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## CONSTITUTIONALITY OF THE BROADENED POWERS OF THE PROBATE COURT IN MISSOURI UNDER THE NEW CODE

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## I. INTRODUCTION

Mounting criticism of Missouri's antiquated probate laws<sup>1</sup> moved the general assembly, in 1953, to establish a committee to "make a complete and detailed study of probate procedure and . . . to formulate a system of practice and procedure in the probate courts [to] . . . meet the needs of modern society."<sup>2</sup>

The committee thus created<sup>3</sup> soon discovered that mere procedural reforms and changes of certain substantive rights of succession in decedents' estates afforded only a partial solution to the problem. Of equal, and perhaps paramount, importance was the necessity of removing the archaic, unrealistic, and often unreasonable restrictions upon the powers of the probate courts to administer estates efficiently, economically and free from ever-recurring controversies over jurisdiction. It was felt to be of fundamental importance that the jurisdiction of the court be broadened to permit the determination in one tribunal of all problems arising in the course of an administration, without remitting litigants to the delays and expense of proceedings in other courts, and without disturbing any concurrent jurisdiction vested in the circuit courts by the general assembly.

The committee's product, after certain legislative amendments, be-

1. Pungently expressed as long ago as 1898 by the outstanding probate authority of his day, Hon. J. G. Woerner, Probate Judge of St. Louis, and author of the learned and definitive *American Law of Administration*, as follows: "The administration code has been refined upon and loaded down with multitudinous and heterogeneous amendments, to which every session of the Legislature has diligently contributed, not always in the spirit of the original act, nor conducive to perspicuity and efficiency of its detail, so that a recodification in the spirit of the codifiers of 1825 would prove a blessing to the courts, the bar and the public." Woerner, *Development of the Missouri Law of Administration*, in *HISTORY OF BENCH AND BAR OF MISSOURI* 32 (Stewart ed. 1898). See also *MISSOURI BAR PROBATE LAWS REVISION COMMITTEE REPORT, INFIRMITIES OF MISSOURI PROBATE CODE (1952-53)*.

2. S. CON. RES. No. 9, 67th Gen. Assem., 1 SEN. JOUR. 821, 822 (Mo. 1953).

3. This committee was composed of Senators Floyd R. Gibson, Independence, Chairman; John W. Noble, Kennett; George A. Spencer, Columbia; R. Jasper Smith, Springfield; Hartwell G. Crain, St. Louis County; Representatives L. A. Vonderschmidt, Mound City; Samuel B. Murphy, Kirkwood; Robert W. Copeland, Webster Groves; Martin Degenhardt, Yount; Warren E. Hearnest, East Prairie; and Robert C. Smith, Columbia. The advisory committee was composed of Judges Walter F. Stahlhuth, St. Louis County; David R. Hensley, St. Louis County; A. J. Bolinger, Morgan County; Byrne E. Bigger, Marion County; William B. Waters, Clay County; Howard B. Lang, Sr., Boone County; Thomas J. Boland, St. Louis City; Leslie A. Welch, Jackson County; and Messrs. Adolph Thym, St. Louis; Rush H. Limbaugh, Cape Girardeau; and Hiram H. Lesar, Columbia. Messrs. Edw. D. Summers, and John L. Porter composed the Research Staff.

came the 1955 Missouri probate code.<sup>4</sup> It is the purpose of this article to examine the constitutional validity of the additional jurisdiction conferred upon the probate courts by the code, and to inquire into the basis and extent of the power of the general assembly in the probate field under the four Missouri constitutions, in the light of their interpretation by the supreme court, the general assembly itself, and the bar, since 1820.

Although one of the interesting subdivisions of probate law relates to those probate matters which are within the exclusive jurisdiction of probate courts and those concerning which the circuit courts have exclusive or concurrent jurisdiction, the subject is not directly related to the constitutionality of the new probate court powers under the code, and apart from the footnote reference,<sup>5</sup> will not be treated in this article.

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4. Chapters 472, 473, 474, 475, RSMo 1955 Supp., as amended by Mo. Laws 1957.

5. The source of the jurisdiction of circuit courts over probate, as well as other, matters is article V, section 14, of the 1945 constitution, which provides:

The circuit courts shall have . . . exclusive original jurisdiction in all civil cases not otherwise provided for, and concurrent and appellate jurisdiction as provided by law.

Since it is nowhere provided in the 1945 constitution that the jurisdiction of probate courts over probate matters is exclusive, and since article V, section 16, of the 1945 constitution, which defines the constitutional jurisdiction of probate courts, is not self-executing, the jurisdiction of probate and circuit courts over probate matters, whether exclusive or concurrent, is within the control of the general assembly, and may be summarized as follows:

(a) If the general assembly so enacts, the probate courts have original jurisdiction of any matter pertaining to probate business.

(b) If the general assembly so enacts, the circuit courts have concurrent original jurisdiction of any such matter.

(c) If the general assembly has not provided for probate court jurisdiction of a probate matter, the circuit courts have exclusive jurisdiction thereof. (And, of course, the general assembly may give, and always has given, the circuit courts appellate jurisdiction over probate matters cognizable in the probate courts.)

(d) If the general assembly has provided for probate court jurisdiction of any probate matter and has not provided for circuit court concurrent jurisdiction, the probate court jurisdiction is exclusive.

A number of cases in the field of probate law involve the question of whether or not probate court jurisdiction of a given probate matter is exclusive. Of the situation under the 1875 constitution, which may be said to be the equivalent of that under the 1945 constitution, the late Judge Ellison, in *Barnes v. Boatmen's Nat'l Bank*, 355 Mo. 1136, 199 S.W.2d 917 (1947), observed that neither the constitution nor the general probate jurisdictional statute (§ 2437, RSMo 1939, now § 472.020, RSMo 1957 Supp.) stated that the jurisdiction of probate courts was exclusive, and criticized certain prior cases wherein it was said or implied that such courts had exclusive jurisdiction over all matters of probate business. Among those so criticized was *State ex rel. Burns v. Woolfolk*, 303 Mo. 589, 262 S.W. 346 (1924), concerning which Judge Ellison commented at page 1143, 199 S.W.2d at 919: "It interpolated the word 'exclusive' in stating the jurisdiction of probate courts over probate business under Art. VI, Sec. 34, Const. 1875. The statement obviously is too broad." Judge Ellison also said, at page 1143, 199 S.W.2d at 920:

. . . it is not hard to understand why the writers of the Constitution of

## II. THE NEW POWERS

For the purposes of this discussion, the powers of the probate courts may be classified as general and specific. The new general powers under the code are found in the italicized language of the following statutes:

Section 472.020.<sup>6</sup> The probate court has jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians of minors and persons of unsound mind, settling the accounts of executors, administrators and guardians, and the sale or leasing of lands by *executors, administrators and guardians, including jurisdiction of the construction of wills as an incident to the administration of estates, of the determination of heirship, of the administration of testamentary trusts and of such other probate business as may be prescribed by law.* (Emphasis added.)

Section 472.030. *The court has the same legal and equitable powers to effectuate its jurisdiction and to enforce its orders, judgments and decrees in probate matters as the circuit court has in other matters* and its executions shall be governed by Chapter 513 RSMo, except that all executions shall be returnable within thirty days unless otherwise ordered by the court. All process of the probate court may be served anywhere within the territorial limits of the state. (Emphasis added.)

Examples of the new specific powers are as follows:

Under the law before the code, the court could determine title to personal property alleged to be wrongfully withheld from an estate,<sup>7</sup>

1875 and subsequent statutes preferred to entrust the circuit courts with a concurrent jurisdiction in the *establishment* of probate claims, which is essentially a judicial act. The fact should be remembered that while Art. V, Sec. 25 of the present Constitution of 1945 requires probate judges to be licensed to practice law, that was not necessary under the Constitution of 1875 and Sec's 1988 and 2444. (Emphasis added.)

And in *West St. Louis Trust Co. v. Brokaw*, 232 Mo. App. 209, 215, 102 S.W.2d 792, 796 (St. L. Ct. App. 1937) (cited with approval by the supreme court in *Campbell v. Campbell*, 350 Mo. 169, 165 S.W.2d 851 (1942)), concerning the authority of circuit courts to retain control and supervise the disposition of proceeds of judgments in favor of minors, the court said:

We appreciate that the circuit court is not without the right to exercise such concurrent jurisdiction with the probate court as is or may be provided by law (article 6, § 22, Constitution of Missouri), but the trouble is that the law as it now stands does not authorize the circuit court to exercise the power it assumed for itself in this case.

See also *State ex rel. Knisely v. Holtcamp*, 266 Mo. 347, 181 S.W. 1007 (1915); *Linn County Bank v. Clifton*, 263 Mo. 200, 172 S.W. 388 (1914).

6. All statutory references, unless otherwise indicated, are to RSMo 1957 Supp.

7. *In re Petersen's Estate*, 295 S.W.2d 144 (Mo. 1956); *State ex rel. Lipic v. Flynn*, 215 S.W.2d 446 (Mo. 1948) (en banc).

but could not do so as to property alleged to be wrongfully withheld by an estate.<sup>8</sup> Section 473.357 adds authority to do the latter also.

Under the previous law, the court could adjudicate claims against the estate of an incompetent accruing before, but not those accruing after, the appointment of a guardian.<sup>9</sup> Under section 475.205 it may adjudicate both.

Prior to the code, the court had no jurisdiction to hear and determine contingent claims against an estate.<sup>10</sup> Section 473.360-1 grants such jurisdiction.

Before the code, the court could determine the persons who succeeded to the interest of a decedent in personal property<sup>11</sup> but not in real estate.<sup>12</sup> Section 473.613 grants jurisdiction to determine the latter, as well as the former.

Before the code, the court could not, by a subsequent confirmation

8. *Tygard v. Falor*, 63 S.W. 672 (Mo. 1901); *Eans' Adm'r v. Eans*, 79 Mo. 53 (1883); 1 LUMBAUGH, *MISSOURI PRACTICE* 601 n.89 (1935). An exception was where one estate wrongfully withheld from another estate. *State ex rel. Lipic v. Flynn*, *supra* note 7.

Additional curious inconsistencies appear in the decisions under the old law as to property wrongfully withheld, either by or from an estate, if it is claimed by any party that the property was held in trust. In such cases it was held that the probate court had no jurisdiction of proceedings to recover specific property because "the issues are purely equitable, and the probate court is without jurisdiction to determine these issues." *State ex rel. North St. Louis Trust Co. v. Wolfe*, 343 Mo. 580, 587, 122 S.W.2d 909, 911 (1938); *In re Main's Estate*, 236 Mo. App. 88, 152 S.W.2d 696 (K.C. Ct. App. 1941). But the contrary was held as to money claims against an estate for the value of property allegedly held in trust by the decedent. *E.g.*, *State ex rel. Stetina v. Reynolds*, 286 Mo. 120, 227 S.W. 47 (1920) (en banc); *Hoffman v. Hoffmann's Ex'r*, 29 S.W. 603 (Mo. 1895); *Grimes v. Reynolds*, 94 Mo. App. 576, 585-87, 68 S.W. 588, 590-91 (St. L. Ct. App. 1902), *quoted with approval on appeal*, 184 Mo. 679, 689-91, 83 S.W. 1132 (1904). In *Orr v. St. Louis Union Trust Co.*, 291 Mo. 383, 408, 236 S.W. 642, 650 (1922), the *Hoffmann* case was declared to be inapplicable if the claimant sought to recover, not the trust money, but property acquired with such money. However, all such cases involved a determination of the question of whether or not a trust relationship existed.

Section 472.030 of the new probate code vests the probate courts with equitable powers sufficient to permit a determination of all such proceedings.

9. *In re Moore's Estate*, 354 Mo. 240, 189 S.W.2d 229 (1945); *St. Louis v. Hollrah*, 175 Mo. 79, 74 S.W. 996 (1903). There was much conflict in the decisions as to whether the probate court had jurisdiction to try claims on debts incurred by an administrator or executor. *E.g.*, see the cases listed by Judge Ellison in footnotes in *Barnes v. Boatmen's Nat'l Bank*, *supra* note 5, at 1144, 199 S.W.2d at 920. The court clearly has such power under sections 472.010-3 and 473.403-3.

10. *Howard's Estate v. Howe*, 344 Mo. 1245, 131 S.W.2d 517 (1939).

11. §§ 465.170, .310, RSMo 1949.

12. 3 WOERNER, *AMERICAN LAW OF ADMINISTRATION* § 562a (3d ed. 1923); *Basye, Proof of Succession to Land Under the New Missouri Probate Code*, 25 U. KAN. CITY L. REV. 67 (1957).

or approval, give validity to a private sale of personal assets of an estate negotiated without a prior court order.<sup>13</sup> Section 473.487 now permits it to do so.

The court could not, before the code, authorize the guardian of an insane person to borrow money on his unsecured note.<sup>14</sup> The court now has such authority under section 475.125.

Under the prior law, the court had jurisdiction of proceedings to discover assets brought by guardians of minors, but not those brought by guardians of incompetent persons.<sup>15</sup> Section 475.160 now permits it to entertain both proceedings.

It was said that under the previous law the court did not have jurisdiction of direct actions to construe wills.<sup>16</sup> Sections 472.020 and 474.520 now provide such jurisdiction.

### III. THE CONSTITUTIONAL JURISDICTION

The jurisdiction which may be conferred upon probate courts by the general assembly is set forth in article V, sections 16 and 17, of the 1945 constitution, as follows:

Section 16. There shall be a probate court in each county with jurisdiction of all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by executors, administrators, curators and guardians, and of such other matters as are provided in this constitution.<sup>17</sup>

Section 17. Probate courts shall be courts of record and uniform in their organization, jurisdiction and practice, except that a separate clerk may be provided for, or the judge may be required to act *ex officio* as his own clerk.

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13. *Orchard v. Wright-Dalton-Bill-Anchor Store Co.*, 225 Mo. 414, 125 S.W. 486 (1910).

14. *First Nat'l Bank v. Vaughan*, 248 S.W.2d 677 (K.C. Ct. App. 1952).

15. *Frost v. Timm*, 238 Mo. App. 121, 176 S.W.2d 833 (K.C. Ct. App. 1943).

16. 2 LIMBAUGH, MISSOURI PRACTICE § 1151 (1935). Construction of wills is the subject of separate treatment herein. See pt. IV, § E, *infra*.

17. The concluding language, "and of such other matters as are provided in this constitution" is not intended, as might at first be supposed, to refer to other constitutional provisions defining additional probate court jurisdiction. Its sole purpose was "to leave the way open" for probate judges to serve as magistrates in certain counties pursuant to article V, section 18. DEBATES OF 1945 CONSTITUTIONAL CONVENTION 2647 (1944). See also *id.* at 2634.

### A. *Specific and General Language*

It will be noted that specific jurisdictional sanction is found only for granting letters, appointing guardians and curators, settling accounts, and selling or leasing estate lands. The constitutional justification for all other probate court powers, including most of the new powers under the code, must therefore be found in the general language, "jurisdiction of all matters pertaining to probate business."

There can be no doubt that this general language will support legislative grants of jurisdiction. For example, specific authority cannot be found in the 1945 or any previous constitution for the following, among other, statutory powers of probate courts, many of which date back more than a century, and the constitutional validity of none of which has ever been successfully challenged:

- Administration of partnership estates.<sup>18</sup>
- Determining rights of legatees and identity and rights of heirs.<sup>19</sup>
- Ordering distribution to heirs or legatees.<sup>20</sup>
- Determining rights of dower.<sup>21</sup>
- Determining rights of homestead.<sup>22</sup>
- Determining and allowing sums for the support of surviving spouses and minor children.<sup>23</sup>
- Ordering administrators to take charge of real estate.<sup>24</sup>
- Ordering repairs to real property.<sup>25</sup>
- Directing purchase or mortgage of real estate or personal property.<sup>26</sup>
- Determining title to personalty wrongfully withheld from an administrator.<sup>27</sup>
- Appointing guardians of drug addicts.<sup>28</sup>
- Commitment of drug addicts to state hospitals.<sup>29</sup>
- Appointing guardians of drunkards.<sup>30</sup>
- Committing insane persons to state hospitals.<sup>31</sup>

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18. §§ 461.650-.770, RSMo 1949.

19. §§ 465.170, .310, RSMo 1949.

20. *Ibid.*

21. §§ 513.500-2, .505, RSMo 1949.

22. §§ 513.490-.505, RSMo 1949.

23. § 469.230, RSMo 1949.

24. § 462.290, RSMo 1949.

25. § 462.300, RSMo 1949.

26. §§ 462.310, .450, .360, 457.350, .290, RSMo 1949.

27. §§ 462.400-.430, RSMo 1949.

28. § 458.030, RSMo 1949.

29. § 202.360, RSMo 1949.

30. § 458.030, RSMo 1949.

31. §§ 202.120-.220, .350, RSMo 1949.



Ordering the county to pay for the support of indigent insane persons.<sup>32</sup>

Ordering sales of realty by executors.<sup>33</sup>

## B. *Matters Pertaining to Probate Business*

### 1. Generally

It may be said that in enacting the 1955 code into law, the general assembly and the executive construed the language of section 16, "all matters pertaining to probate business" to be broad enough to include the new powers of the court. The supreme court has repeatedly declared that it will give great weight to a legislative construction of the constitution.<sup>34</sup> Further, the court has said that every legislative enactment is presumed to be constitutional,<sup>35</sup> and that any doubt concerning the

32. *Ibid.*

33. §§ 463.170-.430, RSMo 1949. It is startling to note that, although innumerable real estate titles hinge on probate court jurisdiction to authorize sales by an executor, the first constitutional reference to sales of a decedent's real estate was in article VI, section 34, of the 1875 constitution, which spoke of "sale or leasing of lands by administrators and guardians", but not by executors. It was not until the 1945 constitution that the word "executors" was inserted in the phrase. Hence, from 1875 to 1945 sales or leases of lands by an executor, *absent a power in a will*, necessarily depended for validity upon statutes enacted pursuant to the general language of the 1875 constitution, "all matters pertaining to probate business."

Below is a partial list of Missouri cases which demonstrate that our courts will uphold statutory grants of jurisdiction based upon the general, rather than the specific, wording of the four Missouri constitutions:

Lolordo v. Lacy, 337 Mo. 1097, 88 S.W.2d 353 (1935); State *ex rel.* Nute v. Bruce, 334 Mo. 1107, 70 S.W.2d 854 (1934); Davis v. Johnson, 332 Mo. 417, 58 S.W.2d 746 (1933); McQuitty v. Wilhite, 218 Mo. 586, 117 S.W. 730 (1909); Kelerher v. Henderson, 203 Mo. 498, 515, 101 S.W. 1083 (1907); City of St. Louis v. Hollrah, 175 Mo. 79, 74 S.W. 996 (1903); Tygard v. Falor, 163 Mo. 234, 63 S.W. 672 (1901); *In re* Lietman's Estate, 50 S.W. 307 (Mo. 1899); Gordon v. Eans, 97 Mo. 587 (1888); Eans' Adm'r v. Eans, 79 Mo. 53 (1883); Allison v. Chaney, 63 Mo. 279 (1876); Bryant v. Christian, 58 Mo. 98 (1874); Rose v. McHose's Ex'rs, 26 Mo. 590 (1858); Overton v. Davy's Ex'r, 20 Mo. 273 (1855); Dyer v. Carr, 18 Mo. 246 (1853); O'Fallon v. Tucker, 13 Mo. 262 (1850); Caldwell v. First Nat'l Bank, 283 S.W.2d 921, 922 (St. L. Ct. App. 1955); State *ex rel.* Lamm v. Lamm, 216 S.W. 332 (K.C. Ct. App. 1919); Beck v. Hall, 211 S.W. 127 (K.C. Ct. App. 1918); Kerwin v. Kerwin, 204 S.W. 922 (Spr. Ct. App. 1918); Lemp Brewing Co. v. Steckman, 180 Mo. App. 320, 168 S.W. 226 (K.C. Ct. App. 1914); Conrad v. Fisher, 37 Mo. App. 352, 370 (St. L. Ct. App. 1889); Woerther v. Miller, 13 Mo. App. 567 (St. L. Ct. App. 1883).

34. State *ex rel.* O'Connor v. Riedel, 329 Mo. 616, 619, 46 S.W.2d 131, 134 (1932).

Because since 1884, the supreme court has had exclusive jurisdiction of cases involving construction of the constitution (State *ex rel.* Dugan v. Kansas City Court of Appeals, 16 S.W. 853 (Mo. 1891)), citations to cases by the courts of appeals on such subject will rarely be given.

35. Wilson v. Washington County, 247 S.W. 185, 187 (Mo. 1922).

constitutionality of a statute will be resolved in favor of validity.<sup>36</sup> And it would appear that the court overlooks few opportunities to observe that the constitution is not a grant of authority to, but simply a restriction upon, the general assembly, whose power is otherwise unlimited.<sup>37</sup>

Since 1822,<sup>38</sup> probate jurisdiction has been regarded by bench and bar of this state as stemming from and dependent upon statutes, so long as such statutes relate to matters pertaining to the estates of decedents, minors or insane persons. Supreme court cases holding matters to be beyond the jurisdiction of probate courts have, with only two exceptions, been bottomed upon an absence of statutory, rather than constitutional, authority. One exception, the *Cave-Tincher* case,<sup>39</sup> involved a legislative attempt to grant criminal jurisdiction over juveniles to probate courts in counties of less than 50,000 inhabitants, and was invalidated because violative of the constitutional provision requiring that probate court jurisdiction be uniform in all counties.<sup>40</sup> The other exception is the *York-Locker* case<sup>41</sup> and it is the *only instance* in which the court invalidated an effort by the general assembly to vest jurisdiction in *all* probate courts as being beyond the scope of the jurisdictional language of the constitution. That case, however, involved the authority of a probate court to *issue a writ of habeas corpus for a defendant charged with rape*, and the court held that the statute which attempted "to confer this jurisdiction upon probate courts is void."<sup>42</sup>

Other than in these instances, no constitutional barriers whatever to the power of the general assembly to confer jurisdiction upon the

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36. *State v. Shelby*, 333 Mo. 1036, 1044, 64 S.W.2d 269, 271 (1933) (en banc).

37. See the list of Missouri cases in 16 C.J.S. § 70, at 191 n.84, so declaring and cited by the author in support of the text that Missouri is in that great majority of states whose constitutions, unlike the United States Constitution, are not grants of, but are mere restrictions upon, legislative power, and therefore the people, through their legislative representatives have retained all the lawmaking power that they have not clearly denied to themselves by their constitutions.

38. Mo. Laws 1822, at 119. The long reliance by bench and bar upon a belief of the constitutional validity of statutes, "is entitled to great weight as a 'pregnant circumstance and very good evidence of what the law is'" said Judge Lamm in *Linn County Bank v. Clifton*, 263 Mo. 200, 215, 172 S.W. 388, 393 (1914). In another case, *Ewing v. Vernon County*, 216 Mo. 681, 689, 116 S.W. 518, 520 (1909), the same judge expressed a somewhat analogous rationale, "show me what by the consensus of public official interpretation has been done under a statute, and I will show you what it probably means."

39. *State ex rel. Cave v. Tincher*, 258 Mo. 1, 166 S.W. 1028 (1914) (en banc).

40. *Id.* at 9, 166 S.W. at 1032.

41. *State ex rel. York v. Locker*, 266 Mo. 384, 181 S.W. 1001 (1915) (en banc).

42. *Id.* at 394, 181 S.W. at 1004.

probate courts have ever been raised, and it would seem to be the position of the courts, as will appear from the following examination into the history and development of Missouri probate law, that a determination by the general assembly as to what matters properly pertain to probate business will not be upset unless it does violence to reason.

## 2. The 1820 Constitution

The constitution of 1820, as amended in 1822, provided that the judicial power be vested:

in a supreme court, in circuit courts, and in such inferior tribunals as the general assembly may, from time to time, ordain and establish.<sup>43</sup>

Article V, section 12, further provided:

Inferior tribunals shall be established in each county, for the transaction of all county business, for appointing guardians, for granting letters testamentary, and of administration, and for settling the accounts of executors, administrators, and guardians.

Pursuant to the constitutional mandate, the first general assembly in 1820 established county courts in each county and outlined in general language their probate jurisdiction.<sup>44</sup> In the Act of Revision of 1825,<sup>45</sup> probate courts were established, to have exclusive original jurisdiction in all cases relative to wills, letters, appointing guardians, settling accounts, suits on demands of not exceeding \$200.00, and concurrent jurisdiction with the circuit court on demands over \$200.00, with appellate jurisdiction in the circuit courts in all cases.<sup>46</sup> Such courts were abolished, however, by an act of January 2, 1827,<sup>47</sup> and probate jurisdiction once again was vested in the county courts.

Shortly after 1835 commenced the practice of creating probate courts in certain counties by special acts, a practice which continued until after the adoption of the 1875 constitution.<sup>48</sup> The jurisdiction of such courts was not uniform, but frequently varied from county to county.<sup>49</sup>

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43. Mo. CONST. Art. I, § 2 (1920), as amended.

44. Mo. Laws 1820, at 43, § 10.

45. RSMo 1825, at 268.

46. *Id.* at 269, 270.

47. Mo. Laws 1827, at 19, § 4.

48. The following are at least part of the counties in which such courts were established. The figures indicate the book and page of the Missouri Laws in which the statutes may be found:

St. Louis County, 1844, at 57; Cooper, 1846-7, at 27; Platte and Andrew

Nor was the probate jurisdiction conferred by the general assembly upon the county and probate courts confined to that of "appointing guardians," "granting letters," and "settling . . . accounts," as specified in article V, section 12, of the constitution. Instead, it included such things as power to order the sale, lease or repair of real estate,<sup>50</sup> to decree specific performance of contracts to sell land<sup>51</sup> and to institute discovery proceedings.<sup>52</sup> In some instances, the court was authorized to exercise jurisdiction "as fully as any court of chancery may or can do."<sup>53</sup>

Whether or not the 1820 constitution limited the jurisdiction which the general assembly might vest in the inferior tribunals which it was directed to "ordain and establish" for the specified purpose of appointing guardians, granting letters, and settling accounts, is a question not necessary to determine or even discuss here. Certain it is, however, that every one of the supreme court cases in the probate field prior to the effective date of the 1875 constitution was based on the concept that the jurisdiction of such tribunals as to probate matters depended solely upon statutes.

This is illustrated by the early cases involving jurisdictional conflicts between county and probate courts on the one hand and circuit courts on the other. Many of these cases are briefly and accurately summarized in the opinion in *Overton v. McFarland*<sup>54</sup> and in the dissenting opinions of Hough and Henry, J.J., in *First Baptist Church v. Robberson*.<sup>55</sup>

The latter case held that a special act of 1855 creating the probate court of Green County and prescribing its jurisdiction did not give such

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1848-9, at 428 (these two adopted Cooper County Act); Linn, 1852-3, at 390; Daviess, 1850-1, at 534, 1867, at 95, 1870, at 206; Saline, 1848-9, at 417; Clay, 1855, at 71, 1858-9, at 326, 1859-60, at 35; Lafayette, 1848-9, at 410; Bates, 1852-3, at 399; Scott, 1854-5, at 488, 1856, at 519, 1867, at 101; Ste. Genevieve, 1855, at 80; Mississippi, 1855, at 85; Monroe, 1855, at 89; Jackson, 1854-5, at 497, 1855, at 56; Kansas City Court of Common Pleas, 1855, at 60; Buchanan, 1850-1, at 514; Caldwell, 1855, at 74; Cape Girardeau, 1852-3, at 80; Dunklin, 1868, at 254; Henry, 1869, at 167; Jasper, 1869, at 170, 1870, at 197; Reynolds, 1858-9, at 406; Mercer, 1861, at 500; Polk, 1861, at 479; Pettis and Ray, 1867, at 95, 1870, at 206; Clark, 1870, at 215; St. Charles, 1858-9, at 27; Dent, 1861, at 493. See Missouri Laws 1866, at 83 and 1867, at 110, for special acts establishing probate courts in 32 additional counties.

Between 1865 and 1875 the number of probate courts created by special acts may have risen to ninety-four, with varying jurisdictions. See 1 LIMBAUGH, MISSOURI PRACTICE, note at 607 (1935).

49. *Coleman v. Farrar*, 20 S.W. 441, 443 (Mo. 1892).

50. RSMo 1835, at 49, 52.

51. *Id.* at 53.

52. *Id.* at 47.

53. RSMo 1825, at 123. See also RSMo 1825, at 98-123; RSMo 1835, at 43-62.

54. 15 Mo. 312 (1851).

55. 71 Mo. 326, 339 (1879).

court exclusive jurisdiction of direct actions to construe wills. Judge Sherwood stated: "Doubtless the Legislature might confer such powers on probate courts, but doubtless our Legislature never has."<sup>56</sup>

Supreme court cases in the field of probate law before the Civil War dealt with such matters, *inter alia*, as settlement of accounts,<sup>57</sup> sales of land,<sup>58</sup> specific performance,<sup>59</sup> discovery,<sup>60</sup> and construction of wills.<sup>61</sup> Two cases held that county courts had exclusive jurisdiction to probate lost wills,<sup>62</sup> and two concerned money demands over which the circuit courts had concurrent jurisdiction.<sup>63</sup> All decisions involving jurisdiction were based solely on statutes, the constitutionality of which was never questioned, and several of such early cases were cited with approval after the adoption of the 1875 constitution.

56. *Id.* at 336. That Judge Sherwood recognized the power of the legislature over probate court jurisdiction, even with respect to equity powers, is apparent when, immediately after the portion quoted above in the text, he said:

This is shown not only by the authority just referred to, but by the case of *Schulter's Admr. v. Bockwinkle's Admr.*, 19 Mo. 647, a case which arose in St. Louis county. In that instance, it was ruled that the special statutory proceeding against an executor or administrator, under the provisions of section 36, page 148, R.S. 1845, for specific performance, could be maintained in the county court only when the contract was in writing; otherwise, the proceeding must be had 'under the general law,' *i. e.*, in the circuit court, which alone could enforce specific performance when the contract rested in parol. And the Legislature must evidently have been of the same opinion as to the jurisdiction of county courts or else they would not have been at the pains to have conferred, in a single instance and in one particular way, equity powers upon such courts, if those courts already possessed a general equitable jurisdiction.

Judge Sherwood further stated that the powers invoked (construction of a will) were not within the "scope" or "grasp" of the probate courts, and it is obvious that such philosophy was the basis for his repeated advocacy of greatly restricting the jurisdiction of such courts. A view similar to that of Judge Sherwood was even more dramatically expressed by the New Mexico supreme court in *Caron v. Old Reliable Gold Mining Co.*, 12 N. Mex. 211, 226, 78 Pac. 63, 67 (1904) when it characterized a probate court of that state as "a court that is not required to know any law, and that does not know any more than the law requires."

57. *Erwin v. Henry*, 5 Mo. 469 (1838), *modified in Clark v. Henry*, 9 Mo. 339 (1845).

58. *Shields v. Ashley's Adm'r*, 16 Mo. 471 (1852).

59. *Schulter's Adm'r v. Bockwinkle's Adm'r*, 19 Mo. 647 (1854).

In *Coil v. Pitman's Adm'r*, 46 Mo. 51 (1870), it was held that the probate court had no jurisdiction to compel a conveyance where the power to convey derived from a will rather than the statute. The court said at page 54: "The County Court exercising probate functions . . . has only such power and jurisdiction as is conferred on it by the statute."

60. *Overton v. McFarland*, 15 Mo. 312 (1851).

61. *Overton v. Davy's Ex'r*, 20 Mo. 273 (1855); *Dyer v. Carr's Ex'r*, 18 Mo. 246 (1853).

62. *Jackson v. Jackson*, 4 Mo. 210 (1835); *Graham v. O'Fallon*, 3 Mo. 507 (1834).

63. *Overton v. McFarland*, *supra* note 60; *Miller v. Woodward*, 8 Mo. 169 (1843).

### 3. The 1865 Constitution

Although the wording of the probate jurisdictional clause of the short-lived 1865 constitution differed somewhat from that of the 1820 constitution, it in no way infringed upon the power of the general assembly in the probate field.

Article VI, section 23, provided:

Inferior tribunals, to be known as county courts, shall be established in each county, for the transaction of all county business. In such courts, or in such other tribunals, inferior to the circuit courts as the general assembly may establish, shall be vested the jurisdiction of all matters appertaining to probate business, to granting letters testamentary and of administration, to settling the accounts of executors, administrators and guardians, and to the appointment of guardians and such other jurisdiction as may be conferred by law.

By virtue of article XI, section 3, all existing courts, including the some 50 or more<sup>64</sup> probate courts created by special legislative acts, were continued in existence with their respective jurisdictions unchanged, until such time as the general assembly saw fit to repeal or amend the statutes creating them and defining their powers.

It will be noted that the concluding words of section 23, *supra*, "and such other jurisdiction as may be conferred by law" did not appear in the probate jurisdictional clause of the 1820 constitution. It does not necessarily follow, however, that it was the intention of the drafters of the later instrument to add to the power of the general assembly to confer jurisdiction on probate tribunals. Many of the probate and other "inferior" courts previously created by special acts of the legislature had jurisdiction which in no way related to probate business,<sup>65</sup> and the framers of the 1865 constitution had no wish to infringe in any respect upon these powers by seeming to limit the jurisdiction of such courts to "matters appertaining to probate business." As will appear later, uniformity of probate jurisdiction was not one of the objectives of the 1865 constitutional convention, as it was of that of 1875.

Only a few of the reported cases of the supreme court during the life

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64. See note 48 *supra*.

65. See statutes cited in note 48 *supra*. See also *State ex rel. Baker v. Bird*, 253 Mo. 569, 580, 162 S.W. 119, 122 (1913) (en banc).

of the 1865 constitution involved probate jurisdiction. All turned upon the construction of statutory, rather than constitutional provisions, and none undertook to define the language "all matters appertaining to probate business." Among them were decisions confirming the authority of the general assembly to vest jurisdiction over certain matters exclusively in the probate courts of some counties, and concurrently in the county and circuit courts of other counties.<sup>66</sup>

It may be said, in summary, that up to the time of the enactment of the 1875 constitution, none of the decisions of the supreme court contained any suggestion that there was a constitutional limitation on the power of the general assembly to confer jurisdiction on probate tribunals.

#### 4. The 1875 Constitution

Delegates to the 1875 constitutional convention found "the jurisdiction in probate matters in great confusion."<sup>67</sup> As has been indicated, the powers of probate tribunals frequently varied widely from county to county and sentiment for uniformity was strong.<sup>68</sup>

After much debate it was decided to strip county courts of all probate jurisdiction and to establish a uniform system of probate courts in all counties. The constitution provided:

Article VI, section 34. The General Assembly shall establish in every county a probate court, which shall be a court of record, and consist of one judge, who shall be elected. Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians; and the sale or leasing of lands by ad-

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66. *Dodson v. Scroggs*, 47 Mo. 285 (1871); *Cones v. Ward*, 47 Mo. 289 (1871). In the *Dodson* and *Cones* cases, it was held that jurisdiction of demands in probate courts specially created by Mo. Laws 1845, at 70, and 1865-6, at 83-88, was exclusive—even though in other counties the circuit court had concurrent jurisdiction under general statutes.

67. *Coleman v. Farrar*, 20 S.W. 441, 443 (Mo. 1892) in which the supreme court said: "When the convention met in 1875 to frame a new constitution for the state, as is well known, it found the jurisdiction in probate matters in great confusion. In many counties the county courts continued to exercise the jurisdiction conferred in the General Statutes, but in many of the more populous counties probate courts had been established by special acts, each having its own peculiar powers." See also *Woerner, Development of the Missouri Law of Administration*, in *HISTORY OF BENCH AND BAR OF MISSOURI* 33 (Stewart ed. 1898); 1 *LIMRAUGH, MISSOURI PRACTICE* 574 (1935).

68. 7 *CONSTITUTIONAL DEBATES, 1875*, at 92-103, 110-134 (1941).

ministrators, curators and guardians; and also jurisdiction over all matters relating to apprentices: *Provided*, That until the General Assembly shall provide by law for a uniform system of probate courts, the jurisdiction of probate courts heretofore established shall remain as now provided by law.

Article VI, section 35. Probate courts shall be uniform in their organization, jurisdiction, duties, and practice, except that a separate clerk may be provided for, or the judge may be required to act, *ex officio*, as his own clerk.

The convention rejected all proposals that it feared might defeat the objective of jurisdictional uniformity. These included proposals that section 34, then without the proviso clause, be amended to provide that it "shall not be so construed as to divest any probate court heretofore established of any jurisdiction they may now have by law," and that the section be made to conclude "such other jurisdiction as may be provided by law."<sup>69</sup> After the rejection of such proposals, their sponsor moved and procured the adoption of the proviso clause.<sup>70</sup>

The foregoing provisions of the 1875 constitution, as Henry, J., observed:

. . . are not self-enforcing. The constitution does not establish the probate courts, or the uniformity which it requires. Legislative enactments are required to carry those provisions into effect.<sup>71</sup>

Legislative enactments came in 1877, when the general assembly

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69. 7 *Id.* at 91, 92, 134.

70. 7 *Id.* at 134. The proviso was adopted without debate and without record opposition, which suggests the probability that during an overnight adjournment its terms and those of section 35 were agreed upon. (*Id.* at 103.) Thus, the very language of sections 34 and 35, construed in the light of the debates, shows that the framers contemplated that the general assembly must implement the constitution by statutes delineating the probate court jurisdiction, limited only by two constitutional mandates: (1) that the statutes must be confined to "matters pertaining to probate business," and (2) that the jurisdiction must be uniform in all counties.

71. *State ex rel. Atty. Gen. v. Gammon*, 73 Mo. 421, 426 (1881). In *Linn County Bank v. Clifton*, 263 Mo. 200, 213, 172 S.W. 388, 392 (1914), the court, through Lamm, J., said, "Notice that the foregoing statute is but the legislation necessary to put into effect the constitutional provision. . ."

In *In re Moore's Estate*, 354 Mo. 240, 249, 189 S.W.2d 229, 234 (1945), the court, through Bradley, C., said:

We are not able to discover in said Sec. 34, Art. 6, the specific language that would, without legislative enactment, authorize the present proceeding, and able counsel do not point out such language. And we might say that if anything in Sec. 34, Art. 6, could in itself possibly be construed to authorize the proceeding here, it would still require legislative authority because legislative enactment was necessary to carry this section into effect.



passed an act establishing probate courts in each county and in the city of St. Louis.<sup>72</sup> It defined the general jurisdiction of such courts in much the same language that had been used in the constitution:

Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by administrators, curators and guardians, and over all matters relating to apprentices; and such judges shall have the power to solemnize marriages.<sup>73</sup>

It should not be supposed, however, that in repeating the language of the constitution the general assembly thereby vested probate courts with all the jurisdiction possible under the constitution. The supreme court has termed "abortive" a legislative attempt to implement constitutional language "by the simple enactment of the terminology of the provision itself."<sup>74</sup> Probably because probate judges under the 1875 constitution were not required to be learned in the law, the courts frequently required that the statutory jurisdiction of probate courts be more carefully defined.<sup>75</sup> For this reason, case decisions under the 1875 constitution to the effect that the probate courts did not possess certain statutory jurisdiction should not be taken to mean that constitutional jurisdiction was also lacking.

Of the numerous supreme court decisions concerning probate court jurisdiction under the 1875 constitution, fewer than a score have been found which are of sufficient constitutional significance to mention here. In *Gentry v. Gentry*,<sup>76</sup> it was held that the probate court had jurisdiction to hear a widow's petition to compel an executor to account for rents collected from her quarantine property. The court said:

The statute in this case, based as it is on a provision of the constitution of similar import (article 6, § 34, Const.; Rev. St. 1889, § 3397), declares of the probate court that 'said court shall

72. Mo. Laws 1877, at 229.

73. *Ibid.*

74. *In re V*———, a Child Under Seventeen Years of Age, 306 S.W.2d 461 (Mo. 1957) (en banc).

75. *Bauer v. Gray*, 18 Mo. App. 164, 168 (St. L. Ct. App. 1885).

76. 26 S.W. 1090 (Mo. 1894).

have jurisdiction over all matters pertaining to probate business.' This authorizes in the fullest manner the present proceeding.<sup>77</sup>

In *Hoffmann v. Hoffmann's Ex'r*,<sup>78</sup> the supreme court declared:

The constitution of the state gives to the probate courts jurisdiction 'over all matters pertaining to probate business.' As a matter pertaining to probate business, the statute declares that 'the probate court shall have jurisdiction to hear and determine all suits and other proceedings instituted against executors and administrators upon any demand against the estate of the testator or intestate.' This provision seems broad enough to include all money demands, of whatever nature, whether legal or equitable. . . .<sup>79</sup>

*Strode v. Gilpin*<sup>80</sup> involved a suit in the circuit court by an administrator against a surviving partner for possession of certain personal assets. The defendant contended that the probate court had exclusive jurisdiction of the matter. The supreme court held otherwise, stating that the suit was "a plain action at common law for the conversion of personal property" and had "nothing to do with probate business, the granting of letters or administration of estates, etc." The opinion thus implied that probate courts would not have jurisdiction of such matters. While undoubtedly the general assembly has power to grant the circuit court concurrent jurisdiction of suits to recover property wrongfully withheld from an executor or administrator,<sup>81</sup> whether it has, in fact, done so is open to serious question, several cases having held that the probate courts not only have jurisdiction of such a proceeding under the so-called discovery statutes, but also that their jurisdiction is exclusive.<sup>82</sup>

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77. *Id.* at 1097.

78. 29 S.W. 603 (Mo. 1895).

79. *Id.* at 605. The *Hoffmann* case, followed in *State ex rel. Stetina v. Reynolds*, 286 Mo. 120, 227 S.W. 47 (1920) (en banc), would also seem to be very persuasive authority of the power of the legislature under the general clause—since there was nothing in the specific language of article V, section 34, anent suits against administrators or executors. Also it is interesting that the court said that the action was one to enforce a contract and for accounting of trust funds. Note that in neither case did the supreme court relate such suits to "settling accounts," but it related them to "matters pertaining to probate business."

80. 187 Mo. 383, 86 S.W. 77 (1905).

81. *Barnes v. Boatmen's Nat'l Bank*, 355 Mo. 1136, 199 S.W.2d 917 (1947).

82. *Lolordo v. Lacy*, 337 Mo. 1097, 88 S.W.2d 353 (1935); *State ex rel. Nute v. Bruce*, 334 Mo. 1107, 1109, 70 S.W.2d 854, 857 (1934); *Davis v. Johnson*, 332 Mo. 417, 58 S.W.2d 746 (1933); *State ex rel. Lamm v. Lamm*, 216 S.W. 332 (K.C. Ct. App. 1919); *Beck v. Hall*, 211 S.W. 127 (K.C. Ct. App. 1918).

In *Scott v. Royston*,<sup>83</sup> the court held that probate courts have exclusive jurisdiction, in the absence of statutes giving circuit courts concurrent jurisdiction, to order the sale of lands of decedents to pay debts and to divide the balance between the widow and children as their homestead, stating:

Whatever may have been the chancery practice prior to the adoption of our present system of probate laws, since then we are clearly of the opinion that the circuit courts of the state have no jurisdiction whatever over any matter pertaining to probate business, except in rare instances. . . . The jurisdiction over all such matters is given to the probate courts by the Constitution and laws of this state. Said courts are courts of record, and they have exclusive original jurisdiction within their respective counties in all cases arising under the general laws of the state relating to the administration of estates and to all matters pertaining to probate business.<sup>84</sup>

*Redmond v. Quincy, O. & K.C. Railroad*<sup>85</sup> involved the constitutionality of the following amendment to a statute providing for the appointment of guardians by probate courts:

Provided, that the probate court shall not have jurisdiction to inquire into the insanity of any person who is the owner of no property.<sup>86</sup>

The supreme court, stating that "an insane person needs a guardian of his person even though he have no property," held the statute invalid as being in conflict with the constitutional jurisdiction of probate courts over "persons of unsound mind."<sup>87</sup>

In *In re Jarboe's Estate*<sup>88</sup> it was decided that the probate court had jurisdiction to appoint a referee pursuant to the agreement of all interested persons. The decision discusses the power of probate courts at some length, and the majority opinion observes:

While probate courts are classed as courts of limited jurisdiction, and are authorized to do those things, or to exercise

83. 223 Mo. 568, 123 S.W. 454 (1909).

84. *Id.* at 592, 123 S.W. at 460-61.

85. 225 Mo. 721, 126 S.W. 159 (1910).

86. Mo. Laws 1903, at 200.

87. 225 Mo. at 731, 126 S.W. at 162. Of course, the amendment did not "implement" the constitutional provision, it did not put it "into effect," it did not "carry it out"—it attempted to nullify it with respect to guardians of the indigent.

88. 227 Mo. 59, 127 S.W. 26 (1910).

such jurisdiction only as is expressly given them by the Legislature, yet the history of such legislation shows a manifest disposition to enlarge their powers and jurisdiction, so as to clothe them with the necessary authority to fully and finally administer the estate intrusted to them.<sup>89</sup>

In *Ex parte Zorn*,<sup>90</sup> the supreme court said that the express constitutional authority under article 6, section 34, to appoint "guardians and curators for persons of unsound mind" implied the power to pass upon sanity.

In the period from 1913 to 1915, some five probate decisions of more than ordinary significance were delivered by the supreme court, four of them en banc. In *State ex rel. Baker v. Bird*,<sup>91</sup> Brown, J., it was held that a probate court order removing a guardian because he was of a religious faith different from that of the deceased parents of a minor was void for a number of reasons, one being that a difference in religious faith was not one of the grounds specified in the statutes authorizing removal of guardians. Although the court had stated earlier that such courts possessed about the same jurisdiction in the probate field as the English ecclesiastical and chancery courts,<sup>92</sup> it now said:

By sections 34 and 35, Art. 6, of our Constitution, it is further provided that the General Assembly shall create probate courts with uniform jurisdiction and duties; so that the Legislature was undoubtedly authorized to vest in said courts such additional powers not named in the Constitution as it deemed proper. We find no attempt has been made, in either the Constitution or statutes, to grant general chancery powers to probate courts, and think it must be conceded that such courts possess only the powers granted to them by the Constitution and statutes, together with such implied powers as are necessary to effectuate those expressly granted.<sup>93</sup>

In *State ex rel. Cave v. Tincher*,<sup>94</sup> Walker, J., a statute granting probate courts in certain counties criminal jurisdiction over juveniles

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89. *Id.* at 80, 127 S.W. at 30. Both the majority through Graves, J., and the dissent by Valliant, C.J., stated that the question of whether the probate court might appoint a referee without the agreement of the parties was within the power of the general assembly to determine by legislation, but Valliant, C.J., opined that the statutes had given such power to the circuit, rather than the probate, courts.

90. 241 Mo. 267, 145 S.W. 62 (1912).

91. 253 Mo. 569, 162 S.W. 119 (1913) (en banc).

92. *Pearce v. Calhoun*, 59 Mo. 271, 274 (1875).

93. 253 Mo. at 579, 162 S.W. at 122.

94. 258 Mo. 1, 166 S.W. 1028 (1914) (en banc).

was declared unconstitutional, not because it was not a matter "pertaining to probate business," but because it violated the constitutional provision requiring uniformity of probate jurisdiction.<sup>95</sup> The court's discussion of the limits of the legislative authority to vest jurisdiction in probate courts is interesting:

It may be contended, however, that as the Constitution, in defining the jurisdiction of probate courts, uses no words of restriction, the Legislature is authorized in conferring upon such courts or the judges thereof other duties, powers, and functions. Notwithstanding the approval of the general rule elsewhere in regard to the jurisdiction of constitutional courts, and its implied approval here, our Legislature has, in several instances, before and since the adoption of the present Constitution, in evident recognition of the rule in regard to the absence of words of restriction, added to the powers of probate courts, and the Supreme Court has, in some instances, put the seal of its approval upon such enactments. Illustrations of these added powers are to be found in the statute (section 2442, R.S. 1909), which prescribes that applications for writs of habeas corpus may be directed to 'some court of record or to any judge thereof in vacation'; this court holding in *State v. Millsaps*, 69 Mo. 359, that a probate judge, under this statute may issue the writ and admit to bail. The authority to grant writs of injunction, under certain conditions, is also conferred by the Legislature on probate courts or judges thereof in vacation (sections 2512, 2513, R.S. 1909); and the judges of such courts are declared to be conservators of the peace, with power to let to bail persons indicted for bailable offenses (section 4061, R.S. 1909; *State v. McElhaney*, 20 Mo. App. 584); and probate judges are authorized in the absence of county judges to hold county courts (section 4062, R.S. 1909).<sup>96</sup>

Eleven months later came *State v. Wilson*,<sup>97</sup> Walker, J., in which the court, en banc, upheld the constitutional validity of a statute<sup>98</sup> pursuant to which a probate court issued a writ of habeas corpus for a defendant charged with bigamy. The court said:

The Constitution of 1875, while it defined the fundamental powers of probate courts and prescribed that their organization, jurisdiction, duties, and powers should be uniform, did not

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95. *Id.* at 19, 166 S.W. at 1032.

96. *Id.* at 18, 166 S.W. at 1032.

97. 265 Mo. 1, 175 S.W. 603 (1915) (en banc).

98. § 2442, RSMo 1909.

attempt in any manner to limit the power of the Legislature to extend their jurisdiction.<sup>99</sup>

Seven months thereafter came the decision in *State ex rel. York v. Locker*,<sup>100</sup> Graves, J. Under the same statute involved in *State v. Wilson*, *supra*, application for a writ of habeas corpus was made to the probate court by three prisoners charged with rape. Insofar as it applied to probate courts, the statute was held to be void, all judges concurring, on the ground that it went beyond the constitutional field of probate court jurisdiction. While in direct contravention of *State v. Wilson*, the decision did not make mention of the latter, and contained no criticism of or reference to the opinion in *State ex rel. Baker v. Bird*, although Judges Graves, Walker and Brown sat in all three cases. And in 1918, Judge Graves, who wrote the *York* opinion, concurred in an opinion which cited with approval the *Wilson* case, saying that it was there held that the probate court "had jurisdiction in habeas corpus under the section of our statute above cited."<sup>101</sup>

It is not here suggested that the supreme court would now approve the broad dicta of *State ex rel. Baker v. Bird* and *State ex rel. Cave v. Tinch*, to the effect that the general assembly can constitutionally grant probate courts jurisdiction over matters which do not pertain to probate business. The cases are important milestones, however, in the history of our probate jurisprudence, and they illustrate a reluctance on the part of the courts to interfere with enactments of the general assembly if any constitutional basis whatever can be found for upholding the same.

*Linn County Bank v. Clifton*<sup>102</sup> merely confirmed that under the 1875 constitution, as prior thereto, circuit courts had concurrent jurisdiction with probate courts of claims against estates, pursuant to section 197, Missouri Revised Statutes (1909) which provided that demands could be established in any court of record.<sup>103</sup>

In *Parsons v. Harvey*,<sup>104</sup> it was held that the so-called "refusal"

99. 265 Mo. at 12, 175 S.W. at 605.

100. 266 Mo. 384, 181 S.W. 1001 (1915) (en banc).

101. *Ex parte Webers*, 275 Mo. 677, 682, 205 S.W. 620, 622 (1918).

102. 263 Mo. 200, 172 S.W. 388 (1914).

103. *Id.* at 214, 172 S.W. at 391-92. Judge Lamm's exposition of the proposition that the power of the general assembly to fix the jurisdiction of the circuit and probate courts in probate matters was not changed by the 1875 constitution foreshadowed Judge Ellison's opinion in the Barnes case. See note 5 *supra*.

104. 281 Mo. 413, 221 S.W. 21 (1920).

statute<sup>105</sup> which authorized the probate court to transfer title to the personal property of an estate of limited value to a decedent's surviving spouse without administration was constitutional, although not within the specific wording of article 6, section 34. Said the court:

It is manifest that section 34 of article 6 of our Constitution confers upon probate courts complete jurisdiction over all matters pertaining to probate business. There is nothing in our Constitution which forbids the General Assembly from passing practical and common sense statutes, like section 10, supra, which facilitate the transaction and convenience of public business at a minimum expense, and that, too, without doing an injury to creditors and other persons, whose rights may still be asserted before the court.<sup>106</sup>

In *Smith v. St. Louis Union Trust Company*,<sup>107</sup> the supreme court held that since no statute provided for circuit court jurisdiction of proceedings for waste and mismanagement against executors serving without bond, and since these matters pertain "directly to the settlement" of estates, probate courts have exclusive jurisdiction of such proceedings.<sup>108</sup>

*Downey v. Schrader*<sup>109</sup> involved the validity of sections 9321-59, Missouri Revised Statutes (1939) which permitted county courts to commit indigent insane persons to state hospitals, it having been argued that jurisdiction was solely in the probate courts under the constitution. The court, per judge Ellison, said that although probate courts could be vested with such jurisdiction, the constitution did not prohibit the general assembly from also vesting it in county courts. In discussing the constitutional provisions relating to county and probate courts, Judge Ellison said:

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105. § 2, RSMo 1919.

106. 281 Mo. at 427, 221 S.W. at 25.

107. 340 Mo. 979, 104 S.W.2d 341 (1937).

108. *Id.* at 984, 104 S.W.2d at 344.

*Titterington v. Hooker*, 58 Mo. 593, 598 (1875), is an early example of the effective abolishment of the old circuit court chancery jurisdiction over estates of decedents when statutes vested jurisdiction in the probate courts and failed to give concurrent jurisdiction to the circuit courts. There the court held that the old equity proceeding to sell a decedent's land to pay his debts was abolished by the statutes providing for the sale of such lands in the probate courts, the court saying, "the whole doctrine of equitable assets, marshalling assets in equity for the payment of debts, and bills for discovery of assets and account, is without application here, save in so far as the principles underlying those proceedings may be invoked in illustration or explanation of analogous (*sic*) remedies afforded by our statute."

109. 353 Mo. 40, 182 S.W.2d 320 (1944) (en banc).

When the county court holds a hearing on the sanity of a proposed indigent county patient for whose keep it will have to pay, it is exercising its jurisdiction as a court of record to transact county business, or at least business prescribed by law. When the probate court holds a similar hearing for the purpose of appointing a guardian and administering an estate, it is transacting probate business. But they are not the same, and have not been through the years. Matters of probate business, as commonly understood and under all the authorities, pertain to the proving of wills, the appointment of guardians and curators, and the administration and settlement of estates of decedents, incompetents and the like. 3 Words and Phrases, Perm. Ed., p. 203; 26 Words and Phrases, Perm. Ed., p. 750; 34 Words and Phrases, Perm. Ed., p. 59.<sup>110</sup>

Although other opinions of the supreme court (and courts of appeals as well) have touched upon the jurisdiction of probate courts under the 1875 constitution, it is believed that the foregoing cases include all decisions of the supreme court that have any substantial bearing upon the question involved, and since, as will be seen, most of the language of the 1875 constitution relating to probate court jurisdiction was carried over into the 1945 constitution, they are important aids to the interpretation of the latter.

### 5. The 1945 Constitution

Judge Ellison, in *State ex rel. Kowats v. Arnold*<sup>111</sup> (en banc) after remarking that "Sec. 16, Art. V, Const. 1945 is not by any means as clear and definite as we might wish," observed that the new constitution made no change whatever in the jurisdiction of probate courts except that it was "perhaps increased because of the elimination of county courts as judicial tribunals." That no major change in probate court jurisdiction was intended is apparent from the remarks of the chairman of the judiciary committee of the 1945 constitutional convention:

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110. *Id.* at 44, 182 S.W.2d at 323. The court further said at page 44-45, 182 S.W.2d at 323:

The general authorities show such lunacy inquisitions are governed by statute, 28 Am. Jur. § 10, p. 661; and that historically the power was derived from the Kings of England, thence passed to the chancellor, and in this country to the people who have left it with the Legislature. 32 C.J. §§ 162, 165, pp. 626, 628. The Legislature has implemented the power through the county court and probate court statutes mentioned in the beginning.

111. 356 Mo. 661, 204 S.W.2d 254 (1947) (en banc).



Our thought was that since probate jurisdiction was well established and well understood under the present language and on the whole . . . satisfactory, it was wiser to adhere to the language with which the courts were all familiar and which, in many instances, had been construed. . . .<sup>112</sup>

The almost identical jurisdictional language of the two constitutions will appear from the following comparison:

*1875 Constitution*

*Art. VI, Sec. 34.* The General Assembly shall establish in every county a probate court, which shall be a court of record, and consist of one judge, who shall be elected. Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians; and the sale or leasing of lands by administrators, curators and guardians; and also jurisdiction over all matters relating to apprentices: *Provided*, That until the General Assembly shall provide by law for a uniform system of probate courts, the jurisdiction of probate courts heretofore established shall remain as now provided by law.

*Art. VI, Sec. 35.* Probate Courts shall be uniform in their organization, jurisdiction, duties and practice, except that a separate clerk may be provided for, or the judge may be required to act, *ex officio*, as his own clerk.

*1945 Constitution*

*Art. V, Sec. 16.* There shall be a probate court in each county with jurisdiction of all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by executors, administrators, curators and guardians, and of such other matters as are provided in this constitution.

*Art. V, Sec. 17.* Probate courts shall be courts of record and uniform in their organization, jurisdiction and practice, except that a separate clerk may be provided for, or the judge may be required to act *ex officio* as his own clerk.

It will be seen that in only three respects does the foregoing jurisdictional language of the two constitutions differ. The 1945 instrument contains no reference to apprentices, and purports to expand the constitu-

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112. DEBATES OF 1945 CONSTITUTIONAL CONVENTION 2622 (1944).

tional jurisdiction of probate courts to include sales of land by executors, and to include "such other matters as are provided in this constitution."<sup>113</sup>

It will also be observed that the 1945 constitution contains no express direction, as does the 1875, to the general assembly to establish probate courts. Because of the absence of such direction, it was at one time suggested that the jurisdictional provisions, article V, section 16, of the 1945 constitution, were self-executing. If self-executing, they would operate as direct grants of jurisdiction to the probate courts, and no implementing legislation would be necessary to make them effective. The statutes on the subject of probate court jurisdiction would be totally ineffective except possibly as unauthorized legislative constructions of the constitutional language. Further, if section 16 were self-executing, the supreme court and courts of appeals would of necessity look directly to article V, section 16 to determine probate court jurisdiction, and it would follow that all reported decisions of such courts under the present constitution concerning probate court jurisdiction should be treated as interpretations of the constitutional, rather than the statutory, language.

The better view, however, would seem to be that the jurisdictional language of section 16 is not self-executing, and that implementing jurisdictional legislation is necessary to make it effective. The reason, of course, that the 1945 constitution did not, as did the 1875, direct the general assembly to establish probate courts in each county was that such courts had long since been established. It will also be noted that the 1945 constitution expressly provides that probate courts shall have jurisdiction (1) to grant letters, (2) to appoint guardians, (3) to settle accounts of executors, administrators and guardians, (4) to order the sale or leasing of lands, and, (5) over "all matters pertaining to probate business." Whether or not the first four of these purported grants of jurisdiction are capable of being given effect without legislation, it is submitted that the fifth, *i.e.*, jurisdiction over all matters pertaining to probate business, is not. What matters pertain to probate business? At

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113. The added language actually contributed nothing to the constitutional jurisdiction of such courts. There was no other probate court jurisdiction "provided in this constitution," the language having been added solely because of the intent that in certain counties under article V, section 18, the individual who is judge of the probate court shall also be judge or magistrate of the magistrate court. See note 17 *supra*. Since the two courts are separate and distinct, with wholly unrelated jurisdictions, one questions the reasoning which prompted the added language. As to the addition of the word "executors," see note 33 *supra*.

the time the 1875 and 1945 constitutional provisions were written, jurisdiction over the various matters relating to the administration of estates of decedents, minors, and incompetents was conferred entirely by statutes and statutory jurisdiction must, therefore, have been contemplated by the term "probate business." If it doesn't refer to statutory jurisdiction, the term is so vague as to preclude its operation as a workable rule of law.

With this in mind, the question of whether the constitutional provision is self-executing is substantially similar to that involved in the recent case of *In re V*———. <sup>114</sup> There the supreme court was called upon to determine whether that part of article V, section 20, of the 1945 constitution, providing that "in counties of less than 70,000 inhabitants magistrate courts shall have concurrent juvenile jurisdiction with the circuit court" was self-executing. In holding that it was not, Hollingsworth, J., speaking for the court, said:

We are forced to the conclusion that the meaning and intended scope of the provision in question is so indefinite as to render it impossible of execution without specific legislative definition of its precise jurisdiction of juvenile matters and implementation of its trial and appellate procedure and its administration. <sup>115</sup>

The 1945 constitution retained the requirement in article V, section 17, *supra*, that the jurisdiction of probate courts be uniform, indicating rather clearly that implementing legislation was contemplated. If the jurisdictional provisions of the 1945 constitution were self-executing, the sole source of probate court jurisdiction would be article V, section 16, which applies alike to all courts, and there would be no reason whatever for providing that the jurisdiction of such courts be uniform. In retaining the uniformity clause, the drafters of the 1945 constitution may be presumed to have known that in the 1875 constitution it contemplated legislative action for its implementation.

The debates of the 1945 constitutional convention indicate that it was not the intention of the delegates to terminate the century-old authority of the general assembly to prescribe probate court jurisdiction. The chairman of the judiciary committee, for example, speaking of probate courts, suggested that:

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114. 306 S.W. 2d 461 (Mo. 1957) (en banc).

115. *Id.* at 465.

. . . there will some day be a single probate code which will unify all their power and jurisdiction and authority, and I would be reluctant to do anything which would in any way hamper that very desirable work.<sup>116</sup>

He commented again:

If it (General Assembly) were to . . . specify additional duties for the court which were in any way germane to the transaction of probate business in the administration of estates, I am confident the (Supreme) court would say that it could probably be given the power under this Constitution.<sup>117</sup>

None of the decisions of the supreme court or courts of appeals under the 1945 constitution, other than the decision in *State ex rel. Kowats v. Arnold*, *supra*, is concerned with the constitutional validity of probate jurisdictional statutes. Only a few relate in any way to the question of probate court jurisdiction, and most of these involve the extent to which the probate courts may exercise "equitable" jurisdiction in the absence of specific statutory authority.<sup>118</sup> In *In re Foster's Estate*,<sup>119</sup> for example, where an attorney sought to recover in the probate court for beneficial services rendered an estate on behalf of an heir, rather than the executor, the court said:

. . . since there is no statute authorizing allowance of a claim for attorney's fees or services not rendered under a contract or as an expense of the administrator or executor, the Probate Court has no power to make such an allowance and there is no statute to which the equitable relief or the appliance of an equitable remedy, as maintained by appellants, can apply in this case.<sup>120</sup>

This and similar cases demonstrate that the courts, even under the 1945 constitution, continue to look primarily to statutes, rather than to the constitution itself, to determine probate court jurisdiction. While neither the cases under the 1945 or any previous constitution furnish an all-purpose definition of the term "all matters pertaining to probate business," they do provide valuable insights into the attitude of the supreme court and courts of appeals toward the subject of probate court

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116. DEBATES OF 1945 CONSTITUTIONAL CONVENTION 2623 (1944).

117. *Id.* at 2647.

118. *E.g.*, *Tracy v. Sluggett*, 360 Mo. 1120, 323 S.W.2d 926 (1950); *In re Oberman's Estate*, 281 S.W.2d 549 (St. L. Ct. App. 1955); *In re Christian Brinkop Real Estate Co.*, 215 S.W.2d 70 (St. L. Ct. App. 1948).

119. 290 S.W.2d 185 (St. L. Ct. App. 1956).

120. *Id.* at 189.

jurisdiction. They constitute persuasive evidence that such courts consider the matter of probate court jurisdiction to be, in the first instance, a proper subject for the discretion and control of the general assembly, and that the constitutional provisions are intended only to insure uniformity of probate court jurisdiction and to prevent the imposition on probate courts of jurisdiction over matters wholly unrelated to "probate business."

#### IV. VALIDITY OF THE NEW POWERS

##### A. *Generally*

The 1955 code was designed by its drafters "to operate within present constitutional limitations."<sup>121</sup> Most of the new probate court powers under the code are clearly "matters pertaining to probate business" and hence of undoubted constitutional validity. For the most part, these powers merely supplement or clarify existing powers and no useful purpose would be served by discussing them here.

With respect to certain of the other new powers under the code, however, as for instance, those relating to equity jurisdiction, testamentary trusts, determination of rights of succession in real property, construction of wills and appointment of guardians, it is believed that further discussion is desirable.

##### B. *Equitable Powers*

Probably no aspect of the Missouri law of administration is as misunderstood as the nature and extent of the equitable powers of probate courts. Any consideration of such powers would be incomplete without at least a brief examination into the history and development of the court itself.

In the 18th century, when American colonial courts of justice were being established, English jurisdiction over probate matters was divided among the ecclesiastical, common law and chancery courts.<sup>122</sup> However, "the extent of jurisdiction exercised by the ecclesiastical courts . . . included but a small proportion of the judicial authority involved in

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121. JOINT PROBATE LAWS REVISION COMMITTEE REPORT TO 68TH GENERAL ASSEMBLY (1955).

122. Simes and Basye, *The Organization of the Probate Court in America*, 42 MICH. L. REV. 965, 967 (1944); Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107, 122 (1943).

the adjudication of questions arising in the settlement of dead men's estates,"<sup>123</sup> and the common law courts "had no machinery adapted to the administration of estates."<sup>124</sup> It was chancery, therefore, with its flexible procedure, which assumed jurisdiction of most probate matters.<sup>125</sup>

Although probate courts were an American judicial innovation,<sup>126</sup> in defining their jurisdiction and powers American legislatures drew heavily on the English, and especially the chancery, practice. As a noted authority observes:

. . . the doctrines and rules of the law regulating the administration of decedents' estates whether testate or intestate, have been reduced to a statutory and often to a minutely codified form. The provisions of these statutes are to a large extent the principles and doctrines concerning the subject-matter which have been settled by the English and American courts of equity through a long course of decision.<sup>127</sup>

It was essential to the effective operation of probate courts that they be vested with powers which were, for the most part, equitable in origin. The extent of the equitable powers thus conferred upon such courts should not be minimized, for there is evidence that they accounted for the majority of causes entertained in the English chancery courts. Pomeroy, for example, states:

Equity, in the exercise of its unrestricted powers, has jurisdiction in the matter of settling the personal estates of deceased persons; and in England this is undoubtedly the most important branch of the equitable jurisprudence—a very large proportion of the suits brought in the Court of Chancery are administration suits.<sup>128</sup>

In view of the equitable origin and nature of most probate proceedings, one may wonder at some of the judicial comment on the subject. For a time, for example, it was asserted that probate courts had "no equity jurisdiction"<sup>129</sup> and "no equitable powers."<sup>130</sup> These doubtful

123. 1 WOERNER, *AMERICAN LAW OF ADMINISTRATION* § 140 (3d ed. 1923).

124. Simes and Basye, *supra* note 122, at 972.

125. *Id.* at 972.

126. Limbaugh, *The Sources and Development of Probate Law*, WASH. U.L.Q. 419, 427 (1956).

127. 1 POMEROY, *EQUITY JURISPRUDENCE* § 347 (5th ed. 1941).

128. 1 *id.* at § 77.

129. *E.g.*, *Morrow v. Morrow*, 113 Mo. App. 444, 456, 87 S.W. 590, 593 (K.C. Ct. App. 1905).

130. *E.g.*, *In re Glover*, 127 Mo. 153, 164, 29 S.W. 982, 985 (1895).

doctrines were re-examined and qualified in *State ex rel. Baker v. Bird*, *supra*,<sup>131</sup> however, and ultimately gave way to what has been termed the "vague abstraction that although the [probate] courts have no general equity jurisdiction, equitable principles may be applied."<sup>132</sup>

The purposes of this article would not be served by an exhaustive analysis of the extensive case literature on the equitable powers of probate courts. One or two observations on the subject seem appropriate, however. It is manifest, of course, that probate courts do not have general equity jurisdiction, that is, the same equitable jurisdiction as the circuit courts, since probate courts are limited in their jurisdiction to matters pertaining to probate business. It is equally certain that prior to the enactment of the code, the appellate courts were unwilling to construe the statutory grant of jurisdiction over "all matters pertaining to probate business"<sup>133</sup> as a grant of plenary equity powers to probate courts, even in the field of probate law.<sup>134</sup> It was frequently said that such courts were limited to those powers "expressly conferred upon them by the statute" or "necessarily incident to the duties imposed."<sup>135</sup>

The reluctance of the appellate courts to attribute powers to the probate courts without specific statutory sanction is not difficult to understand. Prior to the 1945 constitution probate judges were not required to be licensed to practice law, and most were not lawyers.<sup>136</sup>

131. 253 Mo. 569, 162 S.W. 119 (1913) (en banc). Although as late as 1955 it was asserted in *Helliker v. Bram*, 277 S.W.2d 556 (Mo. 1955), that probate courts "do not have jurisdiction of equitable causes," a careful reading of the case indicates that the court was referring to general equity jurisdiction.

132. Note, *Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees*, 48 YALE L.J. 1273, 1277 (1939). And it is also said that such courts "do not have common-law jurisdiction," but may apply "common-law principles." 1 LIMBAUGH, MISSOURI PRACTICE § 506 (1935).

133. § 481.020, RSMo 1949; now § 472.020, RSMo 1957 Supp.

134. "We are first referred to Sec. 481.020. V.A.M.S. This section is nothing more than a recital of the jurisdiction of the probate court following the constitutional provisions. Art. V, Sec. 16, V.A.M.S. It confers no specific power." *In re Foster's Estate*, 290 S.W.2d 185, 187 (St. L. Ct. App. 1956). "Where the statute has not clearly devolved jurisdiction on the County Court, we are not disposed to give it by implication." *Coil v. Pitman's Adm'r*, 46 Mo. 51, 57 (1870).

135. *Bramell v. Cole*, 136 Mo. 201, 210, 37 S.W. 924, 926 (1896).

136. "But the probate court is not a court of general chancery powers. In the distribution of estates it exercises a jurisdiction which is carefully defined . . . by statute. The statute is the grant to those courts of their powers, and it is the highest importance that in exercising those powers they should keep within the limits marked out by the statute. The reason is that many of the judges of our courts of probate are men unlearned in the law. . . ." *Bauer v. Gray*, 18 Mo. App. 164, 168 (St. L. Ct. App. 1885).

Those who were lawyers could practice in other courts.<sup>137</sup> The compensation of probate judges depended upon the fees collected by the court,<sup>138</sup> which were frequently inadequate to attract qualified persons. And because such fees often depended upon the extent and value of the estate assets under court supervision, some judges came to be looked upon as partisans of such estates in litigated matters.<sup>139</sup>

Probably the most significant of the new powers granted probate courts by the code is that of plenary equity powers in the field of probate law. Section 472.030 vests such courts with:

. . . the same legal and equitable powers to effectuate its jurisdiction and to enforce its orders, judgments and decrees in probate matters as the circuit court has in other matters. . . . The foregoing language derives from the Model Probate Code,<sup>140</sup> and is intended to establish that the court's jurisdiction in probate matters is in no sense inferior to that of a court of general jurisdiction in other matters.<sup>141</sup>

The effect of a grant to probate courts of such jurisdiction has been succinctly stated:

This removal of the disability of the probate courts to render adequate relief in all situations makes possible the attainment of the goal underlying and inducing probate finality. All questions involved in the administration of an estate can be determined by the same court and a more expeditious and convenient settlement can be achieved without the delays of filing new pleadings and awaiting trial of new and separate actions.<sup>142</sup>

The authority of the legislature to confer equity powers upon the probate courts has been recognized in several cases,<sup>143</sup> and would appear to be unlimited so long as they are germane to probate business. The constitution itself makes no attempt to apportion jurisdiction among the

137. § 2444, RSMo 1939.

138. § 13404, RSMo 1939.

139. See, for example, DEBATES OF 1945 MISSOURI CONSTITUTIONAL CONVENTION 2632 (1944), where it was asserted that the average probate judge was "definitely a party of interest on the side of the estate."

140. SIMES AND BASYE, MODEL PROBATE CODE § 6, at 46 (1946).

141. *Ibid.* See also Twyeffort, *The Model Probate Code*, 22 N.Y.U.L.Q. REV. 63, 65 (1947); Rheinstein, *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534, 536 (1948); Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321, 324 (1947).

142. Note, *Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees*, 48 YALE L.J. 1273, 1278 (1939).

143. *E.g.*, *Bramell v. Cole*, *supra* note 135.



various courts on the basis of its equitable, legal or other nature, and the fact that equitable jurisdiction is involved would appear to be of no particular significance. This may be illustrated by a single example. It would be difficult to find proceedings more purely equitable than specific performance or discovery,<sup>144</sup> yet statutes authorizing the same have been found in our probate code for more than a century<sup>145</sup> and their constitutional validity has never been questioned. If the legislature can confer upon the court equitable powers with respect to individual matters of probate business, there would seem to be no reason in logic why it cannot confer plenary equitable powers with respect to all matters of probate business.

In Kansas, where the constitutional provisions relating to the jurisdiction of probate courts are quite similar to our own,<sup>146</sup> the constitutional validity of a statute reciting that such courts "shall have and exercise such equitable powers as may be necessary and proper fully to hear and determine any matter properly before such courts"<sup>147</sup> has been upheld.<sup>148</sup>

No attempt will be made here to specify the occasions for the exercise of the plenary powers conferred by section 472.030. Similar statutes may be found in an increasing number of states,<sup>149</sup> however, in keeping with the modern tendency to expand the jurisdiction of probate courts with respect to matters ancillary and collateral to their recognized powers,<sup>150</sup> and the application of such statutes to specific situations has been treated elsewhere.<sup>151</sup>

144. STORY, 2 EQUITY JURISPRUDENCE §§ 928, 992 (14th ed. 1918).

145. RSMo 1825, at 100, § 22 (discovery); RSMo 1835, at 53, § 24 (specific performance).

146. KAN. CONST. art. 3, § 8: "There shall be a probate court in each county, which shall be a court of record, and have such probate jurisdiction and care of estates of deceased persons, minors, and persons of unsound minds, as may be prescribed by law, and shall have jurisdiction in cases of habeas corpus. . . ." Of course, the jurisdiction which "may be prescribed by law" must relate to probate matters. *Citizens Building & Loan Ass'n v. Knox*, 146 Kan. 734, 74 P.2d 161 (1937).

147. KAN. GEN. STAT. ANN. 59-301(12) (1949).

148. *In re Hoover's Estate*, 156 Kan. 31, 131 P.2d 917 (1943).

149. *E.g.*, OHIO REV. CODE ANN. § 2101.24: "The court has plenary power in law and equity to dispose of any matter properly before the court." See also *Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees*, *supra* note 132.

150. 1 POMEROY, EQUITY JURISPRUDENCE § 349 (5th ed. 1941).

151. *Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees*, *supra* note 132; BARTLETT, KANSAS PROBATE LAW AND PRACTICE §§ 108-116 (rev. ed. 1953); Bartlett, *The Equity Powers of the Probate Court*, 11 KAN. B.A.J. 134 (1942).

### C. Testamentary Trusts

It was urged upon the drafters of the code and the general assembly that legislation attempting to vest probate courts with jurisdiction over testamentary trusts would be unconstitutional. This point of view, based primarily upon a 1911 decision of the Illinois supreme court in *In re Mortenson's Estate*,<sup>152</sup> was considered at some length and rejected.

The *Mortenson* case concerned the constitutionality of a statute granting probate and county courts jurisdiction over testamentary trusts, and a divided court ruled that:

The supervision and control of trusts, based on the fact that they are created by will, are not embraced within the words 'probate matters,' as used in the [Illinois] constitution.<sup>153</sup>

Two judges dissented, stating:

. . . from an examination of the statutes and decisions in other jurisdictions, that the great weight of authority would include testamentary trusts and supervision and settlement of such trust accounts in the term 'probate matters.'<sup>154</sup>

The *Mortenson* case, as an aid to the interpretation of our own constitution, is of doubtful value. It appears beyond argument, for example, that the Missouri constitutional terminology, "all matters pertaining to probate business,"<sup>155</sup> is much broader in scope than the words "all probate matters"<sup>156</sup> contained in the Illinois constitution. Nor should it be overlooked that at the time of the *Mortenson* decision, as now, judges of most Illinois courts possessing probate jurisdiction were not required to be lawyers.<sup>157</sup> That appellate courts are inclined to take such a fact into consideration in defining the jurisdiction of the courts affected has been demonstrated elsewhere in this article.<sup>158</sup>

152. 248 Ill. 520, 94 N.E. 120 (1911).

153. *Id.* at 529, 94 N.E. at 123.

154. *Id.* at 531, 94 N.E. at 123. The dissenting opinion also inquired at page 531, 94 N.E. at 123, "if testamentary trusts are not fairly included within the term 'probate matters,' then how can it be argued that the closing up of partnership estates is a probate matter?"

155. Mo. CONST. art. V, § 16 (1945).

156. ILL. CONST. art. VI, § 20 (1870).

157. Simes and Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 139 (1944).

158. See note 136 and text at notes 133 through 139 *supra*. See also *Barnes v. Boatmen's Nat'l Bank*, 355 Mo. 1136, 199 S.W.2d 917 (1947), and note 56 *supra*.

It does not appear that other states with constitutional provisions relating to the jurisdiction of probate courts which are the equivalent of, or are more restrictive than, those of Missouri, have followed Illinois. In New Hampshire, for example, where the constitutional jurisdiction of probate courts is limited to "all matters relating to the probate of wills, and granting letters of administration,"<sup>159</sup> the validity of statutes of long standing giving such courts jurisdiction over testamentary trusts<sup>160</sup> does not seem to have been questioned. Roughly the same situation obtains in Kansas, which has enacted, with slight modifications, the Uniform Trustees Accounting Act<sup>161</sup> as part of its probate code.<sup>162</sup> A leading authority on Kansas probate law comments as follows:

Since the constitution of the state grants to probate courts 'such probate jurisdiction and care of estates of deceased persons, minors, and persons of unsound minds, as may be prescribed by law,' it seems hardly debatable that the supervision and settlement of the accounts of testamentary trustees and trustees of living trusts created for the benefit of minors or incompetent persons by the probate court is really a testamentary and probate matter rather than a chancery case; and that the administration of a trust fund, by testamentary trustees, or by trustees for the benefit of minors or others under disability, is clearly within the jurisdiction of probate courts.<sup>163</sup>

Recitals, per dicta, that Missouri probate courts have no trust jurisdiction may be found in various of our supreme court and court of appeals decisions.<sup>164</sup> In no instance, however, have such courts ever declared unconstitutional *a statute* conferring such jurisdiction on a probate court, and the absence of statutory, rather than constitutional, jurisdiction, is necessarily the basis for all such pronouncements.<sup>165</sup>

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159. N.H. CONST. pt. 2, art. 80 (1955).

160. *Inter alia*, N.H. REV. STAT. ANN. §§ 547:5, 564:6 (1955).

161. 9C UNIFORM LAWS ANN. 273 (1957).

162. KAN. GEN. STAT. ANN. 59-1601; 59-1611; 59-1702; 59-1711; 59-2253; 59-2256 (1949).

163. Bartlett, *Equity Powers of the Probate Court*, 11 KAN. B.A.J. 134, 135 (1942).

164. *E.g.*, *Bolles v. Boatmen's Nat'l Bank* 363 Mo. 949, 961, 255 S.W.2d 725, 731 (1953); *In re Schield's Estate*, 250 S.W.2d 151 (Mo. 1952); *Bramell v. Cole* 136 Mo. 201, 37 S.W. 924 (1896); *Morrow v. Morrow*, 113 Mo. App. 444, 87 S.W. 590 (K.C. Ct. App. 1905).

165. See text at notes 74-75 *supra*. Although the court in *In re Schield's Estate*, *supra* note 164, at 158, implies that probate courts do not have constitutional jurisdiction to decide whether a person acting as attorney for a testator's estate thereby disqualifies himself to act as trustee under the will, cases cited in support of the point are of the character hereinbefore referred to, involving statutory, rather than constitutional, considerations.

Certainly the validity of section 473.643, which has been in effect since 1885, and pursuant to which countless trustees have been appointed, supervised and discharged by the probate courts, has never been questioned.<sup>166</sup>

Wide acceptance of the proposition that supervision of testamentary trusts is properly a matter of probate jurisdiction is attested by statutes to that effect in a majority of states.<sup>167</sup> The desirability and feasibility of such statutes is not difficult to demonstrate. Supervision and control of fiduciary relationships is one of the primary duties of the probate court. The probate court function of admitting the parent will to probate and managing the estate assets during administration are necessary steps in the creation of testamentary trusts. The nature and value of the corpus is determined by, and title thereto passed to, the testamentary trustee by a probate court order of distribution. By virtue of the administration of an estate, probate court personnel may be expected to have acquired a degree of familiarity with the property interests involved, the trustees (frequently the executors) and the beneficiaries to be protected, which is often difficult of attainment by a circuit court. The administrative machinery of probate courts, particularly in metropolitan areas, permits of an expeditious, inexpensive examination of accounts without the necessity or expense of the appointment of a referee.

When a testamentary trust is established, the devolution of the testator's property to its ultimate beneficiaries is not complete until the trust is terminated. It does not seem inappropriate that the probate courts should be required to supervise the process, just as it supervises devolution of property to heirs and devisees in other cases. It sometimes occurs that certain of the beneficiaries of trusts cannot be ascertained for years, often have no knowledge of the existence of the trust<sup>168</sup> and are to that extent solely dependent upon the judgment and integrity of

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166. The court in *Memmel v. Thomas*, 238 Mo. App. 403, 181 S.W.2d 168 (K.C. Ct. App. 1944) emphasizes that the statute intends the creation of a trust.

167. Statutes conferring varying degrees of such jurisdiction on probate courts or their equivalents are in effect in the following states: Arizona, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Utah, Vermont, Washington and Wisconsin.

168. *E.g.*, in the case of a bequest to a trustee for charitable uses, sufficiently definite to be valid, but with beneficiaries so vague as to be enforceable only by the Attorney General, to whose attention the matter may never come.

the trustee. Not all trustees, unfortunately, are responsible corporations or individuals, and in such cases it would seem that the probate court, which has knowledge of the trust and its nature by virtue of the decree of distribution, should be vested with the duty of some measure of supervision.

Incidental, perhaps, to the issue of constitutionality, but certainly not altogether unimportant, is the question of the extent of probate court jurisdiction over testamentary trusts under the present language of the code. Under the previous law, such jurisdiction was the exclusive province of the circuit courts pursuant to article V, section 14, of the constitution and in the absence of legislation vesting it elsewhere. The circuit court jurisdiction, however, was in many respects inadequate, even though its traditional chancery powers were supplemented by statutes such as sections 456.210 and 456.220, Missouri Revised Statutes (1949) and the Declaratory Judgments Act.<sup>169</sup> It has been noted, for example, that circuit courts cannot lawfully require, approve or even permit periodic settlements of the accounts of testamentary trustees, except in the single instance where a successor trustee has been appointed by the court.<sup>170</sup>

It has been suggested that the code did not disturb the jurisdictional status quo with respect to testamentary trusts. The argument advanced in support of this theory is that the only direct reference in the code to such trusts is that found in section 472.020, providing that "the probate court has jurisdiction . . . of the administration of testamentary trusts," which language, it is said, is so general in terms as to be meaningless until further specific implementing legislation is enacted. This argument, however, would seem to ignore the scope, spirit and purpose of section 472.030, granting the probate court "the same legal and equitable powers to effectuate its jurisdiction and enforce its orders, judgments and decrees in probate matters as the circuit court has in other matters."

It is not necessary here to restate the intent of said section 472.030, which has been discussed elsewhere in this article,<sup>171</sup> other than to observe that in matters cognizable by the court, the equitable powers

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169. §§ 527.010-.140, RSMo 1949.

170. Overstreet, *Appointment of Successor Trustees, Trust Administration and Settlements in Missouri*, 13 Mo. L. Rev. 255, 269 (1948).

171. See *Equitable Powers*, pt. IV, § B, of this article, esp. text at notes 140-42.

granted thereunder are plenary and certainly sufficient to confer upon the probate court the equivalent of the non-statutory jurisdiction over testamentary trusts previously exercised by the circuit court.

In view of article V, section 14 of the constitution, providing that circuit courts shall have "concurrent . . . jurisdiction as provided by law," it seems clear that such courts continue to have the statutory jurisdiction over testamentary trusts conferred upon them by chapter 456, Missouri Revised Statutes (1949) and the Declaratory Judgments Act.<sup>172</sup> Not so easily answered is the question of whether or not enactment of the code divested circuit courts of their previous non-statutory jurisdiction over testamentary trusts. The desirability of further trust legislation in Missouri is undeniable, not only to clarify the legislative intent respecting jurisdiction, but also to specify the rights and responsibilities of beneficiaries and trustees.

#### D. Determination of Rights of Succession in Real Property

Prior to the code, probate courts in Missouri had no jurisdiction to determine rights of succession in the real property of a decedent, and the decree of distribution of personal property was not determinative or conclusive with respect to land.<sup>173</sup> The customary method of establishing heirship in such instances was by the use of affidavits.<sup>174</sup> The infirmities of such a procedure have been noted,<sup>175</sup> and it is said that "only the inherent honesty of people and general neighborhood knowledge keeps such a system from breaking down."<sup>176</sup>

Section 473.617 of the code provides that the final decree of distribution shall specify the successors in interest to the real, as well as the personal estate of a decedent, and that such decree "is a conclusive determination of the persons who are the successors in interest to the estate<sup>177</sup> of the decedent and the extent and character of their interests therein."

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172. §§ 527.010-140, RSMo 1949.

173. 3 WOERNER, *AMERICAN LAW OF ADMINISTRATION* § 562a (3d ed. 1923); Basye, *Proof of Succession to Land under the New Missouri Probate Code*, 25 U. KAN. CITY L. REV. 67, 71-72 (1957).

174. 4 GILL, *REAL PROPERTY LAW IN MISSOURI 1756* (1954). See also *MISSOURI TITLE EXAMINATION STANDARDS* 7, 8 (Sept. 1953) (originally printed in 9 *JOUR. MO. BAR* 179-188).

175. 1 GILL, *op. cit. supra* note 174, at 75.

176. Basye, *supra* note 173, at 71.

177. "Estate" means both real and personal property. § 472.010-11, RSMo 1957 Supp.

Section 473.663 furnishes a means for making a similar determination when no administration has been had on an estate. Under both sections the real property is, of course, described in the decree, which thus becomes a muniment of title, to be recorded in every county of the state in which any such land is situated.<sup>178</sup>

Statutes granting the same or similar jurisdiction are to be found in the probate codes of most states.<sup>179</sup> In many such states the executor or administrator takes possession of real property of the decedent during the administration, and the final decree amounts to a distribution of such real property pursuant to a determination of the interests of the heirs and devisees. In Missouri and six other states,<sup>180</sup> however, the probate courts will assume control of land only under certain circumstances,<sup>181</sup> but this does not mean that such court cannot acquire jurisdiction to make a decree concerning rights of succession to it.<sup>182</sup>

The case for the constitutional validity of the power of Missouri probate courts to enter such a decree has been ably stated:

Clearly probate courts are the logical tribunals in which to vest this function, assuming that they are manned by judges amply qualified to pass on questions of heirship or to construe wills. Since it is their peculiar function to do everything else customary in administration proceedings, it would seem most unnatural to one acquainted with the history of our probate system that such a function should be performed elsewhere than in the court having jurisdiction of such a proceeding. This constitutional power has now been vested in probate courts in these seven states, including Missouri.<sup>183</sup>

The similarity of the Kansas constitution to our own in the matter of probate court jurisdiction has been noted.<sup>184</sup> Prior to the enactment of the present Kansas probate code<sup>185</sup> it had been repeatedly held that probate courts had no authority to adjudge heirship as to realty.<sup>186</sup>

178. § 473.617, RSMo 1957 Supp. § 473.103 permits distributees to make record evidence of title to real property in small estates without a probate court decree.

179. Basye, *supra* note 173, at 70.

180. *Id.* at 76.

181. *E.g.*, under §§ 473.263-2, .283-1, RSMo 1957 Supp.

182. Basye, *supra* note 173, at 76.

183. *Id.* at 72.

184. See note 146 *supra*.

185. Kan. Laws 1939, c. 180.

186. BARTLETT, KANSAS PROBATE LAW AND PRACTICE § 100 (rev. ed. 1953).

Kansas statutes<sup>187</sup> now provide authority for probate court determination of rights of succession in land either as a part of, or in the absence of, an administration proceeding, and of such statutes it has been declared:

There is nothing in the state constitution which forbids the legislature from granting to the probate courts jurisdiction over the real property of decedents equal to its jurisdiction over the personal property of decedents; and that is what the legislature has done. The probate court has jurisdiction to determine those entitled to the property, both real and personal, as heirs, devisees, and legatees of the decedents.<sup>188</sup>

The Texas constitution provides that county courts "shall have the general jurisdiction of a Probate Court; they shall probate wills . . . grant letters . . . settle accounts of executors, transact all business appertaining to deceased persons . . . including the settlement, partition and distribution of estates of deceased persons. . . ."<sup>189</sup> The constitutional validity of a legislative grant of authority to such county courts, which are the equivalent of our probate courts, to decree rights of heirship in real property<sup>190</sup> has been established.<sup>191</sup>

Missouri cases which declare that the probate courts have no jurisdiction to decide real estate *title* controversies<sup>192</sup> are not in point. Such cases usually involve the nature and extent of the title the decedent himself had; and a determination of this issue is not necessary to a decree of heirship or succession. Such a decree does not, of course, purport to quiet title in the heirs or devisees, but simply provides, in effect, that such descendible interest as the decedent had, if any, vests in his heirs or devisees according to the court's determination.<sup>193</sup> A somewhat equivalent situation is presented in *Trent's Administrator v. Trent*,<sup>194</sup> where

187. KAN. GEN. STAT. ANN. 59-2249 (on final settlement), 59-2250 to 59-2252 (when no administration) (1949).

188. BARTLETT, *op. cit. supra* note 186, § 100, citing *Jardon v. Price*, 163 Kan. 294, 181 P.2d 469 (1947).

189. TEX. CONST. art. V, § 16 (1876).

190. 17A TEX. REV. CIV. STAT. § 48 (1956).

191. *Zomora v. Gonzales*, 128 S.W.2d 166 (Tex. Civ. App. 1939).

192. *E.g.*, *State ex rel. Kell v. Buchanan*, 357 Mo. 750, 210 S.W.2d 359 (1948); *In re Estate of Strom*, 213 Mo. 1, 111 S.W. 534 (1908).

193. § 473.583, RSMo 1957 Supp. See also 26 V.A.M.S. 15-21 (Supp. 1957) (forms for final settlement and distribution of estate approved by forms committee, Missouri Probate Judges' Association).

194. 24 Mo. 307, 311 (1857).



it was held that a title controversy over land inventoried in an estate would not necessarily prevent the sale thereof to pay debts, since "the deed upon a sale by an administrator of real estate . . . only conveys to the purchaser all the right, title and interest which the intestate had in the same."

The problems involved in determining rights of heirship and succession in real property are not unfamiliar ones to probate courts. Such determinations are necessarily a part of the computation of Missouri transfer and inheritance tax,<sup>195</sup> which has been a function of the courts since 1917. While such adjudications with respect to the assessment of the tax do not constitute muniments of title and are not binding upon the heirs or devisees,<sup>196</sup> the same legal principles are applicable.

When administration is had on an estate, the determination of heirship and succession with respect to real property is incorporated into the final decree of distribution.<sup>197</sup> Section 473.587 provides that the executor or administrator shall give notice by publication, and by ordinary mail, to all interested heirs and devisees whose names and addresses are disclosed by the court records "that he will file final settlement and petition for distribution." The code further provides that the entire administration of an estate is one proceeding in rem and that only the notice by publication of the granting of letters is jurisdictional.<sup>198</sup> It contemplates that the failure of the executor or administrator to give, or any interested person to receive, notice of the filing of the petition for distribution will not affect the validity of the final decree.<sup>199</sup>

It has been suggested, however, that since probate courts in Missouri do not assume jurisdiction of land except under special circumstances, and since proceedings to determine rights of succession in real property are not, from a historical standpoint, part of administration proceedings, notice of such proceedings, in addition to the initial jurisdictional notice of the granting of letters, is necessary to satisfy due process.<sup>200</sup> This

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195. c. 145, RSMo 1949.

196. *State ex rel. Kell v. Buchanan*, *supra* note 192.

197. § 473.617, RSMo 1957 Supp.

198. § 473.013, RSMo 1957 Supp.

199. SIMES AND BASYE, MODEL PROBATE CODE § 62, at 91 (1946).

200. Basye, *supra* note 173, at 74.

suggestion is based upon an interpretation of *Mullane v. Central Hanover Bank and Trust Co.*<sup>201</sup>

While discussion of the question is not within the intended purview of this article, it would seem that due process should be satisfied if the notice provided for in section 473.587 is made to recite that the petition for distribution will ask for a determination of rights of succession to the real property of the decedent, and is served by publication and by ordinary mail upon all interested heirs and devisees whose names and addresses are known.

### E. Construction of Wills

Before the code, probate courts did not have jurisdiction of direct actions to construe wills,<sup>202</sup> although they could and necessarily did construe wills when ordering distribution of testate estates. As the court in *Brown v. Stark*<sup>203</sup> observed:

. . . the jurisdiction of probate courts in respect of the settlement and distribution of estates necessarily includes the power, in the first instance, to construe wills; otherwise there could be no distribution of an estate in the probate court where there was a will. . . .<sup>204</sup>

It frequently occurred, however, that questions of will interpretation which directly affected the administration of estates arose before final settlement and distribution,<sup>205</sup> necessitating the institution of proceedings in the circuit courts. In order to avoid the expense and delay of such proceedings, it was determined by the drafters of the code and the general assembly that questions involving construction of wills, when

201. 339 U.S. 306 (1950). The Supreme Court decided that the published notice of a hearing for a final accounting of a trustee of a common trust fund did not comply with due process and further notice—mail was suggested—should be given to the beneficiaries whose names and addresses were known. The Court declared that reasonable notice must be given whether or not the proceeding was in rem.

202. 2 LIMBAUGH, MISSOURI PRACTICE § 1151 (1939) ("this is a remnant of the ancient jurisdiction courts of chancery exercised which has not been transferred to probate courts"). See also, *Davidson v. I. M. Davidson Real Estate & Investment Co.*, 226 Mo. 1, 125 S.W. 1143 (1910); *Hamer v. Cook*, 118 Mo. 476, 24 S.W. 180 (1893); *Hanssen v. Karbe*, 234 Mo. App. 663, 115 S.W.2d 109 (St. L. Ct. App. 1938); *Peck v. Fillingham's Estate*, 199 Mo. App. 277, 202 S.W. 465 (St. L. Ct. App. 1918).

203. 47 Mo. App. 370 (St. L. Ct. App. 1892).

204. *Id.* at 379.

205. *E.g.*, with respect to apportionment of the federal estate tax, exoneration of liens on specifically devised property, whether a surviving spouse is entitled to statutory allowances in addition to the provisions of the will, investment and sale of estate assets, and numerous inheritance tax questions.

necessary to the administration of estates, should be cognizable by the probate courts. Accordingly, the code provides:

Section 472.020. The probate court has jurisdiction . . . of the construction of wills as an incident to the administration of estates. . . .

Section 474.520. The court in which a will is probated shall have jurisdiction to construe it at any time during the administration. Such construction may be made on the petition of the executor or administrator or of any other person interested in the will; or, if a construction of the will is necessary to the determination of an issue properly before the court, the court may construe the will in connection with the determination of such issue. When a petition for the construction of a will is filed, notice of the hearing thereon shall be given to interested persons.<sup>206</sup>

In addition, numerous other sections of the code contemplate that the court shall construe wills in connection with matters which may arise prior to distribution.<sup>207</sup>

There would appear to be no reason to doubt the constitutional validity of these statutory provision.<sup>208</sup> It has been shown elsewhere that the general assembly may confer upon probate courts powers which are equitable in origin so long as they relate to the administration of estates.<sup>209</sup> That the proceedings contemplated by the statutes are "matters pertaining to probate business" would seem to follow from the fact that they can be entertained by the probate courts only when "incident to the administration of estates."<sup>210</sup>

206. Of a somewhat similar New York statute, it was said in *In re Mount's Will*, 185 N.Y. 162, 167, 77 N.E. 999, 1000 (1906):

The intention of the Code provision was to confer upon the surrogate power and jurisdiction similar to that theretofore possessed by courts of equity. In one respect it is probably a little broader, because a court of equity would not entertain an action brought by one claiming the legal title in unqualified hostility to the will, while the Code provision requires the surrogate to determine the validity of the testamentary disposition when challenged, as well as the construction of the will.

207. *E.g.*, §§ 474.240 (anent pretermitted children), 473.287, .387, and 474.450 (anent exoneration and redemption), RSMo 1957 Supp.

208. In *First Baptist Church v. Robberson*, 71 Mo. 326 (1879), it was recognized that "the Legislature might confer such powers on probate courts."

209. See text at notes 140-48 *supra*.

210. § 472.020, RSMo 1957 Supp.

F. *Appointment of Guardians*

Apart from certain changes in nomenclature and the specification of additional types of mental incapacity which will support a finding of incompetency,<sup>211</sup> the code does not differ materially from the previous law<sup>212</sup> with respect to the appointment of guardians for mentally disabled persons. The source of the statutory definition of "incompetent"<sup>213</sup> is the Model Probate Code,<sup>214</sup> which emphasizes that the requisite infirmity should be mental, rather than purely physical<sup>215</sup> and must be of sufficient intensity to deprive a person of the ability either to manage his property or care for his person, or both.<sup>216</sup> Thus interpreted, the code provisions regarding appointments of guardians would seem to be well within the scope of the constitutional grant of jurisdiction over "persons of unsound mind" and "all matters pertaining to probate business," and no attack upon their constitutionality is anticipated.

It sometimes occurs that persons with pressing business affairs become afflicted with cerebral strokes which leave them unable to speak, write or otherwise communicate. Again, transitory nervous or mental disorders often temporarily incapacitate many people in middle life. Under the previous law, before guardians could be appointed for such persons, the court was not only required to find that such persons were incapable of managing their affairs, but was required to find and enter of record that they were "of unsound mind."<sup>217</sup> Under the code, a guardian may be appointed for a person upon a finding of one or more of the mental incapacities mentioned in section 475.010, accompanied by a finding that such person is incapable of managing his property or caring for himself, or both.<sup>218</sup> It is thus possible to avoid the stigma which, in the minds of many, attaches to the term "unsound mind" and often causes needless anguish to the afflicted, their families and their posterity. The elimination of the term from future court judgments appointing guardians should occasion no regret.

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211. § 475.010 (3), RSMo 1957 Supp.

212. §§ 458.010-.030, RSMo 1949.

213. § 475.010 (3), RSMo 1957 Supp.

214. SIMES AND BASYE, MODEL PROBATE CODE § 196 (1946).

215. *Id.* at 190.

216. *Ibid.*

217. § 458.070, RSMo 1949.

218. § 475.090, RSMo 1957 Supp. See also § 475.010 (3), RSMo 1957 Supp.

## V. CONCLUSION

Under the 1945 constitution, the professional qualifications of probate judges, except for those in office when the constitution became effective, of whom but a few remain, are required to be as high as those of the judges of other courts, and there is no valid reason to doubt their abilities to exercise plenary powers in the field of probate law.

The matters which come before the probate courts for determination are, in the vast majority of cases, noncontentious matters, where the interested parties are merely seeking the direction or protection of a court decree and no appeal is contemplated. To require such matters to be instituted in other courts is to delay unnecessarily the settlement of estates and to add to the expense of administration. In the relatively few instances where a circuit court determination is desired it may be had on appeal, often more expeditiously, because of the prior proceedings in the probate court and because many circuit courts give preference on their dockets to appeals, than if the matter had been originally instituted in the latter court.

The major goal of the general assembly in conferring additional powers upon the probate courts was the promotion of simplicity, speed and economy in the administration of estates, and the better protection of the interests of all persons concerned with the devolution, management and control of estate property. It is submitted that these objectives are meritorious, that they will be subserved by the new powers, and that the exercise of such powers by the probate courts is in harmony with both the spirit and letter of the constitution.