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## AN INTRODUCTION TO WILLS AND ADMINISTRATION†

By PERCY BORDWELL\*

FREEDOM of testamentary disposition has become second nature to Americans and all others brought up under the influence of Anglo-American law. While the testator cannot take his property with him nor have rights after he is dead,<sup>1</sup> yet it is the almost universal rule that by his will he may control the subsequent course of his property even to the extent of leaving his children penniless.<sup>2</sup> So extreme a power of testamentary disposition is probably not to be found elsewhere,<sup>3</sup> and even in Anglo-American law is, as legal history goes, of comparatively recent date. Up until 1692 it was the law in the northern of the two ecclesiastical provinces into which England is divided that where a testator had wife and children he was entitled to dispose of only one third of his goods and chattels, one third going to the wife and the remaining third to his children.<sup>4</sup> And such was the custom of London until 1724.<sup>5</sup> Such is the law of Scotland today.<sup>6</sup> In the time of Edward I such was probably

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<sup>1</sup>See Salmond, *Jurisprudence*, 6th ed. 418. As to the legal status of dead men, Salmond, *Jurisprudence*, 6th ed., 275.

<sup>2</sup>For such limitations as there are on testamentary power in the United States, see McMurray, *Liberty of Testation and Some Modern Limitations Thereon*, (1919) 14 Ill. L. Rev. 96.

<sup>3</sup>For restrictions on testamentary power in favor of the family in continental codes, see McMurray, (1919) 14 Ill. L. Rev. 110.

<sup>4</sup>2 Pollock and Maitland, *History of English Law*, 2d ed., 348.

<sup>5</sup>2 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 351.

<sup>6</sup>2 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 348. Gardner, *Origin and Nature of the Legal Rights of Spouses and Children in the Scottish Law of Succession*, (1927) 39 *Jurid. Rev.* 209, 313, 434.

the general law in England.<sup>7</sup> As to land, there was a period of some three hundred years<sup>8</sup> prior to the Statute of Wills in 1540<sup>9</sup> when what was accounted land, that is, the legal freehold, could not, except for custom, particularly in the boroughs,<sup>10</sup> be devised at all. For a century or more prior to the Statute of Wills, however, this rule against the devise of land had been evaded by means of the use or trust.<sup>11</sup> It was the dissatisfaction caused by the attempt of Henry VIII to stop this evasion that was responsible for the definite authorization by the Statute of Wills of the devise of the land itself.<sup>12</sup>

The extent to which this great freedom of testamentary disposition is made use of will depend primarily on two things, first the extent to which the ordinary laws of succession in the absence of a will are satisfactory and sufficient and second the extent to which the testator's property is disposed of during his life. If the laws of intestate succession become antiquated or for some other reason run counter to public opinion, men will desire to dispose of their property themselves. Thus when the rule of primogeniture was established in England whereby land went to the oldest son, the desire to provide for the other children must have been one of the compelling forces that led to the evasion, by means of the use, of the rule that land could not be devised.<sup>13</sup> And the rule of primogeniture which prevailed quite generally in the original thirteen colonies<sup>14</sup> must have been avoided for the most part by the will, for the fact that it ran counter to public opinion is shown by its virtual abolition soon after independence was gained.<sup>15</sup> Furthermore, if most of a testator's property is disposed of during his life it is clear there will be little left for him to dispose of by will. The extent and relative importance of testamentary dispositions will depend on how much there is left to dispose of. If, as in England, it is customary to provide for the marriage and the fruits of the marriage by marriage settlements<sup>16</sup> most of the immediate ob-

<sup>7</sup>2 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 349.

<sup>8</sup>2 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 26, 329.

<sup>9</sup>32 Hen. VIII. c. 1.

<sup>10</sup>2 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 330.

<sup>11</sup>4 Holdsworth's *History of English Law*, 3d ed., 419-421.

<sup>12</sup>4 Holdsworth, *Hist. of England. L.*, 3d ed., 464-65.

<sup>13</sup>Maitland, *Equity* 26.

<sup>14</sup>Morris, *Primogeniture and Entailed Estates in America*, (1927) 27 *Col. L. Rev.* 24.

<sup>15</sup>(1927) 27 *Col. L. Rev.* 25, 50-51.

<sup>16</sup>As to the prevalence of strict settlements in England see the statement

jects of a testator's bounty are likely to be provided for other than by will and the importance of the will will be secondary. If, as in the United States, marriage settlements are not common and advances to children during their lifetime rather exceptional, the disposition a man makes of his property at his death will be of the first importance. The combination in the United States, therefore, of great freedom of testamentary disposition and rarity of family settlements other than by will give the will an importance in the United States it probably does not possess elsewhere.

The will is the mark of a comparatively advanced civilization. It appears not to have been known to the German tribes in their original habitats but after their wanderings to have been assimilated by them under the influence of the church.<sup>17</sup> The Anglo-Saxons in England developed something that looks very much like the modern will but the instruments that have survived are almost exclusively the wills of the great and there is a question as to whether this kind of a will ever became part of the common practice.<sup>18</sup> It was a common practice however to give land after one's death<sup>19</sup> much, as at present, one may give land reserving a life estate.<sup>20</sup> Such a transaction today is distinguishable from a will in that it is not revocable but if the true will were not possible today the grant with the reservation of a life estate would be much more common even than it is and if the true will never became the common practice in Anglo-Saxon times, it is likely that the resort to this sort of a transaction was frequent.

The immediate effect of the Norman Conquest on the law of wills was probably not very great. However the Norman Conquest did bring one change that was destined to affect vitally not only the law of wills but the whole law of property. On the continent of Europe the church had developed courts of its own which handled matters like matrimony and divorce and a great many other matters as well. In time there developed a system of canon law which compared in extent and importance with its pagan rival, the Roman or civil law.<sup>21</sup> In fact the first

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by the present Sir Arthur Underhill in, *A Century of Law Reform* 282.

<sup>17</sup>Maine, *Ancient Law*, 187.

<sup>18</sup>2 Pollock and Maitland, *Hist. of Eng. L.* 2d ed., 319-21. But see 1 Page, *Wills*, 2d ed., 15 et seq.

<sup>19</sup>2 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 317-29.

<sup>20</sup>1 Tiffany, *Real Property*, 2d ed., 551-2.

<sup>21</sup>1 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 112-16.

professional lawyers in England were canonists<sup>22</sup> and it was the canonists of the time of Henry II and Henry III who as royal judges gave the common law its great start.<sup>23</sup> Prior to the Norman Conquest, however, these church or ecclesiastical courts were unknown in England.<sup>24</sup> It was the purpose of William the Conqueror to right this and he carried out his purpose.<sup>25</sup>

The famous controversy between Henry II and Thomas a Becket<sup>26</sup> was as to the respective jurisdictions of the ecclesiastical courts so established by William the Conqueror, and the king's courts which under Henry II had started on their remarkable career in the development of the English common law.

One of the things that Henry II stipulated as coming within the jurisdiction of his courts was the "lay fee," and he safeguarded this jurisdiction by providing a special remedy for determining the preliminary question as to whether the land was "lay fee" or not. In Henry II's time "lay fee" did not include land held by frankalmoigne or "free alms" tenure. Jurisdiction over such land was conceded to the ecclesiastical courts.<sup>27</sup> Besides prohibiting the ecclesiastical courts from interfering with the lay fee, the king's courts denied them jurisdiction over chattels or debts except in matrimonial and testamentary causes.<sup>28</sup> This concession to the ecclesiastical courts of jurisdiction over testamentary causes indicates the important part the church had in the development of the will. To die without a will probably meant that the deceased had died unconfessed.<sup>29</sup> It was a big step from this jurisdiction over wills to general jurisdiction over distribution of the personal effects of the deceased. But such general jurisdiction was recognized in the century following Henry II, the thirteenth.<sup>30</sup> How this came about is not known. Possibly there was a compromise<sup>31</sup> whereby the king's courts

<sup>22</sup>1 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 214.

<sup>23</sup>Id. 132-135.

<sup>24</sup>Id. 40.

<sup>25</sup>Id. 449-450.

<sup>26</sup>Id. 124, 447-457, 2 id. 198.

<sup>27</sup>1 Id. 246-247.

<sup>28</sup>2 Id. 199.

<sup>29</sup>1 Id. 128, 2 id. 356-359.

<sup>30</sup>2 Id. 360.

<sup>31</sup>2 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 333 suggest a compromise by which the ecclesiastical courts were to have jurisdiction over the testament provided there were to be no testamentary gifts of land. This compromise is suggested by the two writs of prohibition against the ecclesiastical courts meddling with the "lay fee" and with chattels or debts except in matrimonial and testamentary causes. The extension of the exception in the second of these two writs to intestate causes may well have

were willing to concede jurisdiction over the succession to chattels to the ecclesiastical courts in return for the assumption on their own part of jurisdiction over land held by frankalmoigne tenure by the inclusion of such land under "lay fee." The only land thus left to the jurisdiction of the ecclesiastical courts was now "consecrated soil, the sites of churches and monasteries and their churchyards" and possibly land given to churches at the time of their dedication.<sup>32</sup> This concession to the ecclesiastical courts in England of jurisdiction over wills and the succession to property other than land is the more remarkable in that no such jurisdiction was claimed for such courts by the general canon law.<sup>33</sup>

This assignment of land and its succession to the king's courts and of the succession to what we now know as personal property to the ecclesiastical courts made deeper the breach which, because of the fact that feudal law was land law, already existed between the law of land and the law of chattels. Feudalism and the jurisdiction of the ecclesiastical courts over the succession to goods and chattels are in large part responsible for the great difference today between the law of real and the law of personal property.

Already in Henry II's day the king's judges had set their faces against the devise of land. They favored the alienability of land in one's lifetime and held that the consent of the heir was not necessary to such a transfer but apparently for fear of ecclesiastical greed decided that land could not be transferred at death.<sup>34</sup> Not only was the Anglo-Saxon will rejected for land but the grant to take effect at death, in effect, a grant with a reservation of a life estate was placed under the interdict. Great insistence was placed on livery of seisin, that is, the delivery of possession, in the conveyance of land and it was clear that these gifts at death did not allow of livery of seisin.<sup>35</sup> For a while during the thirteenth century it seemed as if the devise of land might be allowed where the land had been given one with the express purpose that he should have power to devise

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been a counter-weight to the inclusion of land held by frankalmoigne tenure under "lay fee."

<sup>32</sup> Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 250.

<sup>33</sup> Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 341; Holdsworth and Vickers, *Law of Succession, Testamentary and Intestate* 13.

<sup>34</sup> Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 328 quoting Glanvill, VII, 1.

<sup>35</sup> *Id.* 328-329.

it but after some hesitation the power was denied even in this case.<sup>36</sup> Until 1540 it remained the law in England, although as we have seen, this had been circumvented for a century or more by the use, that the freehold could not be devised except for local custom, particularly in the boroughs. However, certain interests in land such as leaseholds, were treated as chattels, they were called chattels real, and they could be disposed of by will.

In the Roman law it had been the prime object of a will to appoint an heir, one who should succeed to the testator's legal personality, who should take his property and answer for his obligations, one who, in short, should be the testator's universal successor. There could be no will without the appointment of an heir.<sup>37</sup> At an early time it became apparent that the position of the heir in the English law was to be quite different. Glanvill, in Henry II's time, declared it to be an established rule of law that only God could make an heir.<sup>38</sup> Heir here evidently meant one who succeeds to a man's land on his death and Glanvill was emphasizing that this succession could not be determined by will or in other words, that land could not be devised. His statement of the rule fixed the meaning of the word heir in the Anglo-Saxon law as one who succeeds to land by intestate succession. This is far removed from the meaning of heir in the Roman law as one who was the universal successor of the deceased and whose appointment was the primary purpose of a will.

With land going one way and chattels another, it was a puzzling question as to who should pay the testator's debts and recover debts owed to him. At first this fell on the English heir as it had fallen on the Roman heir. In Henry II's time the heir was bound to make good the testator's debts even though the testator's estate was insufficient to pay them and he had to make them good from his own property.<sup>39</sup> In the following century his liability was limited to the ancestor's property.<sup>40</sup> But that either the recovery of or liability for debts should fall on him was incongruous. He was not concerned with the distribution of the proceeds of debts owed to his ancestor nor was the land coming to him from his ancestor the primary fund for the

<sup>36</sup>Id. 329-330, 26-27.

<sup>37</sup>Buckland, *A Text-Book of Roman Law* 281, 293, 305, 312.

<sup>38</sup>Glanvill, VII. 1.

<sup>39</sup>2 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 344; Glanvill VII. 8

<sup>40</sup>2 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 345; Bracton, f. 61.

payment of the ancestor's debts. The collection and payment of debts naturally fell to the one charged with the distribution of the money and chattels. This person was normally the executor.

The executor was not, like the heir, of Roman origin. His ancestry goes back to the early Germanic law.<sup>41</sup> On the continent he was much used by the church to see that the testator's legacies were paid. In England his functions early became much broader than this<sup>42</sup> for as the creature of the ecclesiastical courts he became the successor to the testator's goods and chattels and charged with their distribution. He did not, as we have seen, at first succeed to the testator's legal personality so as to sue and be sued in the testator's place but early in Edward I's reign actions of debt were allowed in the king's courts for and against executors and gradually by statute and by court action this possibility of suing or being sued became so extended that the executor came to be thought of as the testator's personal representative.<sup>43</sup> The king's courts insisted on keeping to themselves jurisdiction over these matters between the executors and the creditors and debtors of the testator and an elaborate and highly technical body of law resulted. On the other hand at an early time it had become the duty of the executor to prove the testator's will in the proper ecclesiastical court, to swear to administer the testator's effects, to present an inventory of his goods and to account there for his dealings. In case of misconduct he could be removed and the administration turned over to others in his stead.<sup>44</sup>

When there was no will, though this occasion was rare, there could be no executor in our modern sense and the ecclesiastical court had to administer the estate itself or appoint someone for that purpose.<sup>45</sup> By a statute of 1357<sup>46</sup> those appointees were to be from "the next and most lawful friends" of the deceased. Henceforth such appointees came to be known as administrators.<sup>47</sup> The statute did much to put the administrator appointed by the court in the same position as the executor appointed by the testator. On his appointment the intestate's

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<sup>41</sup>2 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 336 n. 1.

<sup>42</sup>Id. 335-337.

<sup>43</sup>Id. 347-348.

<sup>44</sup>Id. 342-343.

<sup>45</sup>Id. 360-362.

<sup>46</sup>St. 31 Edw. III, St. 1, c. 11.

<sup>47</sup>2 Pollock and Maitland, *Hist. of Eng. L.*, 2d ed., 361 n. 2.

goods and chattels vested in him and he was the one to sue or be sued as to the intestate's debts. Like the executor, the administrator thus became the personal representative of the deceased.

At the time of the Reformation, therefore, we find the ecclesiastical courts with an established jurisdiction over the probate of wills, the appointment of administrators, the control of and removal of both executors and administrators and the administration of the personal estate. Debts owing to or owed by the deceased, however, had to be sued for in the courts of the King. The judges and the lawyers in the ecclesiastical courts were ecclesiastics, learned in the canon and civil law but not in the common law administered by the king's courts. The law of wills and of succession to personal property at death, therefore, developed in quite a different atmosphere from that of the common law. There was less of the canon law in this development, however, than one might have expected. This was due to the fact already noted that the jurisdiction over wills and the succession to personalty was a peculiarity of the English ecclesiastical courts. The ecclesiastical courts on the continent had no such jurisdiction. Therefore, the general canon law developed no such definite body of law as to these matters as it did, for instance, with regard to marriage and divorce. Accordingly in so far as the judges and lawyers in the ecclesiastical courts were influenced by their training it must have been to the civil law that they turned for help in these matters rather than to the canon law. There they might find light on such a matter as the interpretation of a will. They showed a tendency to put the executor in the place of the Roman heir.<sup>48</sup> The procedure, however, was that of the canon law, with written depositions and determinations of fact by the judge as opposed to the common method of determination of facts by a jury. The rules of pleading and evidence were accordingly very different from those at common law.<sup>49</sup>

With the Reformation the ecclesiastical courts ceased to look to Rome for guidance and became the King's ecclesiastical courts. However, such of their old law as was compatible with the new conditions remained in force, the same substantive law, the same

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<sup>48</sup>Thus the early writers laid it down that for a will, though not for a codicil, an executor was necessary, just as an heir had been necessary in the Roman law. See Holdsworth and Vickers, *Law of Succession* 31.

<sup>49</sup>See Langdell, *Summary of Eq. Pl.* 1-26.

procedure. The separation of the ecclesiastical lawyers and judges from those of the common law courts was as marked as ever. The study of the canon law, however, was discontinued at the universities and the study of the civil law encouraged in its stead.<sup>50</sup> But though nominally the jurisdiction of the ecclesiastical courts remained the same they no longer had the power of the general church behind them and fell victims to the writ of prohibition which even in the days before the Reformation the common law judges had used to keep the courts Christian within their statutory bounds. They were hampered at every turn in their control over executors and administrators until finally the probate of wills and the grant of administration was all that was in fact left them.<sup>51</sup> As we shall see, the administration of decedents' estates had in fact passed to the Court of Chancery. The ecclesiastical courts continued to function as such in England until 1857 when their de facto jurisdiction was turned over to the newly-established Court of Probate<sup>52</sup> which in turn was succeeded by the Probate, Divorce and Admiralty Division of the High Court of Justice.<sup>53</sup> The continuity and peculiarity of the probate function in England has thus never been lost.

The common law courts were able to nullify the control of the ecclesiastical courts over the administration of decedents' estates but were precluded by their procedure from assuming that control themselves. Their procedure was suitable for the recovery of a sum of money or of property but for little else. On the other hand the Court of Chancery, with a procedure modelled largely after that of the ecclesiastical courts,<sup>54</sup> was as well fitted to exercise such control as the latter, and even better, and at the same time was strong enough to hold its own with the common law courts. It is not surprising therefore that the decline of the ecclesiastical courts in the administration of decedents' estates was marked by the gradual assumption of this jurisdiction by the Court of Chancery. As a result the modern English law of decedents' estates is largely the work of the Court of Chancery.<sup>55</sup> It is an important head of equity jurisdiction. The probate of wills and the grant of administration still continued

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<sup>50</sup>Holdsworth, *History of English Law*, 3d ed., 592.

<sup>51</sup>Holdsworth and Vickers, *Law of Succession* 19.

<sup>52</sup>20, 21 Vict. c. 77.

<sup>53</sup>36, 37 Vict. c. 66 s. 34.

<sup>54</sup>Langdell, *Summary of Eq. Pl.* 1.

<sup>55</sup>Holdsworth and Vickers, *Law of Succession* 19.

to be the work of the ecclesiastical courts and their successors but once the probate court had determined the validity and text of a will, the construction of the will was for the court of equity as incidental to the administration of the personal estate. This split in jurisdiction is reflected today in the separate treatment given the law of wills on the one hand and the law of administration or of decedents' estates on the other. In taking to itself this new jurisdiction equity did not purport to be changing the law previously applied by the ecclesiastic courts. In so far as that law had been affected by the Roman or civil law, it remained so affected although the judges and lawyers who now administered it in chancery were no longer civilians but men trained in the common law.

Aside from the law of probate developed in the ecclesiastical courts and the law of administration taken over and developed by the Court of Chancery, it has already been noticed<sup>56</sup> that a considerable body of quite technical law had been developed in the common law courts dealing with the survivorship of claims to and against the executor or administrator and with the possible defenses to such claims. After the passage of the Statute of Wills of 1540<sup>57</sup> an additional body of law developed in the common law courts about the will of land. The Statute of Wills of 1540<sup>58</sup> authorized the devise of land held in socage tenure and two-thirds of one's land held by military tenure but beyond requiring that the will should be in writing left most of the legal questions that were sure to arise with regard to wills of land to be worked out by the courts.<sup>59</sup> The obvious thing would have been to have allowed these new wills to be probated by the ecclesiastical courts just as these courts had long been accustomed to probate wills of personality. In this way the question of their validity and content would have been immediately determined and the title of the devisee assured. But it was too much to expect that the ecclesiastical courts would be allowed this power in their decline when they had been denied it in their prime. The sacred freehold was involved and matters pertaining to the title thereof

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<sup>56</sup>Supra, p. 7.

<sup>57</sup>St. 32 Hen. VIII, c. 1.

<sup>58</sup>Id.

<sup>59</sup>Some "doubts, questions and ambiguities" were removed by St. 34 and 35 Hen. VIII, c. 5 (1542). Thus it was provided by the latter statute that no will of land should be good if made "by any woman covert, or person within the age of twenty-one years, or by any person de non sane memory." Sec. xiv.

the common law courts guarded as their peculiar prerogative. As a consequence the proof of a will of land was handled by the common law courts much like the proof of any other conveyance. And just as in the case of a deed, the chance for proving its validity might not come until years after it had gone into effect and some controversy had arisen respecting it.<sup>60</sup> In other respects also it was treated like a conveyance rather than like the fully-developed will. Unlike the will of personalty it could not affect property acquired between its execution and the death of the testator.<sup>61</sup> And just as the Court of Chancery would not touch questions as to the validity or text of a will of personal property, so they would not in general touch such questions as to a will of real property but if questions of the kind had to be determined in order for them to proceed with matters properly before them, would send such questions to the common law courts for determination in the usual common law manner by judge and jury.<sup>62</sup> Furthermore, unless a trust was involved, the construction of a will of land was normally a matter for the law courts and even where a trust was involved, the construction of a limitation of land was likely to be referred by chancery to the law court.<sup>63</sup> In the construction of wills, however, the law courts departed from many of their rules applicable to deeds. They were much less technical and much more inclined to have regard to the intent.<sup>64</sup>

The rest of the history of wills and administration in England may be told in brief. With the conversion of military into socage tenures by St. 12 Car. II. c. 24 (1660) practically all freehold land held in fee simple or for the life of another became devisable. In 1677 came the well-known Statute of Frauds,<sup>65</sup> by no means a mere wills act but of like importance in the law of contracts and of conveyances inter vivos. From this statute dates the modern law as to the formalities for the execution and revocation of wills. Prior to this statute it is said that most wills of personalty were made orally<sup>66</sup> and although wills of

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<sup>60</sup>Report of the Ecclesiastical Courts Commission, 1832, pp. 26-27.

<sup>61</sup>Fourth Report of the Commissioners on the Law of Real Property, 1933, pp. 23-24.

<sup>62</sup>See Report of the Ecclesiastical Courts Commission, 1832, pp. 26-27 and Fourth Report of the Commissioners on the Law of Real Property, 1833, pp. 34-38.

<sup>63</sup>1 Spence, Equitable Jurisdiction 517.

<sup>64</sup>2 Jarman, Wills, 6th ed. pp. 2205-2208.

<sup>65</sup>St. 29 Car. II, c. 3.

realty had to be in writing they did not have to be attested. The Statute of Frauds made the will of land a formal document but instead of requiring a seal as in the case of the common law deed, adopted the civil law practice of attestation by subscribing witnesses. The number of such witnesses was fixed at three or four and in this respect a less stringent and rather exceptional provision of the Byzantine law seems to have been followed<sup>67</sup> rather than the general requirement of the classical Roman law which was seven.<sup>68</sup> The Statute of Frauds did not change the law as to wills of personal property not exceeding thirty pounds in value but restricted oral wills of personal property above that amount in value to such as were made in the last sickness of the deceased and with some exceptions at home.<sup>69</sup> These and other restrictions were so severe that oral, or, as they were called, nuncupative, wills ceased to be of importance.<sup>70</sup> Seven methods for the revocation of wills of land were named<sup>71</sup> and provision was made against the revocation of written wills of personalty by mere words.<sup>72</sup>

The Statute of Frauds required three or four "credible" witnesses for wills of land<sup>73</sup> and as the least interest in a witness such as having a debt owed by the testator charged on the land destroyed the creditability of the witness, it became quite a common practice to discharge a legacy or debt before the proof of the will with the thought that this would destroy the interest of the witness at the time of the trial and that lack of interest at that time would satisfy the statute. But it was held otherwise in *Holdfast d. Anstey v. Dowsing*<sup>74</sup> and that creditability at the time of the execution of the will was necessary. It was also denied that the will would be good except as to the interest of the witness. This decision resulted in St. 25 Geo. II c. 6 (1752) which as to prior wills confirmed the old practice of discharging legacies before the time of trial but as to subsequent wills declared the

<sup>66</sup>1 Page, Wills, 2d ed., 404.

<sup>67</sup>Report of the Ecclesiastical Courts Commission, 1832, 33, vouching Allen v. Hill, (1726) Gilbert 257, 261.

<sup>68</sup>Buckland, A Textbook on Roman Law 285-286.

<sup>69</sup>Sec. xix.

<sup>70</sup>Report of the Ecclesiastical Courts Commission, 1832, p. 30; Fourth Report of the Commissioners on the Law of Real Property, 1833, p: 21, vouching 2 Blackstone, Comm. 501.

<sup>71</sup>Sec. vi.

<sup>72</sup>Sec. xxii.

<sup>73</sup>Sec. v.

<sup>74</sup>(1746) 2 Str. 1253.

gifts to witnesses void and the witnesses in consequence credible. That a debt owed to a witness was charged on the land by the will, was not to affect the creditability of the witness.

A much more comprehensive wills act than the Statute of Frauds was the Statute of Wills of 1837.<sup>75</sup> This statute took the provisions for the execution and revocation of wills of land from the Statute of Frauds, modified them in view of the experience of the preceding hundred and fifty years and applied them as so modified equally to wills of real and personal property except that it left the wills of personal property of soldiers and sailors to the unwritten law.<sup>76</sup> Among other changes the number of written witnesses was reduced from three to two.<sup>77</sup> The Statute of 25 George II, c. 6 (1752) as to interested witnesses was also incorporated and made more inclusive.<sup>78</sup> If on the one hand, however, the law applicable to wills of realty was extended to wills of personalty, on the other, law previously applicable only to wills of personalty was made to apply to wills of realty also. The will of land became less like a common law conveyance<sup>79</sup> and more like a true will in that it was made to affect land acquired after the execution of the will.<sup>80</sup> It was not till 1897 however that a will of land alone and in which no executor was appointed was entitled to probate in England.<sup>81</sup>

The Statute of Wills of 1837<sup>82</sup> proved eminently satisfactory and remains substantially unchanged on the statute books today.<sup>83</sup> In 1897 however, it was enacted<sup>84</sup> that land like chattels should pass to the personal representative, that is, the executor or administrator. The personal representative thus became a true universal successor like the heir of the Roman law.<sup>85</sup> In

<sup>75</sup>St. 7 W. IV and 1 Vict. c. 26.

<sup>76</sup>Sec. xi.

<sup>77</sup>Sec. ix.

<sup>78</sup>Secs. xiv-xvii.

<sup>79</sup>See *supra*, pp. 10-11.

<sup>80</sup>Secs. iii, xxiii-xxiv.

<sup>81</sup>1 Jarman, Wills, 6th ed., 43-44. But by the Court of Probate Act, 1857, provision had been made for the probate in solemn form of a will disposing of both realty and personalty. *Id.*

<sup>82</sup>St. 7 W. IV and 1 Vict. c. 26.

<sup>83</sup>The requirement of the Statute of Wills, sec. IX, that the will shall be "signed at the foot or end thereof" has been modified by 15 & 16 Vict. c. 24 (1852) so as to avoid some of the unfortunate decisions under the original act. See 1 Jarman, Wills, 6th ed., 110-112.

<sup>84</sup>Land Transfer Act, 1897, 60, 61 Vict. c. 65. But under the Administration of Estates Act, 1925, 15 Geo. V. c. 23, sec. 32 special executors are provided as respects settled land.

<sup>85</sup>*Supra*, p. 6.

the field of intestate succession the Administration of Estates Act, 1925,<sup>86</sup> has gone one step further. Except for entailed property<sup>87</sup> it has abolished primogeniture and the heir, and substituted one method for the ultimate distribution of property undisposed of by will whether that property be personal or real.<sup>88</sup> Furthermore the Law of Property Act, 1925,<sup>89</sup> has made entailed property devisable.

The law of wills and administration in the United States is largely a heritage from England and yet, especially in the field of administration, there is much of native growth. The ecclesiastical courts were not transplanted. They had become an historical anomaly in England at the time of the settlement of the colonies. Moreover there were no bishops in the colonies<sup>90</sup> and in England it was usually the bishop who, as ordinary, had undelegated authority in ecclesiastical matters.<sup>91</sup> The ordinary was the fountain-head of the ecclesiastical system and might delegate his authority. In the absence of bishops in the colonies the governor was quite generally considered as the ordinary.<sup>92</sup> In New York in addition to his jurisdiction as ordinary, the governor had exclusive jurisdiction where the deceased had effects in more than one county. In this respect his jurisdiction was like that of an archbishop in England, and his court, like the archbishop's, was called the Prerogative Court.<sup>93</sup> About 1746 the local delegates in each county in New York assumed the ecclesiastical title of surrogates.<sup>94</sup> Some of these courts in the various colonies still retain their ecclesiastical names<sup>95</sup> but they are civil

<sup>86</sup>15 Geo. V. c. 23.

<sup>87</sup>Sec. 45 (2).

<sup>88</sup>Sec. 45 (1), 46.

<sup>89</sup>15 Geo. V. c. 20, sec. 176.

<sup>90</sup>The first colonial see in British history was that of Nova Scotia founded in 1787. 1 Burns, Ecclesiastical Law 9th ed., 415 xxxx.

<sup>91</sup>3 Burns, Ecclesiastical Law 39; 4 Gray, Cases on Property, 2d ed., 411.

<sup>92</sup>As to New York, see the clear account of the early history of probate and administration in the colony by Judge Daly in his opinion, while acting as surrogate, in matter of Brick's Estate, (1862) 15 Abb. Prac. 12, 17-31; as to New Jersey, see the opinion in In Re Coursen's Will, (1843) 4 N. J. Eq. 408. Both of these opinions are given in extenso in Reppy and Tompkins, History of Wills, 161-172, 175-177. That in the colonies the governor and his council were quite commonly made a court of probate see Loyd, Early Courts of Pennsylvania, c. V, and Daggett, Wills, in Two Centuries Growth of American Law 174.

<sup>93</sup>Matter of Brick's Estate, (1862) 15 Abb. Prac. 12, 22-23.

<sup>94</sup>Matter of Brick's Estate, (1862) 15 Abb. Prac. 12, 25.

<sup>95</sup>So of the Surrogate's Court in New York, of the Prerogative Court in New Jersey and of the Court of Ordinary in Georgia. 4 Gray, Cases on Property, 2d ed., 413, 1 Woerner, The American Law of Administration,

courts with which ecclesiastics have nothing to do and apparently this has been so from the beginning.

The change from ecclesiastical to civil jurisdiction in probate matters was therefore much earlier in the colonies than in England and the break was much more pronounced. It was common for wills to be probated and administration granted by officials who were primarily administrative.<sup>96</sup> In Rhode Island it is still law that "unless otherwise provided, the town councils shall be probate courts within their respective towns"<sup>97</sup> and while the county courts that still exercise jurisdiction in probate matters<sup>98</sup> probably have professional judges, they take us back to a time when the functions of a county court were largely administrative.<sup>99</sup>

At an early time, however, strong probate courts grew up in the United States<sup>100</sup> and while they looked to the old ecclesiastical courts for much of their law they were not hampered by the same questions of jurisdiction that bothered those courts nor were they familiar with the ecclesiastical procedure.<sup>101</sup> Their powers were almost exclusively statutory.<sup>102</sup> As a consequence the probate courts in this country have come much nearer to exercising the full probate function, that is, the disposition of a decedent's property at his death, than did any one of the English courts among whom that function was divided.<sup>103</sup> Especially have probate courts in the United States regained that jurisdiction over the administration of the decedent's personality<sup>104</sup>

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3d ed., 483. The Orphans' Court in Pennsylvania was named and modeled not after any of the ecclesiastical courts but after the Court of Orphans of the city of London. Loyd, *Early Courts of Pennsylvania* 223.

<sup>96</sup>The whole business of the Prerogative Court in New York "was managed for seventy years before the Revolution by the secretary of the province and his deputy with little interference on the part of the governor and with but little knowledge on their part respecting it." *Matter of Brick's Estate*, (1862) 15 Abb. Prac. 12, 26.

<sup>97</sup>Gen. Laws, 1923, c. 357 s. 1.

<sup>98</sup>1 Woerner, *Am. L. of Administration*, 3d ed., 483 n. 11.

<sup>99</sup>Goodnow, *Principles of the Administrative Law of the United States* 184.

<sup>100</sup>Thus from 1799 to 1821 the powers of the surrogates in New York were being constantly increased. See *Matter of Brick's Estate*, (1862) 15 Abb. Prac. 12, 29-30. The Orphans' Courts in Pennsylvania reached their full dignity as courts of record in 1832. Loyd, *Early Courts of Pennsylvania* 239.

<sup>101</sup>But see 1 Woerner, *Am. L. of Administration*, 3d ed., 509-510.

<sup>102</sup>1 Woerner, *Am. L. Administration*, 3d ed., 482 says that probate courts "can exercise such powers only as are directly conferred upon them by legislative enactment, or necessary to carry out some power so conferred" but this must be taken subject to what is said. *id.*, 509-510.

<sup>103</sup>1 Woerner, *Am. L. of Administration* 3d ed., 480, 481, 513.

<sup>104</sup>1 Woerner, *Am. L. of Administration*, 3d ed., 535-36.

which in England the ecclesiastical courts lost to courts of equity.<sup>105</sup> And in most states the adjudication of claims against the deceased is given to the probate courts<sup>106</sup> instead of being left to the common law courts as in England.<sup>107</sup> A far-reaching change in the matter of procedure is that in most states provision is made for trial by jury.<sup>108</sup>

Probably in every county of the United States there is a probate court.<sup>109</sup> Usually this is a separate court. Frequently, however, the probate jurisdiction is conferred on the court of general original jurisdiction<sup>110</sup> but if so, the law and equity and probate jurisdictions are kept quite distinct. Each has its own docket<sup>111</sup> and the procedure in probate matters is very informal.<sup>112</sup>

In some jurisdictions in the United States land is made to pass to the executor or administrator in the same way as personalty,<sup>113</sup> as is now the case in England.<sup>114</sup> In these jurisdictions therefore the personal representative has become a universal successor. In other states the personal representative is entitled to the possession and control of the real estate and of the rents and profits thereof during the term of the administration.<sup>115</sup> More commonly, however, land passes directly to the heir or devisee as it did formerly in England with power in the probate or other court to subject it to the decedent's debts.<sup>116</sup>

Almost everywhere in the United States the characteristics

<sup>105</sup>Supra, pp. 9-10.

<sup>106</sup>1 Woerner, *Am. L. of Administration*, 3d ed., 522, 2 id. 1264-1267. "By these means the common law right of preferring one creditor of the same class over another; the right of retainer for the administrator's own debt; the artificial system of pleading the existence of a debt of superior dignity in bar of an inferior one, or *plene administravit*, or *rien ultra* in case of insufficiency of assets; the marshalling of assets on securities by courts of equity; the technical distinction between pleas admitting or denying assets; between judgments *de bonis propriis* and *de bonis intestatis* or *testatoris*, and judgments *quando acciderint*, as well as the complicated formalities of enforcing judgments against executors and administrators, are swept away." *Id.* 1264-1265.

<sup>107</sup>See supra, p. 10.

<sup>108</sup>1 Woerner, *Am. L. of Administration*, 3d ed., 508.

<sup>109</sup>4 Gray, *Cases on Property*, 2d ed., 413.

<sup>110</sup>1 Woerner, *Am. L. of Administration*, 3d ed., 483.

<sup>111</sup>As to the probate docket and probate record in Iowa see Iowa, Code 1927, sec. 11841, 11842.

<sup>112</sup>This is true of probate proceedings in general. See 1 Woerner, *Am. L. of Administration*, 3d ed., 504, 505.

<sup>113</sup>2 Woerner, *Am. L. of Administration*, 3d ed., 1118-1119.

<sup>114</sup>See supra, p. 13.

<sup>115</sup>2 Woerner, *Am. L. of Administration*, 3d ed., 1121, 1117-1119.

<sup>116</sup>3 Woerner, *Am. L. of Administration*, 3d ed., 1594.

that made the old English will of land look in some respects more like a conveyance than a will<sup>117</sup> have disappeared. Like the will of personalty the will of land is subject to probate<sup>118</sup> and usually with the same conclusive effects.<sup>119</sup> And like the will of personalty the will of land may affect property acquired after the making of the will.<sup>120</sup>

The Statute of Frauds<sup>121</sup> unlike St. 25 Geo. II. c. 6 (1752) as to interested witnesses<sup>122</sup> was not made expressly applicable to the colonies but its influence on American law would probably not have been much greater had it been made so applicable.<sup>123</sup> The phraseology of these statutes as regards the execution and revocation of wills rather than the phraseology of the Statute of Wills is pretty closely followed in about two-thirds of the states. The changes made in these matters by the Statute of Wills are reflected in the statutes of many of the remaining states. Thus in thirty-three of the states<sup>124</sup> there are provisions similar in phraseology to those of the Statute of Frauds as to nuncupative wills while in only six states<sup>125</sup> is the statutory law on nuncupative wills the same as that of the Statute of Wills. And in enumerating the acts of revocation it is the Statute of Frauds that is followed rather than the Statute of Wills.<sup>126</sup> On the other hand the number of witnesses to a will has been reduced from three to two as in the Statute of Wills except in the old colonial states of Connecticut, Georgia, Maine, Massachusetts, New Hampshire, South Carolina and Vermont.<sup>127</sup> Likewise there has been the same assimilation of wills of realty and wills of personalty as in the Statute of Wills by making the requirements for their execution and revocation in general the same<sup>128</sup> and by extending the efficacy of wills to after-acquired land.<sup>129</sup> There has

<sup>117</sup>See *supra*, pp. 10-11.

<sup>1182</sup> Woerner, *Am. L. of Administration*, 3d ed., 707.

<sup>1192</sup> Woerner, *Am. L. of Administration*, 3d ed., 772-73.

<sup>120</sup>(1929) 14 *Ia. Law Rev.* 187-189.

<sup>121</sup>(1677) S C. 29 Car II. c. 3.

<sup>122</sup>*Supra*, pp. 12-13.

<sup>123</sup>As to its express or tacit adoption in the colonies, see Daggett in *Two Centuries Growth of American Law* 172 n. 1.

<sup>124</sup>(1928) 14 *Ia. L. Rev.* 31.

<sup>125</sup>Maryland, Massachusetts, New York, Rhode Island, Virginia and West Virginia, (1928) 14 *Ia. L. Rev.* 28.

<sup>126</sup>(1929) 14 *Ia. L. Rev.* 288-89.

<sup>127</sup>(1928) 14 *Ia. L. Rev.* 16-17. But the Vermont provision has found its way into the Philippine Islands and the Canal Zone. *Id.*

<sup>128</sup>(1928) 14 *Ia. L. Rev.* 8-9.

<sup>129</sup>See *supra*, n. 120.

also been a tendency in the United States to follow the provisions of the Statute of Wills which were innovations rather than mere modifications of the Statute of Frauds and noticeably so the provision guarding against a lapse on the death of the beneficiary before the testator<sup>130</sup> which has been given a great extension.<sup>131</sup>

Noticeable innovations in the United States have been the holographic will, in the handwriting of the testator, which is not required to have any written witnesses in nineteen states<sup>132</sup> and the provision for the omitted child which exists in a majority of jurisdictions<sup>133</sup> and the provision for the child born after the making of the will which is almost universal.<sup>134</sup>

In most states the wills acts do not exceed in scope that of the Statute of Wills.<sup>135</sup> Georgia, however, has codified some of the old unwritten law and in seven states, California, Idaho, Montana, North Dakota, Oklahoma, South Dakota and Utah there are substantially identical codes, except that in Idaho many of the provisions which cover the otherwise unwritten law are omitted.<sup>136</sup>

The only one of the states not to follow the English tradition as to wills is Louisiana. Her law is based on the Code Napoleon<sup>137</sup> and is therefore of Roman Law ancestry. The familiar phraseology of the Statute of Frauds is lacking. As many as seven witnesses are sometimes required.<sup>138</sup> Wills, other than holographic, are divided into closed and open wills depending on the question of whether the contents are to be kept secret as is the custom with common law wills or are disclosed to the witnesses. For a closed will the services of a notary are called in.<sup>139</sup> Testamentary power is not stated in the sweeping terms of the Statute of Wills nor of the statutes of most of the other states. There are "forced heirs" who cannot be deprived of their shares without due cause shown.<sup>140</sup> Unlike the old Roman law, however, the institution of an heir as a universal successor is

<sup>130</sup>St. 7 W. IV & 1 Vict., c. 26 (1837), sec. xxxiii.

<sup>131</sup>See (1929) 14 Ia. L. Rev. 428-432.

<sup>132</sup>And in Alaska and Porto Rico. All the states are southern or western. See (1928) 14 Ia. L. Rev. 25-26.

<sup>133</sup>(1929) 14 Ia. L. Rev. 174-77.

<sup>134</sup>(1929) 14 Ia. L. Rev. 290-98.

<sup>135</sup>(1928) 14 Ia. L. Rev. 4.

<sup>136</sup>(1928) 14 Ia. L. Rev. 4-5.

<sup>137</sup>Saunders, Lectures on the Civil Code, viii.

<sup>138</sup>(1928) 14 Ia. L. Rev. 17.

<sup>139</sup>(1928) 14 Ia. L. Rev. 10-11.

<sup>140</sup>(1929) 14 Ia. L. Rev. 195.

not necessary to a testament<sup>141</sup> though provision for such institution is made.<sup>142</sup> In Porto Rico the old Spanish code is in force with modification and such code is supplementary law in the Philippine Islands. The Spanish code, too, traces its ancestry back to the old Roman law but it presents many sharp contrasts with the Louisiana code. The arrangement is different and the number of provisions very much greater.<sup>143</sup> The law in the United States and its dependencies offers an excellent opportunity for comparative study.

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<sup>141</sup>La. Rev. Civ. Code (Merrick 1925) Art. 1570.

<sup>142</sup>La. Rev. Civ. Code (Merrick 1925) Arts. 1606-11.

<sup>143</sup>(1928) 14 Ia. L. Rev. 5.