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DISCUSSION OF RECENT DECISIONS

CHARACTER AND PREVIOUS CRIMINAL RECORD AS ELEMENTS IN FIXING BAIL.—The question of whether the character and previous criminal record of an accused may be considered in determining the amount of bail, was raised before the Supreme Court of Illinois for the first time in the recent case of the People ex rel. Sammons v. Snow, et al.¹ Unusual public interest attached to this case because it marked the first expression of the high court's attitude toward a new use of the old "vagrancy statute," which had been resurrected by the prosecutors in a desperate attempt to satisfy public demands for action against notorious underworld characters in Chicago. The statute,² enacted in 1874, provided a fine of a hundred dollars or imprisonment for six months in the house of correction as a maximum punishment for conviction of: "One who is idle and dissolute, and who goes about begging; or who uses juggling or other unlawful games; . . . a confidence man, and all persons who are known to be thieves, burglars, pickpockets, or who have been convicted of a felony and, having no lawful means of support . . . are habitually found prowling around any steamboat landing, railroad depot, etc." Twenty-six warrants had been issued for the arrest of the more notorious denizens of the underworld, and among the first to be apprehended was Sammons.

Police records show that Sammons' criminal career extended back to 1900; and that he had been convicted of rape, robbery, murder, and conspiracy against the laws of the United States. He had on one occasion escaped from the penitentiary and had been returned. Three indictments pending against Sammons at the time of his arrest charged him with assault with intent to murder, with carrying concealed weapons, and with driving while drunk. When he appeared to give bail on the charge of vagrancy, the State's Attorney moved that the amount be raised from the ten thousand dollars indorsed on the warrant. The judge of the Municipal Court consented and, in fixing the amount at fifty thousand dollars, said, "If I thought he would get out on that I would make it more!"

The attorneys for Sammons went directly to the Supreme Court and filed their original petition for a writ of habeas corpus for the purpose of reducing the amount of bail to "a reasonable sum." After hearing the evidence and considering the nature of the charge, the court, in its opinion delivered by Chief Justice Dunn, said, "All persons charged with crime have

¹ 340 Ill. 464.
² Cahill's Ill. Rev. Stat., 1929, Ch. 38, pars. 606, 607.
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A right to be admitted to bail before conviction except for capital offenses where the proof is evident or the presumption great. This right is guaranteed by the Bill of Rights of the Constitution of this State, and all courts are bound to give persons accused of crime the benefit of that right as declared in Section 7 of Article II, providing, 'all persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great.' The object of bail is to make certain the defendant's appearance in court to abide the judgment of the court. Bail is not allowed or refused on account of the presumed guilt or innocence of the person accused, though the existence of a doubt as to the accused's guilt and the probability of his appearing for trial are questions which must be considered in determining the amount of bail to be required. It is also proper to take into consideration on that question the character of the person accused, and the fact, if it is a fact, that he has a criminal record, but excessive bail is not to be required for the purpose of preventing the prisoner from being admitted to bail." The court found that fifty thousand dollars was an unreasonably high amount for bail in a vagrancy case, considered it a practical denial of bail, and reduced the amount to five thousand dollars.

This decision had the effect not only of checking, for the time, further attempts to use high bail as a means of punishment, but also declared the rules governing the fixing of bail and specifically stated that the character and previous criminal record of the accused should be taken into account. No previous decision in Illinois had considered these points expressly, nor do the Illinois statutes furnish any rules for the guidance of the courts.3

It is inherent in the nature of the right to bail that each case must be considered in the light of all the circumstances, as a new question. The right is so jealously regarded in the United States that practically every state constitution includes a provision similar to that of Illinois in regard to bail. In the eighth amendment to the Constitution of the United States, the corresponding right of citizens of the United States to bail in a reasonable amount, in the Federal Courts, is guaranteed by the words, "excessive bail shall not be required." 4

This provision is patterned after a similar provision in the Statute of 1 William and Mary, c. 2, enacted in 1688.4 This set forth the grievous abuses of the liberty of the subject and recited that "excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made

3 Cahill's Ill. Rev. Stat., Ch. 38, par. 706.
4 Dr. Francis Lieber, Civil Liberty and Self Government, p. 67.
for the liberty of the subjects, and excessive fines have been imposed, and illegal and cruel punishments inflicted,' which are thereafter prohibited. Ever since the ancient severity of the obligation of bail has been relaxed from requiring that the surety's body be substituted for that of the accused in case the latter escaped from the custody of the surety, the question of how to determine reasonable bail has been a debated point.

Considerations affecting the amount of bail which will be deemed reasonable have been well stated by Judge Cooley. He says, "That bail is reasonable, which, in view of the nature of the offense, the penalty which the law attaches to it, and the probabilities that guilt will be established on the trial, seems no more than sufficient to secure the party's attendance. In determining this, some regard should be had to the prisoner's pecuniary circumstances; that which is reasonable bail to a man of wealth being equivalent to a denial of right if exacted of a poor man charged with a like offense." This statement was quoted in Carmody v. State, yet the court held that the defendant's right to "a discriminating judgment," was not infringed by a general order of the Circuit Court that for all felonies not amounting to homicides, the amount of bail for that term of court should be one thousand dollars, regardless of the circumstances of the case.

Additional factors are frequently included in what are commonly called by the reviewing courts, "all the circumstances of the case," such as the amount of money involved, the health of the accused, the status of the case when bail is sought, and the conduct of the accused before and after arrest. On the latter point, Lord Mansfield established the precedent for later courts by his decision in the case of Rex v. Baltimore, in which Lord Baltimore was accused of rape, and voluntarily surrendered himself to the court's jurisdiction for trial. Mansfield said that this voluntary surrender was a strong indication that Baltimore had no intention of absconding from justice, particularly in view of the fact that he had large property holdings in the vicinity, which would be forfeit if he absent himself.

Somewhat stricter was the New York decision of People v. Mott. Mott was charged with dishonesty in contracts and ninety-two indictments had been returned against him. Before

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5 Holsworth, History of English Law, IV, 525-529, citing Coke's Fourth institute 178, referring to the Ancienne Costume of Normandy, in which sureties are described as "The Duke's walking prisons;" Holmes, The Common Law, pp. 243, 250.
7 105 Ind. 546.
8 4 Burr. 2179.
his examination as a witness was completed Mott disappeared and was re-arrested in Paraguay. He waited to be extradited. The court stated the common law to be still in force in New York which required no admission to bail unless the court was satisfied that defendant would not leave the country. Bail was denied.

Mere size of the bail has been held not to make it excessive, where the amount involved was larger than the bail, in another New York decision, *People v. Tweed.* One of the largest bonds ever known was required in this action, brought in the name of the State for moneys fraudulently obtained from the city of New York where the amount sought to be recovered was six million dollars. The court refused to cut down the bail of three million dollars and said, "It is also urged that the amount of bail is excessive. This is clearly a question of discretion for the court below and so not appealable. There is no rule of law that a party shall not be held to bail in the sum of three million dollars, especially when the amount sought to be recovered is double that sum."

Similar reasoning is found in the Illinois decision in *Lynch v. People,* rendered in 1865, where it was held that an order denying bail to one accused of murder, although defendant offered to show that the offense was manslaughter, was not such a final order as is subject to review in superior court. Stephen A. Douglas, while a member of the Supreme Court of Illinois, said in the case of *People v. Town,* that "When, under all the circumstances of the case, it clearly appears from the evidence, that the defendant is unable to give such bail as the court believes sufficient to ensure his appearance, the court will not, merely for the sake of reduction, reduce the amount of bail."

Occasionally, lower bail is sought because of the illness of an accused. Where a woman was indicted for murder and was in such poor health that there was some danger of permanent injury to her if she were confined, the Supreme Court of Oklahoma in *Ex Parte Spoon,* refused to order any reduction even though the person was without property. More leniency was shown in *Ex Parte Johnson,* where reasonably strong grounds for apprehending permanent impairment of health or death were considered in admitting the accused to bail.

The right of the prisoner to be admitted to bail after conviction is well stated in the case of the *United States v. Motlow.*

10 5 Hun 382. See also Paul v. Munger et al., 47 N. Y. 469.
11 38 Ill. 494.
12 4 Ill. 19.
15 10 Fed. (2d) 657.
There Justice Butler said: "In opposition to the application [for bail], the attorneys for the United States earnestly emphasize the denial of bail by the trial judge and by two Circuit Judges. While these denials are to be considered thoughtfully, they do not relieve from the duty imposed by the statute to consider the applications in the light of all the circumstances, and by the just exercise of discretion to determine whether the ends of justice require that applicants should suffer imprisonment in the penitentiary pending determination of their writs of error in the appellate court. There is nothing to indicate that their attendance cannot be secured by reasonable bail."

This decision also pointed out that the character of the crime charged and the probable guilt or innocence of the accused had no bearing, according to the recommendation of the Senior Circuit Judges to District Judges, on call of the Chief Justice of the Supreme Court of the United States, of June, 1925. It is stated in the recommendation that "the right to bail after conviction by a court or judge of first instance or an intermediate court, or a judge thereof is not a matter of constitutional right."

Cases directly considering the criminal record of the accused or mentioning character of the accused as a decisive factor in determining what the amount of bail shall be, are not numerous. Almost always, where these factors are considered at all, or are present, the court has decided on a different ground. That the prisoner had been previously acquitted of similar charges was considered in the interesting case of Rex v. Acton. The defendant was deputy keeper of Marshalsea prison; and upon the address of the House of Commons was prosecuted for several murders supposed to have been committed by him on prisoners in his custody. He was tried on four several indictments, whereon the only question was whether a place within the prison called the strong room was a proper place to confine disorderly prisoners; and the jury upon all the four trials acquitted him, to the satisfaction of almost everybody; and in consequence of these acquittals he was discharged. Presently, after he was at liberty, a single justice of the peace, upon information of a fifth person's having been put into the same strong room and dying within a year after, thought fit to commit the defendant again for murder. And upon a habeas corpus, Strange pro def' moved he might be admitted to bail, on producing copies of the information and affidavits of the former trials, and of the identical nature of the offenses; but the court refused to look into the informations though they were pressed with The Lord Mohun's case, Salk. 104, where they looked into the depositions taken by the coroner upon a motion to bail. And in the present

16 2 Strange 851.
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case they remanded the defendant, who lay in prison until the next assizes, when the grand jury did him the justice to return the bill ignoramus, and he was discharged."

Violent protest against arrest and escaping from jail was considered in setting bail, in the novel case of *Ex Parte Thomas.* Defendant was indicted for stealing an automobile. On a previous trial the jury was unable to agree. After a second trial and conviction, the court allowed a motion for new trial. The defendant forfeited one bond and was re-arrested but he escaped, swearing, "That ............ judge will never try me." In view of all these facts, the court held it justifiable to require a larger bond than is ordinarily required of one charged with theft. Three previous violations of bail bonds were also held to warrant a refusal to reduce bail, in the case of *Ex Parte Calloway.*

In a California case of an indictment for forgery for which the possible punishment was one to fourteen years imprisonment, the turpitude of the crime was considered as well as the money involved, the danger to the public, and the punishment for the act. Bail at eight thousand dollars was held not to be so unreasonable as to warrant interference. The citations of *Ex Parte Ryan* and *Ex Parte Duncan,* given as the basis of the court's decision in this case, reveal an interesting contradiction. In the former, Wallace C. J., in passing on whether bail at fifteen thousand dollars was unreasonable for indictment for assault and attempt to murder said, "I am bound to assume his guilt for the purpose of this proceeding." He also said that the presumption of guilt arises upon the return of indictment. In the latter case, Duncan tried to be admitted to bail for a period covering eighteen months while awaiting trial on ten indictments for grand larceny, forgery, and embezzlement of sums aggregating one hundred and twelve thousand dollars. Bail had been fixed at that amount. The same justice said, "We are not at liberty in proceedings of this nature to investigate that question [guilt or innocence]. On the contrary, we are bound by the settled rules of law to presume him not guilty." And he cited for authority the Ryan case!

At the same time that the Sammons case was being decided, Judge Evans of the Federal District Court for the Eastern Division of the Northern District of Illinois, was called upon to

17 91 Tex. Crim. Rep. 49. See also *Ex Parte Jagles et al.,* 44 Nev. 370.
19 In Re Williams, 82 Cal. 183.
20 44 Cal. 555.
21 53 Cal. 410.
decide whether or not fifty thousand dollars bail was too high for Frank Nitti who was under indictment for fraudulent evasion of the Federal income-tax law. Nitti represented that he was unable to raise the bond, and was still in jail, from which he sought release on *habeas corpus*.

The court said, "Whether the requirement of fifty thousand dollars is excessive involves consideration of numerous facts and factors. That Nitti is in jail and has not raised the bail is somewhat persuasive of his inability so to do. . . . Of course, I am not going to hold a bond is not excessive because the accused can furnish it . . . while the amount of bail seems large, I am not prepared to say it is excessive without a more satisfactory showing on the petitioner's part as to his wealth and his ability to raise it," which was just what the petitioner could not afford to do. Doubtless the reputation of the accused as a wealthy criminal also entered into the court's mind in allowing the bond to remain at that figure.

That few cases have been found which consider the character and previous misconduct of the accused as controlling factors, indicates that until the Sammons case the question was more or less open. The Illinois court has therefore taken a step forward toward a clearer definition of the factors which should be considered by the courts in fixing the amount of bail. It is a timely step. Modern developments in psychology have awakened the courts to a deeper appreciation of the responsibilities they assume in judging their fellow men. Better understanding of criminal types makes for a closer approximation to justice. When the court can tell with some degree of accuracy whether or not the man accused of a crime will run away at the first opportunity, the right to reasonable bail—one of the most jealously guarded and most carelessly administered prerogatives of the citizen—will be assured.

**Partnership Liability of Holders of Beneficial Shares in Business Trust.**—An action was brought in Missouri on six trade acceptances amounting in total to about thirty-nine hundred dollars which had been accepted by E. R. Miller Cigar Company. This company had been constituted under a declaration of trust in which trust the defendants held beneficial shares. The company had been adjudged bankrupt and the plaintiff sought to recover against the defendants as partners on the basis that the trust agreement was void. Excerpts from the trust agreement are as follows:

"This Declaration of Trust, Made this 23rd day of February, 1922, by E. R. Miller, W. O. Miles and Phillip G. Gephart, hereinafter called Trustees, witnesseth:

"That whereas, on the 23rd day of February, 1922, there was conveyed to said trustees certain moneys, right and interests and property rights . . . to be held by them upon the trust hereinafter set forth . . .

"This Association shall be designated, trade and do business as the E. R. Miller Cigar Company, and so far as practicable all business thereof shall be transacted and trust property and trust funds held under that name."

It further provided that the trustees should hold title for the benefit of all shareholders, should serve until a vacancy should occur by death, resignation, or removal and all vacancies should be filled by the remaining trustees. The beneficial interest was divided into shares and the trustees were to issue certificates to the shareholders which should be personal property and give only a right to share in the profits and a division of the trust funds on dissolution. The agreement specifically provided that a partnership was not created nor should the shareholders be liable as partners or otherwise. Schedule A which described the property constituting the trust estate was signed by E. R. Miller, W. O. Miles and Phillip G. Gephart, as trustees and also as beneficial owners.

The Supreme Court of Missouri affirmed the decision of the Circuit Court of Jasper County giving judgment to the defendants, who had purchased their shares subsequent to the establishment of the trust. The court said that as a general rule when the same party obtains both the legal title and the beneficial interest, they would merge and that when this trust agreement was established, the trustees being also the holders of the beneficial shares, would be held to be partners and personally liable in so far as their creditors were concerned. However, before the issuance of the trade acceptances, certificates of beneficial interest had been sold to a large number of parties who had no interest in the legal title or control over the trustees. Although the trust would have been of no effect at the outset, yet, as soon as other persons became holders of shares, life was imparted to the agreement and it became valid.

Furthermore the court held that even if the trust agreement never became effective, still it did not follow that a purchaser of a certificate of beneficial interest who acquired his shares with the belief that the trust was valid, would be held liable as a partner. As between themselves, the certificate holders could not be considered partners since their contract provided just the opposite. And a party cannot be liable as a partner, in the absence of estoppel, where no partnership in fact exists.

23Henry G. Taussig Company v. Poindexter, 30 S. W. (2d) 635 (Mo. 1930).
The argument in support of the conclusion announced in this case can be divided into four stages. The first of these and the most important concerns the question of when an agreement will be considered a trust and when a partnership. Secondly, having established that the agreement is a trust in form, it is then necessary to consider the question of merger which results from a union of the legal and equitable title. In the third place, however, it is found that subsequent to the inception of the trust, third parties became holders of the beneficial interests and acquisition of shares by third persons was contemplated at the time the agreement was entered into. The question arises then as to the effect of such intention. Fourthly, if there was no merger, there is the question as to whether the trustees could be held as partners while owning all the beneficial interests. These four stages will now be taken up separately in some detail.

The leading case which considers the distinctions between business trusts and partnerships is *Williams v. Inhabitants of Milton*. That had to do with an agreement known as the Boston Personal Property Trust by the terms of which funds and property were transferred to trustees to manage, invest, reinvest, sell, mortgage and pledge. The trustees had full powers to deal with the property and to designate the dividends to be paid to shareholders out of the income. Vacancies among the trustees were to be filled by the remaining trustees and they might alter or terminate the agreement with the consent of the holders of three-fourths of the shares. This last was the only power which the beneficiaries had, and there was no provision for their assembly in a meeting. The court held that this was a trust, saying "the difference lies in the fact that in . . . [partnerships] the certificate holders are associated together by the terms of the 'trust' and are the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their property, . . . while in . . . [trusts] there is no association between the certificate holders. The property is the property of the trustees and the trustees are the masters. All that the certificate holders . . . had was a right to have the property managed by the trustees for their benefit."

Another case which is clear cut is that of *Bouchard v. First People's Trust*. The trust instrument provided that the trustees might carry on any lawful business, that they could deal with the property without any limitation, and that they might fill the vacancies in their ranks. The only rights of the share-

25 253 Mass. 351.
holders were to be paid such dividends as the trustees declared and to share in the distribution of the property. They had no voice in the management, nor power to terminate the agreement. There was no provision for the meeting of the shareholders for any purpose. This agreement likewise was held to be a trust and not a partnership. From these two cases it can be seen that in general when the trustees are given sole charge of the property with the cestuis que trust only entitled to the benefits, then the agreement is a trust. Where, however, the cestuis que trust control the actions of the trustees, then it amounts to a partnership, the cestuis being liable as partners and the trustees being merely agents.

The decisions referred to indicate that there are two essential characteristics which distinguish the partnership, the first being the association between the beneficiaries and the second, the beneficiaries' power as principals to control the management of the property by the trustees, who are merely their agents.

The element of association between the beneficiaries is perhaps emphasized less than the element of control. In some cases it is not mentioned, as for example in Frost v. Thompson, where is found the statement that "a declaration of trust or other instrument providing for the holding of property by trustees for the benefit of owners of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership. Whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created; but if they are subject to the control of the certificate holders, it is a partnership." However, a logical inference can be drawn that the element of association was implied in these cases since the facts indicate that there actually was association. Moreover, the later cases speak of this element specifically, and it is evident that it cannot be disregarded. The necessity of its existence was recognized by Justice Oliver Wendell Holmes in Crocker v. Malley, when he said, "There can be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more. 'The certificate holders ... are in no way associated together nor is there any provision in the [instrument] for any meeting to be held by them. The only act which ... they can do is to consent to an alteration ... of the trust' and to other matters ... They are confined to giving or withholding assent, and the giving or withholding

26 219 Mass. 360.
28 249 U. S. 223.
it 'is not to be had in a meeting, but is to be given by them individually.'"

When the second essential characteristic which distinguishes the partnership, that of control by the beneficiaries, is considered, it is found that there are some differences in the opinions which have been rendered. The early Massachusetts cases are fairly uniform. Thus in *Mayo v. Moritz et al.*,\textsuperscript{29} an inventor transferred to trustees certain patent rights to be managed and disposed of for the benefit of himself and those who might furnish funds for the exploitation of the invention. The proceeds were to be distributed one-half to the inventor and one-half to the investors to whom transferable scrip had been issued. The scrip holders had no power over the trustees and were held not to be partners. On the other hand in *Hoadley v. County Commissioners of Essex*,\textsuperscript{30} there was a declaration of trust by an individual that he held patents, a factory, and a business in trust for such persons as should buy certificates of interest to be issued in accordance with the terms of the declaration. It provided for the conduct of the business by an executive committee to be chosen by the holders of the certificates. This was held to be a partnership, because the certificate holders through the executive committee had control. Again in *Williams et al. v. Boston*,\textsuperscript{31} there was an agreement which provided that the purpose was to purchase, develop, and dispose of the former site of the Museum of Fine Arts in Boston. The property was to be held by the trustees but the shareholders had the right to remove them and could direct their actions. This was likewise held to be a partnership since the shareholders had control.

Later, the Massachusetts courts had to consider trusts where the control for the time being was in the trustees, but only on sufferance, since the certificate holders might amend the trust at any time, might remove trustees, and might appoint new ones in their places. It was decided that these agreements were partnerships inasmuch as the shareholders had the "ultimate control."\textsuperscript{32} Other jurisdictions have not as a general rule gone quite so far as Massachusetts. In *Rhode Island Hospital Trust Company v. Copeland et al.*,\textsuperscript{33} the agreement was very similar to the Boston Personal Property Trust which was the subject

\textsuperscript{29} 151 Mass. 481.  
\textsuperscript{30} 105 Mass. 519.  
\textsuperscript{31} 208 Mass. 497.  
\textsuperscript{33} 39 R. I. 193.
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of discussion in Williams v. Inhabitants of Milton. The trustees might deal freely with the property and the holders of beneficial interests were entitled to receive dividends only as declared by the trustees. However, the shareholders in meeting assembled could remove a trustee and appoint another and could also terminate the trust. It was decided that this was a trust although the count did not discuss the provision for the removal of the trustees. The Kansas courts have held that where the trustees have entire control and the only power of the shareholders was to elect the trustees at annual meetings called for such purpose, the agreement was a trust.34

In some states; no distinction has been made on the basis of control, and all agreements of this nature have been treated as partnerships.35 The state of Texas has been the most extreme in looking unfavorably upon trusts. In several cases it has been announced that since the statutes of the state provide for corporations and limited partnerships, there is implied a public policy to exclude all other methods of limiting liability. Therefore, all trusts will be held to be partnerships no matter what their provisions.36

In Thompson v. Schmitt,37 the trustees had complete powers and the only rights of the shareholders were to inspect the records of receipts and disbursements, to receive dividends, to have a share of the principal at termination, and not to have the agreement terminated before a stipulated time without their consent. Nevertheless the agreement was said to constitute a partnership.

Having discussed the question as to whether an agreement is a trust or a partnership it is next necessary to consider the question of merger. It is a general equitable doctrine which needs no explanation nor cited authority that when the equitable and legal title to property come to be held by one individual the equitable merges in the legal. Thus where the same persons are both the trustees and the beneficiaries under a trust agreement, a merger occurs and they are the owners and the trust relationship vanishes.38 If then under these facts they engage in business, they can only be doing so as partners and will be held liable as such.

37 115 Tex. 63.
38 Cunningham v. Bright, 228 Mass. 385; Greene v. Greene, 125 N. Y. 506.
However, in most cases where in the first instance the trustees and the beneficiaries are the same, shares are later sold to others; so there arises the question as to whether the merger might not have done away with the possibility of these others having a status as *cestuis que trust*. Trusts of this kind are always instituted with the design that others will become holders of beneficial interests and this will permit the application of the doctrine that merger is essentially a matter of intention, and where the intention to merge does not exist, the rule is not operative.\(^9\) As was stated in *Chase v. Van Meter*,\(^{40}\) "the true test of merger is the intention of the party either expressed or implied. If the intention has not been expressed, it will be sought for and ascertained in all the circumstances of the transaction. If it appears from all the circumstances to be for the benefit of the party acquiring both interests that the merger shall not take place, but that the equitable or lesser estate shall be kept alive, then his intention that such a result will follow will be presumed and equity will carry it into execution by preventing a merger. If from all the circumstances, a merger would be disadvantageous to the party, then his intention that it should not result will be presumed." Therefore, since such is the intention, there will be no merger in these trusts during the interim while the trustees are themselves the owners of all the beneficial shares.

It might be thought that since there is no merger the trustees might conduct the business while they were still the sole beneficiaries and be liable only as trustees. However, they would be attempting to carry on in another form an enterprise which amounted to a partnership with the manifest intent of avoiding personal liability. This they will not be permitted to do and they will be held liable on the same basis as if they had been partners.\(^{41}\)

Much of the law with reference to business trusts comes from the state of Massachusetts. This is, of course, logical, since the business trust originated in that state and has been so closely associated with it that trusts of such a nature have long been called Massachusetts Trusts. The early cases in Massachusetts lay down a simple test as to whether or not the agreement is to be dealt with as a partnership or a trust, namely, is it the duty of the persons designated as trustees to obey instructions directly from the certificate holders? As has been shown, this test is also the one applied in a number of other states. Subsequent Massachusetts decisions, however, have given vagueness

\(^9\) Shreve v. Harvey, 74 N. J. Eq. 336.

\(^{40}\) 140 Ind. 321.

\(^{41}\) Johnson Bros. v. Carter & Co. et al., 120 Iowa 355.
to the clear-cut rule, and the matter of ultimate control through removal of the trustees or amendment of the agreement seems to be the deciding factor. This theory has likewise been followed in some states. It would seem that the doctrine announced first in Massachusetts is the one which is the most equitable and the one most easily applied. It is definite and simple of interpretation. The powers to elect and remove trustees and to change the form of the agreement do not appear to be factors which should make persons liable as partners.

**COLLATERAL ATTACK ON ORDERS OF PROBATE COURT.**—In a recent Illinois case the highest court of the state was called upon to deal with the vexatious problem of collateral attack and the probate court. A trust company, as conservator of the estate of an incompetent, filed a verified petition in the Probate Court of Cook County praying leave to sell certain real estate, alleging that this was necessary and for the best interests of the incompetent. An answer was filed by a *guardian ad litem* but after a hearing the court entered an order of sale. Subsequently another order was entered approving the report of the sale and confirming it. Exceptions were filed to the report of sale but, upon hearing, they were overruled and the conservator was directed to make a conveyance of the property sold. An appeal was prayed from this latter order but never perfected, and more than a year later a writ of error was sued out by the *guardian ad litem* to review the record. The contention was made that the decree of sale, entered on August 13, 1928, was void for the reason that the court had no jurisdiction of the person of the incompetent or of the cause itself. In support of this contention it was urged that the petition to have the respondent declared incompetent and to have a conservator appointed was filed April 30, 1924; that no hearing was then had thereon; that the insanity proceedings thus initiated were discontinued prior to June 6, 1928; and that the hearing of June 6, 1928, was without any notice to the respondent as required by law, and that it was at this hearing that the alleged adjudication of incompetency was made and the alleged conservator appointed. The further contention was made that this proceeding to sell land was a statutory proceeding in a court of limited statutory jurisdiction, and that since the petition did not meet the statutory provisions strictly, the court never acquired jurisdiction to proceed and that such lack of jurisdiction could be attacked at any stage of the proceedings. Thus it was urged that since detailed facts were not set forth to show the urgent necessity for selling the land, the petition involved was defective.

The Supreme Court of Illinois, in a well written opinion, handed down a decision which was both emphatic and unmistakable. It stated, "This contention is not well taken. It involves what amounts to a collateral attack upon the order of the probate court of June 6, 1928. The law is well settled in this state that when adjudicating upon that class of questions over which it has general jurisdiction, the probate court is entitled to as liberal intendments in favor of its jurisdiction as are extended to the acts of courts of general jurisdiction. The probate court has jurisdiction to appoint conservators and jurisdiction over the person and estates of insane and distracted persons after a conservator has been appointed, and where such court has acted in the exercise of such jurisdiction, its judgments and decrees cannot be questioned collaterally. It is not necessary that all the facts and circumstances which justify the action of the court should be shown affirmatively in the record. In the present cause the court exercised a jurisdiction general and not special in its nature and it was vested with authority to proceed and to enter the order of sale. In that order it found and recited that it had jurisdiction and under the present record such jurisdiction must be conclusively presumed. The contention calls for an unduly narrow conception of the jurisdiction of the probate court."

Here we have a definite statement concerning the status of the probate court in Illinois and the presumptions attendant upon its decrees. The numerous citations given in this opinion shows that Illinois has held this position for many years. A great conflict existed in the opinion of courts of other jurisdictions. Is there a basis for this diversity of opinion or are the cases clearly irreconcilable?

The emphasis in the Illinois opinion quoted above is matched by the uncompromising language found in an Alaskan report. "The probate court is an inferior court of limited jurisdiction and no presumptions of regularity support its decrees. The party relying thereon must establish not only the order but also all the steps leading up to it which give the court jurisdiction, and since the statute involved prescribes how an order for the removal of an executor must be made, this must be shown affirmatively by the record."43 More definitely still was it said by Judge Redfield, "There is no controversy, we believe, that courts of probate must be deemed to be inferior courts only, with jurisdiction defined by statute, without presumptions or liberal intendments in favor of jurisdiction, and liable to collateral attack so that their decrees and judgments may be rendered void for all purposes."44

43 Sylvester's Adm'r v. Wilson's Adm'rs, 2 Alaska 325.
These decisions are apparently in direct conflict with the Illinois decisions, allowing of no compromise. To explain the great diversity let us trace back probate jurisdiction to its source.

In an early New York case the court outlined the source of jurisdiction over the person and estate of an incompetent: "The jurisdiction assumed to be inherent in a state over that unfortunate class of persons within its limits who are deprived of the use of their mental faculties, may be said to rest upon two grounds—First: Its duty to protect the community from the acts of those who are not under the guidance of reason, and, secondly, its duty to protect them as a class incapable of protecting themselves.

"In England, whence our law respecting idiots and lunatics is derived, the custody and care of this class of persons and their property is a part of the prerogative of the sovereign. Anciently, by the common law, it was intrusted to tutors, or more properly, curators, the curator being either the feudal lord or the next of kin [who] had the custody of the estate under the obligation of applying the profits to his support, and retaining the excess that it might, together with the estate, be restored to him if he recovered his reason, and if not that it might be secured to his heirs.

"But this practice being attended with great abuses, the king, as parens patriae, or common curator of the realm, assumed as early as the reign of Henry I, exclusive jurisdiction over this class of persons and their estates.

"This duty was first discharged by the king’s committing the custody of such persons and of their estates to proper committees in each particular case; but it was afterwards transferred to the Lord Chancellor, not in his capacity as chancellor or as a part of his equitable jurisdiction, but as the king’s delegate in the exercise of his special jurisdiction, and the exercise of it in England, through many centuries, has resulted in the formation of a body of precedents and rules constituting a distinct branch of jurisprudence.

"So much of the law as formed a part of the king’s prerogative and was applicable under our republican form of government was, upon our separation from Great Britain at the revolution, vested in the people, and his especial jurisdiction was, in this state, by legislative enactments transferred to certain judicial tribunals that have administered it in accordance with the rules and principles which the course of experience in

45 In the Matter of Bomanjee Byramjee Colah, a Lunatic, 3 Daly 529.
England has pointed out as the most just, practicable and judicious."

Interesting indeed is the history of the courts of probate in Massachusetts. In 1691, by special charter granted to the Massachusetts Bay Colony by William and Mary, the Assembly of the province was given power to provide for courts of record and other courts, but the governor was made the king’s delegate in all probate matters. In 1780 the constitution of the state provided for judges and courts of probate, with power of appeal to the governor; but in 1784, there were created definite courts of probate with certain, prescribed jurisdiction. All appeals were required to be made to the Supreme Court of Probate, which was also the Supreme Judicial Court, so that this was no longer a matter of prerogative with the governor. Thus it is easy to see from this history of probate courts in Massachusetts that they would be regarded only as inferior courts and their records would not be held to import absolute verity. It was the accepted doctrine that all the requirements of the statute in any proceedings must be met affirmatively in the record to protect a court order from collateral attack and no presumptions in favor of jurisdiction or of regularity of proceedings attached to such courts. If the record was silent on any point at all material or essential to jurisdiction, the decree of the court was treated as a nullity.46 In 1836 an act was passed, remedial in nature, designed to limit the scope of collateral attack, and the various statutes of Massachusetts with the attendant construction by the courts of that state have found their way into the laws of Michigan, Wisconsin, Minnesota, and other states, bringing with them the same thought that courts of probate were entirely inferior in status and nature. It was not until 1881 that the courts of Minnesota held that probate courts were essentially of superior jurisdiction and entitled to the presumptions of regularity attendant thereon.47

Illinois more than any other state has clarified the status of the probate court. Originally all probate powers rested in the circuit courts but in 1821 a Court of Probate48 was created, dealt with later in 1837 when such courts were repealed and probate Justices of the Peace created,49 with judicial powers as judges of probate but providing that all proceedings in the exercise of such judicial powers, such as administering oaths, issuance of letters testamentary or of administration, appointment of guardians, and the probating and recording of wills,

46 Chase v. Hathaway, 14 Mass. 222.
47 Buntin v. Root, 66 Minn. 454.
48 Illinois Laws 1821, p. 119.
49 Illinois Laws 1837, p. 176.
should be reported to the circuit court for approval when such acts would then become matters of record. Later, by the constitutions of 1848 and of 1870, county courts were created as courts of record with original jurisdiction in all matters of probate. "We may suppose the terms, 'all probate matters,' in the constitution, to be used in their broadest and most general sense," and include all matters defined by the legislature as probate matters. Such jurisdiction was further defined in a later statute as "all matters of probate, settlement of estates, appointment of guardians and conservators ... proceedings by executors, administrators, guardians and conservators for the sale of realty ... All of which ... shall be considered probate matters." The constitution also prescribed that Probate Courts should be created in all counties having a population of 50,000, later changed to 100,000 and again to 70,000, with "original jurisdiction of all probate matters." The county court was directed to turn over all probate records and all papers concerning conservators to such probate court, which was directed to complete all unfinished business. Thus the Probate Court superseded the county court's probate jurisdiction and was given exclusive, not concurrent, jurisdiction in all probate matters. The present status of the probate court and the conclusiveness of its proceedings has been passed on many times. In an early report quoted many times later with approval, it was stated, "The county court, although of limited [jurisdiction], is not strictly speaking of inferior, and certainly is not a court of special jurisdiction. It is a court of record, and has a general jurisdiction of unlimited extent over a particular class of subjects; and when acting within that sphere, its jurisdiction is as general as that of the circuit court. As liberal intenments will be granted in its favor as would be extended to the proceedings of the circuit court; and it is not necessary that all the facts and circumstances which justify its action should affirmatively appear upon the face of its proceedings." This opinion has been followed in many later cases and was restated just as emphatically in these words, "If a [probate] court has jurisdiction of the subject-matter and the parties, it is altogether immaterial, where its judgment is collaterally called in question, how grossly irregular or manifestly erroneous its proceedings may have been; its final order cannot be regarded as a nullity,

50 Winch v. Tobin, 107 Ill. 212.
52 Illinois Constitution 1870, Art. VI, sec. 20.
53 Cahill's Ill. Rev. St. (1929), Ch. 37, par. 335.
54 Meserve, Ex'r v. Delaney, 105 Ill. 53.
55 Propst v. Meadows, 1 Ill. 157.
and cannot therefore be collaterally impeached. The cases all make it apparent that the probate court is qualified to pass upon its own jurisdiction and where the decree recites jurisdiction this will be conclusively presumed unless the record on its face shows such conclusion to be erroneous. Thus the recital of the court that it had jurisdiction to appoint a conservator will be respected by other Illinois courts and where the petition of such conservator to sell realty is acted upon by the court, a similar finding of jurisdiction precludes any collateral attack upon an order of sale. This doctrine was laid down and affirmed so strongly in Illinois Merchants Trust Co. v. Turner that we may feel positive that it states the law in Illinois.

We are indebted to an illuminating opinion in a Missouri report where questions arose as to the status of the probate courts of Missouri and the vulnerability of their orders to collateral attack. The court undertook to review the authorities in the several jurisdictions and to settle the apparent conflict in the decisions found in the Missouri reports. Two earlier cases in Missouri were expressly overruled because they held that the county and probate courts were not general courts of the common law and hence not entitled to liberal presumptions and intendments since they have only limited powers by statute. These cases rested their decisions upon an early Massachusetts report in which it was held that a grant of letters not in strict compliance with the statute was a nullity and subject to attack collaterally. The courts of Illinois, Ohio, Indiana, New Hampshire, New Jersey, California, and the Supreme Court of the United States were found to hold that the decree of the probate court must be deemed conclusive until reversed directly.

We must be careful to recognize the fact that the subjects included in matters of probate are not the same in all jurisdictions. Probate matters were originally meant to include only settlement of estates and the principles and doctrines of the ecclesiastical courts formed a jurisdiction entirely distinct from the assertion of his prerogative by the sovereign of old of his jurisdiction over the estates of incompetents. Thus there is no inherent right in a probate court created by statute to extend its jurisdiction over matters of conservatorships, but where such jurisdiction is specifically given by constitution or statute there should be no distinction drawn between the power of the court to adjudicate as a superior court in either such matters or in the settlement of the estates of deceased persons. Such additional jurisdiction is thus granted in Illinois, as we have seen,

56 People v. Seelye, 146 Ill. 189.
57 Johnson v. Beazley, 65 Mo. 250.
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and we find this statement in an Illinois case, "It is the settled doctrine of this court that the regularity or validity of an administrator's appointment cannot be questioned collaterally, ... and on principle we can see no difference in the case of a conservator and an administrator."

In matters strictly probate, such as the settlement of decedents' estates, practically all jurisdictions have held that the judgments of the probate courts within the sphere of their jurisdiction are as conclusive as those of any general court. Many of the states had not followed this general rule until a specific statute was passed while others reversed their prior position on pure principle. But there are instances where the same state, under the same statute, has made contrary rulings with very little essential differences appearing in the records of the separate cases. Thus while we can find that the general rule has been followed in cases which have given liberal presumptions to the judgments of the probate courts, we also find that these same states including Alabama, Colorado, Maine, Massachusetts, Mississippi, and Wisconsin, have held that compliance with the statutory requirements must appear affirmatively in the record to preclude collateral attack.

Cases are numerous which indicate that courts of probate have been considered not only as inferior in compass but also in dignity for it was held in one report that a writ of prohibition would lie against such court to prevent excess of jurisdiction. And the extent to which all statutory requirements were exacted in the records of such courts—as though probate courts were like the English ecclesiastical courts, not of record, without clerk or seal—is vividly exemplified in the case where the court ordered an administrator to sell certain land to raise $174.99 to pay the debts of an estate. The sale was approved by a court having jurisdiction over such matters but was later held to be entirely void because the land offered at sale brought $180.00, an amount in excess of that required by $5.01, which excess was held to vitiate the transaction. The influence of the courts of Massachusetts has made itself felt all through the New England states and we find that the jurisdiction of courts of probate in

59 Fecht v. Freeman, 251 Ill. 84.
61 Vance's Heirs v. Maroney Adm'r, 4 Colo. 47.
62 Paine v. Folsom, 107 Me. 337.
63 Thayer v. Winchester, 133 Mass. 447.
64 Hill v. Billingsly, 53 Miss. 111.
65 Chase v. Ross, 36 Wis. 267.
66 State ex rel. West et al. v. Clark Co. Ct. et al., 41 Mo. 44.
67 Lockwood v. Sturdevant, 6 Conn. 373.
these states has always been jealously restricted. In an early Vermont case the court said, "The court of probate is a court of special and limited jurisdiction, deriving all its authority from the statute, and though in the settlement of the estates of deceased persons, . . . their proceedings bear a strong analogy to those of courts of general jurisdiction at common law, . . . still in appointing guardians over insane persons, . . . the rules in relation to setting up the proceedings of a court of special and limited jurisdiction should be strictly applied." Connecticut also held at an early date, "Courts of probate have a special and limited jurisdiction. Their proceedings cannot be sustained by presumption, and their records must show an explicit finding of all necessary jurisdictional facts." Two more decisions are in such contrast as to warrant quoting them. A Maine statute required that only municipal officers could sign an application to the probate court for the commitment of an incompetent and the appointment of a guardian. The record failed to show who signed the application and in a collateral attack on the order of commitment by the probate court it was held that the silence of the record made the proceedings entirely void, for since the court was wholly a creature of the statutes it was of limited jurisdiction; that not only must the facts showing jurisdiction of the subject matter have appeared, but silence on any point which would show that jurisdiction of the person was properly acquired necessarily would be fatal. Compare this holding with that of a Federal court in a Florida district, where want of notice to an alleged lunatic of proceedings adjudging him insane, committing him to an asylum, and appointing a guardian for his person and estate was held not to justify an attack in a collateral proceeding, such proceedings being in rem.

Of course where the record shows on its face that the probate court had no jurisdiction of the subject matter or of the person, where the state requires that notice be given, the order of the court may properly be attacked collaterally. Such was the holding in an Illinois case where the court assumed jurisdiction over a proceedings involving a testamentary trust, and it was held that in Illinois, the jurisdiction of the probate court was limited by Art. VI, sec. 20 of the Constitution, to the particular subjects therein named, and was given no general clause of jurisdiction such as is found in section 18 relating to the county.

68 Holden v. Scanlin, 30 Vt. 177.
69 Potwine's Appeal from Probate, 31 Conn. 381.
70 Paine v. Folsom, 107 Me. 337.
71 Bruce v. Bruce, 263 Fed. 36.
courts, which allows jurisdiction to extend to other kindred subjects.\textsuperscript{72} Still, it is not surprising to find that probate court judgments have been attacked collaterally many times on the ground that there was no jurisdiction of the person, for the same is true of many courts of plenary jurisdiction when they have acted in purely statutory matters, as in the sale of lands. And the same is true where such courts have acted under special powers granted specifically by statute. Thus while it was held that in matters of guardianship the probate court record imported verity and was entitled to liberal presumptions where the record was silent as to some matter essential to jurisdiction to the same extent as a common law court of general jurisdiction would be entitled,\textsuperscript{73} and it was similarly held that the probate court, in orders of adoption, was a court of general jurisdiction and the facts necessary to confer jurisdiction were presumed to exist when the contrary did not appear by the record, even though these facts were not affirmatively in the record,\textsuperscript{74} this does not protect the order of the court from collateral attack when it acts under a special power. For we find it said in an Arkansas report, "In cases falling within the usual powers of the probate court the rule is that, where the record is silent with respect to any fact necessary to give the court jurisdiction, it will be presumed that the court acted within its jurisdiction. But where special powers conferred or exercised in special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption or jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."\textsuperscript{75}

In collateral proceedings, the question as to whether or not the court had jurisdiction of the person is vital and sometimes difficult to determine, although some states have by special statute dispensed with the necessity of notice in probate proceedings concerning incompetents. Thus it follows that the status of the court whose order is attacked is of great importance for, in the words of an old English case which has been cited many times, "Nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so

\textsuperscript{72} Frackelton v. Masters, 249 Ill. 30.
\textsuperscript{73} Foote v. Chittenden, 106 Neb. 704.
\textsuperscript{74} Denton v. Miller, 110 Kan. 292.
\textsuperscript{75} Oliver v. Routh, 123 Ark. 189.
expressly alleged." In Illinois it has been held that the records of any superior court import absolute verity and that there is no difference in this respect between circuit, county, or probate courts. If it appears from the record that there was no jurisdiction, then the order of the court is void and subject to attack collaterally. In the matter of notice, the portions of the record involved are the return of the officer serving the summons and the finding of jurisdiction by the court in its decree. Thus it would follow, if there is no actual return shown in the record and the decree finds good service generally by a recital to this effect, the presumptions attending the orders of a superior court will make this finding conclusive. In case of a conflict, as where the record shows a defective return and the court has recited a finding of jurisdiction in its decree, of course the proceedings will be held void, although if there was a continuance at the term to which the defective return of summons was returnable and a similar finding of jurisdiction, then the presumption would be that an alias summons issued and the order of the court would be deemed conclusive.

But let us suppose that the record is entirely silent in both respects, then we must fall back upon the rule that if the court is one of general jurisdiction then "silence is golden," while if the court is one of inferior jurisdiction such silence is fatal. Again we are brought face to face with the vexatious problem which Van Fleet attempted to solve, how to distinguish between an inferior and a superior court. A Kentucky report, speaking of its own county court, said, "A court is inferior not because it has jurisdiction of only a limited number of subjects but because it has not full and complete jurisdiction over the subject matters about which it assumes to act. If the jurisdiction thus assumed is complete and unlimited, the action of the court will always be taken as conclusive unless the record shows affirmatively that there was no proper jurisdiction."  

In the circuit court of Illinois, a proceedings to sell land is special and statutory, and it was held that the record must show affirmatively proper jurisdiction over the person since without the statute the court would have no jurisdiction. But in a similar case only a few years later, the court held that where the record is silent as to jurisdiction over the person, the presumption of jurisdiction attending the orders of a superior court will support its decrees. This impasse is further empha-

76 Peacock v. Bell & Kendal, 1 Wms. Saund. 73.
77 Bostwick et al. v. Skinner et al., 50 Ill. 147.
79 Fell v. Young, 63 Ill. 106.
80 Swearengen v. Gulick et al., 67 Ill. 208.
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sized by a ruling that Illinois has repudiated the doctrine of the Federal courts that, in a proceedings to sell the land of a decedent to pay debts, where the record is silent as to service on the defendant the attendant presumptions will support such proceedings. No wonder Van Fleet said, "There seem to be decisions and rules without logic or reason." We arise from a study of the reported cases with a feeling of bewilderment and a sense of frustration. Any attempt to draw general conclusion would be futile and we must be satisfied with the few generalities which appear.

This much, however, seems certain. A finding of jurisdiction by the court in the absence of error apparent on the record will protect its order of sale, but complete silence as to jurisdiction of the person will render the order subject to collateral attack. On its face this appears to be an inherent absurdity, since to require the court to recite that conclusion is to insist that it may not have known when rendering its decree that it should have had jurisdiction of the person. As was said by Breese, J., "It is to be presumed no court would state of record the existence of facts which had no existence, or pass a decree, or render a judgment, unless proof of service or notice was actually produced." Thus it is reasonable to presume that any court of record which actually proceeded to adjudicate upon a matter had concluded that it had jurisdiction, even though it has made no express recital to that effect.

In the past, the common law rules as to the conclusiveness of the orders of inferior courts involving questions of jurisdiction have been applied in all their severity to the probate courts of Massachusetts although such courts are not inferior in the true sense of the term. The reason for this was stated by Shaw, C. J., to be that "a decree, which in other courts would be voidable, shall be held wholly void, because it cannot be re-examined and reversed in a common law court, by common law process, but only in the supreme court of probate on appeal." This same reason was given in a much later case where it was said, "Error does not lie to the court of probate, and, when its decree is erroneous, it not only may be collaterally impeached by plea and proof, but it will be set aside by the court on the application of a person interested in the estate and injuriously affected by the decree." But now, with the

81 Donlin v. Hettinger et al., 57 Ill. 348.
82 Israel v. Arthur, 7 Colo. 5.
methods of appeal available in all the states, there seems to be no good reason for applying the old rule to the decrees of courts of probate. Furthermore, since the decrees of these courts involve, to a great extent, important questions of title, the same considerations of public policy which exempt the judgments of superior courts of common law jurisdiction from the entanglements of collateral attack, with ensuing uncertainty in land titles acquired by purchasers at sales pursuant to court orders, more imperatively require the same exemption in the case of decrees made by courts of probate.

Thus it can be seen that no general rules can be laid down in an attempt to define the status of the courts of probate in the various jurisdictions or to reconcile the apparent conflicts in the reported cases as to the conclusiveness of their decrees. One must look to the constitutions and statutes of the several states and, more particularly, to the origin of such courts in the several states, for the feeling that they are akin to the ecclesiastical courts whose jurisdiction was so jealously limited by courts of general jurisdiction seems to have persisted even to a late date. The reason for the diversity of holding in the various states become obvious when one realizes that it would have been a veritable miracle for the original colonies to have preserved the old laws unchanged through the many years of rapid growth, even if their probate law and their courts had been alike in the beginning. But this much, however, we may draw as a conclusion. The trend of the law today is in the direction of recognizing probate courts as courts of record, whose jurisdiction, within the sphere of delegated powers, is truly general and superior; and their orders within this sphere are entitled to liberal intendment and presumptions and not subject to collateral attack unless wholly void by facts apparent in the record.