September 1940

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Recommended Citation
Cecil Bronston, Jurisdiction of the Probate Courts of Illinois II, 18 Chi.-Kent L. Rev. 371 (1940). Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol18/iss4/2

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JURISDICTION OF THE PROBATE COURTS
OF ILLINOIS. II*

CECIL BRONSTON†

PLACE OF PROBATE COURTS IN JUDICIAL SYSTEM OF ILLINOIS

Exclusive Jurisdiction

As previously seen, probate courts are courts of record of general jurisdiction when adjudging upon the administration of estates, but are of limited jurisdiction when compared with certain other courts of the state in that they can exercise only such powers as are expressly granted or such further powers as are by implication necessary to carry out the powers expressly granted.

In all probate matters and the settlement of estates of deceased persons, the probate court has original jurisdiction. It has exclusive jurisdiction in the granting of administrations and the allowing of wills. In ordinary cases, it has exclusive jurisdiction of the administration proper of estates, although under extraordinary circumstances a court of equity may assume and exercise jurisdiction which is paramount to that of the probate court. Under such circumstances,

* For the first part of this article, see 18 CHICAGO-KENT LAW REVIEW 248.
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153 Joseph Story, Commentaries on Equity Jurisprudence (Boston: Little, Brown & Co., 12th ed., 1877) I, 525, note 1: "Courts in equity can neither grant administration, nor allow a will, nor will they interfere with the judgment of the proper courts in granting administration or allowing wills," citing Case of Broderick's Will, 21 Wall. 503, 22 L. Ed. 599 (1875), and Jairus W. Perry, A Treatise on the Law of Trusts and Trustees (Boston: Little, Brown & Co., 6th ed., 1911) 1, §§ 182, 183 and 184.

154 Chapman v. American Surety Co., 261 Ill. 594, 104 N.E. 247 (1914). The court said: "This court, in Howell v. Moores, 127 Ill. 67, in discussing the jurisdiction of probate courts, held that under the constitution circuit courts had original jurisdiction in all cases at law and in equity, therefore the jurisdiction conferred upon the county or probate courts was concurrent only with that previously existing in the circuit courts in matters of trust; that under the constitution this equitable jurisdiction could not be taken from the courts of equity by the legislature. This court has more than once stated that courts of equity have a paramount jurisdiction in matters of administration and settlement of estates. . . . The rule now appears to be that courts of equity will not exercise jurisdiction over the administration of estates in ordinary cases." For further development of this subject, see, infra, "Jurisdiction in Relation to Circuit and Superior Courts."
the court of equity may take over the entire administration,155 but ordinarily it will confine itself to questions arising in the course of the administration between parties interested in the estate and not attempt to set up an administration of itself.156

The probate court's sole original jurisdiction to probate wills157 contemplates not only the determination that the instrument probated as a will is valid in its execution by the *prima facie* proof required by the statute, but also the determination of whether events occurring subsequent to its execution are sufficient to invalidate and revoke it. In other words, the jurisdiction to probate wills includes the jurisdiction to determine the validity of the wills offered for probate.158 And, together with the probating of a will, it is within the exclusive jurisdiction of the probate court to establish a lost or destroyed will.159 Further, the probate court has the exclusive right to grant letters testamentary and letters of administration,160 and the regularity of the appointment of an executor or administrator cannot be questioned in a collateral proceeding.161 The jurisdiction over the estate of a deceased person is a continuing jurisdiction which remains with the probate court until the estate is finally closed and distributed to the parties entitled to such distribution.162

Of course, references in this paper to exclusive jurisdiction mean only that in the original instance such jurisdiction is exclusive.163 Appeals from final orders or decrees of the

155 Grattan v. Grattan, 18 Ill. 167 (1856); Townsend v. Radcliffe, 44 Ill. 446 (1867).
157 Schofield v. Thomas, 231 Ill. 114, 83 N.E. 121 (1907); Beatty v. Clegg, 214 Ill. 34, 73 N.E. 383 (1905); People v. Knickerbocker, 114 Ill. 539, 2 N.E. 507 (1885); Wild, *Ex'r* v. Sweeney, 94 Ill. 213 (1879).
159 Mather v. Minard, 260 Ill. 175, 102 N.E. 1062 (1913).
160 Kennedy v. Kennedy, 105 Ill. 350 (1883).
161 People v. Saloman, 184 Ill. 490, 56 N.E. 815 (1900); Golder v. Bressler, 105 Ill. 419 (1883).
163 Story, *Equity Jurisprudence*, I, 526, note: "Generally all errors in the proceedings in the settlement of estates, in surrogate or probate court, can be corrected on appeal; and appeal is the proper remedy," rather than recourse to equity.
probate court in a proceeding for the sale of real estate may be taken to the appellate or supreme court of the state\textsuperscript{164} and appeals from any other orders, judgments, or decrees may be taken to the circuit court.\textsuperscript{165} On appeal to the circuit court the trial is \textit{de novo} and from this trial lie further appeals, if desired, to the appellate and supreme courts—all as in other civil cases in courts of record.

\textit{Jurisdiction in Relation to County Courts}

Reference to the relationship between probate and county courts has already been made to some extent in Chapter II. It will be recalled that there are two classes of cases in which county courts have jurisdiction: first, those enumerated in Article VI, Section 18 of the constitution, and, second, those cases where jurisdiction is specially conferred on county courts by the enactment of a general law authorized and permitted by said article; whereas the jurisdiction of probate courts is limited to those cases specifically enumerated in Article VI, Section 20 of the Illinois Constitution.\textsuperscript{166} Consequently the jurisdiction of probate courts is not coextensive with nor as large as the jurisdiction of county courts.\textsuperscript{167}

The relationship of these two courts on probate matters is set forth clearly in \textit{Klokke v. Dodge}:

\ldots the establishment of a probate court, under the constitution, in a particular county, is \textit{ipso facto} a revocation of the jurisdiction of the county court of such county as to all matters over which probate courts are given jurisdiction, and with respect to which county courts in counties not having probate courts exercise a similar jurisdiction,—or, in other words, \ldots the county court \ldots is at once, by operation of law, deprived of its jurisdiction in matters of probate, \ldots for there is no such thing \ldots as concurrent jurisdiction between the two courts in the same county. The jurisdiction of the \ldots [probate] courts is clearly exclusive.\textsuperscript{168}

\textit{Jurisdictional Relationship of Courts of Probate of Different Counties}

The Probate Act provides, when the will of a testator is probated or when the estate of a decedent is administered in

\textsuperscript{164} Ill. Rev. Stat. 1939, Ch. 3, § 483.
\textsuperscript{165} Ill. Rev. Stat. 1939, Ch. 3, § 484.
\textsuperscript{166} Ante, pp. 266 et seq.
\textsuperscript{167} City of Moline v. C. B. & Q. R. R. Co., 262 Ill. 52, 104 N.E. 204 (1914).
\textsuperscript{168} 103 Ill. 125 (1882); also, Meserve Ex’x v. Delaney, 105 Ill. 53 (1882).
Illinois, that the probate or the administration shall be in the probate court of the county determined as follows:

(a) In the county where his mansion house is situated.
(b) If he has no mansion house in this state, in the county where he has a known place of residence.
(c) If he has neither a mansion house nor a known place of residence in this state, in the county wherein the greater portion of his real estate is located.
(d) If he has no mansion house, no known place of residence, and no real estate in this state, in the county where the greater part of his personal estate is located at the time of his death.160

Further, the act provides, for the purpose of granting administration of both testate and intestate estates of nonresident decedents, the situs of tangible personal estate is where it is located, and the situs of intangible personal estate is where the instrument evidencing a debt, obligation, stock, or chose in action happens to be, or where the debtor resides, if there is no instrument in this state.170

There is little to be added from the cases to the plain words of the statute. Of course, the first section referred to applies solely to domestic estates,171 and under former acts of slightly different wording it has been held that jurisdiction to admit wills to probate is, primarily, exclusive in the probate court for the district in which the testator was domiciled at the time of his death.172 The statement in Balsewicz v. Chicago Burlington & Quincy Railroad Company173 that residence of the decedent at the time of his death within the territorial jurisdiction of the court is essential to the probate court's jurisdiction now seems too broad.

But in any event it seems certain that where a court of one county acquires jurisdiction over an estate, it retains such jurisdiction until the estate is fully administered.174

170 Ill. Rev. Stat. 1939, Ch. 3, § 207.
171 Davis v. Upson, 230 Ill. 327, 82 N.E. 824 (1907); Upson v. Davis, 110 Ill. App. 375, reversed in 209 Ill. 206, 70 N.E. 602 (1904).
172 Wild, Ex'r v. Sweeney, 84 Ill. 213 (1876).
174 Dougherty v. Hughes, 165 Ill. 384, 46 N.E. 229 (1897); People v. White, 11 Ill. 341 (1849).
Jurisdiction in Relation to Circuit and Superior Courts\textsuperscript{175}

Article VI, Section 12 of the Illinois Constitution provides: "The circuit courts shall have original jurisdiction of all causes in law and equity, and such appellate jurisdiction as is or may be provided by law, and shall hold two or more terms each year in every county." The original jurisdiction so conferred upon circuit courts of all causes in law and equity is unaffected by Section 20 of Article VI conferring original jurisdiction upon probate courts in all probate matters and the settlement of estates, as it has been held that the legislature has no power to abridge the original jurisdiction of circuit courts.\textsuperscript{176}

At Law

Under this constitutional provision, circuit courts have jurisdiction of actions against administrators and executors to enforce the legal liabilities of the decedent "regardless of the character or form of the action."\textsuperscript{177} A right of action at law against a person while living remains a right of action of the same nature against his legal representatives and may be prosecuted in the circuit court as an action at law against the administrator or executor, or may be filed in the court of probate as a claim against the estate.\textsuperscript{178} A judgment in either court becomes a charge against the estate.\textsuperscript{179} A judgment in

\textsuperscript{175} The Superior Court is existent in Cook County only. Provision for its establishment and jurisdiction is found in Ill. Const. 1870, Art. VI, § 23 and 24; and it has the same jurisdiction and powers as the Circuit Court of Cook County, the two courts really being identical except in name. See Berkowitz v. Lester, 121 Ill. 99, 11 N.E. 860 (1887); Cobe v. Guyer, 237 Ill. 516, 86 N.E. 1071 (1908), affirming 139 Ill. App. 592 (1908). Thus, references herein to the circuit court mean also the Superior Court of Cook County, and for the sake of brevity the latter court will not further be mentioned by name.

\textsuperscript{176} Myers v. The People, 67 Ill. 503 (1873); People v. Feinberg, 348 Ill. 549, 181 N.E. 437 (1932).

\textsuperscript{177} Howard v. Swift, 356 Ill. 80, 88, 190 N.E. 102 (1934), which cites Darling v. McDonald, 101 Ill. 370 (1882); Roberts v. Flatt, 142 Ill. 485, 32 N.E. 484 (1892); Morse v. Pacific Railway Co., 181 Ill. 356, 61 N.E. 104 (1901); and Starrett v. Brosseau, 206 Ill. 408, 70 N.E. 354 (1904).

\textsuperscript{178} Starrett v. Brosseau, supra. Ill. Rev. Stat. 1939, Ch. 3, § 494: "In addition to the actions which survive by the common law, the following also survive: actions of replevin, action to recover damages for an injury to the person (except slander or libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, and actions for fraud or deceit."

\textsuperscript{179} Morse v. Pacific Railway Co., 191 Ill. 356, 61 N.E. 104 (1901).
the circuit court properly reads "to be paid in due course of administration," which means that it shall be paid as, and pro rata with, other claims of the same class, out of the assets administered. Since the executors or administrators are parties to the judgment they need no further notice of it. But the court of probate should be informed of the existence of the judgment in order that such court may properly discharge the duty of causing settlement of the estate to be made, as otherwise it could not intelligently pass upon the accounts and could never know whether the estate was settled or not. Therefore the judgment itself or a copy thereof should be filed in the court of probate where it is to be taken as duly proven and as a legal claim, to the extent it purports to be, against the estate. The judgment is subject to no revision by such court since the circuit court is of general original jurisdiction. Conversely, executors and administrators resort to the circuit court in its law branch to obtain legal remedies on behalf of the estates they are administering.

In Chancery

In the chancery branch of the circuit court there is a much broader concurrence of jurisdiction with that of the probate court, for courts of equity may, in the exercise of their general jurisdiction, take upon themselves the administration of estates, supersede the jurisdiction of the probate court, and take the whole administration into their hands. However, in Illinois, as in the rest of the United States, courts of equity seldom interfere in the administration of estates. When they do it is only in aid of the courts of probate, and for the accomplishment of some specific end not readily attain-

180 Darling et al. v. McDonald, 101 Ill. 370 (1882).
181 Grattan v. Grattan, 18 Ill. 167 (1856); Townsend v. Radcliffe, 44 Ill. 446 (1867). Historically, the jurisdiction of courts of equity in the administration of estates is founded on the principle that it is the duty of the court to enforce the execution of trusts and that the executor or administrator is bound to apply the property in his hands to the payments of debts and legacies and to apply the surplus according to the will of the testator, or, in case of intestacy, according to the statute of distribution, a constructive trust thereby being created. Other auxiliary grounds are the necessity of taking accounts, and compelling a discovery, and the consideration that the remedy at law, when it exists, is not plain, adequate and complete. These reasons are more English than American, for ordinarily courts of probate in this country have ample powers, both in the extent of their jurisdiction and their mode of procedure, for the accomplishment of the principal objects upon the attainment
able in the courts of probate, after which the cause is remanded to the probate court with the decree of the court of equity, and becomes a part of the proceedings there, that the final settlement of the estate may remain in that court.\(^{182}\) In Illinois it has been said:

While in some of the earlier cases in this state it is held that equity retains a general jurisdiction over administrators, concurrent with that exercised by probate courts, yet the rule as now declared is, that courts of equity will not exercise jurisdiction over the administration of estates except in extraordinary cases; and by the liberal statutory rules for the settlement of estates, based on equitable principles and enforced in courts of probate, the reasons for equitable jurisdiction in such cases are greatly restricted. Probate courts are established for the settlement of such estates, and questions arising in the course of administration are decided by them to the practical exclusion of the jurisdiction of courts of equity.\(^{183}\)

The test to be applied in determining whether a court of equity will assume jurisdiction is whether the ordinary powers of the probate court are adequate to the protection and enforcement of every right which is shown to exist in the parties at interest. If special reasons can be shown why the court of probate cannot afford the requisite relief, equity will assist, but not otherwise.\(^{184}\) The difficulty, as is always the case, comes in the application of the rule or test to the particular circumstances of a case.

Facts which are severally insufficient to warrant the interposition of a court of equity may together equal a complicated sum that justifies the interposition. Such were the circumstances in *Elting v. First National Bank.*\(^{185}\) The executrix was guilty of neglect and mismanagement, but these, the court said, were not of themselves sufficient to warrant the intervention of equity. However, she had pyramided her

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\(^{183}\) Goodman v. Kopperl, 169 Ill. 136, 48 N.E. 172 (1897); *Elting v. First Nat. Bank,* 173 Ill. 368, 50 N.E. 1095 (1898); *Winslow v. Leland,* 128 Ill. 304, 21 N.E. 588 (1889); *Harris v. Douglas,* 64 Ill. 466 (1872).

\(^{184}\) Freeland v. Dazey, 25 Ill. 266 (1861); *Elting v. First Natl. Bank,* 173 Ill. 368, 50 N.E. 1095 (1898). This test is in reality merely an application of the elementary principle that a court of equity will not intervene where there is an adequate remedy at law, but the remedy at law must be pursued.

\(^{185}\) 173 Ill. 368, 50 N.E. 1095 (1898).
wrongs. Her bond was fraudulently insufficient; she had entered into collusion with a claimant; through an intermediary she had acquired title to real estate of the decedent sold ostensibly to pay debts—such acquisition being fraudulent per se—and, finally, she had removed herself and personal assets of the estate beyond the jurisdiction of the probate court by leaving the state. The probate court could not grant the relief necessary to the creditors, but the circuit court properly took jurisdiction for that purpose.

The jurisdiction of the circuit court has also been upheld to expedite and simplify the settlement of issues which were within the province of the probate court but were directly involved in matters properly initiated in a court of equity. In Potter v. Clapp, the widow filed her bill against the children of the decedent by a former marriage for the assignment of dower and homestead, the establishment of a resulting trust in the realty to the extent her personal funds had been used in its improvement subsequent to the decedent's death, and an accounting. By leave of court, a divorced wife of the decedent intervened as a claimant for dower. It was held that there was no objection to a full settlement and adjustment in this suit of all claims or matters in difference relative to the estate nor to a full determination of the respective interests in the real estate, the improvements made, and the rents received; because the complainant widow was the only creditor, she and the defendants were the only persons interested in the estate, the only asset was the real estate subject to the suit, and any claims, widow's award, and administration expense that were properly payable would have to be paid from the income or sale of the real estate.

That courts of equity have peculiarly within their province the enforcement of trusts is, of course, ample reason for the circuit court to assume jurisdiction. Where, during lifetime, a decedent had received money as assignee, in trust, it was held proper for his creditor to enforce the trust and obtain an accounting in the circuit court despite a contention that the creditor was limited to filing his claim in the probate court. The court said that the statute providing for the filing of claims, and establishing as one class of claims those

186 203 Ill. 592, 68 N.E. 81 (1903).
"where the decedent has received money in trust for any purpose," confers upon the probate court jurisdiction which is merely concurrent with the previously existing jurisdiction of the circuit court in matters of trust, and the court which first obtains jurisdiction will have precedence. ¹⁸⁷

For the same reason, where trustees were also executors under a will, and during the executorship a loss was incurred by reason of their negligence, it was held not to be an interference with the jurisdiction of the probate court for the circuit court to compel the trustees to make good the loss, even though the estate was still pending before the probate court. ¹⁸⁸ It has even been indicated that if a testator should make the payment of his debts a charge upon real estate devised by his will, using language showing a broader intent than the ordinary provision for the payment of debts, such language might be construed to establish a trust in the devisee for creditors which would furnish sufficient grounds for a court of equity to take jurisdiction of the claim in the first instance, without requiring its exhibition and establishment in the probate court. ¹⁸⁹

However, the application of the test of whether a complainant may come into a court of chancery, or should obtain relief in the probate court, more often than not has resulted in a decision that the former court should not intervene.

It is well settled that a claimant may not, in the first instance, file a bill to enforce the payment of a claim against an estate. The statute has pointed out a different mode of procedure, and the claimant must pursue that remedy, which is to exhibit his claim and have it allowed by the court of probate. Then, if any special reasons that may be deemed sufficient can be assigned why that court cannot afford the requisite relief, equity will assist him, but not otherwise. ¹⁹⁰ There-

¹⁸⁷ Howell v. Moores, 127 Ill. 67, 19 N.E. 863 (1889). While the circuit court undoubtedly has jurisdiction it would still seem advisable to apprise the probate court of the decree in order to aid it in the proper settlement of the estate.

¹⁸⁸ Waterman et al. v. Alden, 144 Ill. 90, 32 N.E. 972 (1893), holding that merely because individuals are guilty of negligence as executors does not mean that they are not also guilty as trustees, and that since they are "the same persons, it is impossible that there should be an act of fraud, or breach of duty by the executors, which is not consented to and acquiesced in by the trustees."

¹⁸⁹ Harris v. Douglas, 64 Ill. 466 (1872).

¹⁹⁰ Blanchard v. Williamson, 70 Ill. 647 (1873); Harris v. Douglas, 64 Ill. 466 (1873); Freeland v. Dazey, 25 Ill. 294 (1861); Armstrong v. Cooper, 11 Ill. 561 (1850).
fore, the circuit court erred in assuming jurisdiction of a bill to compel an executrix, after the expiration of the period of administration and her discharge, to pay from uninventoried assets a note alleged to have been made by the decedent, because the claimant could file her claim in the court of probate, and if it were allowed, obtain payment from such assets as had not been inventoried.  

Similarly, where a decedent owned only real estate and no administration of his estate had been had, it was held that a creditor should have compelled administration, as was his statutory right, rather than bring a bill in equity against the heirs. The court pointed out that the right to satisfaction of debts from real estate is secondary, as the personalty must first be exhausted, and asked how it was to be known whether there was personalty or whether there were other creditors to be satisfied without proceeding in the usual manner in the probate court.

It has been held to be an insufficient reason for the intervention of equity that an administrator was negligent or acted fraudulently in failing to find and collect assets in the hands of the surviving partner of an intestate person, and the same with reference to an administrator making false and fraudulent reports to the court of probate as to the

191 Blanchard v. Williamson, 70 Ill. 647 (1873).

192 Garvin, Bell & Co. v. Stewart's Heirs, 59 Ill. 229 (1871). It was held to the same effect where the creditor sought to have set aside an allegedly fraudulent conveyance made by the insolvent decedent during his lifetime so that the creditor might satisfy his demand from the property. Scripps v. King, 103 Ill. 469 (1882). Nor does it make any difference that the administrator fraudulently procured his appointment as a creditor when in fact he was not a creditor, or that another claim allowed is fraudulent, as the probate court has full power to deal with improperly appointed administrators and possesses equitable powers, itself, sufficient to set aside and disallow fraudulent claims. Strauss v. Phillips, 189 Ill. 9, 59 N.E. 560 (1901). Neither will a creditor's bill lie to reach insurance or premiums paid thereon by an insolvent debtor, since deceased, when filed by a creditor holding a simple promissory note which has never been allowed against estate of deceased debtor in probate court. Houston v. Maddux, 179 Ill. 377, 53 N.E. 599 (1899). Nor was it a case of equitable cognizance when an individual had been denied the right to set off a claim purchased from a creditor of an estate against the purchase price of land bought at an administrator's sale, such denial being rendered by the circuit court in the sale proceedings and the probate court on subsequent petition thereto. Thus, when he filed a bill in equity to relitigate the matters the decision was he had had his day in court; he should have appealed. Harding v. Shepard, 107 Ill. 264 (1883).

193 Winslow v. Leland, 128 Ill. 304, 21 N.E. 588 (1889).
amount of personal estate of a decedent;\textsuperscript{194} and likewise where it was charged that an executor had failed to discharge his duties promptly and had by various plausible devices excused himself from properly accounting for and making final settlement of his estate.\textsuperscript{195} In each of these cases, it was said, the probate court had full and ample power to grant relief.

No administrator has such an interest in the assets of the estate he represents as to maintain a bill in equity to determine what creditor or creditors shall receive the funds he holds for distribution.\textsuperscript{196}

Prior to the present Probate Act, which became effective on January 1, 1940, a petition to sell real estate to pay debts could be filed in the circuit court or the court of probate in the county where letters were issued. The present act grants jurisdiction to the probate court only, and it seems probable, therefore, that the circuit court no longer has concurrent jurisdiction of the proceedings since they are statutory and not a part of general equity jurisdiction.\textsuperscript{197}

 Appeals to Circuit Court

Reference has been made to the appellate jurisdiction of the circuit court both by constitution and statute and for the purpose of this paper little elaboration is necessary. The general jurisdictional power of the circuit court on appeal is limited and circumscribed to the same jurisdictional subjects as the probate court. That is, if it is not within the power of the probate court to hear and determine an issue it is not within the power of the circuit court to hear and determine that issue upon appeal from the probate court.\textsuperscript{198} An appeal does not transfer the administration of the estate, or the jurisdiction over the estate, or property to the circuit court. Nothing is transferred except the particular order appealed from, and when that is disposed of, the order of the circuit court in relation thereto is transmitted to the probate court,

\textsuperscript{194} Duval v. Duval, 153 Ill. 49, 38 N.E. 944 (1894).
\textsuperscript{195} Heustis v. Johnson, 84 Ill. 61 (1876).
\textsuperscript{196} Shepard v. Speer, 140 Ill. 238, 29 N.E. 718 (1892).
\textsuperscript{198} Howard v. Swift, 356 Ill. 80, 190 N.E. 102 (1934). Motsinger v. Chenoweth, 308 Ill. 31, 139 N.E. 27 (1923); Road District v. McKinney, 299 Ill. 130, 132 N.E. 529 (1921).
which court is again possessed of full and complete jurisdiction over the administration.\textsuperscript{199}

In the circuit court the trial upon appeal is \textit{de novo}. The sole duty of the court is to try the case the same as if it had never been tried before, for which reason it is said that that court should render final judgment rather than reverse the judgment, order, or decree of the probate court, or remand the matter to the latter court.\textsuperscript{200}

An appeal for the removal of a cause from the probate court to the circuit court for the purpose of obtaining a trial \textit{de novo} is a statutory proceeding not peculiar to Illinois, but not of particularly wide usage. The necessity for it is often questioned. If a review is desired upon the findings of the probate court, why should the appeal not be direct to the appellate court in all proceedings as well as in those relating to the sale of real estate which may now be taken direct to the appellate or supreme court?

The answer lies largely in the development of the system of probate administration. Trials \textit{de novo} upon appeal were unknown to the common law,\textsuperscript{201} but in probate matters may nonetheless be traced to England. The ecclesiastical courts had sole jurisdiction to grant probate of wills and letters of administration and concurrent jurisdiction in the suing for legacies. All other jurisdiction was in the lay courts and there was no comity between the two classes of courts. As to real estate, it will be remembered, the lay courts did not even recognize the ecclesiastical probate of a will; and every action in the lay courts involving any matters which might today be termed probate matters was an initial proceeding. In Illinois the first courts of probate were inferior in position to the courts of common pleas, and their powers were largely ministerial. Recalling that for a period their judges were styled "Probate Justices of the Peace" one need consider nothing further than the common opinion of justices of the peace and

\textsuperscript{199} Minkler v. Simons, 172 Ill. 323, 50 N.E. 176 (1898); Jones & Cunningham, Practice, I, 5.
\textsuperscript{200} Anderson v. Patty, 168 Ill. App. 151 (1912); American Surety Co. of N.Y. v. Sperry, 171 Ill. App. 56 (1912); In re Petition of Saunders, 245 Ill. App. 423 (1927).
\textsuperscript{201} Schooner Constitution v. Woodworth, 2 Ill. (1 Scam.) 510 (1838); In the Matter of Storey, 120 Ill. 244 (1887): the power to retry is not inherent in the superior court.
their legal qualifications to understand why it was desirable to try anew in the circuit court all causes emanating from the probate court on appeal.

Yet this method of a new trial in the circuit court is not entirely an anachronism. Today legal training is not a prerequisite for election as a judge, any more than it was in 1818. The courts of probate throughout the state have uniform powers, and it is not unexplainable that members of the bar of many of the smaller counties prefer to have the right to retry their probate causes before a circuit court rather than have to appeal direct to the appellate court.

Equitable Jurisdiction of Probate Court

The right of the probate court to exercise equitable jurisdiction in the settlement of estates, when necessary, has been recognized and sustained in many cases:

"It lies in the nature of these courts that in the exercise of their jurisdiction they are not confined to legal principles or the rules of common law courts but exercise equitable powers as well." Whenever, within the scope of their statutory jurisdiction, the relief to be administered, the right to be enforced or the defence of an action properly depending before them involves the application of equitable principles, their powers are commensurate with the duties demanding their exercise, whether legal or equitable.202

However, the probate court has no general equitable jurisdiction, and, as in all other matters, can exercise equitable power only within the limits of power conferred by the constitution.203 Perhaps it is more precise, therefore, to say that in probate matters and the settlement of estates it has jurisdiction of an equitable character, may adopt the forms of equitable proceedings, and grant relief of an equitable nature where justice and equity require such relief.204

Thus, in proceedings for the allowance of claims, the

202 Woerner, American Law of Administration, I, 506, quoted in Chapman v. American Surety Co., 261 Ill. 594, 104 N.E. 247 (1914), and Shepard v. Speer, 140 Ill. 238, 29 N.E. 718 (1892), and cited supra, note 117.

203 Howard v. Swift, 356 Ill. 80, 190 N.E. 102 (1934); In re estate of Shanks, 282 Ill. App. 1 (1935); People v. Seelye, 146 Ill. 189, 32 N.E. 458 (1892).

204 Sebree v. Sebree, 293 Ill. 228, 127 N.E. 392 (1920); Walker v. Cook, 294 Ill. 294, 128 N.E. 584 (1920); Spencer v. Boardman, 118 Ill. 553, 9 N.E. 330 (1886); Trego v. Cunningham, 188 Ill. App. 70 (1914); Hutton v. Porrovecchio, 188 Ill. App. 81 (1914).
court exercises a kind of equitable jurisdiction, is not limited to the technical legal rights of the parties, but may act upon their equities; and the form of such proceedings is similar to proceedings in chancery. And proceedings for accounts or the adjustments of accounts of executors or administrators are not, under the statute, common law actions, but are equitable in nature.

It is also held that the probate court has such equitable jurisdiction that it may, in a proper case, set aside the allowance of a claim and require the parties to proceed de novo; and such a case would be presented when it appeared that fraud or mistake had intervened so that a court of equity, if the facts were before it in a bill to set aside the judgment, would entertain jurisdiction. It may vacate judgments or any other order fraudulently or collusively procured to be en-

205 Gilbert v. Guptill, 34 Ill. 112 (1864); Hurd, Admr. v. Slaten, 43 Ill. 348 (1877); McCall v. Lee, 120 Ill. 261 (1897); Shepard v. Speer, 140 Ill. 238, 29 N.E. 708 (1892), where the court restrained the transfer of a note held against the estate, a power pertaining exclusively to a court of equity; Matthews v. Kerfoot, 167 Ill. 313, 47 N.E. 859 (1897).

206 Dixon v. Buell, 21 Ill. 202 (1859), wherein it was held permissible for the beneficial holder, or assignee, of a contract not assignable at law to file a claim and proceed in his own name, although courts of law would require such a proceeding to be in the name of the owner of the legal interest; cited frequently in subsequent decisions.

207 Chapman v. Amer. Surety Co., 261 Ill. 594, 104 N.E. 247 (1914); Wadsworth v. Connell, 104 Ill. 369 (1882), wherein it was held that court of probate had full power to apply equitable relief and hold executor liable for loss on money loaned by him without authority of will or statute; Millard v. Harris, 119 Ill. 185, 10 N.E. 387 (1887): "In case of mistake or accident, by which the administrator or executor is charged in his report with too much or too little, the court will be authorized to ascertain the true facts, and correct the report as the facts may justify and warrant, and charge the executor or administrator with the amount he justly owes," and the court "has equitable jurisdiction, and may adopt equitable forms of procedure." In The Matter of Corrington, 124 Ill. 363, 16 N.E. 252 (1888): where land had been devised to be sold by the executor, the proceeds thereof divided among testator’s children, and the children had objected to the executor’s account on basis land was sold for less than its value and less than executor might reasonably have received; held, in equity this devise, by doctrine of equitable conversion, was a fund in executor’s hands.

208 Schlink v. Maxton, 48 Ill. App. 471 (1892), affirmed 153 Ill. 447, 38 N.E. 1063 (1894): "There seems to be great propriety, and even necessity, in permitting that court (of probate) to open an allowance whenever it finds that fraud or mistake has occurred. There is nothing to prevent a proper exercise of equity jurisdiction upon a motion. The court may hear evidence and sift the matter with as much care and accuracy as though the proceedings were in chancery, and the rights of parties may be adjusted more speedily than would be possible if resort were had to that tribunal."
tered, even though the term of court at which a judgment or order was entered, or a claim allowed, has passed.\textsuperscript{209}

But inasmuch as the probate court does not have a general chancery jurisdiction it can have no supervision and control over trust matters;\textsuperscript{210} it cannot judicially pass upon the question of liability of a trust estate nor determine solicitor's fees and expenses in litigation thereof;\textsuperscript{211} it cannot take jurisdiction of a contest between an administrator and a third person alleged to have received property in trust for an intestate during lifetime in which the administrator asks an accounting;\textsuperscript{212} and for the same reason, when executors and trustees under a will are the same persons, the probate court loses jurisdiction of the property upon the final settlement of the estate even though the executors fail to procure their formal discharge as such.\textsuperscript{213}

**General Classification of Grants of Power to Probate Courts of Illinois**

(Illustrated from the Probate Act)

Some five or six years ago the section on probate and trust law of the Illinois State Bar Association initiated a movement for the codification of the laws of the state relating to the estates of minors, incompetents, and decedents, which culminated in the enactment of the Probate Act of 1939 to become effective on January 1, 1940. The act represents a comprehensive revision and consolidation of former statutes dealing with the substantive and procedural aspects of probate law. The most important of the former statutes relating to the estates of decedents which were merged in the Probate Act are the Administration Act, Descent Act, Dower Act, and Wills Act.

\textsuperscript{209} Hicks v. Monahan, 209 Ill. App. 516 (1918); In re German's Estate, 144 Ill. App. 109, affirmed Whittemore v. Coleman, 239 Ill. 450, 88 N.E. 228 (1909); Schlink v. Maxton, 153 Ill. 447, 38 N.E. 1063 (1894).

\textsuperscript{210} Estate of Mortenson, 248 Ill. 520, 94 N.E. 120 (1911); Frackelton v. Masters, 249 Ill. 30, 94 N.E. 124 (1911).

\textsuperscript{211} Montgomery, Hart and Smith v. Dime Savings & Trust Co., 214 Ill. App. 553, affirmed 290 Ill. 407, 125 N.E. 309 (1919).

\textsuperscript{212} In re Chalifoux's Estate, 230 Ill. App. 199 (1923), reversed in Runyan v. Williams, 315 Ill. 628, 146 N.E. 487 (1923) on other grounds.

\textsuperscript{213} In re Robinson's Estate, 214 Ill. App. 262 (1919).
The committee of the bar association which prepared the act for presentation to the legislature consisted of lawyers from different sections of the state, who were well versed in probate law and procedure, and their various drafts were submitted for comment to bench and bar throughout the state. Constitutional limitations upon the jurisdiction and powers of probate courts were constantly before the draftsmen in the form of Illinois case law, and the act itself bears testimony that they labored conscientiously as well as intelligently. But, of course, neither their good conscience nor their intelligence can support an assumption that every power conferred by the act upon probate courts is within the framework of the constitutional provisions relating to such courts. That, only time and the supreme court will determine.

In the meanwhile, by way of illustration, observation may be made of certain powers so conferred upon probate courts which tend to broaden in more or less degree their jurisdiction or about which there have been questions relative to the courts' constitutional jurisdiction. Some of these appear minor, but they assume importance when it is remembered that a showing of a want of power in the court to do even a minor thing may subject to successful collateral attack an order, judgment, or decree dealing with major affairs.

These grants of jurisdiction,214 in the same manner as all previous grants, are subject to classification in a general way as follows:

1. Jurisdiction to hear and determine matters incident to the settlement of an estate, the administration of which is currently pending in that court, which matters may be further subdivided into
   a. those strictly and unequivocally incident to the settlement, and
   b. those only collaterally incident to the settlement;

2. Jurisdiction to hear and determine matters incident to

214 The grants discussed are not necessarily new or additional powers; indeed, some of them may more properly be termed new methods of the exercise of jurisdiction previously recognized. Others, of long, but perhaps questionable standing, are discussed because of their general interest.
the settlement of an estate, the administration of which is not pending in that court.

There is ample logic and reason—indeed, necessity—that the probate court have full jurisdiction to hear and determine all matters strictly and unequivocally incident to the settlement of an estate pending before it, which, with the trend of recent decisions, may reasonably support a conclusion that any power conferred upon the court within that phase of the classification is constitutionally valid. However, as one progresses downward in the classification, the logic, necessity, and precedents diminish, so that there may be some question of the constitutionality of powers relating to matters in estates the administration of which is not pending in the particular probate court. This was recognized by the framers of the Probate Act in the provisions relating to certain matters that proceedings might be brought in the circuit as well as in the probate court.

For purposes of the discussion, the illustrations will be grouped in the form of the classification.215

*Jurisdiction to Determine Matters Strictly Incident to Settlement of Estate the Administration of Which Is Pending in Probate Court*

**Extension of Time:** for Renunciation of Will; for Perfection of Dower

The act provides that the surviving spouse of a testator, in order to renounce the will, shall file an instrument in the

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215 To treat the possibilities exhaustively is clearly not within the province of this thesis. However, attention may be drawn to other powers granted by the act which would serve as well for purposes of illustration, as follows:

**Administration of personal estate:** the power to authorize representative to mortgage personal estate, Ill. Rev. Stat. 1939, Ch. 3, § 363; to direct representative to “exchange any claim or any interest in personal estate for other claims or personal estate,” ibid., 368.

**Administration of real estate:** the power to authorize executor to whom real estate has been devised as executor to lease, ibid., § 374; to order the completion of the purchase of real estate being purchased under contract (if no claim has been filed by vendor), ibid., § 404; to authorize representative to complete a decedent’s contract to convey real estate, ibid., § 406.

**Nonresident executors or administrators:** the power to authorize sale of personal estate for purposes under act for which a resident representative may sell, or for such other purposes as the domiciliary court may direct.

**Wills:** the power to determine whether it was intention of testator to disinherit a child of testator born after execution of will, ibid., 199.
probate court in which the will was admitted to probate, declaring the renunciation. The instrument shall be filed within ten months after admission of the will to probate, or within such further time as may be allowed by the probate court if, within ten months after the admission of the will to probate or before the expiration of any extended period, the surviving spouse files a verified petition therefor setting forth that litigation is pending that affects the share of the surviving spouse in the estate.\textsuperscript{216}

There is a similar provision for the extension of time within which a surviving spouse may perfect dower.\textsuperscript{217}

These provisions are new to Illinois law.\textsuperscript{218} Their purposes are obvious: to enable the surviving spouse to elect the most advantageous course to him or her after the litigation has been determined. The discretion of the court under the sanctions of these provisions is qualified in that a petition must be filed setting forth the pendency of litigation affecting the share of the surviving spouse in the estate, and in neither situation is it possible for the court to act unless the administration of the estate is pending before it.

The court's power to extend the time within which instruments must be filed in these situations would seem to be certain by reason of its equitable jurisdiction over the questions. It has been held that the court has equitable powers concerning questions arising out of a renunciation and also over the election of a surviving spouse as between the taking of a dower or a fee interest in the real estate.\textsuperscript{219} The basis of the decisions is that the questions involve the equitable doctrine of election; the surviving spouse must choose whether to take his or her statutory share of the estate or the devise under the will.

The Assignment of Dower

By Section 30 of the act, the proceedings for the assignment of dower are required to be commenced "in a court of

\textsuperscript{216} \textit{Ill. Rev. Stat.} 1939, Ch. 3, § 169.

\textsuperscript{217} Ibid., 171. Instrument is to be filed with Recorder of Deeds or Registrar of Titles of the county in which the real estate lies. Petition for extension must be filed within ten months after issuance of letters or after admission of will to probate or before expiration of any extended period.

\textsuperscript{218} Illinois Probate Act Annotated (Chicago: The Foundation Press, 1940), p. 27. This annotation was published under the direction of the Illinois State Bar Association.

\textsuperscript{219} Davis v. Mather, 309 Ill. 284, 141 N.E. 209 (1923); Kerner v. Peterson, 368 Ill. 59, 12 N.E. (2d) 884 (1938).
record of competent jurisdiction” and the mode of trial shall be “as in cases in equity.” The probate court is not a proper court in which to institute the proceedings, but the circuit court has jurisdiction. As stated in People v. Graw:

By the constitution circuit courts have jurisdiction of all causes in law and equity. The term . . . includes every claim or demand in a court of justice which was known at the adoption of the constitution as an action at law or a suit in chancery, and also all actions since provided for which involve personal or property rights of the same nature as those previously enforced by actions at law or in equity.

As has been pointed out by annotators of the Probate Act, not only was there a common law action of dower, but by the former Dower Act the right of dower was enforced by a petition in chancery.

However, Section 37 provides:

In any proceeding involving the title to real estate in which a person claims an unassigned dower interest and on the petition of any person interested in the real estate, the court shall decree the assignment of dower in accordance with the provisions of this Article.

And in the sale or mortgage of a decedent’s real estate for the purpose of paying debts, legacies, or administration expenses it is provided by Section 234 that the probate court may, in the proceeding, “decree the assignment of dower” in accordance with the provisions in the act. Only as an incident to the sale or mortgage of real estate for the purposes stated does it appear that the probate court has jurisdiction for the assignment. In such cases there seems to be no question, because of the precedent that, incident to such sales, the court has broad powers to adjust equities and determine questions of conflicting titles.

The Determination of Questions of Title, Claims of Adverse Title, and the Right of Property Upon Citation to Recover Property and Discover Information

Under Article XV of the act, if the executor or administrator or any person interested in the estate believes that
someone is concealing, converting, embezzling, or has in his possession or control any personal property, books of account, papers, evidences of debt, or title to lands, which belonged to a person whose estate is being administered, or which belongs to his estate or his executor or administrator, or believes that someone is withholding information or knowledge which is needed for the recovery of any property by suit or otherwise, he may file a verified petition and the probate court shall order a citation to issue for the appearance before it of the person named in the petition.\textsuperscript{225} The proceeding is similar to discovery in chancery.

At the hearing the court may examine the respondent, hear the evidence offered by any party and "... may determine all questions of title, claims of adverse title, and the right of property, and may enter such orders and judgment as the case requires."\textsuperscript{226}

The respondent may be committed to jail if he refuses to answer proper questions or obey the orders or judgment of the court, or the court may enforce its order of judgment by execution against the property of the respondent.\textsuperscript{227}

Upon the demand of any party to the proceeding, questions of title, claims of adverse title, and the right of property shall be determined by a jury.\textsuperscript{228}

Illinois' first statute of wills enacted in 1829 provided that if an executor or administrator or other person interested in an estate should state on oath, to the court of probate, that he believed any person had in his possession, or had concealed or embezzled any goods, chattels, moneys, books of account, papers, or any evidences of debt, etc., the court should require such person to appear on a citation and might examine him on oath; and if such person should refuse to answer proper interrogatories, or should refuse to deliver up such property when required by order of the court, the court

\textsuperscript{225} IlL Rev. Stat. 1939, Ch. 3, § 335. \hspace{1cm} \textsuperscript{226} Ibid., § 337.
\textsuperscript{227} Ibid. \hspace{1cm} \textsuperscript{228} IlL Rev. Stat. 1939, Ch. 3, § 338.
might commit such person to jail until he should comply with the order.\textsuperscript{229} The same provisions were carried into the statute of wills of 1845.\textsuperscript{230}

The purpose of the enactment was to enable proper parties to discover assets of an estate, and it was designed to afford a more speedy and less expensive mode than by detinue, trover, or replevin. The remedy was cumulative to those and the only change it intended to introduce from an ordinary trial involving ownership of property was to enable the court to compel the person charged with having the property, to discover, on oath, whether he had property in his possession.\textsuperscript{231} It was held such statute was not designed to afford the means of collecting debts due to estates, but was applicable only to obtaining possession of money, books, papers, or property which remained in specie and was capable of being identified and pointed out.\textsuperscript{232}

The Administration Act adopted in 1872, as amended in 1873, also contained substantially the same provisions, except that the remedy was broadened to apply not only to property and effects, but also, if they had been converted, to the proceeds or value thereof.\textsuperscript{233}

From 1873 to 1925 the Administration Act thus provided a summary method for the recovery of property of the character defined which belonged to a decedent at the time of his death, but had come into the possession of a third party prior thereto, and which that party either retained in his possession or had concealed or embezzled. Where the decedent’s ownership of the property in his lifetime was not disputed, the court might order the respondent, by authority of these provisions, to deliver the property, or if he had converted it, the proceeds or value thereof, to the executor or administrator.

But since the act provided for no jury trial, the proceeding was not properly to be invoked if the respondent claimed to be the owner of the property sought to be recovered or if the obligation was a debt. To determine the ownership or

\textsuperscript{230} Rev. Stats., 1845, Ch. 109, p. 556, § 90.
\textsuperscript{231} Wade v. Pritchard, 69 Ill. 278 (1873).
\textsuperscript{232} Williams v. Conley, 20 Ill. 643 (1858).
\textsuperscript{233} Laws 1871-2, p. 77, §§ 81 and 82; as amended by Laws of 1873, p. 1.
obtain satisfaction of the debt, the executor or administra-
tor was compelled to resort to a court of competent jurisdic-
tion wherein the defendant could have a trial by jury as
guaranteed by the constitution.\textsuperscript{234}

In 1925 the act was amended.\textsuperscript{235} The amendment, among
other things, provided specifically that the respondent's con-
trol of property as distinguished from possession merely, and
his conversion as well as concealment and embezzlement,
might be made the subject of inquiry; it enlarged the pro-
vision to include property belonging "to the executor or ad-
ministrator or the estate of any deceased person" as well as
to the decedent; and conferred upon the court the power to
determine, upon a trial by jury if demanded by either party,
questions of title and rights of property.

Thus has this proceeding, and the power of the probate
court with reference thereto, been developed. The Probate
Act reflects the development, and since the provisions are
the same there seems no doubt of the constitutionality of this
grant of power to the probate court inasmuch as the con-
stitutionality of the provisions, as amended in 1925, has been
upheld.\textsuperscript{236}

Summarizing, it may be said that Article XV of the Pro-
bate Act provides a proper summary method—apart from the
recovery of books of account, papers, evidences of debt, or
title, and the obtaining of information—to recover possession
of specific property, or if converted, its proceeds or value.
It contemplates that the decedent, at the time of his death,
held or at least claimed, and that the executor or administra-
tor, since his death, either in succession or initially, holds
or claims the title to the property of which possession is
sought. It does not include jurisdiction of an action for the
recovery of money the title to which is in the debtor, because
in such case the debtor owns the money, is indebted for it,
and consequently has no money belonging to the decedent,
the estate, or executor or administrator, in his possession.\textsuperscript{237}

\textsuperscript{234} Johnson v. Nelson, 341 Ill. 119, 173 N.E. 77 (1930), citing Dinsmoor v. Bress-
l er, 164 Ill. 211, 45 N.E. 1066 (1896); Martin v. Martin, 170 Ill. 18, 48 N.E. 164 (1897);
\textsuperscript{235} Laws 1925, pp. 1, 2.
\textsuperscript{236} Hansen v. Swartz, 345 Ill. 609, 178 N.E. 246 (1931).
\textsuperscript{237} These are substantially the words of Mr. Justice DeYoung in Johnson v. Nel-
son, 341 Ill. 119, 173 N.E. 77 (1930).
The executor or administrator may be the respondent, as one of the purposes of the provisions is to confer upon the court the power to compel him to inventory and account for assets. The fact that the executor or administrator claims the property in question in his individual capacity is immaterial.

The Sale or Mortgage of Real Estate to Pay Administration Expenses

Section 225 of the act provides:

When there is insufficient personal estate to pay expenses of administration, claims against the estate, or legacies expressly or impliedly charged by the decedent's will upon his real estate, the executor or administrator by leave of the Probate Court and upon such terms as the court directs, may sell or mortgage for those purposes real estate or interest therein to which the decedent had claim or title.

No former statutes of Illinois have contained authorization for an administrator to mortgage real estate, and it was held that he lacked the authority, but an executor could do so under certain limitations and upon proper order of the county court. Inasmuch as an executor or administrator, in mortgaging real estate, cannot bind the heir or devisee personally, without consent of the heir or devisee, and further, since the mortgaging of real estate is the conveyance of a lesser interest therein than the sale of such real estate, for purposes of this discussion it will be assumed that if support may be found for the jurisdiction of the probate court to sell real estate to pay administration expenses in an estate pending before it, the court will have the same jurisdiction to mortgage real estate for the purpose.

References:

239 Day v. Bullen, 226 Ill. 72, 80 N.E. 739 (1907); In re Estate of Bennett, 248 Ill. App. 174 (1928); Northern Trust Co. v. Archbald, 303 Ill. App. 486, 25 N.E. (2d) 593 (1940).
241 Smith v. Hutchinson, 108 Ill. 662 (1884).
242 The former statute (Ill. Rev. Stat. 1939, Ch. 3, § 120) giving power to executors to mortgage real estate by leave of county court was enacted in 1869, Laws 1869, p. 372. Since this was prior to the creation of probate courts by constitution and statute, probate courts have had no jurisdiction over the proceeding.
243 Upon this logic the court would have jurisdiction over the mortgaging of real estate for the payment of debts and legacies since it unquestionably has jurisdiction over the sale of real estate for such purposes.
Section 98 of the former Administration Act had a rather obscure provision that, if the personal estate of a decedent was insufficient to pay the claims against his estate, real estate might be sold "to satisfy the indebtedness of such decedent, and the expenses of administration." From the wording the inference would seem to be that, provided the real estate had to be sold to pay debts primarily, funds for the payment of administration expenses might be obtained from the same sale. However, there are only two supreme court decisions on the question of sale to pay administration expenses, and in both it was held improper.\(^\text{244}\)

The case of *Fitzgerald v. Glancy*\(^\text{245}\) came before the court on a state of facts in which all of the equities were against the permission of the sale. The estate had no personalty and no debts. The administrator incurred and paid needless expense seemingly for the sole purpose of establishing a premise for the sale of the real estate. The court held that real estate can be sold only to liquidate debts which were due and owing at the time of the death of the decedent.

In Massachusetts it has been held that there is no right of sale to pay administration expenses where the statute provides only for sales to pay debts.\(^\text{246}\) And in construing an Ohio statute providing that in case of insufficiency of personal assets "to pay all debts of the deceased . . . and charges of administration of the estate" application should be made "to the probate court or the court of common pleas for authority to sell the real estate of the deceased," it was held that the land could not be sold for the sole purpose of paying administration expenses where there were no debts of the decedent to be paid.\(^\text{247}\)

The premise of the Illinois court that debts must be due or owing at the time of the death of the decedent in order to form the basis for a sale of real estate has an exception.

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\(^\text{244}\) *Fitzgerald v. Glancy*, 49 Ill. 465 (1869); *Walker v. Diehl*, 79 Ill. 473 (1875). The former case was decided prior to enactment (1871) of provision referred to, but the latter case was subsequent.

\(^\text{245}\) 49 Ill. 465 (1869).

\(^\text{246}\) *Dean v. Dean*, 3 Mass. 258 (1807). To the same effect was *Drinkwater v. Drinkwater*, 4 Mass. 353 (1808), but held: lands received in foreclosure of a mortgage, or taken in execution to satisfy a judgment are considered as personal assets and liable to administration expenses.

\(^\text{247}\) *Carr v. Hull*, 65 Ohio St. 394, 62 N.E. 439 (1901).
When the personalty is insufficient to pay the widow's award, sales of real estate are permitted for that purpose. The court has not attempted to say the award is a debt due and owing at the time of the husband's death, but has based its conclusions on two reasons: first, that the rights of widows are favorites of the law; and second, that the award is a preferred claim. By analogy it could be argued that sales of real estate should be permitted for the payment of administration expenses because they also constitute a preferred claim under the statute.

Favoring the validity of sales for the purpose of paying administration expenses and, therewith, the authority of the probate court to order such sales is: first, the now specific statute providing the requisite authority; second, the provision of the Probate Act that the act shall be liberally construed and that "the rule that statutes in derogation of the common law shall be strictly construed does not apply"; third, the desirability and necessity of a public policy encouraging executors and administrators to proceed diligently in the collection of assets without the fear that expenses thus incurred will have to be borne by themselves, individually; fourth, the fact that under the statutory classification of claims administration expenses are prior to the widow's award, and the payment of the latter will support sales; fifth, the payment of administration expenses is as much an indispensable incident to the administration of an estate as is the payment of legacies, which has been held to be a valid reason for sales of real estate where by the will the legacies were made a charge upon the real estate.

In Fitzgerald v. Glancy the court seemed to fear that, if the proceeding were allowed, it would subject the real estate of intestates dying free from debt "to the cupidity of unconscientious administrators, whose designs might be to appropriate it to themselves, to the injury of the heirs at law." The statutes, it would seem, furnish other sufficient remedies.

248 Cruce v. Cruce, 21 Ill. 46 (1858); Deltzer v. Scheuster, 37 Ill. 302 (1883); Denk v. Fiel, 249 Ill. 424, 94 N.E. 672 (1911).

249 Ill. Rev. Stat. 1939, Ch. 3, § 159. The proceeding for leave to sell real estate was unknown to common law for which reason, heretofore, strict compliance with the statutory provisions permitting it has been held necessary.

250 40 Ill. 465 (1889).
to control such administrators without necessitating the complete disallowance, no matter what the circumstances, of the court's authority to permit honest administrators to sell real estate to pay expenses of administration validly incurred and necessary to "the settlement of estates of deceased persons."

The Power to Construe a Will

Section 291\textsuperscript{251} of the act provides:

The probate court may enforce the settlement of estates. On every settlement . . . when it appears that there are sufficient assets to pay all claims . . . the court may order the executor or administrator to distribute the estate to the persons entitled thereto.

By implication this section clearly confers upon the probate court the right to construe a will whenever such construction is involved in the settlement and distribution of the estate of a testator.\textsuperscript{252} As Woerner has said, writing generally:

It is obvious that distribution cannot be made nor legacies ordered to be paid, unless the rights of legatees are first adjudicated; and such adjudication involves the ascertainment of the testator's intention, in order to fix the rights of legatees in accordance therewith, and whether a bequest is void, or adeemed. It is the decree of distribution that determines the rights of legatees and distributees; hence such order or decree is conclusive as to the rights of heirs, legatees and devisees, subject only to be set aside or modified on appeal.

However, the power is limited to determining to whom the executor must pay or deliver the funds in the first instance, and does not extend to the determination of questions between legatees themselves, such as whether the legacy is absolute or for life only, or subject to trusts or conditions.\textsuperscript{253}

\textsuperscript{251} Ill. Rev. Stat. 1939, Ch. 3, § 445.

\textsuperscript{252} It will be remembered that at common law the ecclesiastical courts could neither take the accounts necessary sometimes to ascertain the amount of legacies, nor enforce their decrees; construction of a will was primarily a function of equity and, at the most, the ecclesiastical courts did not ever have more than a concurrent jurisdiction in the "suing for legacies." It seems clear the power to construe does not reside in probate courts unless expressly or by necessary implication conferred, and some decisions hold the jurisdiction of equity will be exercised unless taken away by a statute in plain and unmistakable terms; Woerner, op. cit., I, 530, and note 6.

\textsuperscript{253} Woerner, op. cit., I, 527. In Minkler v. Simons, 172 Ill. 323, 50 N.E. 176 (1898), controversy was in regard to construction of will and distribution of trust funds in hands of administrator with will annexed; held: anyone interested in the trust property had the right to invoke aid of a court of equity to obtain construction and
It has been held that Section 116 of the former Administration Act, authorizing county courts to enforce the settlement of estates and to order and direct the payment of legacies, gave to probate courts the power to determine the legal right of a legatee. The court approved the statement of Professor Page that where a statute gives probate courts authority to direct the payment of legacies such courts may construe wills insofar as is necessary to direct the payment of legacies.

This holding would seem to apply with equal force to the authority of the court as provided by the new act, but the precedents limit the application to determination of legal rights only.

Jurisdiction to Determine Matters Collaterally Incident to Settlement of Estate the Administration of Which Is Pending in Probate Court

Partnership Estates: Power to Deal with Surviving Partner and Partnership Estate

Article XVI of the act provides that after the death of a partner the surviving partner shall file an inventory of the assets of the partnership in the probate court in which letters testamentary or of administration are issued on the estate of the decedent; or if no letters are issued in this state, in the probate court of the county of which the decedent was a resident at the time of his death or, if a nonresident, in the probate court of the county in which the partnership carried on its business.

The article further provides that the court may order the surviving partner to account to it, and, if it appears that it is for the best interest of the estate of the decedent, the court may order him to give security for the faithful enforce the trust, but when the will was construed and the rights of the parties determined, the settlement of the estate could proceed in the county court.

254 Strawn v. Trustees of Jacksonville Female Academy, 240 Ill. 111, 88 N.E. 460 (1909), wherein the jurisdiction of the circuit court was denied because the circumstances were ordinary; Kerner v. Peterson, 368 Ill. 59, 12 N.E. (2d) 884 (1938).


257 Ibid., § 341.
settlement of the partnership affairs and the payment of any amount due the decedent's estate. If the surviving partner neglects or refuses to file an inventory, a list of liabilities, or an appraisal, or fails to account to the court or to file a bond, after he has been directed to do so, the court may commit him to jail; and where the surviving partner fails to file a bond after being ordered to do so, the court may also appoint a receiver of the partnership estate with like powers and duties of receivers in chancery.

These provisions originated with the laws of 1869, were altered only slightly with the enactment of the Administration Act in 1872, and are continued in substance in the present law.

It is held that surviving partners, on the dissolution of the firm by the death of one of the members, are charged with the duty of proceeding at once to settle the partnership estate. They become trustees as to the deceased partner's interest, and while there is a community of interest between them and the representatives of the deceased partner in the adjustment of the partnership affairs, the partnership, for that purpose, only has a limited continuance. If the survivors do not account in a reasonable time, a court of chancery will grant an injunction to restrain them from acting, appoint a receiver, and direct an account to be taken.

Precedents established under the former statutes seem equally applicable to the present act. If they are applied, the act is to be considered merely as confirmatory of the rights of the personal representatives as such rights were previously recognized by equity and it does not provide new remedies with reference to settling partnership estates; the jurisdiction conferred upon the court of probate by the act is not to be regarded as exclusive of the ordinary jurisdiction of a court of equity; but a court of equity will
only interfere in the settlement when there is some equitable ground for interference.\textsuperscript{264}

The settlement of a partnership estate is in the nature of a collateral incident to the administration of an estate, rather than a strict incident, and the cases cited leave no doubt as to the authority of the probate court when the administration of the estate is pending before it. In the cases cited, such were the facts.

However, under circumstances wherein no administration is pending in this state, the act nevertheless purports to confer the same authority on the probate court. If the decedent was a resident, the power is given to the court of the county in which he resided or, if he was a nonresident, to the probate court of the county in which the partnership carried on its business. Under such circumstances the probate court’s authority would seem to be questionable, and a court of equity would appear to be the better court in which to bring proceedings. The classification within which such circumstances fall is next to be discussed.

\textit{Jurisdiction to Determine Matters Incident to Settlement of Estate the Administration of Which Is Not Pending in Probate Court}

\textbf{Estates of Nonresident Decedents: Power to Authorize Nonresident Executor or Administrator to Sell or Mortgage Real Estate}

By Section 271\textsuperscript{265} a nonresident executor or administrator,\textsuperscript{266} when no letters have been granted in Illinois on the estate of his decedent, may file his petition in the circuit or probate court of the county in which the real estate of his decedent, or the greater part therof, may lie

\ldots for the sale or mortgage\textsuperscript{267} of the real estate or interest therein for any of the purposes for which a resident executor or administrator may sell or mortgage under this Act, or for such other purposes as the

\textsuperscript{264} Wharf v. Wharf, 306 Ill. 79, 137 N.E. 446 (1922).
\textsuperscript{265} Ill. Rev. Stat. 1939, Ch. 3, § 425.
\textsuperscript{266} To qualify as executor of the will or administrator of the estate in an Illinois administration a person must be a resident of Illinois; Ill. Rev. Stat. 1939, Ch. 3, §§ 229, 246.
\textsuperscript{267} For the sake of brevity in the discussion only sales will be referred to.
court which issued letters to such person may direct. The circuit or probate court of this state is authorized to grant the prayer of the petition.

This section places resident and nonresident representatives on different planes in respect to the purposes for which sales of real estate may be authorized by the probate court. The court may authorize the former to sell only for the purposes of paying debts and legacies, when they are a charge upon the real estate, and administration expenses; but may authorize the latter to sell not only for those purposes but also for such other purposes as the foreign court which issued letters testamentary or of administration may direct. However, a mere lack of uniformity in the purposes which will support a sale as between resident or nonresident representatives would not appear to be a serious fault so long as the respective purposes stand on an equal footing of constitutional validity.

That, of course, raises the question of whether the probate court has the constitutional jurisdiction to authorize sales for the respective purposes, and this, with complete assurance, may be answered affirmatively only as to sales to pay debts or to pay legacies. Jurisdiction of the court over sales for the purpose of paying administration expenses, in view of the lack of either specific constitutional authority or modern judicial consideration, must remain questionable. Jurisdiction of the court over sales for "such other purposes" as a foreign court may direct seems to be a rank delegation of legislative power to another entity—and one out-of-state at that—as well as a most questionable extension of the jurisdiction of the court when viewed in the light of the decisions. Moreover, it is obvious that under these circumstances the power of the court to authorize a sale for "such other purposes" must be within the limits of its constitutional jurisdiction, for, certainly, no mere direction of a foreign court can add one ounce to the power of the probate court as given to it by the Constitution.

However, assuming for the moment that the respective purposes for which a sale may be authorized are all of constitutional validity, the problem then becomes focused in this single question: When no administration is pending in
Illinois, can the sale of real estate owned by a nonresident decedent be a proper subject of jurisdiction of the probate court?

In Estate of Mortenson\(^{268}\) it was stated that a probate court has no jurisdiction over real estate,\(^{269}\) but that what it has is certain powers in regard to real estate. This distinction is pertinent to the question, and of particular force in that the context of the Supreme Court's statement would seem to limit the real estate in regard to which the probate court could exercise its powers to that owned by a decedent whose estate was in administration before the court.

In Winch v. Tobin\(^{270}\) it was held the court had jurisdiction to order the sale of a minor's real estate because such sale was "a kindred matter to the appointment of guardians and the settlement of their accounts." This conclusion, it was said in the Mortenson opinion, was reached only by giving a very liberal construction to the constitution, and perhaps could not have been justified solely on the ground that an application by a guardian to sell the real estate of his minor was a probate matter.

In another case the probate court was said to be the ultimate legal adviser and director of a conservator, which reason was assigned in aid of the conclusion that the court could hear and determine claims against incompetents as a feature of its jurisdiction in the appointment of conservators and settlement of their accounts.\(^{271}\) For the court to maintain a relationship such as "ultimate legal adviser and director" is clearly impossible when the fiduciary is the appointee of a foreign court.

The sale of real estate on the petition of a nonresident representative is without doubt a probate matter, but it is the probate matter of the domiciliary or other court that has probate jurisdiction of the estate. In the proceedings, the factor of jurisdiction for the purpose of administration is lacking. That lack was sufficient reason for the denial of

\(^{268}\) 248 Ill. 520, 94 N.E. 120 (1911).
\(^{269}\) Citing Ferguson v. Hunter, 2 Gilm. 657 (1845).
\(^{270}\) 107 Ill. 212 (1883).
\(^{271}\) First State Bank of Steger v. Chicago Title & Trust Co., 302 Ill. 77, 134 N.E. 46 (1922).
the court's jurisdiction over testamentary trusts\textsuperscript{272} and it would seem to be a sufficient reason for the denial of jurisdiction in this situation. The factor of a pending administration before the court is one without which jurisdiction of the court need be recognized in no conceivable situation as a necessity to the accomplishment of the true purposes for which the probate court was created.

The court may, of course, gain jurisdiction through ancillary administration proceedings, but the administration then becomes domestic and the question vanishes. When a nonresident executor or administrator wishes to avoid an Illinois administration, yet sell or mortgage real property of the estate in Illinois, he will be better advised to bring his proceedings in the circuit court.

\textbf{Conclusion}

The words of the present Constitution of Illinois, insofar as they are determinative of the jurisdiction and powers of the probate courts relative to the estates of decedents, are that the courts, when established, "shall have original jurisdiction of all probate matters . . . the settlement of estates . . . and . . . of the sales of real estate of deceased persons for the payment of debts." If there is a fundamental defect in these provisions, it is that they are specific when they should be general, for, in the creation of a judicial system, it more befits the organic law to establish only the framework, leaving to the statute law the details of the structure. With reference to the probate courts it may be said, with some justification, that the framers of the Constitution invaded the rightful province of the legislature.

The function of probate courts is to supervise and control the administration of estates, but the immediate purpose which prompted their creation was the relief of county courts, in the counties of larger population, from the overburdening probate business naturally resulting from great numbers of people. Time has proved the wisdom of this division of labor. However, the phraseology of the framers of the Constitution has produced a paradox in that the legislature may grant

\textsuperscript{272} Estate of Mortenson, 248 Ill. 520, 94 N.E. 120 (1911).
such jurisdiction as it sees fit to the courts of probate in the counties of smaller population, because they are county courts; whereas to the courts of probate in the counties having the greater volume of probate business and a consequent greater need for courts with clear and ample powers, the legislature may grant only a limited jurisdiction, because they are probate courts.

The restrictive nature of the constitutional phraseology also produced a train of doubts—doubts as to the scope and nature of the jurisdiction which probate courts might exercise, doubts as to their powers even within their acknowledged field of jurisdiction, doubts as to the force and effect of their orders, judgments, and decrees. How numerically great have been these doubts in the minds of members of the bar, and how prompt lawyers have been to raise them when a cause could thereby be served, is witnessed by the mass of cases which have come before the higher courts. And the end is not yet, for judicial construction is still necessary to clarify some uncertainties that remain.

There have been factors other than the constitutional phraseology which have tended to prevent greater acknowledgment of the courts' jurisdiction. One was the long continued acceptance of the English conception of probate jurisdiction. The strength of this traditional viewpoint was greatest in the earlier days of Illinois, diminished naturally as time widened the perspective and other American states broke from its embrace, and seems to have waned almost completely by the year 1909, else the attempt, though unsuccessful, would not then have been made to give probate courts jurisdiction in the supervision and control of testamentary trusts.

Another factor has been the apparent desire of some members of the bar that courts of probate be held as closely as possible to be ministerial rather than judicial agencies. This attitude of the profession may be traced to a distrust of the legal qualifications of some of the judges, and its result is apprehended most readily in the statutory provision for appeals to the circuit court with trials de novo, rather than appeals direct to the appellate court, in matters other than proceedings for the sale of real estate. By reason of
this form of procedure these attorneys may have their issues retried before circuit judges, whose legal wisdom they seem to consider of a higher order than that of county or probate judges. The consequence is that courts of probate, no matter how able their judges may be, are held to a position inferior to that of the circuit courts, even though the importance and volume of their work and their standing in the communities which they serve warrant for them, within their field, recognition equivalent to that of circuit courts.

All other factors having a restrictive influence upon the probate courts are of insignificance in comparison to the controlling influence of the constitutional provisions. Were these provisions completely general in nature it is probable that, long ere this, probate courts would have become possessed of wider jurisdiction and greater relative dignities within the judicial system; and they would have been troubled less with questions as to their authority. Even so, judicial construction of the constitutional provisions has kept pace with changing conditions and has enlarged the scope of the courts’ jurisdiction; and in this process there has been resolved one doubt after another as to their powers.

As conditions stand today, it may be said, in summary, that the constitutional provisions are properly interpreted in delineation of the field of enterprise in which probate courts may engage. To that extent only are the words restrictive, for it is definitely determined also that within that field of enterprise the legislature may give to the courts all powers necessary for them to have for the accomplishment of the purposes for which they were created.

In their scope of original jurisdiction are all things pertaining directly to the administration proper of estates. Over personal property, as traditionally, they exercise complete jurisdiction. Over real property, also as traditionally, they exercise no true jurisdiction, but in departure from tradition, they exercise such powers in regard to real estate as are necessarily incident to the administration of estates. The nature of their proceedings is primarily statutory, thus legal, but in the performance of their functions they exercise powers that are equitable in nature.

In short, whatever powers the legislature chooses to grant
to probate courts and which are necessary to their proper functioning in the supervision and control of the administration of estates—from the date of death of the decedent to the final dispositive act of his personal representative in effecting the transfer of his property to whom it rightly belongs—may be theirs.

Looking to the future, having in mind that probate courts have reason for their being only in the performance of the functions for which they were created, and thinking to discern a trend in the attitude of the supreme court, one may formulate this test as to whether any specific matter is within the scope of the probate courts' jurisdiction, and validly to be acted upon by them:

Does the matter relate to the administration of an estate?
Is the matter a direct, or collateral but necessary, incident to the settlement of the estate?
Is the administration proper of the estate pending before the particular court whose jurisdiction and authority is being questioned?
Does the statute grant to probate courts the power to act in the matter, either expressly or by implication?

If the answer to each of these questions is in the affirmative, the particular probate court would seem to have jurisdiction and power to hear and determine the matter. If the answer to any one is in the negative, the jurisdiction and power of the particular court to hear and determine the matter is questionable.

It is submitted that the concept of the jurisdiction and powers of probate courts implied in the application of this test encompasses fully all that is possible under the present constitution and all that is required in furtherance of the ends for which the courts were created.