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THE HISTORY OF THE PROBATE COURT*

EUGENE M. HAERTLE**

The Norman Conquest, 1066 A. D., produced a series of changes in the government, judicial system, and social organization of England which affected the development of the laws of wills, relating to real estate, and the laws of testament, relating to personal property.

Before the Norman Conquest there had been no separate ecclesiastical courts in England. The clergy took part in the proceedings of the secular courts. William the Conqueror separated the ecclesiastical courts from the secular courts. In the field of probate the result was that the ecclesiastical courts ultimately acquired jurisdiction of succession to personalty, including testamentary succession, while the secular courts retained jurisdiction of succession to freehold interests in realty, including jurisdiction over wills.

The Norman Conquest also hastened a set of changes in the organization of England, the result of which is known as feudalism. The immediate effect of feudalism on landowning was the institution of the doctrine of tenure. By that doctrine no subject in the kingdom could own land absolutely. He could own only an interest in land under and subject to some other superior person. Every parcel of land in England was held under some lord by some kind of service, and the king, from whom theoretically all lands were originally derived, was the lord paramount. When a tenant died without heirs, the land returned or escheated to the lord. Thus, feudalism destroyed the power of everyone but the king to will away the complete legal title to lands in England.

By the Statute of Wills, 32 Henry VIII, Ch. 1 (1540), all persons, except married minors, infants, idiots, and persons of unsound mind were enabled to devise by will all land held by socage tenure and two-thirds of the land held by knight service. Since the Statute of Wills give power to devise all land held in socage, the effect of the legislation of Charles II, 12 Charles II, Ch. 24 (1660), was to make practically all lands devisable.

The Common Law took little interest in the goods of a person, which were of far less public importance than land. The Church had a definite interest in the goods of a deceased. The religious belief of the time required that at least a part of his property be devoted

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to the good of his soul. If he made a will, it was almost certain that he would make provisions for the saying of Masses. If he neglected to make a will, and in the twelfth and thirteenth centuries it was regarded as almost a sin to die without making one, the Church would make the provisions which he had failed to make for his soul. Thus, the Church Courts assumed jurisdiction over dead men's goods. If there was a will, the Bishop's Court was the proper place in which it was to be proved and it was also the function of this court to see that the executor carried out his duties properly. If there was no will, the bishop would take charge of the goods that were left and would make a suitable disposition of them. In 1285, the 'Ordinary,' i. e., the ecclesiastical superior who had jurisdiction, was required by statute to pay the debts of the intestate, just as the executor was required to pay them. In 1357, he was required by statute to entrust the administration of the property to the near relations of the deceased. This statute originated the office of administrator.

The Ecclesiastical Court was not the only court that dealt with the goods of dead men since the executor or administrator often had to sue in the Common Law Courts to recover the claims or property of the deceased. The deceased's creditors could also sue the executor in the Common Law Courts. Since neither the Ecclesiastical Courts nor the Common Law Courts were well adapted to settle the numerous conflicting rights of creditors, legatees, and next of kin, the most effectual and usual method of asserting a claim for or against the estate of a deceased person was to get the estate administered in Chancery. That court either told the executor or administrator what to do or took the whole estate under its charge and distributed it. But this could be done only after the will was proved or after letters of administration were granted by the Ecclesiastical Court. Without probate of the will or letters of administration, neither executor nor administrator could take any steps in any other court of law, for the executor's proof of his title and the administrator's title itself could only be given by the Ecclesiastical Court.

The jurisdiction of the ecclesiastical courts placed the development of the laws of testament in the hands of men who knew more about Canon Law and Roman Law than the Common Law and accordingly, the law of testament was borrowed in part from the Roman Law.

Like the lay courts, the ecclesiastical courts were organized in a graduated hierarchy; appeals lying from the lowest, through the intermediate, courts and finally to the highest courts.

The lowest regular ecclesiastical courts were the courts of the archdeacons. Above these came the Diocesan Courts of the bishops ("Con-

sistory" Courts) and above these the provincial Courts of the two archbishops. At the head of all was the Papal Curia at Rome.

In these courts the Mediaeval Church exercised a very wide jurisdiction.

1. It had jurisdiction, both civil and criminal, over the doings of the clergy.

2. It had jurisdiction over the laity in matters affecting faith and morality.

3. It had wide jurisdiction in matrimonial matters.

4. It originally had exclusive jurisdiction over wills of "personal" property, over the granting of "probate" of such wills, and over the administration of the personal property of intestates.

5. It had jurisdiction over matters affecting church property.

The mediaeval system of ecclesiastical courts was not much affected by the Reformation, except that since the power of the State had replaced the power of Rome, the ultimate right of appeal to the Papal Curia naturally disappeared. In its place a Court of Delegates was established in 1534, to hear appeals from the decisions of the Provincial Courts. This new Court was composed of Royal Commissioners.

The law which was administered in the Ecclesiastical Courts was the "Canon" (Church) Law, and many of its principles were derived from the "Civil" (Roman) Law. Hence the lawyers who practiced it were not ordinary barristers, but "Civilians" (or Doctors"). In the 16th century these doctors acquired a special habitat of their own, separate from the ordinary inns of courts, known as "Doctors Common."

THE JUDGES

In the middle ages an ecclesiastical judge had to be in orders and over twenty-five years of age. He was not necessarily a priest but might have been in minor orders. He had a professional knowledge of Canon Law gained through practice in some capacity in the ecclesiastical courts and would also have a degree in Canon Law. He was appointed by a commission either for a limited period or during the bishop's pleasure. In the latter case, he could not enter into office under a new bishop until such bishop had confirmed the appointment. In actual practice a judge once appointed was generally continued in office by succeeding bishops.

Every ecclesiastical judge could appoint a deputy, known as a surrogate, to keep court for him in his absence. Under Canon 128, the surrogate had to be a grave minister and a graduate, a licensed public

preacher, or a Bachelor of Law (or a Master of Arts, at least), who had some skill in the Civil and Canon Law.

REGISTRARS AND SCRIBES

Each court had its Registrar and Scribe to keep its acts. The former was appointed by the judge of each ecclesiastical court. In the seventeenth century registrars began to be appointed for life under letters patent from the bishop. On appointment they took the same oath and made the same declaration as prescribed for ecclesiastical judges.

If the efficiency of the ecclesiastical courts depended on any one man, that man was the registrar. He determined the time and order of the hearing of cases, entered the acts of the court in the various registers, supervised the dispatch of citations, letters of suspension and excommunication, and directly controlled the activity of the apparitors (officers who executed the orders and decrees of the ecclesiastical courts). He received the fees, examined witnesses, and conducted inquisitions as ordered by the judge. A high standard of education and training was required for the efficient conduct of his office. He was of necessity a public notary. The registrars employed assistants called scribes, who made the entries into the records.

At the present time in England there are four probate registrars, assisted by a staff of clerks. In addition there are sixteen groups of district registrars, with a chief registry and certain subject registrars in each group. To qualify as a probate registrar, one must be a practicing barrister or solicitor of ten year standing, a district probate registrar of five year standing, or a clerk with ten years service in the principal probate registry.

PRACTICE OF THE COURTS

Probate Acts, containing the details of the process of proving testaments and granting letters of administration, were entered in the Ex Officio Act books. They usually contained the name of the deceased, the names of the executors or administrators, the notice of the grant of execution upon the exhibition of the inventory, the value of the goods, and the fee charged. The books also contained various claims upon goods of the deceased, letters to the court requesting payments of debts or wages, and many other miscellaneous papers.

The goods of intestates were collected by the apparitors, and proclamation was made three times to allow persons to claim any debts owing to them by the deceased.

Regular fees were charged for probate, but no fees were charged if the total value of the goods was less than 30s. 1s. was charged for totals ranging from 30s. to 100s.; 3s. for totals between 100s. and £20;

5s. for totals between £20 and £40; 10s. for totals between £40 and £100; 20s. for totals between £100 and £150, and thence an additional 10s. for every increase of £50.

In the course of time, as the power of the State grew and the power of the Church in England diminished, the Ecclesiastical Courts lost much of their ancient jurisdiction. In the early years of the nineteenth century, the Ecclesiastical Court nevertheless retained jurisdiction over the conduct and discipline of the clergy in respect to church matters, over matters affecting churches and consecrated ground, over the probate of wills (though their early jurisdiction which had extended to the interpretation of wills and to the administration of estates had passed to the Court of Chancery), and over certain matrimonial matters. If a party to a proceeding in the ecclesiastical court thought that the court had exceeded its jurisdiction, he might obtain a writ of prohibition in the common-law courts. While the writs of prohibition crippled the jurisdiction of the ecclesiastical courts, the common-law courts from which they issued had no machinery adaptable to the administration of estates. The net result was that chancery, with its more flexible procedure, tended more and more to take over matters of administration. Though the will would be admitted to probate and the personal representative appointed by the ecclesiastical court, a creditor or distributee might file his bill to have the estate administered in chancery. This jurisdiction might be sought for the purpose of discovering assets, because a trust was involved, or, though no actual trust was involved, because the estate was regarded as a kind of trust fund and the personal representative as a kind of trustee. But, for whatever reason jurisdiction was assumed, chancery ordinarily continued with the administration until it was completed. Notices to creditors were published, actions by creditors in common-law courts were enjoined, and assets were brought in and distributed to creditors and legatees or next of kin.

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

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

In 1832, the Court of Delegates was abolished, and its powers were transferred to the Judicial Committee. In 1857, the probate and matrimonial jurisdiction of Ecclesiastical Courts was conferred upon the Court of Probate and the Divorce Court. "Doctors Common" ceased to exist. In 1925, a high court of justice was created, consisting of three divisions, the Chancery Division, the Kings Bench Divisions, and the Probate, Divorce, and Admiralty Division. "The lumping together of these three topics is often a source of wonder or amusement. Sir Alan Herbert has suggested that the idea is jurisdiction over wrecks — wrecks of wills, marriages and ships," but it is to be noted that "these three topics represent the main parts of the English law that was of non-native growth."¹ Today, in England, the powers of the Ecclesiastical Courts are for the most part confined to a corrective jurisdiction over the clergy and in this sense they are now really "domestic tribunals."

The English colonists who settled the Atlantic coast in the seventeenth century brought with them the common law of England as modified by the Statute of Wills. However, the feudal system was never a part of our law. The power of a testator to dispose of his realty as well as his personalty by last will and testament has always been recognized in the United States, but, nevertheless, it is upon English law that the law of wills in the United States is based.

In very early colonial times, testamentary jurisdiction was commonly given to the general courts or vested in the governors and their councils. Somewhat later, probate jurisdiction was added to the county or other trial courts. Orphans courts were created in several states to include jurisdiction over executors and administrators, as well as over guardians. Separate probate courts were established in other states and have in the main persisted. Jurisdiction over the persons and estates of minors was given to the probate courts. Guardianship, curatorship, conservatorship, adoption, proceedings, change of name, solemnization of marriages, the administration of state inheritance or transfer taxes, supervision of testamentary trusts, and, more recently, inter vivos trusts were also added to the jurisdiction of the probate courts.

From approximately the middle of the 17th century until past the middle of the 18th century, the region later known as the Northwest Territory was a theater of exploration and occupancy by England and France. The government was wholly military and private controversies were summarily adjusted by the commandants. No written or statutory law seemed to have been enacted for this region either by the older French provinces of lower Canada or by England.

All French claims to the soil and jurisdiction were extinguished by

¹ JACKSON, R.M., *THE MACHINERY OF JUSTICE IN ENGLAND* 46 (2d ed. 1953).

the capture of Quebec and the surrender of all other French military posts in America in 1760. The Treaty of Paris in 1763 cleared up the title of England to all territories of the Mississippi. Government by English commandants was substituted for that of French commandants. The first legislation affecting the region was an act of the English Parliament in 1774.

By the Treaty of 1783, terminating the Revolutionary War, England in turn relinquished to the American Congress all the territory east of the Mississippi and south of the Great Lakes which she had wrested from France 20 years earlier. Congress then enacted the Ordinance of 1787, setting up the Northwest Territory.

The Ordinance of 1787, in the second of its "Articles of Compact," provided that the inhabitants "shall always be entitled to . . . judicial proceedings, according to the course of the common law." A court of probate and a surrogate court were established in 1793, and in 1795, a recording act for deeds, wills, and other important instruments was passed. In 1818, "An act for establishing courts of probate," adopted bodily from Massachusetts, and three several acts adopted also from Massachusetts provided every county in the territory with a probate court and a full code of probate law. This code, planted initially in Wisconsin in Brown and Crawford counties, soon extended to Iowa and Milwaukee counties, and, when Wisconsin became a territory, to the other counties from time to time as they were organized. The laws originating in Massachusetts thus became and still constitute the basis of jurisdiction and procedure in the county courts of Wisconsin.

No other court of civil or criminal jurisdiction was established west of Lake Michigan until an act, taking effect April 1, 1821, provided each county with a court called the county court, presided over by not less than two of the territorial judges, who were required to hold one term each year.

The case of *Estate of George*² gives the following historical development of the courts of probate:

It appears that in 1839 there was established in the territory of Wisconsin courts of probate by act of the legislative assembly for the territory. The territorial court had jurisdiction to probate wills, grant letters of administration, appoint guardian, examine and allow accounts of executors, administrators, and guardians 'and shall have cognizance of all such other matters and things as the laws of this territory do or may direct.' See Territorial Stats. 1839, p. 296. See also Laws of Territory of Michigan 1833, p. 297.

Sec. 2 art. VII, Wis. Const., provides:

"The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court,

² 225 Wis. 251, 259-62, 274 N.W. 294, 295-6 (1937).

circuit courts, courts of probate, and in justices of the peace. . . ."

Sec. 14, Art. VII, after providing for the election of a judge of probate, provides:

" . . . Provided, however, that the legislature shall have power to abolish the office of judge of probate in any county, and to confer probate powers upon such inferior courts as may be established in said county."

The first legislature enacted ch. 85, R. S. 1948, establishing courts of probate. The powers of this court were defined in secs. 5 to 8 of that act. The powers conferred were substantially those conferred upon the territorial court.

By sec. 2, ch. 86 R. S. 1849, an inferior court to be known as the county court was created. The county court so created was vested with civil jurisdiction. By secs. 3 and 4 of ch. 86 the duties of a judge of probate were transferred to the county courts as of January 1, 1850. By that act it was provided:

"Sec. 3. Such court (the county court) shall have the powers and jurisdiction not by law conferred on judges of probate, and shall perform all of the duties of judges of probate, in the manner provided by law, etc.

[Sec. 4 provided:]

. . . and the said judges of the county court, from and after that day, shall be invested with full and exclusive probate powers.

Thus, it appears that the county court at the time of its origin had two kinds of jurisdiction: Jurisdiction in civil matters and in probate matters. In considering the early cases this distinction must be borne in mind. *Norval v. Rice* (1853), 2 Wis. 17; *Supervisors of Crawford County v. Le Clere* (1851), 3 Pin. 325; *Brunson v. Burnett* (1849), 2 Pin. 185.

In the revision of 1858, the provisions of ch. 85, R. S. 1849, appear as the first part of ch. 117, under the title 'Of county courts.' Ch. 86, R. S. 1849, became the last part of ch. 117 under the subtitle 'Of county courts having civil jurisdiction.' However, the county courts with civil jurisdiction were confined to the counties of Milwaukee, LaCrosse, St. Croix, Douglas, and La Pointe. In the revision of 1878, the statutory provisions relating to the probate powers of the county court were set out in ch. 114, entitled 'Of county courts.' Ch. 115, entitled 'Of other courts of record,' related to the civil jurisdiction of some of the county courts. This legislative treatment of the county court as a court of probate (ch. 114) and as an inferior court (ch. 115) reappeared in the Wisconsin statutes for 1889 and in the original revision of 1898. . . . ch. 114 of the statutes of 1898 is now ch. 253 of the Wisconsin statutes for 1935. Ch. 115, R. S. 1898, now appears as part of the 'Table of all special private and local laws,' etc., in the 1930 Annotations and the appendices under the title 'County Courts.'

* * * *

Although the probate courts derive historically from the ecclesiastical courts of England, their jurisdiction is different

and wider, our county courts having jurisdiction in matters in probate formerly exercised by courts of chancery and common law.

With respect to matters in probate equity. *State ex rel. Peterson v. Circuit Court* [(1922), 177 Wis. 548, 188 N. W. 645]; *Shupe v. Jenkes* (1928, 195 Wis. 334, 218 N. W. 375; *Wisdom v. Wisdom* (1914), 155 Wis. 434, 145 N. W. 126; *Meyer v. Garthwaite* (1896), 92 Wis. 571, 577, 66 N. W. 704.

Under court reorganization the probate jurisdiction is retained in the county courts of the state. If there is more than one branch of the county court in a county, the probate jurisdiction is centered in Branch 1, except in Milwaukee County where it is centered in Branches 1 and 2. The judges sitting in these branches exercise the constitutional probate powers of the probate courts.³ Under the act,⁴ the registers in probate remain the right hand of the judges of the probate branches of the county courts.⁵

³ WIS. CONST. art VII, §§2 and 14; WIS. STAT. §§253.18(1) and (2) (1959).

⁴ WIS. STAT. §§253.31, 253.32, and 253.33 (1959).

⁵ The above article was prepared from the following additional sources:

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