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DEFECTS IN THE ILLINOIS PROBATE STATUTES

GEORGE S. STANSELL¹

SURELY one cannot doubt that the styles in lawmaking shift and vary and are as subject to the perpetual flux and change of Heraclitus as are the eternal atoms. Time was when a Hammurabi, a Justinian, or a Napoleon aspired to synthesize the law into a code of Hegelian prescience, but such an enterprise occurred only once in centuries, and then only under stress of urgent political or social necessity.

In these times, however, such necessity is no longer requisite. The tendency to codify and revise everything susceptible, or believed to be susceptible, of codification or revision has become absolute and self sustaining. One is reminded of the saying of Selden,

The Rack is used nowhere as in England. In other countries it is used in Judicature, when there is *semi-plena probatio*, a half proof against a man, then to see if they can make it full, they rack him to try if he will confess. But here in England, they take a man and rack him I do not know why, nor when, not in time of Judicature, but when somebody bids.

The American Law Institute, unofficially, but with tremendous prestige, has undertaken not only to smooth the waters of so bellicose a subject as Conflict of Laws, but even to appropriate to its own domain the innocuous

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solemnity of Contracts and the fidelity of Trusts. Now we understand that even the unstable law or Real Property is to be put upon a firm foundation.

“Uniform” laws covering Sales, Negotiable Instruments, Marriage Evasion, Bank Collections, and other subjects too numerous and various to mention have been promulgated, and adopted by the several legislatures in somewhat un-uniform form; and construed in even less uniform manner.

Nor has Illinois escaped the general flood. In addition to participation in the national movement, the Civil Practice Act has sought to avoid old evils by new forms and nomenclature. An entirely new criminal code is in the offing, presenting a delightfully new and different classification of crimes, with rape, burglary, and arson distributed through the various classes. One wonders if the sympathy erstwhile enjoyed by the criminal may not soon be well deserved by his attorney. The practice of law is ever new, ever young, ever changing.

It is submitted, however, that there is a legitimate field for revision, and proper channels into which the urge to revise should be guided, and to which it should be confined. This field is the mere physical rearrangement of statutes, the reconciliation of inconsistencies, the resolution of ambiguities, and the remedying of obvious deficiencies. Such work should be primarily editorial in its scope. The tendency toward sweeping reform should be resisted, and the essential integrity of the law preserved.

Certainly such a work might with advantage be performed in the broad field of probate law in Illinois. It is the proposal of the present writer to consider a few of the more obvious ambiguities, inconsistencies, and deficiencies of the present Illinois probate statutes with a view to such possible revision. Since from the very nature of the subject there is no orderly mode of procedure,

it is proposed simply to select somewhat at random points from the Illinois statutes dealing with probate, wills, guardians, dower, descent, etc.

PREFERENCE TO CREDITOR OR PUBLIC ADMINISTRATOR

One of the most obvious ambiguities occurs in section 18 of the Administration Act, in connection with the classes of those entitled to be appointed as administrator. The ninth and last class provides that administration shall be granted: "To the public administrator or to any creditor who shall apply for the same." Is preference to be given to a creditor or to the public administrator? This question might easily be resolved by removing one or the other into a tenth class.

Nor has the matter been clarified by judicial opinion. In the appellate court case of *Coffee v. Mann*,² apparently in point, preference is given to the public administrator. Upon careful inspection, however, this case is found to be one involving the estate of a non-resident, with respect to which all doubt is removed by express provision in a subsequent portion of section 18.³

From section 47, and to a lesser degree from section 51, we may infer a legislative intent to prefer the creditors. The former section provides:

Whenever any person dies seized or possessed of any real estate within this state, or, having any right or interest therein, has no relative or creditor within this state who will administer upon such deceased person's estate, it shall be the duty of the county court, upon application of any person interested therein, to commit the administration of such estate to the public administrator of the proper county.

This cannot be regarded, however, as in any sense satisfactorily determining the matter.

² 200 Ill. App. 143 (1916).

³ "In all cases where the intestate is a non-resident, and in all cases where there is no widow, husband or next of kin entitled to a distributive share in the estate of such intestate, who at the time of the death of said decedent is a bona fide resident of this State, administration shall be granted to the public administrator. . . ."

This ambiguity was not present in the earlier acts. In that of 1872,⁴ provision is made that,

if no widow or other relative of the intestate applies within sixty days from the death of the intestate, the County Court may grant administration to any creditor who shall apply for the same. If no creditor applies within fifteen days . . .

provision is made for granting of administration to the public administrator. This same distinction was preserved in the acts of 1891,⁵ and 1897.⁶

Whether the creditor or the public administrator is to be given the preference, or whether the court is to have the power to elect is not with certainty indicated, and clearly cannot be satisfactorily deduced. How the matter should be resolved is beyond the purview of this paper; that it should be resolved one way or the other is obvious.

TIME FOR ELECTION

Section 18, along with section 19, is involved in further confusion with respect to the appointment of public administrators. Section 18 provides:

Preference and the right to nominate under this act must be exercised within sixty days from the death of the intestate, at the expiration of which time administration shall be granted to the public administrator.

However, section 19 provides that

letters . . . shall not be granted to any person not entitled to the same as husband, widow, next of kin, creditor or public administrator, within seventy-five days after the death of the intestate, without satisfactory evidence that the persons having the preference have relinquished their prior right thereto; and if within said seventy-five days letters of administration of the estate of a resident intestate have been granted to the public administrator or a creditor and it shall afterwards appear that there is a widow or husband or child of such intestate a resident of this State, the letters granted to such public administrator or cred-

⁴ Laws of Illinois 1871-72, p. 77, sec. 18.

⁵ Laws 1891, p. 1, sec. 1.

⁶ Laws 1897, p. 1, sec. 1.

itor may be revoked, provided application is made . . . within six months after the death of such intestate. . . .

The seventy-five day provision tends to render somewhat nugatory the sixty day provision of section 18. In *Dupee v. Follett*,⁷ the Illinois Supreme Court held that the sixty day proviso was not strictly mandatory, and that heirs might be granted administration upon application made five months after the death of the intestate, provided that letters had not been previously granted to the public administrator.⁸

Although some of the problems presented have been solved by the courts, the entire picture is not yet clear, and there is, at least, a fifteen day twilight zone urgently demanding legislative clarification.

APPOINTMENTS OF ADMINISTRATORS DE BONIS NON AND WITH THE WILL ANNEXED

The situation with respect to appointment of successors after removal, death, or other disqualification or resignation of administrators is considerably confused, but that with respect to the appointment of administrators with the will annexed is hopeless. Sections 27 to 39 of the Administration Act set forth the grounds for removal: letters obtained through false pretenses,⁹ production of will,¹⁰ setting aside of will,¹¹ lunacy, disability, mismanagement,¹² removal from state,¹³ failure to give further or other security under certain situations,¹⁴ and death.¹⁵

⁷ 304 Ill. 166, 136 N. E. 543 (1922).

⁸ This decision follows *Cotterell v. Coen*, 246 Ill. 410 (1910), which held that where the heirs agreed to dispense with administration, and where there were no debts, there was no authority for granting administration to the public administrator.

⁹ Ill. State Bar Stats. (1935), Ch. 3, sec. 27.

¹⁰ *Ibid.*, sec. 29.

¹¹ *Ibid.*, sec. 30.

¹² *Ibid.*, sec. 31.

¹³ *Ibid.*, sec. 32.

¹⁴ *Ibid.*, sec. 33-37.

¹⁵ *Ibid.*, sec. 38, 39.

In all instances except two, provision is made for revocation of letters, but none for appointment of a successor. In section 37, which provides for the revocation of letters if the representative, upon being duly notified of the withdrawal of a surety, shall fail to furnish sufficient security, and in section 38, providing for the death of a sole representative, the statute merely provides that letters of administration *de bonis non* or with the will annexed shall be granted to "some other fit person," or "to some suitable person" respectively.¹⁶

Section 39 is the crucial one and the one most involved in doubt and controversy. It provides that,

where the letters of one of several executors or administrators are revoked, or one or more of the executors or administrators die or become disqualified after their appointment by the court, the court shall, on petition of the surviving husband, or wife, or next of kin of the testator, or if there are none such, then upon the petition of any of the beneficiaries named in such will, appoint others in their place. . . . When all the letters of all of them are revoked, or all of such executors or administrators die before final settlement and distribution of the estate, administration, with the will annexed, or *de bonis non*, shall be granted to the person next entitled thereto: Provided, That in making any appointment under this section, the court shall give preference to the surviving husband, or wife, or next of kin of the deceased, or beneficiaries named in the will, in the order named.

The order of preference is certainly far from clear. Perhaps the best interpretation would be that preference is to be in accordance with the original classifications contained in section 18. And in *Wilkinson v. Nowers*,¹⁷ the Appellate Court laid down the rule that generally persons are entitled to administration *de bonis non* in the same order as they would have been entitled to an original grant in case of intestacy or to letters with the will annexed. The last part of section 39 provides that letters

¹⁶ In section 41, dealing with resignation, similar provision is made that letters shall be granted "to some suitable person."

¹⁷ 217 Ill. App. 314 (1920).

“shall be granted to the person next entitled thereto,” which might, upon its face, be thought to refer to section 18. However, there is appended the following proviso, which indicates clearly that section 18 was not expressly contemplated:

That in making any appointment under this section, the court shall give preference to the surviving husband, or wife, or next of kin of the deceased, or beneficiaries named in the will, in the order named.

This last demonstrates that testate as well as intestate estates are contemplated, as is clearly indicated throughout the section as a whole. Section 18, of course, expressly refers to intestate estates only.

Practically the only guide furnished for the appointment is that “the court shall give preference to the surviving husband, or wife, or next of kin.” No more definite rule is furnished for the appointment of administrators with the will annexed; if anything, the matter is rendered even more complex by the appendage to those to be given preference of “or beneficiaries named in the will, in the order named.”

Just what is the meaning of the words “in the order named?” Does it mean the “order named” here in the statute, or the “order named” in the will? If the former, is it not superfluous? If the latter, is it not a hopelessly illogical rule of preference, inasmuch as the beneficiaries in a will are not often named in the order of importance? A will frequently begins with desultory bequests of small amounts to servants, friends, and the like, to be followed later by the principal beneficiaries. Is it intended to prefer the former over the latter?

Much of the responsibility for the indefiniteness of the guide available is the result of a statutory accident. Section 39 was last amended in 1901.¹⁸ Until 1905, section 18

¹⁸ Laws 1901, p. 2, sec. 1.

had been last amended in 1897.¹⁹ Under the act as then amended, section 18 furnished substantially the same guide as that now indicated in section 39. When, in 1905,²⁰ section 18 was placed in its present form, with the classifications at present in force, section 39 was not revised and coördinated to section 18.

Nor is this phase of the law uncertain only as to the order of preference. Equal difficulty prevails with respect to the mode of removal. The mode of procedure in each instance is little more than suggested, and even as so suggested differs for each cause of removal.

That the entire matter of revocation of letters and appointment of administrators *de bonis non* and with the will annexed is urgently in need of clarification and revision can scarcely be doubted. This work could unquestionably be effected without change in the substantive law, and almost purely as an editorial matter.

ADMINISTRATION OF ESTATE PENDING APPEAL

Who is to administer an estate during appeal from an order revoking letters? Probably an administrator to collect, in accordance with the provisions of section 11 providing for the appointment of an administrator to collect

during any contest in regard to the right of executorship, or to administer the estate of any person dying either testate or intestate, or whenever any other contingency happens which is productive of great delay. . . .

This provision would seem to be broad enough. However, the Illinois Supreme Court held, in *Day v. Bullen*,²¹ that such appointment cannot be made after letters have been issued to an executor unless the letters are revoked. When an appeal is pending from an order revoking letters, have the letters been decisively revoked? It is suggested

¹⁹ Laws 1897, p. 1, sec. 1.

²⁰ Laws 1905, p. 2, sec. 1.

²¹ 226 Ill. 72, 80 N. E. 739 (1907).

that there is sufficient question with respect to this matter to require clarification of the statute.

ANCILLARY ADMINISTRATION

Upon the subject of ancillary administration the statutes are conspicuously silent. Except for section 43, empowering foreign executors and administrators to sue, section 44, limiting such power to cases where letters have not issued in this state, section 9 of the Wills Act relative to filing of authenticated copies of wills probated outside the state, and sections 29 to 34 of the Wills Act—the so-called Uniform Foreign Probate Act—the statutes are practically silent with respect to rights and powers of foreign representatives, and ancillary administrators. This deficiency has been partially supplied by rules of some courts, as in the case of Rule 84 of the Probate Court of Cook County providing for the payment of distributive shares to foreign representatives.

Inasmuch as most questions of ancillary administration and relationships between representatives of different jurisdictions are apt to cause difficulty and confusion, it is submitted that adequate provision therefor should be expressly made in the Administration Act.

REPUBLICATION FOR CLAIMS

Another situation in urgent need of clarification is that relating to the republication for claims. The statute,²² as amended in 1933, after providing that claims not exhibited within one year shall be barred as to inventoried property, provides that

if the executor or administrator shall thereafter file any inventory listing other estate not previously inventoried or accounted for, and shall cause notice to be published . . . all claims not exhibited to the court prior to the date so fixed shall be forever barred as to the property and estate listed in such inventory. . . .

Whether this provision is intended, as might be inferred

²² Ill. State Bar Stats. (1935), Ch. 3, sec. 71.

from a literal construction of the statute, to apply only to supplemental inventories, where one has already been filed within the year, or whether it is intended likewise to bar claims upon republication where no inventory has been filed at all within the year, presents a perplexing question, which, probably because of the recentness of the provision, has not as yet been sufficiently determined by judicial decision. A timely clarification by the legislature may well obviate the necessity for any such judicial determination.

CITATION PROCEEDINGS

There are a number of provisions scattered throughout the probate statutes in a desultory way with respect to citation—to discover assets, prevent waste, etc.²³ Inasmuch as probate proceedings are often from their very nature actually *ex parte*, citation proceedings are of especial importance. It is believed that such provisions should be carefully coördinated, and a definite, feasible procedure for the use of citation machinery outlined in the statute itself. At present, such proceedings lack “teeth,” and even in the hands of an aggressive court constitute little more than a feeble threat.

INVESTMENTS BY GUARDIANS AND CONSERVATORS

An interesting situation obtains with respect to the respective investments of guardians and conservators. The provisions in the two acts²⁴ are for the most part substantially identical, but in several respects, apparently with no better explanation than the vagaries of statutory growth, different. Both provide for the investment in United States bonds, F. H. A. debentures, county or city bonds, and personal loans not to exceed \$100.

However, a conservator is permitted to invest the funds of his ward in the bonds of any state, whereas,

²³ *Ibid.*, Ch. 3, sec. 60, 82, 83, 91, 116, 117, 133, 140; Ch. 148, sec. 18.

²⁴ *Ibid.*, Ch. 64, sec. 22; Ch. 86, sec. 18.

curiously enough, no such investment is permitted the guardian of a minor. The writer is unable to discover any basis for the distinction. One must reluctantly assume that it is merely fortuitous.

Another variance is of interest, particularly in view of its possible implications—that regarding mortgage investments. Loans made by the guardian upon real estate must be “secured by first mortgage thereon,” whereas those of conservators may be “secured by first mortgage, or trust deed thereon.” Despite the provision contained in a subsequent section of each act,²⁵ that “the word ‘mortgage’ as used in this Act shall include a trust deed and any instrument in the nature of a mortgage,” one finds it difficult, especially in view of the fact that the last mentioned is in each instance appended to a section making provision for the mortgaging of the property of the ward rather than for the investment of the ward’s funds, to resist the suggestion at least that the failure to include “trust deed” in the provision with respect to guardians’ investments may have been intended to exclude investments in such, and to have precluded investment in “split-mortgages,” while allowing the same in the case of conservators.

One cannot but note in passing that specific provision is made with respect to conservators that “all loans shall be subject to the approval of the court”; whereas no such provision is contained in the section dealing with the investments of guardians. It may possibly be implied from a proviso that loans secured by mortgages may be “extended from year to year without the approval of the court,” but certainly it is not expressly provided. While prudence would dictate investment only upon approval of the court in either case, reason recommends uniformity of provision in the absence of logical distinction.

²⁵ *Ibid.*, Ch. 64, sec. 25; Ch. 86, sec. 21.

The provision, contained only in the section relating to guardians' investments, limiting loans upon mortgages to five years and to the period of minority, is, of course, based upon such logical distinction.

Upon the whole, no good reason appears why, with the exception of the last mentioned logical difference, the provisions for investment of funds by guardians and conservators should not be identical throughout, or even embodied in one section. The present condition merely introduces needless confusion, doubt and perplexity into the law, calling for interpretation and argument where none should be required.

APPEALS

There are five different provisions for appeal from the various probate acts, the Administration Act,²⁶ the Guardian and Ward Act,²⁷ the two acts on lunatics, etc.,²⁸ and the Wills Act.²⁹ Some contain provisions for superseedeas; some, none. One—the Wills Act—makes some provision with respect to evidence and procedure; the others, none. The provisions for the giving and approval of bonds vary generally.

There is practically no suggestion of the actual machinery of appeal, no indication of the procedure to be followed, nor any designation of a model.

It is recommended that these various modes of appeal from the county or probate court be made uniform, and that the procedure to be followed be definitely outlined, or, in the alternative, that the mode of appeal provided for in the Civil Practice Act be adopted.

THE DOWER ACT

Perhaps the most difficult portion of all the so-called

²⁶ *Ibid.*, Ch. 3, sec. 126, 127.

²⁷ *Ibid.*, Ch. 64, sec. 44.

²⁸ *Ibid.*, Ch. 85, sec. 11; Ch. 86, sec. 41.

²⁹ *Ibid.*, Ch. 148, sec. 15, 16.

probate statutes is the Dower Act, especially the extremely complex provisions with respect to the property taken by a surviving spouse "in lieu of dower."³⁰ The attitude of the Bar with respect to the Act is most interesting. To be perfectly accurate, it must be said that there are at least two attitudes toward it. There are those who flatly contend that the Act is unintelligible and incapable of being comprehended, that an attempt to trace its treacherous provisions is merely a legal "merry-go-round."

There are others, who, while admitting that the provisions are somewhat complex, stoutly contend that the legislative intent is clear and unavoidable, that while there is some apparent ambiguity, the means of resolving it is always at hand. One might be more convinced by the confident assurance of these latter if they were in agreement among themselves. Unfortunately, they are not.³¹ Even these stalwart defenders are, however, in substantial agreement that the Act needs attention, and that little short of general revision will suffice.

Perhaps the situation can be best illustrated by reference to the case of *Clark v. Hanson*,³² decided by the Illinois Supreme Court in 1926. The court there held that a widow may not, upon renunciation of her husband's will, where the entire estate consists of personalty, share in that personalty. The contention was made in that case, and sustained by the court, that the sole rights of a renouncing widow are, under section 12, "in lieu of dower"; that to hold otherwise would render the statute unconstitutional as embracing a subject not expressed in its title, "An Act to Revise the Law in Relation to Dower." The result, of course, was most inequitable, and

³⁰ *Ibid.*, Ch. 41, sec. 1, 10, 11, 12.

³¹ Note the articles of Mr. Samuel Fox and Mr. William L. Eagleton, taking issue, in 26 Ill. L. Rev. 145.

³² 320 Ill. 480, 151 N. E. 369 (1926).

certainly could not have been contemplated or intended by the legislature.³³

In 1927, the Dower Act was amended, unquestionably to remedy the situation presented the preceding year in *Clark v. Hanson*. Whether or not the amendments accomplished the purpose intended is now a seriously disputed matter. One may assert with confidence that the constitutional objection has been obviated by changing the title to read: "An Act Concerning the Rights in Real and Personal Property Accruing by Reason of the Marital Relation."

Prior to the amendment of 1927, section 1 merely provided for the abolition of curtesy, and substitution and definition of dower. The amendment of 1927 added a provision with respect to personal property, beginning in the following language:

And except where the deceased spouse died intestate, the surviving husband or wife, in case the deceased spouse died leaving surviving a child or children or descendants of a deceased child or children, shall also be entitled to one-third of all the personal property. . . .

Mr. Samuel Fox, in an article in the Illinois Law Review,³⁴ sustains his primary thesis—that the amendment of 1927 has not accomplished its purpose—by arguing that the use of the initial conjunction "And" in this clause immediately following the old provision with respect to dower, and especially coupled with the expression "shall *also* be entitled," is indicative of an intent that the provision with respect to personalty shall be available only where there is dower.

This construction, Mr. William L. Eagleton, in an accompanying note,³⁵ characterizes as "strained." It

³³ One could picture an extreme situation where the widow might be permitted to take 50 per cent of a million dollar estate provided there was a \$100 lot in the estate; but nothing where, as in *Clark v. Hanson*, there was no realty, or the only realty had been held in joint tenancy.

³⁴ 26 Ill. L. Rev. 145.

³⁵ 26 Ill. L. Rev. 164.

must be said that the general opinion of the Bar at the present time is that the doctrine of *Clark v. Hanson* has been eliminated by the amendment of 1927.

The entire Act is immersed in complexity. Under section 10, a share in fee in preference to dower may be obtained either by electing or by failing to elect. In the case of a testate estate, the Act allows the spouse four alternatives: (1) the provision under the will; (2) dower; (3) the statutory alternative provided in section 10; and (4) the election in section 12—similar to but not identical with that in section 10.

If it be said, as can hardly be denied, that the Dower Act is the most in need of revision, it can with equal truth and propriety be said that it will offer perhaps the most difficult task of all the probate statutes. Part of the explanation for its present unsatisfactory condition doubtless lies in the inherent perplexity of its subject matter. Its revision must be effected with the utmost care, and only by those who have thoroughly familiarized themselves with all the law upon the subject.

The foregoing represent a few of the more obvious defects of the present probate statutes. If no more were accomplished than their elimination, such revision would represent a worthy contribution to the statutory law of the state. There are, however, a number of other respects in which the form, if not the contents of these statutes could be improved by proper revision.

Many of the sections are too long, and should be broken down into smaller ones. This would not only obviate the burdensome necessity for searching the present formidable expanses of solid type, but would, in and of itself, tend to eliminate confusion and promote greater clarity.

It is suggested that, in the interest of simplicity, sim-

ilar matters be grouped together in the statutes, and that sections practically identical, unless some basic difference exists, be made identical. This is true, not only with respect to investments of guardians and conservators, and procedure for appeal, as above mentioned, but also of many other matters referring to guardians and conservators, whose duties offer more similarities than differences—certainly of their bonds, as well as of those of executors and administrators.

It is recommended that definite procedure be indicated for all phases of probate administration; that where the Civil Practice Act is to be applicable, it be made so specifically. In addition to the revocation of letters, above mentioned, the sale and mortgaging of real estate requires such treatment. It might be feasible to group in one portion of the statutes all provisions for selling and mortgaging realty, whether by an executor, an administrator, a guardian, or a conservator.

It is submitted that if general statutory revision is ever justified, as we cannot doubt it sometimes is, the probate statutes of Illinois certainly offer a most apt subject for such revision.