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JURISDICTION OF THE PROBATE COURTS
OF ILLINOIS*

CECIL BRONSTON†

Any system is nothing more than a plan, be it simple or comprehensive, devised to effect and facilitate the performance of certain actions, and it is explainable only in the light of the reasons which prompt such actions. It is pertinent, therefore, in the study of the Illinois judicial system of probate administration to inquire into the reasons for such administration and, in so doing, trace the origin and development of the underlying actions which give purpose to the system. Further, since laws are rules of action which have objectivity only in the peoples who submit to their governing force, any sketch of the development of the system cannot be entirely divorced from the society which has nurtured it.

In modern English and American practice, estates of decedents are settled under the immediate supervision of local, and usually, county tribunals. The main purposes are:

That the personality of the deceased be properly collected, preserved, and [together with income and profits] duly accounted for; that his just debts and the charges consequent upon his death and the administration of his estate be paid and adjusted, with such discrimination only as the law recognizes in case the assets should prove insufficient; that the immediate necessities of spouse and young children [if there be such surviving] be provided for as the statute may have directed; that the distribution and division of the residue or surplus of the estate be made among such persons and in such provisions as the will of the deceased, if there be one, otherwise the statute of distribution, may have prescribed. The primary purpose of administration is to collect the assets and to pay debts; and distribution is only an incident.¹

* This is the first half of a thesis submitted by Mr. Bronston in connection with the work of the Graduate School of Banking, American Bankers Association. The balance will appear in the September, 1940, issue of the Review.
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¹ Schouler on Wills, Executors and Administrators (6th ed., 1933) III, 1672, par. 1391. The law of inheritance and administration, as explained in Pollack and Maitland, The History of English Law (2d ed., 1911), II, 256, "seems to answer two purposes, which can be distinguished, although in practice they are blended. The dead man has left behind him a mass of things, and we must decide what is to be done with them. But further, he has gone out of the world a creditor and a debtor, and we find it desirable that his departure shall make as little difference as may be to his debtors and creditors. Upon this foundation we build up our
The foundations of Illinois law are in the common law of England. True, the first settlements in the Illinois country were French, but at the most, they numbered in population only some 2,000 people, and, except for a gleam of the romance and chivalry of old France across the page of Illinois history, a few oddly shaped land holdings, a few peculiar titles to be fitted into a world of township surveys and Anglo-Saxon land laws, and a few names of places, it is vain to inquire as to results of the French regime. It ended in 1763, when all that France had claimed east of the Mississippi River, excepting New Orleans, was ceded to England. The governmental authority of Great Britain over the Northwest was relatively short lived; it terminated with the Treaty of 1783 which gave the United States title to the country.

Seven of the original thirteen states had claims to the western lands, founded on the terms of their colonial charters, but, fortunately, these claims were relinquished to the confederation of states, permitting settlement of the region to take place under the auspices of the federal government for the benefit of the United States as a whole. The Northwest Ordinance of 1787 established a government for the territory northwest of the Ohio and provided, among other things, that not less than three, nor more than five states might be established in the region. Illinois achieved statehood in 1818 after having been subject successively to government of the Northwest (1787), Indiana (1800), and Illinois (1809) territories.

In the beginning all the colonies except New York and Delaware were English and the English life and law was the rule, or became so, when the foreign-planted colonies fell into

elaborate system of credit. Death is to make as little difference as may be to those who have had dealings with him who has died, to those who have wronged him, to those whom he has wronged."

4 Ibid., p. 216.
5 Pease, op. cit., Ch. III; Bassett, op. cit., p. 231 et seq.
7 Act of Congress, Enabling Act, April 18, 1818; Ordinance of Illinois accepting Enabling Act, August 26, 1818.
8 Act of Congress, Creation of Indiana Territory, July 4, 1800.
English hands. Subsequent colonial settlements included substantial numbers of persons with other national origins, notably German and Scotch-Irish, but the English influence never waned.10

Bassett observes, "the best colonizers were native born colonists . . . to . . . whom the forest was more attractive than the farmsteads of the East,"11 and the history of the settlement of Illinois will not belie his words. It was a natural consequence, then that the laws of Illinois should follow the same English pattern of the seaboard states whence came most of her people.

ORIGIN AND DEVELOPMENT OF PROBATE ADMINISTRATION

English System

The early history of probate lies outside England.12 Blackstone points out the great antiquity of testaments, citing their use among the ancient Hebrews and in Athens, but not in many other parts of Greece nor at all among the northern nations.13 But the common law of England, as affected by such statutes as were enacted prior to the settlement of the American colonies, forms the basis for American statutes concerning administration and of the law in American states insofar as it has not been supplanted by their own statutes.14

10 Bassett, op. cit., p. 145 et seq.
11 Ibid., p. 147.
12 Pollack and Maitland, op. cit., II, 341.
13 Cooley's Blackstone, Commentaries on the Law of England (4th ed., 1899), II, 490. From this circumstance wherein testaments were permitted in one nation and not in another, and were subjected to as many different formalities and restrictions as there were nations permitting their use, Blackstone concludes that the right of making wills and disposing of property after death is a creature of the civil state; and the sovereign power which gives the right may govern and restrict its use or, indeed, take it away entirely. See also Blackstone, II, 12.

With reference to testamentary dispositions, it has been said, United States v. Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. Ed. 287 (1896): "Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good." And in Illinois, it has been held, "Rules of inheritance are the creatures of the municipal or civil law, and, except as to rights already vested, may be changed and modified at pleasure . . . the legislature has power to change the course of descent. . . ." Wunderle v. Wunderle, 144 Ill. 40, 60, 33 N.E. 195 (1893).

This principle also forms the basis for inheritance taxation. Magoun v. Illinois Trust and Savings Bank 170 U. S. 283, 18 S. Ct. 594, 42 L. Ed. 1037 (1898).

There appears to have been no time in the recorded history of England when the power of bequeathing one's personal property, in part at least, did not exist. We are informed that by the common law, as it stood in the twelfth century, a man's goods were to be divided into three equal parts: one for his heirs or lineal descendants, another for his wife, with the third being at his own disposal. If he died without a wife, the division was by halves: one to his children, the other as he wished; and, by the same token, if he died without children, his wife was to receive half and he could bequeath the other. If he died with neither wife nor issue, he could dispose of the whole. This law was changed by imperceptible degrees until Blackstone could write in the eighteenth century that a testator might bequeath the whole of his goods and chattels without limitations.\textsuperscript{16}

It further appears that before the Norman conquest lands were devisable by will; but with the conquest came certain restrictions so that for a long period thereafter no estate greater than one for a term of years could be devised, except in Kent and some other few districts. In the sixteenth century, while Henry VIII was on the throne, the devise was liberated from its limitations when it was enacted that legally competent persons owning land in fee simple might by will in writing devise to any person, except to bodies corporate, two-thirds of their lands, or the whole thereof, depending upon the type of tenure. In another hundred years the distinction between the tenures had been abolished so that at the time of the American revolution the whole of one's lands, except copyhold tenements,\textsuperscript{16} could be devised.\textsuperscript{17}

Intestacy, it would seem in the eleventh century and before, was merely accidental,\textsuperscript{18} and in the two centuries which followed it acquired an intense and holy horror in the minds of men. Their abhorrence is explained by the historian on religious grounds:

\textsuperscript{15} Blackstone, op. cit., II, 492, 493.
\textsuperscript{16} Copyhold estates arose when lords of manors for a long period of time had permitted their serfs and the children of their serfs to enjoy their possessions without interruption, in a regular course of descent; the common law, of which custom is the life, thereby gave them title as against the services to the lords. Blackstone, op. cit., II, 95.
\textsuperscript{17} Blackstone, op. cit., II, 373 et seq.
\textsuperscript{18} Ibid., p. 493.
the man who dies intestate dies unconfessed, and the man who
dies unconfessed—it were better not to end the sentence; God's mercy
is infinite; but we cannot bury the intestate in consecrated soil.19

Anciently, if a man died intestate, the king, through his
ministers, administered the goods of the decedent and dis-
tributed them in accordance with the practice of the day.
Later the crown directed that the intestate's goods should be
divided for the good of his soul and invested the prelates of
the church with this prerogative, on the apparent theory that
the churchmen were of better conscience than laymen and
knew best how to dispose of the property for the benefit of
the soul of the deceased. It seems to have followed as a
natural event that, since the ordinary of the church had the
disposition of the intestate's effects, the will of a decedent
should be proved to his satisfaction, his right of disposition of
the chattels being thereby superseded.20 Thus was inaugu-
rated the ecclesiastical jurisdiction over administration and
probate which was almost wholly peculiar to and prevailed
in England until 1858.

Students question if what we call the probate of a will
was known in England prior to the time when the jurisdiction
had been conceded to the church,21 but it is stated definitely
that in the thirteenth century the law had become well settled
that the goods of the intestate were at the disposal of the
judge ordinary,22 and by that time testamentary jurisdiction
belonged exclusively to the spiritual courts.23 Fortunately,
the privileges enjoyed by the clergy constituted a special
grant under the law and were not a matter of ecclesiastical
right, for thereby abuses which sprang up could be corrected
by civil legislative action.

In the beginning of the ecclesiastical jurisdiction owner-
ship of the goods of intestates became vested in the church-
men. They were accountable to no one but God and them-
selves, but the record would indicate that their god was, as
often as not, egoistic. At that time the third part of a man's

19 Pollock and Maitland, op. cit., II, 356. The connotation of intestacy is further
shown by the authors: "Of the terrible Fawkes of Breauté, it is written that he was
poisoned; that having gone to bed after supper, he was found dead, black, stinking
and intestate." Ibid., p. 358.
20 Blackstone, op. cit., II, 494.
22 Pollock and Maitland, op. cit., II, 359.
23 Ibid., p. 341.
estate was his to dispose of as he saw fit, and since, inherently, an intestate did not dispose of his third, the clergy appropriated it to themselves "in the name of the church and the poor." This was done without the payment even of the decedent's lawful debts, and, in an attempt to correct such abuses, there was enacted a statute directing the ordinary to pay the debts so far as his goods would extend. 24

But the residuum of the third after the payment of the debt still remained in the possession of the ordinary for whatever use he might approve, and the abuses were not completely checked. Hence, a further statute followed, 25 which is of particular significance in that it marks the origin of administrators. By it estates of intestates were directed to be administered by the next of kin of the decedent under appointment by the ordinary. 26 The administrator thus became the officer of the ordinary; a relationship similar to that which an administrator bears to his probate court today.

Quite some time later the discretion of the ecclesiastical judge was broadened, permitting him to appoint either the widow or the next of kin, or both at his pleasure; and in the case of two or more persons of the same degree of kindred he might appoint whichever he pleased. 27 The seventeenth century saw the statutory directions 28 that all surplus of the

24 Statute of Westminster II, 13 Edw. I, c. 19 (1285). Woerner, op. cit., I, 475. Blackstone, op. cit., II, 495; Blackstone comments dryly that the payment of the debts was "a use more truly pious than any requiem or mass" for the intestate's soul.

25 31 Edw. III, c. 11 (1358).

26 Woerner, op. cit., I, 475; Blackstone, op. cit., II, 496. In Pollock and Maitland, op. cit., II, 359, the authors report the earliest specimen of letters of administration to come to their attention was a document issued by a bishop of Durham in 1313 by which he addressed Margaret the widow of Robert Haunsard, knight, and William and John Walworth: "Confiding in their fidelity he commits to them the administration of the goods of Robert Haunsard, who has died intestate. They are to exhibit a true inventory, to satisfy creditors, and to certify the Bishop's official as to the names of the creditors and the amount of the debts. The residue, if any, they are to divide into three parts, assigning one to the dead man, one to his widow Margaret and one to the children 'according to the custom of the realm of England.' The dead's part they are to distribute for the good of his soul in such pious works as they shall think best according to God and good conscience, and of their administration they are to render account to the bishop or his commissaries. The bairns' part they are to retain as curators and guardians until the children are of full age. If any one impleads the bishop concerning the goods, they are to defend the action and keep the bishop indemnified."

27 21 Henry VIII, c. 5 (1538); Woerner, op. cit., I, 475; Blackstone, op. cit., II, 496.

28 22 and 23 Charles II, c. 10 (1673, 1674); 29 Charles II, c. 30 (1680); 1 James II, c. 17 (1685).
personal estate of an intestate should pass to the widow and children, or to the next of kin.\textsuperscript{29}

Of the testamentary jurisdiction conferred upon the church it is related that from the first there were "two distinct things: (i) competence to decide whether a will is valid, whenever litigants raise that question; (ii) a procedure, often a non-contentious procedure, for establishing once and for all the validity of a will, which is implicated with a procedure for protecting the dead man's estate and compelling his executors to do their duty."\textsuperscript{30} Having established the will before the "judge ordinary," the executors swore that they would duly administer the estate, and they became bound to exhibit an inventory of the goods and to account for their dealings. Prior to 1300 a regular procedure seems to have been developed for their control. If guilty of negligence or misconduct the ordinary could set them aside and commit the administration to others, but if the executors were acting properly they could not be ousted.\textsuperscript{31}

The ecclesiastical jurisdiction seems never to have encompassed more than these three branches: the probate of wills,\textsuperscript{32} the granting of administrations, and the suing for legacies.\textsuperscript{33} And within these branches the powers of the courts were more restricted than the powers of modern probate courts with reference to the same subject matter. Very early the question arose, "What debts owed by, or to, the testator continue to be due after his death and who can sue

\textsuperscript{29} Alexander, Commentaries on the Law of Wills, (San Francisco: Bender-Moss Co., 1918), III, 1834.

\textsuperscript{30} Pollock and Maitland, op. cit., II, 341.

\textsuperscript{31} Ibid., p. 342.

\textsuperscript{32} The restrictions on the significance of the probate of wills in the ecclesiastical courts is to be seen in the description of the two modes of probate in England set forth in the opinion in Dibble v. Winter, 247 Ill. 243, 93 N.E. 145 (1910). One mode was ex parte, in common form; the other, inter partes, in solemn form. "By the first method the will was taken before the judge of the proper court of probate and proved by attesting witnesses without citing or giving notice to the parties interested. When, however, it was proved under the second method it was done upon the petition of proponent for a hearing and all persons having an interest were cited to be present. The executor of a will proved in common form might, at any time within thirty years, be compelled by any person having an interest therein to prove it in 'solemn form.' . . . The probate of the will was held binding and could not be contested collaterally as to personality, but . . . as to real estate amounted to nothing. The devisee produced the will, and . . . (in controversies as to devise of lands) had to prove it as any other paper, as well as the capacity of the testator to devise, on every trial."

\textsuperscript{33} Blackstone, op. cit., III, 98; and the author remarks that the suing for legacies was subject to the concurrent jurisdiction of the lay courts.
or be sued in respect to them?" In the struggle to determine which forum should have jurisdiction of the question the temporal courts won. Later, the act which originated administrators placed such administrators on the same footing as executors with regard to the settlement of claims, thereby bringing them also into the lay courts in dealing with creditors or debtors of their decedents. Thus it is not to be presumed that from the time churchmen were granted authority over intestates' estates and assumed probate jurisdiction that, thereafter, the ecclesiastical courts exercised all-inclusive powers with respect to the many questions arising in the settlement of dead men's estates.

Woerner clearly distinguishes between the powers and authorities of the ecclesiastical and the lay courts of the later days as follows:

To some extent, the power to pass upon the accounts of executors and administrators, if no trial of issues, either of fact or law, was necessary, and to grant them a discharge after a true accounting, seems to have been exercised by the ecclesiastical tribunals. But the trial of disputed accounts, involving the testimony of witnesses, questions of devastavit, liability to creditors, legatees, and distributees, the marshaling of assets, recourse to real estate for the payment of debts and legacies, etc.—in short, the control over executors and administrators in every respect not included in the probate of wills, appointment of administrators and payment of legacies—was exclusively in the common-law and chancery courts.

It is to be seen, therefore, that by the time of the American Revolution the exclusive authorities of the church courts had become little more than ministerial in nature. By the time of the American Civil War their jurisdiction had been abolished and a new court, called the court of probate, established. This court was given the authority to grant probate of wills and letters of administration, but the enacting statute left to the sole jurisdiction of courts of chancery suits for legacies, and suits for distribution.

American System

There is no one American system of probate. A general pattern may be seen, but probate law and practice in the

34 Pollock and Maitland, op. cit., II, 343 et seq.
35 Alexander, op. cit., III, 1834.
36 Woerner, op. cit., I, 477.
37 Probate Act of 1857, 20 and 21 Vic., c. 77.
United States must, in the main, be studied with reference to the judicial system and code of each particular state. Therefore the national development of the subject can be traced only in the broadest general terms and with the understanding that even such generalities may be subject to many and minute qualifications.

In this one fundamental, however, are all the states identical: their judicial systems are, in outline at least, established by their respective constitutions. But the constitutional provisions vary greatly; most importantly, perhaps, in that the legislature may or may not be granted broad authorities for the creation of courts and the definition of their jurisdiction; or the constitution itself may provide for the different courts and prescribe their jurisdiction with little or no latitude granted to the legislature, of its own motion, to alter the constitutional system.\(^{38}\)

The colonial tribunals were modeled after those of England, but, with independence, the American states could and did adapt the composition and powers of their courts to the requirements and convenience of their peoples.\(^{39}\)

The chief distinction and, albeit, improvement of the American probate courts as compared to the English was that in most instances the American courts were invested with the necessary jurisdiction and authority to supervise completely the administration of decedents' estates. In their powers were combined not only those of the spiritual courts of England but also the powers possessed by the English common-law and chancery courts insofar as such powers were necessary to control the administration.\(^{40}\)

The first probate courts to be established in this country after the Revolution were in Massachusetts in 1784\(^{41}\) but in many of the original and other early states probate jurisdiction was vested in the general county courts. Today in the more sparsely settled states or even in thinly populated sections of some of the more populous states, probate functions

\(^{38}\) These dissimilarities have their ultimate effect in the ease with which the judicial system may be revised to meet changing conditions, a legislative enactment, of course, being much less difficult to effect than a constitutional amendment.

\(^{39}\) Woerner, op. cit., I, 477.

\(^{40}\) Alexander, op. cit., III, 1837.

\(^{41}\) See Wales v. Willard, 2 Mass. 120 (1806).
are exercised by the county or parish tribunals. As population grew, however, it became necessary to divide the work of the courts, and new courts were created for the transaction of such business as might pertain to the estates of the dead and the guardianship of minors and incompetent persons. Moreover, in many states there has also been delegated to these courts the supervision of testamentary trusts, a jurisdiction historically and factually within the realm of equity jurisprudence. These courts are variously known as Orphans’, Surrogate’s, Prerogative, and Probate courts.

Probate jurisdiction in the United States is exercised in simplicity. Costs and fees are relatively small. The mode of procedure is ordinarily by simple petition which states the few facts necessary to give the court jurisdiction. Because of the informality of the proceedings, parties often appear before the judge without legal counsel, the usual aspect of a probate courtroom in the rural counties being that of some executive office where business is summarily disposed of.

The procedure is in rem, and not inter partes among the various claimants, so that jurisdiction of the persons of such claimants is unnecessary. The res is the estate of the decedent in whose name and on behalf of whose estate proceedings have become needful. Both realty and personalty are subject to the probate jurisdiction. Certain of these generalities apply to Illinois; others do not.

ORIGIN AND DEVELOPMENT OF PROBATE ADMINISTRATION

Illinois—Territorial System

From our present vantage point one might conceive that the first enactment dealing with the establishment of government in a vast area destined to assume such an important rank among the states as that of Indiana, Illinois, Ohio, Michigan, and Wisconsin would commence in a grand manner setting forth the form and method of government. Or, hearing so much today of the rights of man as opposed, presumably, to his rights in property, one might be excused for thinking that the Congress of the day which saw the dawn of democracy in America would certainly not begin such enact-

42 Schouler, op. cit., III, 1710.
43 Ibid., p. 1713.
44 Ibid., p. 1673.
45 Alexander, op. cit., III, 1837.
ment with what is but a detail of the general law of property, relating merely to its devolution. Quite to the contrary, however, the first working clause of the Ordinance for the government of the territory northwest of the Ohio River\textsuperscript{48} sets forth the mode of descent and distribution of the estates of intestate "resident and non-resident proprietors in the said territory."\textsuperscript{47} Yet, perhaps this fact is not so queer. If settlers were to venture into that wilderness territory it was doubtless important to them to know, in the event misfortune should befall them, to whom would pass such property as they might wrest from its dangers. Such reason is an absurdity, of course, for the legislators must have had broader objects in view; but, whatever the reason, there is the clause. At the least, its primal placing is indicative of the importance with which man regards the disposition of his property after death; that core around which revolves the subject of this paper.

Further, the same section of the ordinance set forth that estates might be devised or bequeathed by wills in writing, attested by three witnesses, "provided such wills be duly proved . . . and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose. . . ."

The government of the territory was vested in a governor and three judges, a majority of whom should adopt such laws of the original states as might be necessary and report them to Congress; such laws to be in force until the organization of the general assembly,\textsuperscript{48} unless disapproved by Congress.\textsuperscript{49} A court was to be appointed consisting of the three judges, who should have a common law jurisdiction;\textsuperscript{50} and to the inhabitants was warranted the "benefits . . . of judicial proceedings according to the course of the common law. . . ."\textsuperscript{51}

The governor and judges enacted more than twenty-five laws from 1788 to 1792 but, since these were not adopted from the laws of the original states as seemed to be the technical

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\textsuperscript{47} Ibid., § 2.

\textsuperscript{48} The first assembly met in 1799.

\textsuperscript{49} Ordinance of 1787, enacted July 13, 1787, § 5.

\textsuperscript{50} Ibid., § 4.

\textsuperscript{51} Ibid., § 14, art. II.
construction of the empowering provision in the ordinance, there arose grave question as to their validity. Included in the laws of 1788 was one establishing a court of probate,\textsuperscript{52} one judge to be appointed in each county:

\ldots whose duty it shall be to take the proof of last wills and testaments and to grant letters testamentary and letters of administration and to do and perform every matter and thing that doth, or by law may appertain to the probate office, excepting the rendering definitive sentence and final decrees. \ldots

It further directed that the judge should record last wills and testaments; make entries of the granting of letters testamentary or of administration; and receive, put on file, and carefully preserve all bonds, inventories, accounts, and other documents necessary to be preserved.

In 1795, because of the question of validity of the preceding statutes, a large number of laws were adopted from state codes, principally from Pennsylvania. These included acts for the establishment of orphans' courts,\textsuperscript{53} for the settlement of intestates' estates,\textsuperscript{54} for the probate of wills,\textsuperscript{55} concerning the order of paying debts of persons deceased,\textsuperscript{56} concerning how husband and wife might convey their estates,\textsuperscript{57} all from Pennsylvania statutes; and a law for the speedy assignment of dower,\textsuperscript{58} taken from the Massachusetts code.

In 1800 the first division of the Northwest was made. The western part, including Indiana and Illinois, was called the territory of Indiana, the government of which was to be in all respects similar to that provided in the ordinance of 1787.\textsuperscript{59} Apparently the governor and judges of the new territory enforced the laws which had been already adopted by the legislature of the whole Northwest, repealing some but adding none. By 1807 the population warranted a legislature and the general assembly then organized revised all of the territorial laws, providing that those laws, so revised, altered and amended, should, with the laws passed at that session, be the only statute laws in force in the territory.\textsuperscript{60}

\textsuperscript{52} Pease, Laws of the Northwest Territory, 1788-1809, (Ill. State Bar Ass'n. Reprint), I, 9.
\textsuperscript{53} Ibid., p. 181. \textsuperscript{54} Ibid., p. 188.
\textsuperscript{55} Ibid., p. 232. \textsuperscript{56} Ibid., p. 237. \textsuperscript{57} Ibid., p. 242. \textsuperscript{58} Ibid., p. 244.
In 1809 the territory of Indiana was divided into two parts, the western section becoming the territory of Illinois. Here also the government was to be in all respects similar to that provided in the ordinance of 1787\textsuperscript{61} and the first act of the governor and judges was to adopt the Indiana laws, excepting those which were of local character.\textsuperscript{62} No substantial changes occurred in the substance of the statutory law dealing with probate, administration, and the courts during the period Illinois was a territory, even after its general assembly came into existence.

Illinois became a state of the Union on August 26, 1818, when its constitutional convention adopted the Ordinance of Illinois\textsuperscript{63} accepting the enabling act of congress\textsuperscript{64} for its admission, and adopted its first constitution.\textsuperscript{65}

Statehood—System under First Constitution

From the standpoint of organic law and priority of time reference should probably first be made to the provisions of the constitution of 1818 pertinent to this study. However, this constitution is now of little more than historic significance, whereas a simple act passed by the first general assembly gave expression to a fact of tremendous influence in Illinois law, not only in that day, but also currently, and in all the time between. Somewhat loosely we say Illinois is a common law state. The act,\textsuperscript{66} little changed and present in the stat-

\textsuperscript{62} "Laws of the Territory of Illinois" 1809-11, op. cit., p. 1. The resolution:
"13th June 1809

"This day Ninian Edwards, Governor of the Illinois Territory, Alexander Stuart and Jesse B. Thomas, Judges in and over the territory aforesaid, met at the home occupied by Mr. Thomas Cox in the town of Kaskaskia, and after mature deliberation, they hereby resolved as their opinion that the laws of Indiana Territory of a general nature and not local to that Territory are still in force in this Territory as they were previous to the first day of March last.\n
Ninian Edwards
Alexr. Stuart
Jesse B. Thomas"

\textsuperscript{63} Ordinance of Illinois, August 26, 1818; Laws of 1819; Appx., p. 21; Jones Ill. Stats. Ann., Vol. 1, p. 54.
\textsuperscript{66} Act of General Assembly of the State of Illinois, approved February 4, 1819, L. 1819, p. 3. The original of this Act was an Act of the general convention of delegates of the colony of Virginia in 1776; Collection of Acts and Ordinances, Richmond, 1785, p. 37. The fourth year of James I began on March 24, 1606. In
utes today, declared that the common law of England and all statutes or acts of the British parliament made in aid of the common law prior to the fourth year of the reign of King James I, with certain exceptions, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered of full force in Illinois until repealed by legislative authority. The influence of all that is incorporated into Illinois law by this act is by no means unfelt in the branch dealing with the administration of estates.

It may also be well at this point to direct attention to the great similarity to that of England which will be noticed in the Illinois system of administering decedents' estates, from the first days of the state to the present. Of course, no ecclesiastical courts will be found, but it will be seen that their counterparts, at least in the earlier history of the state, had little more than ministerial powers. And one may note in the development of the system in what relative derogation courts of probate have been held in the acknowledgment of their jurisdiction and authority, how slowly has been the broadening of their field of recognition and, indeed, how in some respects in their evolution Illinois has lagged behind many states comparable to her in point of economic development and wealth. If Illinois has been mistaken in declining to invest this particular class of courts with full authority to settle all questions in the administration of a decedent’s affairs, including testamentary trusts, the fault, if fault it be, is traceable to the adoption in the state of the English dual system of courts, and the subsequent close adherence to it. But the system has served well the English speaking world for many centuries and even this particular thereof, although regarded by some persons as imperfect, is not to be impugned lightly.

The constitution of 1818 vested the judicial power of the state in one supreme court and such inferior courts as the

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this year the charter of the London company, which settled Virginia, was granted. (The act was embodied in the territorial laws of both Indiana and Illinois.)


68 The excepted statutes are given at length in 3 Ill. (2 Scam.) 596 (Appendix B). They consisted of acts against usury and the limitation of the recovery of costs in personal actions on frivolous suits.
general assembly should ordain and establish.69 This grant of power enabled the legislature to provide properly for the subsequent judicial system relating to probate and the settlement of estates.70

Probate jurisdiction was first lodged in the county commissioners' courts.71 The clerks of such courts were authorized to take proofs of wills and to grant letters testamentary and letters of administration, subject to the confirmation or rejection of any of their acts by their courts.72 The courts were empowered to require accountings from administrators, decree and settle distributions thereby determined, and to compel the administrators to observe and pay the same; and, further, to hear and determine all causes touching any legacy or bequest in any last will and testament, payable or coming out of the personal estate of the testator and to decree and compel the payment thereof.73

By Act of February 10, 1821,74 there was established in each county of the state a court of record to be styled "The Court of Probate." These courts were to have:

... exclusive original jurisdiction of all matters and things relative to the proof of last wills and testaments, the granting of letters of administration and letters testamentary; the settlement of all estates of which any person has or may die seized. . . .

All the powers relative to wills, administrations and estates, with which the county commissioners' courts had been vested were given to the courts of probate. They were to decide upon both fact and law; and an appeal or writ of error was to lie from the court of probate to the circuit court and from the latter to the supreme court.

Within the next decade several further acts75 were passed, which were of more or less importance, but the jurisdiction remained unchanged, except that in 1831 there was con-

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69 Ill. Const. 1818, Art IV, § 1.
71 Laws 1819, p. 223.
72 Ibid., § 1.
73 Ibid., § 7.
74 Laws 1821, p. 119.
75 Laws 1823, p. 132, repealed provision making courts courts of record. Laws 1825, p. 87, re-established the courts as courts of record. Laws 1829, p. 37, repealed the previous acts of 1821, 1823 and 1825, but re-established the courts as courts of record on the same basis. This was in reality a revision and consolidation of the previous acts.
ferred upon the courts concurrent jurisdiction with the circuit court in all cases, without regard to the amount in controversy, when an executor or administrator defended, and must have been sued as such executor or administrator.\textsuperscript{76}

The courts of probate were abolished in 1837 by an act\textsuperscript{77} providing for the election of an additional justice of the peace in each county, to be styled "by way of eminence and distinction, 'Probate Justice of the Peace.'" Powers conferred upon this officer relative to probate affairs were: to issue and grant letters of administration and letters testamentary and to repeal the same; to take probate of wills and record the same; to determine the person or persons entitled to letters of administration, or to letters testamentary; to receive, file, and record inventories, appraisement bills, and sale bills; to require executors and administrators to settle their accounts, and to settle for the property in their hands, for which the justice might issue citations and attachments into every county in the state; and to do and to perform all other acts of a ministerial character which the judges of probate were theretofore authorized to perform in their respective counties. They were also vested with all judicial powers theretofore exercised by judges of probate. Proceedings under their ministerial powers might be made matters of record in the circuit court of the county for the purpose of certifying the same to be used as evidence in any foreign state or territory, but proceedings in the exercise of their judicial powers were required to be reported to the next term of the circuit court of the county for approval, and, if approved, such proceedings then became matters of record in such circuit court.

These same provisions were included in substance in 1845 in a revision of the statute.\textsuperscript{78} This law was condemned by bench and bar generally throughout the state, "on account of the mongrel character bestowed upon the probate justice and the incongruities and anomalies of the act."\textsuperscript{79}

During the period of the first constitution, the courts of

\textsuperscript{76} Laws 1831, p. 191. This act also provided the judge of probate should keep and preserve complete records of all wills, testaments and codicils, and the probate thereof.

\textsuperscript{77} Laws 1837, p. 176.

\textsuperscript{78} Rev. Stat. 1845, Ch. 85.

\textsuperscript{79} Ayers v. Clinefelter, 20 Ill. 465 (1858).
probate continued to exercise no jurisdiction whatsoever over realty of a decedent although, of course, having exclusive jurisdiction of his personalty. However, one step away from the common law is to be seen in the provision in 1819 that the proof of a will before the court of probate should be sufficient to pass title to real estate devised thereunder. Theretofore the probate of a will had amounted to nothing as to real estate, but in all controversies relating to devises the devisee had had to produce the will and prove it as any other paper, as well as the capacity of the testator to devise. This provision of the act of 1819 has its counterpart in the current Probate Act reading as follows: "Every will when admitted to probate . . . is effective to transfer the real and personal estate of the testator devised and bequeathed therein."  

**The Constitution of 1848**

Under the Constitution of 1848 the judicial power of Illinois was vested in one supreme court, in circuit courts, in county courts, and in justices of the peace. There was to be in each county a court to be called a county court the jurisdiction of which was to "extend to all probate and such other jurisdiction as the General Assembly may confer in civil cases."  

Pursuant to this provision, the law of February 12, 1849, was enacted, establishing county courts, to be vested "with all the powers and jurisdiction of the probate court as now established by law," and — note — conferring upon such courts concurrent jurisdiction with the circuit courts in applications for the sale of lands of deceased persons for the payment of debts. The clerks of the courts were to perform all ministerial duties theretofore performed by the probate courts, but the following were to be considered as general judicial powers: granting of letters testamentary or of letters
of administration, except to collect, and repealing the same; allowing or disallowing claims; determining who were entitled to letters; requiring the settlement of estates; and directing the issuing of citations and attachments.

In 1851 the county clerk was given power to grant letters testamentary or of administration, and citations, while the court was not in session, subject to the approval or disapproval of the court at its next term. 89 The only significant change of this period was the investment of the courts of probate with the power to decree the sale of real estate of a decedent for the payment of debts.

The Constitution of 1870—Modern System

The present constitution of Illinois was adopted in 1870.90 By Article VI, Section 1, the judicial powers of the state are vested, except as otherwise provided in the article, in one supreme court, circuit courts, county courts, justices of the peace, police magistrates, and in such courts as may be created by law in and for cities and incorporated towns.91

Section 18 of this article provides that county courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians and conservators, and settlements of their accounts, in all matters relating to apprentices, and in proceedings for the collection of taxes and assessments, and such other jurisdiction as may be provided for by general law.92

Section 2093 provides for the creation of probate courts, as follows:

The general assembly may provide for the establishment of a probate court in each county having a population of over 50,000, and for the election of a judge thereof, whose term of office shall be the same as that of the county judge, and who shall be elected at the same time and in the same manner. Said courts, when established, shall have original jurisdiction94 of all probate matters, the settlement of estates of de-

91 Ibid., p. 351.
92 Ibid., p. 367. Under this provision the general assembly may, by a general law, confer upon county courts any jurisdiction which may be deemed advisable. In re Mortenson's Estate, 248 Ill. 520, 94 N.E. 120 (1911).
93 Ibid., p. 370.
94 In convention the draft of Section 20 provided for "exclusive jurisdiction."
ceased persons, the appointment of guardians and conservators, and settlement of their accounts; in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts.\textsuperscript{95}

Thus probate jurisdiction was continued in county courts but the legislature was empowered to create and establish a distinctive probate court in each county having the requisite population. The quite apparent reason of the framers of the constitution in providing that the legislature might create probate courts was to relieve the county courts of the business which would necessarily come to them with the increase in population and the consequent increase in probate business.\textsuperscript{96}

By act in force July 1, 1877, the legislature provided that there should be established in each county of the state then organized, or thereafter to be organized, having a population of 100,000 or more, a probate court, to be a court of record and to have the jurisdiction prescribed in Section 20 of Article VI of the Constitution, the language being almost verbatim.\textsuperscript{97} County courts in counties wherein probate courts should be established were directed to turn over to the probate court all probate records, files, books, and papers of every kind relating to probate matters in such county courts, the probate court to proceed to complete all unfinished business. Therefore, where established, the probate courts take

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One delegate sought to change this to "exclusive original jurisdiction" but it was amended to "original jurisdiction" on the argument of Mr. Hay in which he stated: "There are . . . many instances in which a court of chancery has necessary concurrent jurisdiction with probate courts, in matters of probate, which would be effectually cut off by the use of this language. It is well known that there are many cases in which the settlement of an estate becomes complicated with equitable and conflicting questions that cannot be adjudicated in the county court and it becomes a necessity to resort to a settlement of those questions in a court of equity." Debates and Proceedings of the Constitutional Convention, Vol. 2, p. 1467.

\textsuperscript{95} Only the final draft contained the phrase concerning the sale of real estate to pay debts. By amendment in convention it was added, the reasons stated being the desirability, in counties of such size as to require a probate court, that all questions relating to the estates of deceased persons shall be settled therein, and that it would only place the probate court on that point on the same level with county courts in the exercise of probate jurisdiction given to them. \textit{Ibid.}, Vol. 2, p. 1467. This reasoning is somewhat inconsistent with the argument described in Note 94. It would have been more apt if the delegate had suggested "as many questions as possible" should be settled in the probate court.

\textsuperscript{96} Klokke v. Dodge, 103 Ill. 125 (1882); City of Moline v. C.B. & Q. R. Co., 262 Ill. 52, 104 N.E. 204 (1914).

\textsuperscript{97} \textit{Laws} 1877, p. 79.
over exclusively the probate functions from the county courts.  

The act was amended in 188199 by providing for probate courts in counties having a population of 70,000 or more. In 1933100 the limitation was again changed, from 70,000 to "... a population of eighty-five thousand or more, and in counties having a population of seventy thousand or more but less than eighty-five thousand inhabitants which vote to establish or continue such court."101

In the revision of the statutes in 1874,102 county courts were given probate jurisdiction similar to that later given to probate courts by the act of 1877, with one most important distinction. In defining the jurisdiction of county courts the constitutional provision included "such other jurisdiction as may be provided for by general law," which was also included in the statute. Appearing as this provision does in constitution and statute, there seems always to be the possibility that the legislature could, if it so desired, confer upon county courts probate jurisdiction and powers that it cannot confer upon probate courts. It would seem possible, therefore, subject to constitutional limitations,103 for the legislature to create an anomalous condition wherein county courts, in the exercise of their probate functions, could have broader powers and jurisdiction than probate courts; for, it is well established that the powers and jurisdiction of probate courts are definitely confined to the subjects specifically declared in section 20 of article VI.104

However, this added jurisdictional provision for county courts appears not to have been utilized and, thus, it seems

98 Klokke v. Dodge, 103 Ill. 125 (1882).
99 Laws 1881, p. 72.
100 Laws 1933, p. 458.
101 The establishment of a probate court is unauthorized until the county has requisite population and the time has arrived for the election of its judge which must be at the same time the county judge is elected. People ex rel. Herndon v. Opel, 188 Ill. 194, 58 N.E. 96 (1900).
102 Revised Statutes 1874, p. 339.
103 Ill. Const. 1870, Art. VI, § 29: "All laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings and practise of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform."
104 People ex rel. Otis v. Loomis, 96 Ill. 377 (1880); First State Bank of Steger v. Chicago Title and Trust Co., 302 Ill. 77, 134 N.E. 46 (1922); In re Estate of Shanks, 282 Ill. App. 1 (1935).
that, under the law as it exists, the probate powers and jurisdiction of a county court, which powers are existent only in those counties in which there is no probate court, are identical with the powers and jurisdiction of probate courts. Not without some hesitation is this statement ventured, but, if it be taken as a recital of what the legislature has done in conferring jurisdiction and not as what it is within the power of the legislature to do, it is believed to represent a true and proper statement of the present relative powers and jurisdiction of the two courts in the exercise of probate functions within their respective spheres. Hereinafter, therefore, references to the extent of the powers, authorities and jurisdiction granted to the probate courts may be taken to include the same for county courts in counties not having a probate court.105

Of the classes of jurisdiction limited to probate courts by the constitution this paper is concerned with only three: all probate matters; the settlement of estates of deceased persons; and the sale of real estate of deceased persons for the payment of debts. The first two of these classes, at least, are of wide extent. They encompass all and much more than was embodied in the three branches of ecclesiastical jurisdiction—the probate of wills, the granting of administrations, and the suing for legacies—which constitute but details of probate matters and the settlement of estates. And the sale of real estate to pay debts is a subject which has never been within the purview of English courts of probate, either ecclesiastical or civil. The further purpose of this paper is to explore the question of what details in the administration of estates within these three constitutional limitations have been properly conferred by the legislature upon probate courts.

Constitutional Jurisdiction of Illinois Probate Courts106

In General

In our theory of government, the legislature, in representation of the sovereign people, can perform any acts from

105 In the Probate Act, Art. I, § 1, par. 2, it is provided that, unless the context requires otherwise, "'probate court' includes the county court of any county not having a probate court."

106 For an analysis of this subject see W. L. Schlegel, "Jurisdiction of the Illinois Probate Courts," 17 CHICAGO-KENT LAW REVIEW 169 (1939). Mr. Schlegel's article
which it is not restrained by the federal or state constitutions, and conversely, can perform no acts from which it is restrained. Thus, where the jurisdiction of a court is defined by the constitution, as is the case with the probate court in Illinois, the legislature can by statute neither restrict nor enlarge that jurisdiction.

Apparently in recognition of this principle, the general assembly, in the act of 1877 creating probate courts, adopted in almost identical terms the language of the constitution. Where the courts have acted under the provisions of this statute its language is to be interpreted in order to determine the validity of the courts' action. But there are other legislative acts—such as the Probate Act—authorizing specific actions which the probate courts may perform, and the validity of the courts' conduct under such other statutory provisions is to be measured by the constitutionality of the specific provision in question. This distinction, however, becomes academic, because in either case the language to be construed is the same.

The constitutionality of the act of 1877 establishing probate courts in counties of 100,000 population or more, and the amendatory act of 1881 extending the provisions to counties of 70,000 or more, was raised in Knickerbocker v. The People has been very helpful in the preparation of this chapter. There are no direct references to the article by way of notes, but in lieu thereof this general and, it is intended, greater acknowledgment is made.

107 Cooley, Constitutional Limitations (8th ed., 1927), I, 173 et seq. See also James Bryce, The American Commonwealth (3d ed., 1895); Thorpe v. Rutland & Burlington Rd. Co., 27 Vt. 140, 142: "The people ... possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular state in question."

108 State of Rhode Island v. State of Massachusetts, 12 Pet. 657, 720, 9 L. Ed. 1233 (1833): "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether in the case before a court, their action is judicial or extra judicial; with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged the case, its judicial action, by hearing and determining it." Cited and quoted with approval in People v. Seelye, 146 Ill. 189, 32 N.E. 458 (1892).

109 Howard v. Swift, 356 Ill. 80, 190 N.E. 102 (1934); First State Bank of Steger v. Chicago Title & Trust Co., 302 Ill. 77, 134 N.E. 48 (1922).


112 In re Estate of Mortenson, 248 Ill. 320, 94 N.E. 120 (1911).
The acts were upheld notwithstanding that there were counties in the state having populations of "fifty thousand or more"—the constitutional provision—which were excluded from the operation of either of the acts. The court held that Section 29 of Article VI of the Constitution, prescribing the rule of uniformity in respect to all laws relating to courts, was not a limitation on the power of the legislature in establishing probate courts. Rather, it said that the only effect intended to be given the prescription was to require all laws relating to "the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade" to be general and uniform.

Being creatures of the statute and deriving their existence from the section of the constitution hereinbefore referred to, probate courts possess only such powers as are expressly conferred upon them by laws passed in pursuance of the constitutional provision, or as are by implication necessary to carry out such powers. They are courts of limited jurisdiction, but, while acting within the scope of their constitutional and statutory limitations, they have a general jurisdiction of an unlimited extent over the particular class of subjects within their sphere—but not special or inferior. Therefore, when adjudicating upon the administration of estates, as liberal intendments will be granted in their favor as will be extended to the proceedings of courts of general jurisdiction; and it is not necessary that all the facts and circumstances which justify their action should appear affirmatively upon the face of a proceeding.

113 102 Ill. 218 (1882); Meserve v. Delaney, 105 Ill. 53 (1882).
115 Ford v. Ford, 117 Ill. App. 502 (1905). This distinction as between courts of inferior and those of superior jurisdiction only goes to the question of the presumption which must obtain in favor of the jurisdiction of a court and the mode by which want of it must be shown. That is, a court of superior jurisdiction, proceeding within the general scope of its powers, is presumed, in a collateral proceeding, to have had jurisdiction of the cause until the contrary appears, but the facts which give an inferior court jurisdiction must appear on its record. People v. Seelye, 146 Ill. 189, 32 N.E. 458 (1892).
Further, within the scope of their statutory jurisdiction, whenever the relief to be administered, the right to be enforced, or the defense of an action properly pending before them involves the application of equitable principles, their powers are commensurate with the duties demanding their exercise, whether legal or equitable.\textsuperscript{117}

Judicial Definitions of the Constitutional Limitations on the Legislature's Power to Grant Jurisdiction to Probate Courts

The two phrases, "all probate matters" and "the settlement of estates of deceased persons," are general in terminology and effect. That is, in analysis they are capable of being separated into many integral elements, and must be so separated in any accurate and complete definition of their meanings. In their broadness they are like the others of the first four phrases designating the classes of jurisdiction to which the constitution limits probate courts, and dissimilar to the fifth and last phrase—that afterthought of the constitutional convention\textsuperscript{118}—conferring jurisdiction in "sales of real estate of deceased persons for the payment of debts." The final phrase, alone of all the five, is narrow and specific and of itself qualifies and completely defines its own meaning.

Interpretations of the first two phrases show an overlapping, a blending into each other; and the phrase "probate matters" has, in fact, been said to "mean matters pertaining to the settlement of the estates of deceased persons."\textsuperscript{119} The term "probate," strictly used, means the proving of a will before the officer or tribunal having jurisdiction to determine its validity,\textsuperscript{120} but in common usage it has come to be applied to any of the incidents of administration.\textsuperscript{121} The Illinois courts, wisely no doubt, seem never to have attempted to circumscribe the meaning of "all probate matters" with a rigid

\textsuperscript{117} Chapman v. American Surety Co., 261 Ill. 594, 104 N.E. 247 (1914); Shepard v. Speer, 140 Ill. 238, 29 N.E. 718 (1892).
\textsuperscript{118} See note 95 supra.
\textsuperscript{119} Frackelton v. Masters, 249 Ill. 30, 94 N.E. 124 (1911).
\textsuperscript{120} Blackstone, op. cit., II, 508; Research Hospital v. Continental Illinois Bank and Trust Co., 352 Ill. 510, 186 N.E. 170 (1933), in which the court said: "Jurisdiction to probate wills must mean jurisdiction to determine the validity of the wills offered. Such power inheres in the jurisdiction conferred by the constitution." Schofield v. Thomas, 231 Ill. 114, 83 N.E. 121 (1907).
\textsuperscript{121} Dibble v. Winter, 247 Ill. 243, 93 N.E. 145 (1910).
definition, but rather, have seemed to content themselves with general statements such as, "the words were used in the constitution in a broad and general sense," and "in their commonly accepted meaning."

For example, in Winch v. Tobin, the court said:

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

Still general, but somewhat more precise, is the definition which has been given to "the settlement of estates." In the case of In re Estate of Mortenson the court said:

The settlement of an estate, in legal significance and common understanding, is the process by which letters testamentary or of administration are granted, assets collected, claims allowed, debts paid, real estate sold if necessary for the payment of debts, and the property distributed to those who are entitled to it by the laws of descent or by the will.

There are really fewer decisions than one might expect in which the courts have said in so many words that certain specific subjects are within or without the import of the constitutional phrases.

122 Estate of Mortenson, 248 Ill. 520, 94 N.E. 120 (1911).
123 Howard v. Swift, 356 Ill. 50, 190 N.E. 102 (1934).
124 107 Ill. 212 (1883). Going beyond the Illinois cases one finds this more specific definition in Martinovich v. Mariscano, 137 Cal. 354, 70 P. 459 (1902): The words as used in the constitution, vesting jurisdiction of matters of probate in the superior court "include the ascertainment and determination of the persons who succeed to the estate of a decedent, either as heir, devisee, or legatee, as well as the amount or proportion of the estate to which each is entitled, and also the construction or effect to be given to the language of a will; but do not include a determination of claims against the heir or devisee for his portion of the estate arising subsequent to the death of the ancestor, whether such claim arises by virtue of his contract or in invitum; nor is the determination of conflicting claims to the estate of an heir or devisee, or whether he has conveyed or assigned his share of the estate, a 'matter of probate'."
125 248 Ill. 520, 94 N.E. 120 (1911).
126 Courts of other states have indicated that "the settlement of estates" is the method by which the accounts of the executor or administrator are approved, Sellew's Appeal from Probate, 36 Conn. 188 (1869); Allen v. Dean, 148 Mass. 594, 20 N.E. 314 (1889); and that the phrase does not necessarily include "distribution," In re Creighton, 12 Neb. 280, 11 N.W. 313 (1882).
Among such cases was *Newell v. Montgomery*127 in which the court decided that the legislature properly included as a probate matter within the jurisdiction of the probate court the authority to call before it, in selling real estate to pay debts, all adverse claimants to the land and adjudicate upon their rights before ordering a sale. The theory was that the land could be sold more advantageously and with the expectation of realizing a better price after the interests of all parties had been determined so that the purchaser might know precisely the nature and extent of the interest for which he was bidding.

As the case cited confirmed the power in probate courts to quiet title to real estate sought to be sold for the payment of debts, so also has been confirmed its power to remove clouds from the title.128

In the more recent case of *Rosen v. Rosen*,129 the court held that the sale of real estate to pay legacies which, by the will, were made a charge upon such real estate, was a probate matter and an incident to the settlement of an estate, as these terms are used in the constitution. This was a direct appeal to the supreme court from an order of the probate court of Cook County vacating a former order of sale to pay legacies. The sole question involved was the constitutionality of

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127 129 Ill. 58, 21 N.E. 508 (1889), as cited in In re Estate of Mortenson, 248 Ill. 520, 94 N.E. 120 (1911). Until 1887 probate courts had no jurisdiction to quiet title to real estate of a decedent which was being sold for the payment of debts. Smith v. McConnell, 17 Ill. 135 (1855); Phelps v. Funkhouser, 39 Ill. 401 (1866); Cutter v. Thompson, 51 Ill. 390 (1869); Gridley v. Watson, 53 Ill. 186 (1870); Shoemate v. Lockridge, 53 Ill. 503 (1870); LeMoyne v. Quimby, 70 Ill. 399 (1873). However, as shown by the decision in Newell v. Montgomery, this was for the reason that the legislature had not by statute conferred such jurisdiction upon probate courts, and was not because of any constitutional inhibitions. By Laws 1887, p. 3, the administration act was amended to provide that all persons holding liens against the real estate, or any part thereof, or having or claiming any interest therein, in possession or otherwise, should be made parties to the proceeding to sell; that the practice in such cases should be the same as cases in chancery, and that the probate court might settle and adjust all equities, and all questions of priority, between all parties interested therein, and might also investigate and determine all questions of conflicting or controverted titles arising between any of the parties to such proceeding and might remove clouds from the title to any real estate sought to be sold, and invest the purchasers with a good and indefeasible title to the premises sold. See also Clayton v. Clayton, 250 Ill. 433, 95 N.E. 480 (1911).

128 Schottler v. Quinlan, 263 Ill. 637, 105 N.E. 710 (1914).

129 370 Ill. 173, 18 N.E. (2d) 218 (1938).
Section 137 of the Administration Act,\textsuperscript{130} which provided that when it appeared that a legacy was a charge upon the real estate and there was not sufficient personalty out of which such legacy could properly be satisfied, the probate court might, upon petition of the executor, order the sale of the real estate. In holding the section of the act constitutional the court said it is manifest that the estate could not be settled until the real estate was sold for the purpose of paying the legacies.

In other cases it has been held that the probate court has sole original jurisdiction to probate wills,\textsuperscript{131} and as an incident to the probating of wills the power to establish the existence of a lost will has been held to be within its exclusive jurisdiction.\textsuperscript{132} The same rule has been applied with regard to the reformation of wills in cases of spoliation, whether innocent or fraudulent.\textsuperscript{133} Also, where the circuit court, on appeal, ordered a will probated, a petition by an heir over whom jurisdiction had not been acquired, to set aside the probate for fraud and want of jurisdiction, was properly entertained by the probate court, and its power to set aside the probate of the will was upheld.\textsuperscript{134}

On the assumption that the payment of legacies is necessary to the settlement of estates the power of the probate court to construe a will has been upheld as incident to the payment of legacies.\textsuperscript{135} Further, as incidental to jurisdiction to settle and distribute the assets of a decedent, it has been held that the probate court has power to determine the rights and interests of an assignee of an heir of the decedent in such heir's distributive share in the estate.\textsuperscript{136}

On the other hand, some boundary lines have been drawn beyond which the jurisdiction of probate courts has not been permitted to extend. In 1909 the legislature attempted to extend the jurisdiction of probate courts, and county

\textsuperscript{130} Ill. Rev. Stat. 1937, Ch. 3, § 137, par. 139. The Probate Act in force January 1, 1940, attempts to enlarge further the use to which proceeds from sales of real estate may be put by including "the payment of expenses of administration" as well as claims and legacies. Ill. Rev. Stat. 1939, Ch. 3, § 397.

\textsuperscript{131} Oliver v. Oliver, 313 Ill. 612, 145 N.E. 123 (1924).

\textsuperscript{132} Mather v. Minard, 260 Ill. 175, 102 N.E. 1062 (1913).

\textsuperscript{133} Schofield v. Thomas, 231 Ill. 114, 83 N.E. 121 (1907).

\textsuperscript{134} Strawn v. Trustees of Jacksonville Female Academy, 240 Ill. 111, 88 N.E. 460 (1909).

\textsuperscript{135} People v. Rigdon, 204 Ill. App. 309 (1917).
courts having probate jurisdiction, to the supervision and control of testamentary trusts, including appointment and removal of trustees, the issuing of letters of trusteeship to trustees, the fixing and approving of their bonds, and the settlement of their accounts. By this act the courts of probate were to have and exercise full chancery powers. But the supreme court said that the settlement of estates has no relation to the management or execution of trusts, which are either entirely independent of the administration of the estate by the executor or administrator to the same extent that a devise of real estate is independent of such administration, or, if the trust is in the residue of property committed to the executor, can only become operative after the settlement of the estate is completed and the trustee receives the property from the executor;

and, therefore, even though the words "probate matters" were used in the constitution in a broad and general sense and the broadest meaning was given to them, nevertheless, the supervision and control of testamentary trusts are not included in the settlement of the estates of deceased persons.

Within the same year the supreme court also considered the question of whether it could sustain this act as to county courts and hold it invalid as to probate courts. It observed that had the act been limited to county courts, the constitutional objections would not exist for the reason, as noted hereinbefore, that the constitution authorizes the legislature to confer upon county courts "such other jurisdiction as may be provided for by general law." Because it is largely in the centers of wealth and population that testamentary trusts are created and administered, and it is in counties of such character that probate courts are established, the court concluded that one of the controlling purposes of the act, if not the principal one, was to confer jurisdiction over testamentary trusts upon probate courts. Since that part of the act was invalid, but so essentially connected with the rest of the act, the court declared the whole thereof to be void.

Another important case is that of Howard v. Swift, in
which a trustee in bankruptcy filed claim against a decedent's estate seeking to impose a liability founded upon the alleged fraudulent and unlawful acts of the decedent while in his lifetime acting as a director of the corporation which became bankrupt. It was contended by the trustee that, under the constitution, the probate court has general jurisdiction to hear and adjudicate all claims that may be made against the estate of a decedent, but the court held that the commonly accepted meanings of the constitutional phrases contemplate conferring upon probate courts jurisdiction only over claims arising out of contracts, either express or implied, and not claims based on torts.

Further examples of such matters as have been held not to be incident to the broadest meaning of the terms "all probate matters" and "settlement of estates" are the power to reform a written instrument under seal or to declare a deed absolute on its face, to be a mortgage;\(^{141}\) the compulsion of the completion of a bid by the highest bidder at the sale of a decedent's realty for the payment of debts;\(^{142}\) the foreclosure of a mortgage on a decedent's estate;\(^{143}\) and the cancellation of a deed made by a legatee transferring his interest in the real estate of the deceased to the administrator who, in his individual capacity, has obtained the deed through fraud.\(^{144}\)

Attention has already been drawn to the narrow and specific phrasing of the final class of jurisdiction, "sales of real estate of deceased persons for the payment of debts," and to the fact that the clause was an afterthought of the constitutional convention. And it will be recalled that prior to the act of 1849 applications for the sale of lands of deceased persons for the payment of debts could be directed to the circuit courts only, and that that act conferred concurrent jurisdiction of the subject upon the county courts—the then courts of probate.

In 1849 the constitutional provisions relating to the courts of probate were broader than the current provisions, but there was, of course, necessity for specific legislative action

\(^{141}\) Rook v. Rook, 111 Ill. App. 398 (1903).

\(^{142}\) Hannah v. Meinshaussen, 299 Ill. 525, 132 N.E. 820 (1921).

\(^{143}\) People ex rel. Otis v. Loomis, 96 Ill. 377 (1880).

\(^{144}\) Dowdall v. Cannedy, 32 Ill. App. 207 (1889).
if such courts were to exercise jurisdiction in the sale of real estate to pay debts. This is borne out by an opinion rendered in 1829 by Chief Justice John Marshall, in which he said:

"Jurisdiction of all probate and testamentary matters," [given by the constitution of Ohio to the court of common pleas] may be completely exercised without possessing the power to order the sale of the lands of an intestate. Such jurisdiction does not appear . . . to be identical with that power, or to comprehend it.\(^{145}\)

Modern decisions of the Illinois courts speak in direct contradiction to the principle stated by Chief Justice Marshall. In them no attempt is made to rationalize the contradiction and, indeed, since no references are made to the earlier case, the contradiction may have developed unwittingly. In any event, in these decisions the courts declare that sale of real estate for the payment of debts is embodied in probate matters and the settlement of estates. In *People ex rel. Otis v. Loomis*\(^{146}\) the court said that the jurisdiction of the probate court embraces four subjects, naming the first as all probate matters, embracing settlement of estates of deceased persons, and sale of their real estate to pay their debts. And in the most specific definition which has been rendered in Illinois as to the phrase "the settlement of estates," the court included as a part thereof the sale of real estate, if necessary, for the payments of debts.\(^{147}\)

The authority of probate courts to adjudicate the rights of all claimants to land being sold for the payment of debts as confirmed in *Newell v. Montgomery*\(^{148}\) and *Schottler v. Quinlan*\(^{149}\) seems at first glance to be an extension of the powers granted under this constitutional phrase, but, as has been related, the jurisdiction of the probate courts was affirmed as a probate matter and as incident to the settlement of an estate.

One may well wonder if the supreme court has not now by its definitions of "all probate matters" and "the settlement of estates" so widened the scope of jurisdiction of pro-

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\(^{145}\) The Bank of Hamilton v. The Lessee of Dudley, 2 Pet. 492, 524; 7 L. Ed. 496 (1829).
\(^{146}\) 96 Ill. 377 (1880).
\(^{147}\) *In re Estate of Mortenson*, 248 Ill. 520, 94 N.E. 120 (1911).
\(^{148}\) 129 Ill. 58, 21 N.E. 508 (1889).
\(^{149}\) 263 Ill. 637, 105 N.E. 710 (1914).
bate courts as to render quite superfluous the phrase relating to the sale of real estate to pay debts. The decisions referred to above point in that direction but the Rosen decision,\textsuperscript{100} by analogy, would seem to give support to this view. There, disregarding intentionally or otherwise the doctrine \textit{expressio unius est exclusio alterius}, with its implication that the express inclusion in the constitution of jurisdiction in sales of real estate to pay debts excludes the sale of realty for any other purposes, the court held, as has been previously stated, that the sale of realty to pay legacies is incident to "the settlement of estates."

Is it not a fair inference that in the settlement of an estate the necessity for the sale of real estate to pay debts is equal to the necessity for the sale of real estate to pay legacies? As a matter of fact, is not a sale to pay debts the more important of the two? Such a conclusion would seem warranted in the light of Woerner's summary that the primary purpose of administration is to collect the assets and to pay debts, whereas distribution, in which category falls the payment of legacies, is only incidental to administration.\textsuperscript{151}

The grant of jurisdiction in sales of realty to pay debts has doubtless served as a means without which the supreme court probably would not have reached its present viewpoint, but from the position of that high court today it is not an unjustified inference that support for jurisdiction of probate courts on this subject, as well as all others affirmed to date, is amply found in the phrases "all probate matters" and "the settlement of estates of deceased persons."

\textsuperscript{100} 370 Ill. 173, 18 N.E. (2d) 218 (1938).
\textsuperscript{151} Woerner, op. cit., I, 2.