. 339, 11 P. 650 (1886); Burris v. Kennedy, 108 Cal. 331 at 338, 41 P. 458 (1895);

*Georgia.* Stanley v. Metts, 169 Ga. 101, 149 S.E. 786 (1929); Wood v. Crawford, 18 Ga. 526 (1855);

*Illinois.* Ill. Merchants' Trust Co. v. Turner, 341 Ill. 101, 173 N.E. 52 (1930); Housh v. People, 66 Ill. 178 (1872); People v. Cole, 84 Ill. 327 (1876); People v. Gray, 72 Ill. 343 (1874); Matthews v. Hoff, 113 Ill. 90 (1885);

*Indiana.* Sims v. Gay, 109 Ind. 501, 9 N.E. 120 (1886);

*Iowa.* McFarland v. Stewart, 109 Iowa 561, 80 N.W. 657 (1899);

*Kansas.* Denton v. Miller, 110 Kan. 292, 203 P. 693 (1922);

*Kentucky.* Goss' Exr. v. Ky. Refining Co., 137 Ky. 398, 125 S.W. 1061 (1910);

*Michigan.* Church v. Holcomb, 45 Mich. 29, 7 N.W. 167 (1880); Chapin v. Chapin, 229 Mich. 515, 201 N.W. 530 (1924);

*Minnesota.* Davis v. Hudson, 29 Minn. 27, 11 N.W. 136 (1881);

*Mississippi.* Gillespie v. Hauenstein, 72 Miss. 838, 17 So. 602 (1895);

*Missouri.* Johnson v. Beazley, 65 Mo. 250 (1877); Desloge v. Tucker, 196 Mo. 587 at 601, 94 S.W. 283 (1906);

*Nebraska.* Foote v. Chittenden, 106 Neb. 704 at 707, 184 N.W. 167 (1921);

*New Hampshire.* Kimball v. Fisk, 39 N.H. 110 (1859);

*New Jersey.* Plume v. Howard Savings Inst., 46 N.J.L. 211 (1884) (as to orphans' court);

*New York.* Van Deusen v. Sweet, 51 N.Y. 378 (1873); Bearns v. Gould, 77 N.Y. 455 (1879); Harrison v. Clark, 87 N.Y. 572 (1882); O'Conner v. Huggins, 113 N.Y. 511 (1889);

*Ohio.* Shroyer v. Richmond, 16 Ohio St. 455 (1866);

*Oklahoma.* Hunter v. Wittier, 120 Okla. 103, 250 P. 793 (1926); Drum v. Aetna Cas. & Surety Co., 189 Okla. 307, 116 P. (2d) 715 (1941);

*Oregon.* Russel v. Lewis, 3 Ore. 380 (1872); Slate's Estate, 40 Ore. 349, 68 P. 399 (1902);

*South Carolina.* Clark v. Neves, 76 S.C. 484, 57 S.E. 614 (1906);

*Tennessee.* Townsend v. Townsend, 44 Tenn. 70 (1867);

*Texas.* Reeves v. Fuqua, (Tex. Civ. App. 1916) 184 S.W. 682; Jones v. Sun

In Connecticut, Florida, Maine, Maryland, Vermont and Wisconsin, however, no such presumption is indulged.[139] This presumption, according to the judicial acts of probate courts the same force and effect as to those of courts of general jurisdiction, represents a noteworthy and important step in their development.

A second important test of a court's position in any judicial organization is whether it has been made a "court of record." Most, but not all, probate courts in this country have been created or subsequently made courts of record.[140] This being true, and, since all courts of gen-

Oil Co., (Tex. Civ. App. 1940) 145 S.W. (2d) 615 reversed on other grounds, 137 Tex. 353, 153 S.W. (2d) 571 (1941); Tucker v. Imperial Oil and Development Co., (Tex. Civ. App. 1921) 233 S.W. 339;

*Virginia.* Saunders v. Link, 114 Va. 285, 76 S.E. 327 (1912);

*Washington.* In re Upton's Estate, 199 Wash. 447, 92 P. (2d) 210 (1939); Christianson v. King County, 239 U.S. 356, 36 S. Ct. 114 (1915);

*West Virginia.* State ex rel. Conley v. Thompson, 100 W. Va. 253, 130 S.E. 456 (1925);

*Wyoming.* Lethbridge v. Lauder, 13 Wyo. 9, 76 P. 682 (1904).

[139] *Connecticut.* Palmer v. Palmer, (D.C. Conn. 1940) 31 F. Supp. 861;

*Florida.* State ex rel. Everette v. Petteway, 131 Fla. 516, 179 So. 666 (1938), 135 Fla. 757, 185 So. 619 (1939);

*Maine.* Appeal of Waitt, (Me. 1943) 34 A. (2d) 476;

*Maryland.* Talbot Packing Corp. v. Wheatley, 172 Md. 365, 190 A. 833 (1937);

*Vermont.* Probate Court v. Indemnity Ins. Co. of No. America, 106 Vt. 207, 171 A. 336 (1934); Abbott v. Abbott, (Vt. 1943) 28 A. (2d) 375.

*Wisconsin.* Estate of Anson, 177 Wis. 441, 188 N.W. 479 (1922); Estate of Ott, 228 Wis. 462, 279 N.W. 618 (1938). This last Wisconsin case is based on Wis. Stat. (1943) § 310.045 which requires the petition for letters to allege and the order to find the facts necessary to the jurisdiction of the court. But see Wis. Stat. (1943) § 316.33 which prevents the invalidation of a sale by a representative except for causes that would invalidate it had it been made pursuant to an order of a court of general jurisdiction.

[140] Ala. Const., art. 6, § 148; Ariz. Const., art. 6, § 10; Cal. Const., art. 6, § 12; Colo. Const., art. 6, § 23; Fla. Stat. Ann. (1943) §§ 36.02, 36.14, 732.07; Idaho Const., art. 5, § 21; Ill. Const., art. 6, § 18; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 37, §§ 171, 299; Ind. Stat. Ann. (Burns, 1933) §§ 4-324, 4-2902, 4-3002; Iowa Code (Reichmann, 1939) § 10761; Kan. Const., art. 3, § 8; Kan. Gen. Stat. Ann. (Corrick, Supp. 1943) § 59-301; La. Const., art. 7, § 35; Me. Rev. Stat. (1930) c. 75, § 1; Md. Const., art. 4, § 1; Mass. Ann. Laws (Michie, 1932) c. 215, § 1; Mich. Stat. Ann. (1943) § 27.3178 (26); Minn. Const., art. 6, § 7; Mo. Const., art. 6, § 34; Mo. Rev. Stat. Ann. (1942) § 1990; Mont. Const., art. 8, § 25; Neb. Const., art. 5, § 16; Nev. Const., art. 6, § 8; Nev. Comp. Laws (Hillyer, 1929) § 8403; N.H. Rev. Laws (1942) c. 346, § 1; N.J. Rev. Stat. (1937) § 2: 7-1; N.M. Const., art. 6, § 23; N.Y. Judiciary Law, art. 2, § 2; N.D. Comp. Laws (1913) § 8514; Ohio Const., art. 4, § 7; Okla. Const., art. 7, § 11; Ore. Const., art. 7, § 1; Pa. Stat. Ann. (Purdon, 1930) §§ 2081, 2082, 2083, 2085; S.C. Code (1942) § 206; S.D. Const. art. 5, § 20; Tex. Const., art. 5, § 15; Utah Const., art. 8, § 17;

eral jurisdiction are likewise courts of record, this test *alone* cannot be very significant. The fact that a probate court is not a court of record is a distinct indication that it is regarded as inferior.

Even though a probate court be termed a court of general or coordinate jurisdiction, in many cases appeals from it are taken to the courts of general jurisdiction and heard de novo. Behind this plan of procedure on appeal lies a mistrust in probate courts, at least in contentious matters.[141] In relation to the appellate court in this instance, the probate court is an inferior court.[142] And, even though the appeal is not heard de novo, the inferiority, though not so pronounced, still exists.

Another test to determine the status of a probate court is the extent to which jurisdiction has been conferred upon it in probate matters. As has been seen, the jurisdiction of the ecclesiastical courts was to probate wills, grant letters and entertain suits for legacies; but the jurisdiction of probate courts in America has not been so narrow. Probate courts usually have power to hear and determine issues on disputed claims, accountings, legacies, the sale of land to pay debts, partition of land, and a multitude of matters relating to the management of the estate. However, in some states resort must be had to the court of general jurisdiction for the enforcement of claims, for authority to sell land for the payment of debts or legacies, or for partition of lands. To the extent that its jurisdiction is incomplete and resort must be had to other courts, the probate court remains, in a sense, inferior.

Furthermore, the functions of probate courts have frequently been combined with certain minor jurisdictions in civil and criminal matters such as is exercised by county courts.[143] At the same time, the qualifications of judges presiding over such combined courts have frequently coincided with those required of judges of such inferior courts. A degradation of the probate court has resulted rather than an elevation of the inferior court with which it was combined.

Finally the caliber of judicial personnel has not been unrelated to the organization of courts and the respect which we have for them. A

Vt. Pub. Laws (1933) § 2719; Wash. Const., art 4, § 11; W.Va. Const., art. 8, § 24; Wis. Stat. (1943) § 253.08.

[141] See POUND, APPELLATE PROCEDURE IN CIVIL CASES 311 (1941).

[142] "All courts from which an appeal lies are inferior courts, in relation to the appellate court before which their judgment may be carried; but they are not, therefore, inferior courts, in the technical sense of those words." Chief Justice Marshall in Kempe's Lessee v. Kennedy, 5 Cranch (9 U.S.) 173 at 185 (1809).

[143] POUND, ORGANIZATION OF COURTS 137, 180-181 (1940).

large portion of probate business in England receives the attention of the chancellor, the vice-chancellors and judges of the common-law courts, each of them eminently qualified for these tasks. In vesting all probate jurisdiction in one court in America, we have lost sight of the qualifications and ability possessed by English judges who have presided over probate matters. The qualifications for the office of judge of county and other similar courts of an inferior status in this country have been notoriously low; and qualifications for the office of probate judge in a large number of states are not much higher. If a lay judge is allowed to preside over an inferior court, appeals with a trial de novo are likely to be the answer to objections against lay personnel. Inefficiency and loss of prestige are the prices paid for such a system. Administrative ability and a specialized legal knowledge on the part of modern probate judges are indispensible qualifications necessary to bring the American probate courts to a position fully equal to that of our courts of general jurisdiction.[144]

### C. *General Survey of American Probate Courts*

No single formula is adequate to describe the present-day organization of probate courts in America. Furthermore, a single characterization of the probate court system of a given state would be an inaccurate description in a number of instances. But, despite an inability to generalize broadly, some useful classifications are possible; and from these classifications, some conclusions may be drawn with respect to the status, the powers, and other incidents that an ideal probate court should possess.

It is the purpose of this study to consider the present-day probate court or courts of each state and appraise them in terms of their relation to the court organization of that state. In making the classification that is to follow it is obviously impossible to appraise all probate courts on the basis of all the tests outlined above. Some one test alone must be used as a yard stick. Most probate courts are now courts of record; [145] and in a substantial number of states there is the same presumption of jurisdiction in favor of probate proceedings as is made in favor of courts of general jurisdiction.[146] If appeals from the probate court are taken to the court of general jurisdiction, the former certainly occupies an inferior position in relation to the latter; but if appeals lie to the same

[144] See VII and VIII infra.

[145] See note 140 supra.

[146] See notes 137 and 138 supra.

tribunal as do appeals from the court of general jurisdiction, then the two courts occupy coordinate positions. It is believed that this one factor of the court to which an appeal lies from a probate court is the most significant criterion in determining the position or status to be ascribed to the latter. Consequently this one test is employed to the exclusion of all others in the analysis which follows.

Without attempting to trace the history or development of probate courts in any state, it may be said generally (and perhaps none too accurately) that probate courts exist in four different forms in the United States today. *First,* the most numerous group of states has separate courts, but with definitely inferior attributes in the local hierarchy of courts. This form of court exists in twenty-three jurisdictions and also has some kind of partial existence in ten other jurisdictions. *Second,* there is the system typified by California, where the court of general jurisdiction embodies both the trial court and the probate court; in other words, there is combined in one judge and one court the two functions of presiding over the ordinary trial court of general jurisdiction and also of supervising the administration of probate matters. This unified system exists in nine states and prevails in part in seven others. *Third,* there is the somewhat less numerous group of states in which there exist separate probate courts, without the inferior status of those mentioned in the first category, but having a place in the local court system more or less coordinate with the court of general jurisdiction. Appeals from their judgments are taken to the same courts and in the same manner as are appeals from courts of general jurisdiction. This form of court prevails in five states, and also has a partial existence in six others. *Fourth,* there are a few states in which probate matters are or may be committed to the jurisdiction of chancery—a legacy of the former English practice.

These variations within these four categories are sufficient to indicate the impossibility of generalizing and, also, to warrant the observation that our present product of probate courts is the result of additions and subtractions, impacts and influences, of each generation. Many of these changes have been wrought in the interest of improving the efficiency and operation of probate courts; others have been made in the interests of economy or for the avowed purposes of bringing the probate court closer to the people and thus making it more democratic; or to make it available at all times. All of these may seem worthy objectives in themselves, and they should be so considered as long as

they are not made at the expense of efficiency and simplicity in the administration of estates.

### 1. *Separate probate courts with inferior status*

In about two-thirds of the states the probate court is a separate court but relegated to an inferior position in the judicial organization of those states. As already indicated, the separate probate court was an early institution in America. The specialized nature of probate proceedings readily justified its separability. Furthermore, while it may have been agreed that the transmission of property from one generation to another required some judicial supervision, yet the process of effecting its transmission was so close and personal to the parties concerned that some court with less of the technical procedure employed in trial courts—a court which was open at all times[147] and where the parties interested could go at any time and discuss their affairs in an informal atmosphere[148]—seemed a necessary part of every community. The separate probate court in every county answered these requirements.[149]

But with this separate court in every county also came in most instances a relaxation of the qualifications of the probate judge. This suggested the necessity of closer scrutiny and supervision over his judicial acts when dispute or contest arose. The supervision of uncontested matters by a probate judge without legal training or judicial experience, but with rights secured by an appeal, usually in the form of a trial de novo before a court presided over by a judge adequately trained, became the established practice.[150] This procedure of a trial de novo on appeal from probate courts amounts to nothing less than a method of control over their proceedings without the supervision of a competent judge in the first instance. Thus created as inferior tribunals, there is little incentive to improve their judicial position. A trial de novo in the court of general jurisdiction on appeal is thought to be cheaper than to have the affairs of the probate court directed by competent personnel in the first instance. Twenty-six states[151] have created probate courts

[147] Statutes in nearly all states provide that the probate court shall be open at all times.

[148] POUND, ORGANIZATION OF COURTS 262 (1940).

[149] For a summary of this development see POUND, ORGANIZATION OF COURTS 136-137, 250 (1940).

[150] POUND, ORGANIZATION OF COURTS 140, 250 (1940).

[151] Colo. Stat. Ann. (Michie, 1935) c. 46, § 168, c. 176 § 243; Conn. Gen. Stat. (1930) § 5624; Ga. Code Ann. (Park, 1936) § 6-501; Idaho Code Ann. (1932) § 11-406 (unless errors of law appear on face of the record); Ill. Ann. Stat. (Smith-

in this image. In seven others[152] appeals lie to the court of general jurisdiction upon the record made in the probate court. This may imply a little more confidence in the probate court. At least it eliminates the necessity of a complete rehearing, but does not eliminate the court of general jurisdiction as an intermediate court of appeal.

### 2. *Probate courts unified with courts of general jurisdiction*

Under the California Constitution of 1849[153] the exercise of probate jurisdiction was conferred upon county courts. There were separate county courts in each county, but the state was divided into districts with only one district judge for each district of several counties. It was found that many county judges did not have sufficient work to keep

Hurd, 1941) c. 3, § 487; Kan. Gen. Stat. Ann. (Corrick, Supp. 1943) § 59-2408; Ky. Civ. Code (Carroll, 1938) § 726; Me. Rev. Stat. (1930) c. 75, §§ 32, 36; Mich. Stat. Ann. (1943) § 27.3178 (42); Minn. Stat. (1941) § 525.72; Mo. Rev. Stat. Ann. (1942) § 291; Neb. Comp. Stat. Ann. (Dorsey, 1929) § 30-1606; N.H. Rev. Laws (1942) c. 365, § 11; N.M. Stat. Ann. (1941) § 19-1001; N.D. Comp. Laws Ann. (1913) §§ 8616, 8620 (unless on question of law alone); Ohio Gen. Code Ann. (Page, 1937) §§ 12223-21, 12223-27 (if no record made of proceedings in probate court); Okla. Const. art. 7, § 16; Okla. Stat. Ann. (1941) tit. 20, § 275; Ore. Comp. Laws Ann. (1940) § 10-810; Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 2005 (on appeal from register of wills to orphans court); In re Geho's Estate, 33 Berks 43, aff'd. 340 Pa. 412, 17 A. (2d) 342 (1941); R.I. Gen. Laws Ann. (1938) c. 573, § 1; McSoley v. Slepkow, 54 R.I. 374, 173 A. 124 (1934); Davis v. Higgins, 59 R.I. 339, 195 A. 495 (1937); S.D. Code (1939) § 35.2111; Tenn. Code Ann. (Michie, 1938) § 9033; Tex. Rules Civ. Proc. (Supp. 1944) Rule 334; Vt. Pub. Laws (1933) § 3016, as amended by Vt. Laws, 1941, No. 42, p. 53; Va. Code Ann. (Michie, 1942) § 5249; Saunders v. Link, 114 Va. 285, 76 S.E. 327 (1912) (appeal from clerk of circuit court); Wis. Stat. (1943) § 324.03 (on appeal to circuit court from courts in counties of less than 15,000 population).

In this study we have not attempted to study those statutes which provide for probate jurisdiction to be exercised by other courts in exceptional cases. See, for example, Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 208, providing for administration to be carried on in the county or circuit court in estates in which the probate judge is interested; and Mich. Stat. Ann. (1937) § 27-1204 providing for the probate in the circuit court in chancery of foreign wills not required to be probated in order to be effective in the foreign jurisdiction. Such jurisdiction is the exceptional, not the normal, one.

[152] Ala. Code Ann. (1940) tit. 7, §§ 783, 784; Del. Const., art. 4, §§ 33, 34; Del. Rev. Code (1935) § 4418, 4419 (on record if taken, otherwise de novo); Fla. Stat. Ann. (1943) §§ 61.01-61.07; 732.18; N.J. Prerogative Court Rules, No. 93 (1941 revision) (but court in its discretion may permit testimony not previously available); N.C. Gen. Stat. Ann. (Michie, 1943) §§ 1-274, 1-275; S.C. Code Ann. (1942) § 231; Ex parte White, 33 S.C. 442, 12 S.E. 5 (1890); Sartor v. Fidelity & Deposit Co., 160 S.C. 390, 158 S.E. 819 (1931); W. Va. Code Ann. (Michie, 1937) §§ 5763, 5764, 5765.

[153] Cal. Const. of 1849, art. 6, §§ 5, 6.

them busy at all times; and also that, when a district judge was needed in civil or criminal matters, he was frequently far away in another county and not readily accessible. It was observed that, frequently, large estates came under the jurisdiction of the county courts and required able and capable supervision. Simple calculations were sufficient to show that no substantial expense would be incurred if a separate judge were provided for each county and the jurisdiction of the county courts consolidated with that of the district courts. Accordingly, it was proposed in the Constitutional Convention of 1878-79 to consolidate these two courts and have a separate "superior court" and "superior judge" for each county. Judicial ability, accessibility, responsiveness to the local community, elimination of competition between the different counties in the same district as to the selection of the judge—all at no increased expense—were believed to be thus available, although there was some dissent voiced to these alleged advantages. Nevertheless, after some debate,[154] this plan was embodied in the California Constitution of 1879[155] and has been in operation since that date. Thus the county courts were abolished and their jurisdiction transferred to the newly created superior courts—courts of general jurisdiction.

The same system had been inaugurated in Nevada some fifteen years earlier in the Constitution of 1864[156] and with hardly a dissenting voice. The arguments in favor of the plan were succinctly stated in the debates of the Nevada Constitutional Convention and are worth restating here:

> "In the first place, under such a system, we have all the judicial business done in the county which could be done by the District Judge and by the County Judge of that county; that is to say, we have ample force on the bench, in each county, to discharge all the duties that could be discharged in that county by the District and County Judges, and we have those duties performed, too, more expeditiously, and more economically; and we, at the same time, obviate the necessity of an appeal from the County Judge, or, if you please, from the Justices of the Peace to the County Judge, and from the County Judge to the District Judge, and then again from the District Judge to the Supreme Court. We rid ourselves of all this delay and difficulty by adopting this resolution, and thus we avoid, as it were, two intermediate stumbling-

[154] 2 Debates and Proceedings of the Constitutional Convention of California, 1878-1879, pp. 972-976 (1881).

[155] Cal. Const., art. 6, § 5.

[156] Nev. Const. of 1864, art. 6, § 6.

blocks in the way of justice, wiping them out of our judicial system altogether. In each of those inferior courts, expenses are necessarily incurred, and time wasted by litigants, before they can reach the court of final resort.

"Not only that, Mr. Chairman, but if you adopt the system proposed, you dignify the character of your judiciary in the several counties, and secure the respect of litigants for the courts, to a degree which, I humbly submit, they do not always challenge at the present time. Further than that, you also secure the services on the bench, of men of ability—men in whom the community can confide. You get men whose qualifications are known, coming from the neighborhoods in which they are elected, and known to all the citizens within their counties, and you avoid the great struggle which, aside from political considerations, would always be sure to arise, to a certain extent, under the old system of judicial districts comprising several counties in each, between the different counties of those respective districts, where men would naturally be combatting and struggling over the question of which county should present the candidate for District Judge."[157]

Whether California was influenced by the reform in Nevada is not clear. At least no reference to the system already in operation in Nevada is to be found. From the discussions on this proposed system, it is probable that California was influenced solely by considerations peculiar to itself.[158]

This plan of conferring probate jurisdiction upon the courts of general jurisdiction was widely copied from California, especially in the western states. In addition to California and Nevada, it has been adopted in Montana,[159] Utah,[160] Washington,[161] Wyoming,[162] and Arizona.[163] But this plan is not confined to the west. It also exists in Iowa,[164] Indiana,[165] and Louisiana.[166] Moreover, this system may be

[157] Nevada Constitutional Debates and Proceedings, 1864, p. 233 (1866).

[158] 2 Debates and Proceedings of the Constitutional Convention of California, 1878-1879, pp. 972-976 (1881).

[159] Mont. Const., art. 8, § 11.

[160] Utah Const., art. 24, § 9.

[161] Wash. Const., art. 27, § 10.

[162] Wyo. Const., art. 5, § 10.

[163] Ariz. Const., art. 6, § 6. In Arizona and California there is a separate court and judge for each county. Other states in which probate matters are handled by courts of general jurisdiction, are divided into districts with one judge presiding over courts in several counties except in the most populous places.

[164] Iowa Code (Reichmann, 1939) §§ 10763, 11819.

[165] Ind. Stat. Ann. (Burns, 1933) § 4-303.

[166] La. Const., art. 7, § 35.

said to prevail in Alabama[167] and New Mexico[168] insofar as an administration proceeding may be removed to the circuit or district courts of those states. Insofar as a probate proceeding is under the supervision of the circuit courts (or the hustings courts or law and chancery courts in certain cities) in Virginia[169] or of the superior courts in North Carolina,[170] the same may be said of these courts. In a certain sense this is also true in those counties of Oregon having a population of over 30,000 in which the probate court has been made a division of the circuit court.[171] In the three counties of Ohio in which the probate court has been "consolidated" with the common pleas courts,[172] there may be an appearance of a unified court, but this is not so. The probate courts there have neither been extinguished nor merged with the common pleas courts. Rather there has been a union of the personnel of the judge presiding over those two courts.[173] Indeed a decision of the probate court may be reviewed de novo on appeal before the same judge sitting as a common pleas judge.[174]

The old county courts in California in exercising their probate jurisdiction had been regarded as courts of limited and special jurisdiction.[175] What was the nature of this fusion with the court of general jurisdiction? It has been described thus: "It may be said that the probate court is gone, but that the probate jurisdiction remains. And that jurisdiction is now vested in the same court that exercises jurisdiction in cases of law and equity."[176] In exercising that jurisdiction, however, the court of general jurisdiction does not have general powers, but only those powers formerly exercised by courts of probate. Except for the power to exercise equitable jurisdiction as an incident of its probate functions, the superior court in probate is entirely distinct from the same court in a civil or criminal proceeding. It remains essentially a probate court and must confine its movements to probate matters. A remedy sought in the wrong side of the court may be as fatal as though

[167] Ala. Code Ann. (1940) tit. 13, §§ 138-144.

[168] N.M. Stat. Ann. (1941) §§ 16-312, 16-419, 16-420.

[169] Va. Code Ann. (Michie, 1942) §§ 5247, 5360, 5910, 5914, 5920, 5935, 5947.

[170] N.C. Gen. Stat. Ann. (Michie, 1943) §§ 28-30, 33-31.

[171] Ore. Comp. Laws Ann. (1940) §§ 13-206, 13-207, 13-209, 93-310.

[172] Ohio Gen. Code Ann. (Page, 1937) §§ 10501-47, 10501-50.

[173] State ex rel. Sattler v. Cahill, 122 Ohio St. 354, 171 N.E. 595 (1930).

[174] Ohio Gen. Code Ann. (Page, Supp. 1943) § 10501-56.

[175] Pryor v. Downey, 50 Cal. 388 at 400 (1875).

[176] In re Estate of Davis, 136 Cal. 590 at 597, 69 P. 412 (1902).

sought in the wrong court.[177] This same conception of divisible jurisdiction prevails also in Montana[178] and Wyoming.[179]

The Constitution of Washington, not unlike that of California, provides that "the superior court shall have original jurisdiction in all cases in equity and in all cases at law . . . and all criminal cases . . . of all matters of probate."[180] But it is said that "the Constitution does not make the superior courts probate courts. On the contrary it vests the superior courts with jurisdiction of 'all matters of probate'; hence the court is not shorn of its general powers simply because the cause before it may be one which was cognizable formerly in a court of probate."[181] It has been repeatedly held that the superior court sitting in probate matters loses none of its powers as a court of general jurisdiction.[182] It is said that "the constitution simply throws probate matters into the aggregate jurisdiction of superior courts as courts of general jurisdiction, to be exercised along with their other jurisdictional

[177] In re Estate of Davis, 136 Cal. 590, 69 P. 412 (1902); In the Matter of Estate of McLellan, 8 Cal. (2d) 49, 63 P. (2d) 1120 (1936); Fisher v. Superior Court, 23 Cal. App. (2d) 528, 73 P. (2d) 892 (1937). In the last case cited, a proceeding to contest a will after probate was declared ineffectual because filed in the general, rather than the probate, jurisdiction of the superior court, as required by the California probate code. This means that only probate matters must be tried on the probate side and non-probate matters on the non-probate side of the court. Three cases may seem to violate this principle: In re Thompson's Estate, 101 Cal. 349, 35 P. 991 (1894); In re Clary's Estate, 112 Cal. 292, 44 P. 569 (1896); and In re Riccomi's Estate, 185 Cal. 458, 197 P. 97 (1921). In each of these cases, however, relief essentially equitable in nature was sought on the probate side of the court, whereas it should have been sought on the equity side of the court. The estate of a deceased person was involved in each case which probably accounts for the mistaken choice of forum. Nevertheless in each instance the parties submitted and the matter was tried as an equitable matter and the adjudication upheld. The pleadings also supported the equity jurisdiction which justified the court in ignoring the fact that the remedy was formally sought under the probate jurisdiction. If the parties had objected before trial, however, a different result might have been obtained. See Hampshire v. Woolley, 72 Utah 106, 269 P. 135 (1928) as an example of this procedure.

[178] In re Sprigg's Estate, 68 Mont. 92, 216 P. 1108 (1923); State ex rel. Hahn v. District Court, 83 Mont. 400, 272 P. 525 (1928).

[179] Church v. Quiner, 31 Wyo. 222, 224 P. 1073 (1924).

[180] Wash. Const., art. 4, § 6.

[181] Reformed Presbyterian Church v. McMillan, 31 Wash. 643 at 646-647, 72 P. 502 (1903).

[182] State ex rel. Keasal v. Superior Court, 76 Wash. 291, 136 P. 147 (1913); In re Martin's Estate, 82 Wash. 226, 144 P. 42 (1914); State ex rel. Neal v. Kauffman, 86 Wash. 172, 149 P. 656 (1915); In re Wren's Estate, 163 Wash. 65, 299 P. 972 (1931); In re Kelley, 193 Wash. 109, 74 P. (2d) 904 (1938).

powers, legal and equitable, and as a part of those general powers."[183] This unitary notion of the superior court has likewise been followed in Oregon,[184] Utah,[185] and Arizona.[186]

This conception of jurisdiction has several noteworthy consequences. For many purposes the line of demarcation between the equity and probate jurisdiction of the court need not be observed. In either case it is in the same court and before the same judge. Thus the court of general jurisdiction may do many things in connection with a probate proceeding that would otherwise have required a separate action or proceeding addressed to its non-probate side. It can construe a

[183] State ex rel. Keasal v. Superior Court, 76 Wash. 291 at 298, 136 P. 147 (1913).

[184] In re Will of Pittock, 102 Ore. 159, 199 P. 633, 202 P. 216 (1921); In re Faling's Estate, 113 Ore. 6, 228 P. 821, 231 P. 148 (1924). This is confined to those counties in Oregon now having a population in excess of 30,000 and in which probate jurisdiction is vested in the circuit courts, department of probate. In the first case cited the court construed a will and decided a will contest in the same proceeding. In the second case it allowed attorneys' fees in connection with a will contest, which could not have been done had the court had jurisdiction solely over probate matters. The court said that its mode of proceeding was in the nature of a suit in equity. Completeness of administration in one proceeding was the objective.

[185] In Utah it is said: "We therefore have no courts which are known as probate courts, or as law courts, or as equity courts; but we have courts possessed of general original jurisdiction, which are known as district courts. The district courts of this state, therefore, administer the estates of decedents as a part of their original jurisdiction, the same as they hear and enter judgments on promissory notes, or enter decrees in equity, foreclosing mortgages or quieting titles." Weyant v. Utah Savings & Trust Co., 54 Utah 181 at 204, 182 P. 189 (1919). Other cases implying or holding that the court's jurisdiction is independent of the nature of the subject matter are: In re Tripp's Estate, 51 Utah 359 at 363, 170 P. 975 (1918); In re Reiser's Estate, 57 Utah 434 at 440, 195 P. 317 (1921); In re Agee's Estate, 69 Utah 130, 252 P. 891 (1927); In re Thompson's Estate, 72 Utah 17 at 32-35, 269 P. 103 (1927). But see Hampshire v. Woolley, 72 Utah 106, 269 P. 135 (1928) where a writ of prohibition was granted to restrain exercise of non-probate jurisdiction by district court sitting in probate; In re Rogers' Estate, 75 Utah 290, 284 P. 992 (1930) where the pleadings were held insufficient to invoke the non-probate jurisdiction of the court sitting in probate.

In In re McLaren's Estate, 99 Utah 340 at 346-47, 106 P. (2d) 766 (1940) the question of the power of a district court sitting in probate to pass upon a non-probate matter was held waived by the parties. The court said that the proper procedure "when a contested question arises in a probate proceeding involving the determination of disputed facts, is to strike the matters from the probate calendar and transfer it to the calendar of civil cases to be heard and determined as a contested civil matter. . . . The matter of transferring a cause from the probate calendar to a civil clendar in the same court is not a matter of jurisdiction but one of procedure."

[186] Estate of Hannerkam, 51 Ariz. 447, 77 P. (2d) 814 (1938) in which the district court in an action in which administratrix was substituted as party plaintiff approved a settlement of the action, which it could only do under its probate power.

will[187] or make partition of property,[188] even though not essential to the exercise of its probate jurisdiction. But, where the matter is one in which there is a right to trial by jury, it must not be impaired by calling it a probate matter—in which there is ordinarily no right to a jury trial.[189] The fusion of probate with law and equity cannot so easily abolish their essential differences. Furthermore courts must be ever alert not to proceed by citation or publication against a person in an alleged probate proceeding—a proceeding in rem—and end up by a judgment or decree in personam, for such may violate the requirement of due process.[190]

### 3. *Separate Probate Courts but Coordinate with Those of General Jurisdiction*

Several developments in Massachusetts have resulted in a profound change in the essential character of the probate court in that state. By a statute in 1862[191] the probate courts were made courts of record. In 1891 another statute[192] made them "courts of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction." The method of accomplishing this was not left to a mere designation. The statute indicates how this is to be done, viz., by a presumption "in favor of the proceedings of the probate courts as would

[187] Reformed Presbyterian Church v. McMillan, 31 Wash. 643 at 646-647, 72 P. 502 (1903).

[188] In re Wren's Estate, 163 Wash. 65, 299 P. 972 (1931).

[189] Id.

[190] The importance of keeping this distinction clear is well brought out in In re McLaren's Estate, 99 Utah 340 at 354-355, 106 P. (2d) 766 (1940) in which the court said: "But again, warning should be sounded regarding the situation where a civil case is tried as a probate matter and probate matter tried as a civil case when they are respectively purely matters cognizable only as civil and as probate. It is one thing to determine a civil matter as a probate matter or a probate matter as a civil case and quite another thing to try a probate matter as a probate matter and a civil case as a civil case, although they may be addressed to the wrong divisions of the court. The first is a matter of substance; the second a matter of labels and ministerial adjustment. . . . The probate division by virtue of its jurisdiction of the estate and the heirs for general purposes of administration could not in probate proceedings wherein the party was served by the mailing to him of a probate notice of the contest, have given judgment against him in a matter essentially civil in its nature." See also In re Martin's Estate, 82 Wash. 226, 144 P. 42 (1914); and In re Kelley, 193 Wash. 109, 74 P. (2d) 904 (1938).

[191] Mass. Acts and Resolves, 1862, c. 68, p. 56, now Mass. Stat. Ann. (Michie, 1932) c. 215, § 1.

[192] Mass. Acts and Resolves, 1891, c. 415, § 4, now Mass. Stat. Ann. (Michie, 1932) c. 215, § 2; and see Commissioners' Report (Mass.) for Consolidating Public Statutes, notes on c. 162, §§ 2, 8 (1901) .

be made in favor of the proceedings of the other courts of superior and general jurisdiction." Both of these changes were in the right direction, but still the procedure on appeal was left untouched. Trials de novo on appeal remained before one justice of the Supreme Judicial Court under whose direction there could even be a trial by jury. Final appeal from the decision of the single justice was heard before the full Supreme Judicial Court sitting as the Supreme Court of Probate.[193] Finally in 1920 appeals were taken directly to the full bench of the Supreme Judicial Court.[194] The hearing before the single justice was eliminated. And the appeal has been since treated as an appeal in a suit in equity under the general equity jurisdiction.[195] Questions of fact as well as of law are considered with respect to the evidence given in the probate court.[196] Thus the procedure on an appeal from the probate court was substantially as from the superior courts, i.e., on the record made in the court below and without a trial de novo.[197] This last step was the most fruitful in elevating probate courts to a stature fully coordinate with that of the superior courts in Massachusetts.

Several other states have felt that the character of probate proceedings was such as not only to justify separate probate courts, but also that their function was of such moment that they be given the same standing as courts of general jurisdiction. Thus in Pennsylvania the orphans' courts are courts of record;[198] and their proceedings are entitled to the same recognition and presumptions of validity as those of common pleas courts;[199] and appeals are prosecuted to the superior or supreme court in the same manner as are appeals from the common pleas courts.[200]

In New York substantially the same comparison may be made. The surrogates' courts are courts of record,[201] and their proceedings and decrees are entitled to a presumption of regularity and validity.[202] Ap-

[193] NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS, § 250 (1937).

[194] Mass. Stat. Ann. (Michie, 1932) c. 215, § 9 et seq.

[195] Ibid.

[196] Id. c. 215, § 12.

[197] NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS, § 250 note 4 (1937).

[198] Pa. Stat. Ann. (Purdon, 1930) tit. 20, §§ 2081, 2082, 2083, 2085.

[199] Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 2085.

[200] Pa. Stat. Ann. (Purdon, 1930) tit. 17, §§ 181, 185; tit. 12, §§ 1091, 1107.

[201] N.Y. Judiciary Law, (McKinney, 1939) art. 2, § 2.

[202] N.Y. Surrogates' Court Act (Cahill, 1937) § 43. See also O'Conner v. Huggins, 113 N.Y. 511 (1889).

peals lie to the Appellate Division of the Supreme Court, in the same manner as from the Supreme Court.[203]

A similar summary may be made in Maryland. The orphans' court is a court of record;[204] appeals are taken directly to the Court of Appeals of Maryland where they are heard on the record made in the orphans' court.[205]

The administration of probate matters in New Jersey by the surrogate's court, the orphans' court, and the prerogative court has already been detailed. Appeals from orphans' courts lie to the prerogative court and from the latter to the court of errors and appeals.[206] The common pleas courts are the courts of general jurisdiction and appeals from them lie to the supreme court and from the latter to the court of errors and appeals.[207] In this respect, the orphans' courts may be termed coordinate with the common pleas courts.

The probate courts of Ohio, like the common pleas courts, are courts of record,[208] and are accorded a presumption in favor of their proceedings.[209] Appeals lie directly to the courts of appeals in the same manner as do appeals from the common pleas courts,[210] unless no record was made of the proceeding in the probate court, in which case appeals are heard de novo in the common pleas court[211] from which an appeal will then lie to the court of appeals. To the extent that appeals lie and are taken to the courts of appeal directly from probate courts, the latter are coordinate with the common pleas courts; but, to the extent that no record is made in the probate court and appeals are taken to the common pleas courts with a trial de novo, the probate courts are definitely of an inferior status.

In Wisconsin probate matters come under the jurisdiction of the county courts,[212] which also handle a limited amount of civil and criminal matters in some counties under special legislation.[213] These courts are courts of record.[214] In counties having a population of 14,000 or

[203] N.Y. Surrogates' Court Act (Cahill, Supp. 1943) § 288.
[204] Md. Const., art. 4, § 1.
[205] Md. Code Ann. (Flack, 1939) art. 5, §§ 64, 66.
[206] N.J. Rev. Stat. (1937) § 2:30-16.
[207] N.J. Rev. Stat. (1937) §§ 2:27-355, 2:27-350.
[208] Ohio Const., art. 4, § 7.
[209] Shroyer v. Richmond, 16 Ohio St. 455 (1866).
[210] Ohio Gen. Code Ann. (Page, Supp. 1943) § 10501-56.
[211] Ibid.
[212] Wis. Stat. (1943) § 253.01.
[213] Wis. Stat. (1943) App. p. 8.
[214] Wis. Stat. (1943) § 253.08.

more the county judge must be a member of the bar or have previously occupied the office of probate judge.[215] In other counties no such qualifications are required. A layman may be county judge.[216] Appeals from counties having a population of more than 15,000 lie to the Supreme Court;[217] in the remaining twelve counties appeals lie to the circuit court with a trial de novo.[218] In the former case, the hearing on appeal is on the record of the proceedings in the county court, and otherwise has the same procedure as do appeals from circuit courts.[219] Thus in counties having a population of more than 15,000 the county courts occupy a position coordinate with the circuit courts in the matter of appeals. In other counties, their position may only be described as inferior.

In Indiana administration of decedents' estates is had in the circuit courts by circuit judges for the most part,[220] similar to the California system. In Marion[221] and Vanderburgh[222] counties, however, separate probate courts have been created and designated as courts of record.[223] Appeals from the circuit court in probate matters lie to the supreme court or one of the courts of appeals.[224] As might be expected the appeal is not heard de novo but on the record, since the matter originally was heard by a circuit judge. Similarly appeals from these two separate probate courts lie to the supreme court or a court of appeals.[225] Thus these two probate courts may be said to have the same standing as circuit courts in Indiana.

In the District of Columbia there is a separate probate term each year of the United States District Court there.[226] That term of court is presided over by the district judge. Nevertheless there is a separate probate court, with a union of personnel.[227] Appeals are taken to the United States Court of Appeals for the District of Columbia in the

[215] Wis. Stat. (1943) § 253.02.
[216] Wis. Stat. (1943) § 253.02, except in counties where civil or criminal jurisdiction has been conferred upon county courts.
[217] Wis. Stat. (1943) § 324.01.
[218] Ibid.
[219] Wis. Stat. (1943) § 324.04.
[220] Ind. Stat. Ann. (Burns, 1933) § 4-303.
[221] Ind. Stat. Ann. (Burns, 1933) § 4-2901.
[222] Ind. Stat. Ann. (Burns, 1933) § 4-3001.
[223] Ind. Stat. Ann. (Burns, 1933) §§ 4-2902, 4-3002.
[224] Ind. Stat. Ann. (Burns, 1933) §§ 4-214, 6-2001.
[225] Ind. Stat. Ann. (Burns, 1933) §§ 2-3218, 2-3222, 2-3223.
[226] D.C. Code (1940) § 11-501.
[227] Ibid.

same manner as appeals from the district court.[228] Hence the probate court for the District of Columbia is fully coordinate with the district court there.

In Tennessee the chancery courts have concurrent jurisdiction with the county court to appoint an administrator six months after the decedent's death.[229] The county courts have concurrent jurisdiction with the chancery and circuit courts in proceedings to sell real estate of decedents, and for distribution and partition.[230] Appeals from the county courts lie to the circuit courts with a trial de novo[231] except that, if the jurisdiction of the county court in the matter appealed from is concurrent with that of chancery and circuit courts, an appeal lies directly to the court of appeals or supreme court.[232] Insofar as appeals from the county court lie directly to the court of appeals or supreme court, the former may be termed coordinate with the courts of general jurisdiction in the present classification.

A Vermont statute provides that appeals from probate courts lie directly to the supreme court on questions of law,[233] but otherwise to the county courts.[234] To the extent that appeals lie directly to the supreme court, the probate courts of Vermont are coordinate with the courts of general jurisdiction.

In Illinois, appeals from a final order of the probate court in a proceeding for the sale of real estate lie to the appellate or supreme court of that state,[235] rather than to the circuit courts. In this one instance, probate courts in Illinois are clearly coordinate with those of general jurisdiction.

In each of the first five states discussed here, probate proceedings are believed to be of such a character and volume as to justify a separate probate court substantially on a par with those of general jurisdiction. Certainly in Massachusetts, New York and Pennsylvania, and in certain communities of New Jersey, Maryland and Ohio, the population and amount of probate business is large enough to warrant the establishment of separate courts.

[228] D.C. Code (1940) § 17-101.
[229] Tenn. Code Ann. (Michie, 1938) § 10382.
[230] Tenn. Code Ann. (Michie, 1938) §§ 8263, 10326, 10380.
[231] Tenn. Code Ann. (Michie, 1938) §§ 9028, 9033, 9060.
[232] Tenn. Code Ann. (Michie, 1938) §§ 9029, 9059.
[233] Vt. Pub. Laws (1933) § 3001.
[234] Vt. Pub. Laws (1933) § 3002.
[235] Ill. Stat. Ann. (Smith-Hurd, 1941) c. 3, § 486.

### 4. *Probate Matters Handled in Chancery*

In most states the aid of chancery may be sought only when the power of the probate court is insufficient for the desired end. In Alabama any person interested in an estate may, at any time prior to final settlement, take the proceeding into chancery. Even under the early decisions of that state, no reason need be given. It was a matter of absolute right.[236] This was probably a broader jurisdiction than was exercised by English chancery courts over decedents' estates. In 1915 this was embodied in a statute there.[237] Under the present practice an estate may be removed either to the circuit court[238] or to chancery.[239] In effect then, there is concurrent jurisdiction in the probate, circuit and chancery courts to administer estates in Alabama.

In Mississippi jurisdiction over probate matters in the county courts was abandoned in 1890 and conferred entirely upon the chancery courts.[240] This put probate jurisdiction in a court which had exercised it upon special occasions previously and which had ample equipment and personnel capable of the new task assigned to it. Furthermore, it eliminated any question as to the amount of equity powers possessed by the probate court or whether the circumstances of a particular administration proceeding warranted the intervention of chancery.[241]

Prior to 1939 there were separate probate courts in Arkansas. By a constitutional amendment, effective January 1, 1939, the judges of the chancery courts have been given the added duty of presiding over the probate courts.[242] It is said that the probate courts have not lost their identity by such consolidation, but that they remain probate courts in chancery.[243] However, the effect of transferring this function to the judges of the chancery courts cannot be merely formal; it will likely import into probate proceedings some of the equitable practices and doctrines known and practiced in courts of chancery.

In addition to these three states where chancery has a hand regularly in the administration of probate matters, there are numerous situ-

[236] See SIMS, CHANCERY PLEADING AND PRACTICE IN ALABAMA, § 658 (1909) and cases there cited.

[237] Ala. Acts, 1915, p. 738.

[238] Ala. Code Ann. (1940) tit. 13, §§ 138, 139.

[239] Ala. Const., art. 6, § 149.

[240] Miss. Const., art. 6, § 159.

[241] Some idea of the extent as to the uncertainty of equity powers possessed by probate courts is described in POUND, ORGANIZATION OF COURTS 140 (1940).

[242] Ark. Const., Amend. 24; Ark. Acts, 1939, act 3, p. 6.

[243] Lewis v. Smith, 198 Ark. 244, 129 S.W. (2d) 229 (1939).

ations that arise in the administration of estates where it is thought that the machinery of probate courts is inadequate to deal with the problem; and that because of special circumstances, the invocation of equity jurisdiction is justified. This is an established practice in most states at the present time. The occasions for this special jurisdiction of equity over the administration of estates are not within the primary purpose of this study and cannot, therefore, be treated here.[244]

*(To be concluded in the August issue of the Review)*

[244] As to the jurisdiction of equity to administer estates, see 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., § 156 (1923); "Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees," 48 YALE L. J. 1273 (1939).