Probate of a Will and Its Effect

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PROBATE OF A WILL AND ITS EFFECT.

— THESIS —

Presented by

Morgan Strong

For the Degree of Bachelor of Laws.

— Cornell University, --1896. —
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INTRODUCTION.

There is a general notion among the common people that the distribution and descent of personal and real property according to law is vague, uncertain, and often unjust, but that its division by devise or will is definite, certain and just. Following this idea and born, perhaps, of a reverence for the deceased and the reverence with which they look upon his property, there is generally, a reluctance, a positive disinclination on the part of relatives and friends of the deceased, to question the validity of his will. This seeming act of justice and peacefulness can be, and often is, made the instrument of a sad and hopeless legal war against innocent people. Sad, not only because of the poverty in which it leaves its victims, but also because of the rupture and hatred which is often left between persons of
the same blood.

Suppose for example A marries and then makes his will devising certain lands to B, his wife, later a child is born, C, and A dies. The will is admitted to probate and B takes the land and sells it to D. D sells it to E and so on until X holds it. An action in ejectment can now be maintained by C against X if brought at any time within the statutory limitation. This statutory limitation is different in different states. In New York State the statute is such that it may so happen that the action can be brought any time within twenty years after the death of A.

As can easily be seen this barbarous state of things is not conducive to the quiet enjoyment of one's property. An honest, hard working man may have invested all the money he had in that one piece of property anticipating a quiet, rural home in which to spend the last days of his life, and enjoy the fruits of his hard earned money. But in a case like the above the law says that although the land has been held by different people, it may be for twenty years, under as good a looking title as a parcel of land could possibly have, yet we must
The right to bequeath property by will has been exercised since the remotest time. One of the earliest wills of which we have any record was made when Jacob said to Joseph: "I have given to thee one portion
above thy brother". (Gen. Chap. xlviii, v. 22)

It is said that there has been unearthed in Egypt a document, bearing date 2550 B.C., by which the testator gave his brother, a priest of Osiris, all his property and things (22 Irish Law Times & Solicitor's Journal, 223).

Coming down thus from the earliest periods, the law of wills and their execution has undergone various changes, principally in England, where, prior to the enactment of the Statute of Wills (32 Hen. viii, 1540, cap. 1), the will of land was not permitted. By that act and the act of 34 & 35 Hen. viii, explaining the same, a person was authorized after July 20th, 1540, to devise two thirds of his lands held by knight's service, and certain other lands held by other service, but saving and reserving the one third to the King.

Since Charles I, the Statutes of England have undergone imperceptible changes until July 3rd. 1637, when by Statute of 1 Vic. cap. 26, a man could bequeath the whole of his goods and chattels.

The law of wills in New York State is composed of (1) the common law of England, (2) the Statutes of
England which have become practically embodied in the common law,(3) the Statutes of New York State.

An estate settled under the provisions of the statute is generally more permanent than one settled under the provisions of a will, because there is a possibility of the will being invalid unless it has been adjudicated. And this class of invalid wills, not known at the time of their probate to be so, and relied on by the devisees and legatees, and in many cases the public also, to devise as represented, while in fact they are utterly void and liable to be declared so whenever the question is raised, are those which oftenest find their way into our courts and cause a denunciation of the law by the public.

But to maintain that a will should stand as probated is to deny an infant a very potent right, of which the courts are very jealous, and which they always have guarded with great care.

The problem before us is: what is a legal and equitable solution of the conflict of rights between parties who have been misled by the probate of a will and parties for whose benefit the probate is sought to be set aside.
We shall discuss this problem by examining

(1) the law relating to the probate of a will and to probate courts,
(2) the effect of this probate as regulated by statute,
(3) the law as applied by the courts.
PART I.

PROBATE OF WILL.

(1). Origin and Jurisdiction of Probate Courts.

As will be shown hereafter, a will is ambulatory, and hence ineffectual, until the death of the testator, and the instrument has been admitted to probate or proof. This is perfectly clear since it is a common right of every person to change their will at any time before their death, and it is due to the common sense of the ancient law to provide that no will should be operative unless proved to be genuine.

The first question to be considered is: "By whom and in what courts it is thus to be admitted and proved"? In regard to jurisdictions generally we may say that there are several distinct kinds, jurisdiction may arise under the civil law, in admiralty, in courts of equity, or chancery, at common law, and in the federal courts. Having thus the various courts before us, in what jurisdiction will we place the proving of wills? By the Roman civil law, wills were authenticated first, before the praetor, and
afterwards before the magister census. (2 Swinb. Wills, 773 note, Hunt. Rom. Law. 587, 88, 93, 94).

(a) In England.

Jurisdiction over wills and their probate in England belonged, before ecclesiastical functions were exercised in such cases, to the county court or court baron of the manor where the testator died; and before these county tribunals all other matters of civil dispute were determined. Upon this question the books say that "there were wills before there was any ecclesiastical jurisdiction; and consequently the cognizance thereof pertained solely to the civil magistrates. After the establishment of Christianity and the ecclesiastical courts in England until the time of the conquest, the courts ecclesiastical and temporal were conjoined, the bishop and the earl sitting together for the transaction of business in the county courts. Upon the separation of the courts in the time of King William I, it doth not appear into which of the two jurisdictions the cognizance of wills immediate acceded. But so early as the reign of King Henry I, Sir Henry Spelman observes that in Scotland the cognizance of wills belongs to the ec-
clesiastical jurisdiction; and, he adds, doubtless then also in England. And Cluny doth testify thus much in the time of King Henry II; who saith: that if there be any dispute concerning a testament, the same is to be heard and determined in a Court Christian.

And the reason why the probate of testaments hath been given unto spiritual men, is, because it is to be intended that they have more knowledge what is for the profit and benefit of the soul of the testator than laymen have: and they will look more than the laymen that the deceased be paid and satisfied out of his goods, and that they will see his will performed so far as his goods estend". (4 Burn's Ecc. Law, 291-2; Arg. in Marryat v Manot, Gil. Eq. Rep. 203).

It will thus be seen that the power of probate of the county court or court baron existed down to the Norman conquest when the ecclesiastical and temporal jurisdictions were separated, and gradually the bishops became invested with the plenary authority as to the matters which pertained to the estates of the dead. This was, not a usurpation of authority by the ecclesiastical courts, but due rather, as Blackstone ascribes, to the Crown's
favor of the church. The Crown having once granted the disposition of the intestates effects to the church, the probate of wills followed as a matter of course.

The complete jurisdiction of the ecclesiastical courts was finally declared by act of 29 Car. II, which went into effect June 24th, 1677, and provided that "nothing in this act shall extend to, alter, or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative courts of the Archbishop of Canterbury and other ecclesiastical courts and other courts having the right of probate of such wills, shall retain the same right and power as they had before in every respect, subject nevertheless, to the rules and directions of this act."

Down to this period and at no time thereafter, did the court of chancery have jurisdiction of the probate of wills. (Kerrich v Branby, 7 Brown Parl. Ca. 437; Webb v Claverdon, 2 Atk. 424; Barnaby v Powell, 1 Ves. Sr. 119, 234 (1749); Lynn v Beaver, 1 Turn & R. 63).

By the statute of 20 and 21 Vic. cap. 77 (1857) a new tribunal, known as the Court of Probate, was erected and the jurisdiction of the ecclesiastical and manorial
courts over decedent's estates was superseded.

In 1873 by virtue of the Judicature Act, sec. 21, the Court of Probate was merged in the Probate, Divorce and Admiralty Division of the High Court of Justice.

(b) In the United States.

Having thus traced the history of probate jurisdiction through the English courts, we will consider the exercise of this jurisdiction in the United States generally, and especially in New York State.

In this country the matter of probate jurisdiction is regulated by the statutes of the several states and given to courts under various titles or names; but it is generally conceded that, independent of statute authority, neither equity nor law has any probate jurisdiction inherited from the mother country.

In many of the United States there are special courts whose jurisdiction is confined wholly to probate and to the administration of decedents' estates.

In New England, and many of the western states each county has a court of probate. In Pennsylvania and other states there is an orphan's court in each county:
in Kentucky, and some of the Western and Southern states the county court has jurisdiction. In North Carolina the powers and jurisdiction is exercised by the Clerk of the Superior Court as an independent tribunal of original jurisdiction. In other states clerks have a certain probate jurisdiction during vacation.

There is in New York State, a probate jurisdiction, similar to that exercised by the court ordinary of England: it is limited, however, to each county, and is called the 'Surrogate's Court', which in English Law meant nothing more than 'a deputy or substitute of the Chancellor, Bishop, ecclesiastical or admiralty judge appointed by him'. (Redf. Sur. Cts. 130-34).

The jurisdiction of the Surrogates Court in New York State is purely civil and regulated by statute: and the judgments thereof admitting wills to probate or rejecting them are subject to appeal.

The Surrogates Court was established by the constitution of New York State of 1846, and provides that the county judge of each county shall be surrogate of that county unless a separate surrogate has been elected and such surrogate can be elected only when the legis-
lature so provides: and this power of the legislature can only be exercised in acts relating to counties whose population exceeds forty thousand.

The surrogate is elected by the people, holding office for six years, and (except the Surrogate of New York County in vacation month) is confined in the execution of his duties, to the county for which he is elected, although his process may run throughout the state. Where he is also county judge he must reside in the county for which he is elected.
(2) What is a Will?

Definition. A will or more accurately, "last will and testament" may be defined, in the present condition of the common and statute law, of the legal declarations of a man's intention which he wills to be performed after his death, touching either the distribution of his property, the guardianship of his children, or the administration of his estate. (See also 2 Bl.Com. 499; Colton v do 127 U.S. 309; Frew v Clark, 30 Pa.St. 178; Barber v Barber, 17 Hun, N.Y. 72; Cover v Stem, 67 Md. 449).

Different kinds of Wills. Classification. All wills or testamentary dispositions may be thus classified.

1. Written instruments or ordinary wills.

2. Nuncupative or oral wills.

3. Mystic Testaments. This class has its derivation in the Civil law and their manner of execution was supposed to give them some peculiar efficacy (La.Civ. Code, Art. 1584-88).

4. Holographic or Olographic Testaments; that is a will written, signed and dated entirely by the testator
5. Contingent Wills. Those which become operative upon the happening or not happening of a certain event (Maxwell v Maxwell, 3 Met. Mass. 101).

6. Alternative Wills are instruments so expressed that the contingency upon which each is to become operative is the alternate of that upon which the other is to become operative. (Hamilton's Est. 74 Pa. St. 79)

7. Wills Operative at the election of a third person (In re Goods of Smith, L.R. 1 P. & M. 717).


9. Joint and Mutual Wills. These are wills made and executed by two or more persons and are intended to take effect upon the death of each (Exp. Day, 1 Bradf. N.Y. 476; Matter of Diez's Will, 50 N.Y. 38).

   Joint Wills by husband and wife (Allen v Allen, 28 Kan. 18; Matter of Diez's Will supra)

   Distinguishing characteristics of a will.

A genuine testamentary instrument, whatever its form, should be first written animo testandi, that is, the instruments
was intended by the testator to be operative, and, second, ambulatory or revocable during testator's life.

Informal instruments, in the absence of any particular statute prescribing a particular mode of attestation, are admitted to probate; but in England, New York State and some of the other United States, there are special statutory provisions which must be complied with. (For statutes regulating the attestation of wills in New York State see: N.Y.R.S.p.2545; Do, 1890, vol.4, p.2545)
17.

(3). What constitutes probate of a will?

(a) What papers may be probated. All papers which are testamentary in character and contain provisions relating to the disposition of real or personal property, should be probated. This includes a codicil, even if it contains nothing more than the revocation of the former will (Langhton v Atkins, 1 Pick. Mass. 535). If made in execution of a power it must likewise be probated (Sugd. on Powers, 16th Ed. 121).

A paper in the form of a power of attorney may be admitted to probate if intended to operate as a testamentary disposition of property (Rose v Quick, 30 Pa. St. 235), so also a deed may be probated (Frew v Clark, 80 Pa. St. 171), or a bill of exchange (Jones v Nicolay, 2 Rob. La. 283).

In general if writing shows an intent to dispose in whole or in part a person's estate upon his decease, a probate of that paper is proper. (Patterson v English, 71 Pa. St. 454; In Re Beebe, 19 N. Y. St. Repr. 833)

The following paper is an example of some of the papers that should be probated: "After my mother's death,
my cousin Anna is my heir. This writing is instead of a formal will which I intend to make. B executrix". A letter may be proved as a will if it contains apt words of disposition (Morrill v Dickey, 1 Joh n. Ch.153). A letter from a soldier in actual service may be proved as a will (Bosford v Crake, 1 Abb. Pr. (N.C.) N.Y. 112)

A bond and mortgage providing for the payment of interest, to the mortgagee for life, and the principal, at his death, to certain grand nephews, share and share alike, who paid no consideration therefor, was held to be in the nature of a will, and that the mortgagee had power to change it in his life-time (Kelsey v Cooley, 33 St. Repr. 775).

The instrument must be of such a nature as to be ineffectual until after the death of the maker, to be capable of probate (In Matter of Diez's Will 50 N.Y. 38).

Papers not testamentary in character, such as letters not executed and attested according to law, do not require to be probated, or letters written for the information and government of executors, and which need be followed only so far as it seems fit to carry out the testator's views and wishes (Lucas v Brooks, 13 Wal. U. S. 436)
When a will, properly executed and witnessed, refers to a paper containing directions as to the disposition of the testator's estate, such papers, if in existence at the date of the will and fairly identified as the papers referred to is a part of the will and should be admitted to probate as such. (Newton v Seaman, 130 Mass. 91; Est. of Schildabor, 74 Cal. 144).

A paper containing a mere nomination of an executor, without any disposition of property is a will and should be admitted to probate (Barber v Barber, 17 Hun. 72).

But a paper executed as a will, but simply appointing a guardian for minor children, should not be probated (Goods of Morton, 3 Sw. & Tr. 422).

A nuncupative will may be probated according to statute if made by a soldier in actual military service or if made by a mariner at sea (New York R.S. p. 3343, 8th Ed; Hulbert v do. 8 N.Y. 196). This will can only dispose of personal property; hence when it purports to devise real property, probate has no effect. A nuncupative will executed in another state according to the laws of that state, which however, would not have been
valid if made here, may be proved in this state, and have the same effect as if executed according to the laws of this state (Slocum v. do. 13 Allen Mass. 38).

It must be made by testator when in extremis (Prince v. Haggleton, 28 Johns. Ch. 502; Hulbert v do. 12 Barb. 148)

(b) Who may probate a will?

In order to have a will probated it is necessary that there should be a will produced by a proper person for probate and that there should be a competent court exercising the proper jurisdiction, the surrogate or registrar of which is duly authorised to hear the proof of the will and to render a decision thereon.

First, as to the production of a will. The rule in regard to this is, that after the death of the testator, it is the duty of the executor to propound the will for probate, but any other person interested may propound it, and any other person in whose custody it is, may be compelled to produce it in order that it may be proved by some person entitled to probate it.

Secondly, as to who may prove the will. In New York State a person designated in the will as executor, de-
visee, or legatee or a creditor of the decedent, may present to the surrogate's court, having jurisdiction, a written petition duly verified, describing the will, setting forth the facts upon which the jurisdiction of the court to grant probate thereof depends, and praying that the will may be proved (New York R. S. 1390, vol. iii, p. 2550; Brick's Est. 15 Abb. Pr. 12; Cook v. Lowry 95 N. Y. 103; Wright v. Flemming 19 Hun. 370).

The following persons must be cited to attend:

(a) If will relates exclusively to real property, the husband, if any, and all heirs of testator.

(b) If will relates exclusively to personal property, the husband or wife, if any, and all the next of kin of the testator.

(c) If will relates to both real and personal property, the husband or wife, if any, and all of the heirs and all of the next of kin of the testator (Code. Civ. Pro. sec. 2615).

A person who suppresses a will may be committed for contempt by the probate court or he may be punished as for a criminal offence (Stebbins v. Lathrop, 4 Pick. Mass. 33)
If a judge of probate has any interest in the estate or has been appointed executor thereof, he cannot assume jurisdiction to probate the will or grant letters of administration.

As a general rule a court of probate has jurisdiction over the estate of the decedent if, at the time of his death he had his domicile within the limits of the jurisdiction of the courts. What was the decedent's last domicile is to be inferred from the facts and circumstances of the case; but the rule prevails that "though one may have two domiciles for certain purposes, he can have only one for the purpose of succession" (5 Ves. Jr. 750)

(c) How a will is probated. Production of will.

At common law there was no fixed period after the decease of the testator within which it was necessary to produce the will for probate. In the United States statutes have been passed which require its production within a reasonable time after the death of the decedent.

The Massachusetts statute requires the will to be produced within thirty days after notice of death of the testator and to be delivered to the probate court that has jurisdiction, or to the executor named in the
will (Mass. Genl. Statutes, cap. 92, sec. 16).

In New York State a good faith purchaser of real property, from an heir, made at least after four years from the death of the testator, is protected unless the devisee is within the age of twenty one, insane, or unless some other disability attaches, when the limitation does not run until the disability is removed (New York Code Civ. Pro. sec. 2628).

Probate. First: The party who has the will of the deceased testator in his possession, delivers the will to the executor named in the will, or to the probate court that has jurisdiction over the probate of that will.

Secondly, the executor, on learning of his appointment as an executor, and the death of the testator, it becomes his immediate duty to decide whether or not he will take upon himself the discharge of the trust to which he is nominated, and to give notice to those interested in the will, of his decision. He can relieve himself of the trust in two ways, (1) by taking no steps in the matter, (2) by making and filing a renunciation. And if there are two executors named, and one of them refuses to act, the remaining one may go on and act, and will have full powers as if he had been appointed sole executor (Rights to Dispose of and pay expenses, p. 36, McClelland).
Persons not competent to act as executor. No person is competent to serve as an executor who at the time the will is proved, is:

1. Incapable in law of making a contract.
2. Under the age of twenty one years.
3. An alien, not an inhabitant of this state: or
4. Who shall have been convicted of an infamous crime: or
5. Who, on proof, is found by the executor to be incompetent to execute the duties of such trusts by reason of drunkenness, dishonesty, improvidence or want of understanding. If such person is named as sole executor in a will, or if all the persons named therein as executors, be incompetent, letters of administration with the will annexed must be issued as in the case of all executors renouncing.

A surrogate in his discretion, may refuse to grant letters testamentary or of administration to a person unable to read and write the English language (N.Y. Code Civ. Pro. sec. 2612).

The application for probate of a will may be made by any one who is interested in the estate. The
petition, containing the information desired, having been presented to the surrogate, he will issue a citation to the proper persons requiring them, at the time and place mentioned, to appear before him and attend the probate of the will. (For contents of citation and collateral conditions, see N.Y. Code Civ. Proc. Secs. 2116-27).
PART II.

THE EFFECT OF PROBATE UPON A WILL UNDER THE
STATUTES OF NEW YORK
STATE.

(1) General outline.

The effect of probate of a will varies greatly in the different states. In no case has more than eight or ten states laws which are exactly parallel, and therefore it will be the most practical to limit this work simply to a discussion of the law as it stands in New York State.

We will consider first the effect of the probate of a will upon the will itself.

The effect of probate is first, to give notice to all parties how the estate of the deviser is to be distributed, secondly, to determine to some degree the validity of the deviser's will, thirdly, to give the probate court jurisdiction over the will and to see that the executors faithfully fulfill their duty, and that each legatee
gets his or her share, and fourthly, so that the executors can be discharged after they have settled up the estate and can be relieved from all further liability.
(2). The effect under the Common Law.

A decree of a probate court at common law was not conclusive as regards real estate until it was duly proved in an action of ejectment, or by some other suit affecting the title of the realty (Brady v McCasker, 1 N.Y. 214).

But the decree of a probate court at common law was conclusive as far as personal property was concerned (Colar v Ross, 2 Paige, 396).
(3). General effect under the Statutes.

Since the passage of the statute, the probate of a will relating to real property is no more conclusive than it was at common law, and in many respects as will be shown hereafter, the probate is less conclusive and more uncertain than was the case at common law.

There is no state in the union in which the probate of a will pertaining to real property is less affected and conclusive than in the State of New York, but as to personal property there is no state in which the probate is more conclusive and satisfactory.

As a general rule the probate court will be presumed to have lawfully exercised its jurisdiction, and the decree of the court cannot be attacked in a collateral proceeding (Wetmore v Parker, 52 N. Y. 450).

Nor can the probate of a will be attacked collaterally for an irregularity in the service of the citation upon the next of kin (Wetmore v Parker, supra). It has been also held that the probate of a will could not be collaterally avoided on the ground that the will was a forgery (Priestman v Thomas, 9 L.R. P.D. 210). Nor upon the ground that the will that had been admitted to probate,
had been procured by fraud or undue influence (Archer v Meadows, 33 Wis. 167). Nor the fact that the will had been revoked by the subsequent execution of another will (Davis v Gaines, 104 U. S. 386).

The decree of a surrogate having jurisdiction of the subject, declaring that a will of personal property is duly executed, is conclusive evidence, in a collateral action of such execution, notwithstanding it be shown there was but a single subscribing witness to the will (Vanderpoal v Van Valkenberg, 6 N. Y. 190).

(a) Statement of Statutes and how interpreted by the courts in reference to wills relating to real property.

In the year of 1876, the legislature of New York State enacted the following statute: "A surrogate, in court or out of court, as the case requires, has power to open, vacate, modify, or set aside, or to enter, as if a former time, a decree or order of his court: or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The power conferred by this subdivision, must be exercise only in a like case and in the same manner as a court of re- cord and of general jurisdiction exercises the same.
powers. Upon an appeal from a determination of a surrogate, made upon an application pursuant to this subdivision, the general term of the supreme court has the same power as the Surrogate: and his determination must be reviewed, as if an original application was made to that term.

It has been held under this section that the probate courts always had been possessed incidentally of the powers so conferred by the statute, and that this section was framed mainly to expressly confer the powers that were derived from the common law (L. & L. Co. v Hill, 4 Denio, 41).

If there was any really new power granted by the statute it was the power to grant a new trial, or another hearing for newly discovered evidence which is a retrial of the issues made on the former trial (Olmstead v Lang, 4 Denio, 44).

But it was held sometime before the statute was passed that a surrogate of New York State could open, vacate or modify his probate of a will of real property (Bailey v Hilton, 4 Hun 3).
It was laid down very forcibly in a late court of appeals ease that a surrogate had power to open a decree in for an excusable default resulting, juriously to the defaulting party for a clerical error, for fraud in procuring a decree, and for similar causes of like character. The power to open a decree and grant a re-hearing for an error does not apply to error of law, but only to errors of fact, and the power was not changed by the statute. But the statute by defining the nature and character of the proof that would be required to open a decree, implies that it cannot be opened on any other ground (Matter of Hawley, 100 N.Y.206).

There are a number of authorities which hold that it makes no difference if the time for appeal has expired if the decree is opened to correct a mistake, or if the other party shows that fraud has been committed or excusable negligence in connection with an alleged error, but there should never be any more of the probate revoked than relates to the error (Matter of Day, 24 Hun 1; Story v May, 22 Hun 450).

There seems to be no doubt that the surrogate has power to open his decree on any of the following grounds:

1. If there has been a mistake or accident in re-
gord to the probate, or

(2) If the probate was procured by fraud.

It is a general rule that the power should be cautiously exercised, and in no case should it be used for the purpose of enabling the surrogate to review his own decision. If a review is wanted it should be done by an appeal only, and the statute does not authorize the surrogate's court to sit and review its own decision as upon an appeal (Melcher v. Stevens, 1 Denio, 123).

The following case decided in the New York Court of Appeals, seems to be authority for settling the law in regard to the conclusiveness of the probate as to an infant party. In this case the devisor made his will in 1862 by which his executor was authorized to sell all his real and personal estate and pay the proceeds to his widow. In April, 1864, a child was born, and in May of that year he died. The child was not mentioned, nor provided for in any way by the will, nor by any settlement. The executors sold the land to bona fide purchasers and paid the proceeds over as directed by the will, and were discharged by the surrogate. Several years later this action was brought in behalf of the infant child against
the parties who purchased the land of the executors, to recover the land as if there had been no will. The court laid down the law as being that the child took the real estate as if the father had died intestate, and the child did not take under the will or subject to any of its provisions, and that the child need not follow the proceeds of the sale, but that she could maintain ejectment to recover the land even if the land was held by bona fide purchasers for value who relied upon the probate of the will as being conclusive. (Smith v Robertson, 39 N.Y. 555)

But if in the above case the surrogate's decision had been made in a proceeding to which the minor being under 12 years of age, was personally served and was regularly represented, by an intelligent and competent special guardian, the probate would have had the same effect as an adjudication between adults, and his rights of release from one that is irregular as erroneous would have been exactly the same as in the case of an adult, with the exception that with an infant the time in which an action may be brought is reckoned from the time that he becomes of age.

Upon the application of an heir who was not cited
the decree of probate is properly opened (Barley v Hilton, 14 Hun 3).

But not upon the application of a creditor, because he is not a proper party to the proceedings for probate (Heilman v Jones, 5 Redf. 393).

The grant or refusing of an application to open a decree is a matter of discretion with each judge, and if the judge refuses to open a decree it is not reviewable in the court of appeals (Boughton v Flint, 74 N. Y. 476). A party interested may apply to have the probate of a will revoked because of newly discovered evidence, and when a party applies on this ground to open, vacate, modify or set aside a decree, or order, such newly discovered evidence must in all cases be considered with that evidence that is taken on the former trial, and a determination had whether this newly discovered evidence would probably have changed the result. In all cases special reasons should exist for granting the relief asked for, where the application is one made after the expiration of one year from the date of probate (Crossman v Crossman, 2 Denio 69).

(b) Same: in reference to wills relating solely to personal property.
The common law upon the effect of the probate of a will pertaining to personal property seems to be fully enacted in the Code of Civil Procedure in secs. 2647-9.

The law as it stands after the passage of the code can be best ascertained by first giving the substance of the law as enacted in the code, and a statement of the principal decision rendered by the courts for the purpose of interpreting the meaning and scope given to the enactment by the courts.

First, in regard to the substance of the statutory enactment.

The statutory enactment is in substance that a person, who is interested in the estate of the decedent may, within one year, (unless under a disability, and then the time does not run until such disability is removed) present to the surrogate's court, in which the will of personal property was proved, a written petition, duly verified, containing allegations against the validity of the will, or the competency of the proof thereof, and praying that the probate thereof may be revoked, and that certain persons may be cited to show cause why the probate should not be revoked.
Secondly, the principal decisions of the courts in construing the enactment, and the effect or change upon the common law.

The power conferred on the surrogate, relating to the revocation upon a petition of the probate of a will is wholly statutory, and therefore it must be done strictly in accordance with the statute. Whenever a will of personal property is probated, or the part of the will that relates to personal property has been probated, a court of equity has no jurisdiction to set aside the will which has been duly admitted to probate, and has remained undisturbed for over one year, and it makes no difference if fraud, or undue influence has been practiced and the probate is conclusive after the expiration of one year (Post v Mason, 91 N.Y. 539).

Whenever a person has accepted a benefit under the will, he is estopped from claiming a revocation of the probate, unless he has made full restitution, where the tender was not made until after the proceedings to set aside the probate had been commenced, it was held that both upon principle and authority, the tender or offer to deposit came too late to prevent the operation of the estoppel (Matter of Soule, 19 St.Rep. 532).
All that is required as regards the will of personal property, by the statute, is that the petition shall be presented within one year. And the citations need not be issued within the year; it is enough if the petition is filed. But if the petition for the revocation of the probate of a will made by one who was an infant at the time the will was admitted to probate, and no guardian was appointed by the court, the infant can file the petition at any time within one year after he became of age. Where an infant waited four years after becoming of age to bring an action to have the probate revoked upon the grounds first, that the decree was not binding upon him because he was not represented by guardians when the will was probated, and secondly, upon the ground that the will was not correctly executed because it was procured by undue influence. The application was denied by the court because of the laches of the petitioner (Matter of Becker, 28 Hun. 207).
CONCLUSION.

The effect of probate upon a will of either real or personal property.

From what has already been stated we find that a will pertaining to real estate is presumed to be valid after being probated, but that the presumption may be overcome any time within twenty years upon the ground of fraud, newly discovered evidence, clerical error or other sufficient cause, and that in case the court does not obtain jurisdiction, as when the party whose will it was sought to probate was not dead, that the proceedings are void. And that within one year it may be set aside upon the same grounds and under the same circumstances as a will of personal property.

That the probate of a will of personal property is conclusive and final after the expiration of one year from the date of probate; unless the probate was void for one of the following reasons:

First, if the court did not obtain jurisdiction of the party plaintiff, the action, as for example if he was an infant and not properly served, the infant can bring an
action to have the probate revoked when he becomes of age if the action is commenced within one year, for personal, and within two years, if the will pertains to real property. Or, if a party that was interested under the will was imprisoned or kept away by force, the time does not commence to run until such disability is removed, as for example: in the case where the testator's daughter was served with a summons, but was prevented from appearing by being sent on a pretext to an insane asylum, and soon after the will was probated she was released. Five years afterwards she brings this action to have the probate set aside, and the court said that when an heir had been prevented by forcible detention from appearing in probate proceedings, that was an ample warrant to a surrogate to open the decree and allow her to come in and contest the probate (Hoyt v Hoyt, 112 N.Y. 493).

Second. If any of the heirs were not served with a citation to appear and did not appear voluntarily, or if being an infant, did not have a guardian appointed to represent them in the probate proceedings, the probate is void as regards them and they may apply to have the probate proceedings revoked (Denis v Crandall, 101 N.Y. 311).
41.

In this case it was held that when the citation was served on the infant's mother and not upon the infant, who was under twelve years of age, that the mother had appeared with the infant and a special guardian was appointed to look after the infant's interest by the court, that the accounting of the executors and the probate of the will had no effect upon the infant because, not being served as required by the statute, the court did not obtain jurisdiction over him, and therefore the appointing of the guardian had no effect and his appearance in court made no difference, because it is impossible for an infant to waive a right so as to make it binding upon him. Therefore the probate in the above case was set aside (Denis v Cran dall, 101 N.Y. 311).

Third. To obtain jurisdiction over a will which it is sought to probate, the maker must in fact be dead at the time the will is presented. It makes no difference that the person has been away for a great length of time and that his will has been admitted to probate in good faith. The probate in all such cases is an absolute nullity and can be attacked collaterally. But other parties may get a good title to his lands only by adverse
possession.

In a Pennsylvania case, letters of administration were granted by the registrar of wills upon the estate of a person who, having been absent and unheard of for over fifteen years, and so was presumed to be dead, the parties were however mistaken and the supposed testator brings this action to have the probate set aside. Probate was held to be absolutely void, and that it could be impeached collaterally. The payments made voluntarily to the executor were no defence to a subsequent action by the supposed deviser against the persons who owed him and had paid the amount of their indebtedness to the executor. The court said that the probate of a will and the letters of administration issued upon the estate of a living person are absolutely void, and the will therefore passes no title even to a bona fide purchaser. This seems to be an absolute rule in all the states except New York (Melia v Simmons, 45 Wis. 334; Stevenson v Superior Court, 62 Cal. 60; Mouse v Smith, 11 Rich. Law. 569; Buli v Comm. 101 Pa. 213).

In Wisconsin the doctrine is well illustrated by a case where the party was supposed dead and his estate was settled up and the land sold to a bona fide purchaser for value. Eight years later the supposed deceased person was discovered to be still living and he brought
this action of ejectment to recover the land, and the court held that the probate was of no effect because it had no jurisdiction over a person not yet dead, and consequently he recovered back the land by ejectment.

The New York rule can be best ascertained by a consideration of a court of appeals case upon which the New York doctrine has been founded. In this case the party was supposed to be dead and his estate was distributed according to law and the administrators had been discharged, the supposed decedent returned and now sues to recover his property from the purchasers; the defendants set up that they had paid the administrators. The opinion of the court was that upon the inquiry by the surrogate as to the death of the person upon whose estate the administration is applied for is judicial in its nature; and letters issued by him upon due proof, is conclusive evidence of the authority of the administrators to act until the order granting them is reversed on appeal, or vacated so far at least as to protect innocent persons acting upon the faith of them, and when persons have paid the administrators in good faith, as in this case, the court held that it was a sufficient payment and that the innocent party was not liable in an action brought by the party who was supposed to be dead.
Three judges dissented in the above case, and judge Redfield in a note to this case says, that this case is perhaps without precedent either in America or England. (Roderiges v The East River Savings Bank. 63 N. Y. 460. Note in 15 Am. L. R. (U. S.) 212)

Finis.