

SOCIAL INQUIRY SOCIETY OF IRELAND

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ON THE PRESENT STATE

OF THE

LAW AND PRACTICE IN IRELAND

WITH RESPECT TO

WILLS

AND

THE ADMINISTRATION OF ASSETS.

BY JAMES A. LAWSON, LL.B.

BARRISTER-AT-LAW ;

EXAMINER IN ENGLISH LAW IN THE QUEEN'S UNIVERSITY IN IRELAND, AND LATE ARCHBISHOP  
WHATELY'S PROFESSOR OF POLITICAL ECONOMY IN THE UNIVERSITY OF DUBLIN.

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## Social Inquiry Society of Ireland.

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# THE PRESENT STATE OF THE LAW, &c.

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GENTLEMEN,—I beg leave to submit to you the following report upon the question proposed to me for investigation; namely, “The Present State of the Law and Practice in Ireland with respect to Wills, with a view to have all wills proved and registered at the domicile of the deceased, and to have the jurisdiction with respect to legacies, devises, the administration of assets, and the validity of wills consolidated and vested in the same Court.”

Following the course naturally suggested by the question itself, I propose to point out the present state of the law and its practical working in this country, upon the following points:—

1. The proof of wills.
2. The registry of wills.
3. The custody of wills.
4. The decision of questions respecting the validity of wills.
5. The decision of questions arising upon the construction of wills.
6. The administration of assets.

I propose to notice, as I proceed, the defects in the present system, under each of the foregoing heads.

And in the last place, I propose to suggest such alterations in the law as appear to me necessary in order to remove those defects, and introduce a better system.

## CHAPTER I.

### ON THE PRESENT STATE OF THE LAW AND PRACTICE IN IRELAND WITH RESPECT TO WILLS AND THE ADMINISTRATION OF ASSETS.

#### Section 1.—*The proof of wills.*

With respect to the proof of wills, our law makes a great distinction between a will disposing of personal property, and one disposing of real property,\*—a distinction not very intelligible to the

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\* Real property includes lands held in fee-simple or in fee-tail, or for lives. Personal property includes leases for years, all moveable property, goods and chattels, money, stock, shares in public companies, &c.

public, who do not see any good reason why a will which disposes of land held by a lease for 10,000 years, should be treated differently from a will disposing of land held in fee-simple; such, however, is the law, and it is absolutely necessary clearly to explain this distinction at the very outset, in order to render the subject intelligible to the general reader. A will disposing of personal property must be proved; a will disposing of real property need not be proved; and if, as is generally the case, the same will dispose of personal and of real property, it must be proved in order to give a title to the personal property; but the proving of the will does not at all establish its validity as to the real property included in it, or confer title on those to whom the real property is devised; so that although our law now requires the very same formalities to be observed in the execution of wills of personal and of real estate, and although the question as to the sanity and disposing mind of the testator is one and indivisible, yet it may so happen that a will shall be established to be a good will so far as it disposes of personal estate, and yet the same will shall be declared invalid and of none effect in respect of the real estate; the consequence of which is, that the legatees who are left the personal estate obtain their legacies, while those to whom the real estates are devised are disappointed, and the testator's heir at law takes the real estate. The two classes of wills are adjudicated upon by tribunals wholly different, and under systems of law wholly different; the Ecclesiastical Courts alone taking cognizance of wills of personal estate, and the ordinary tribunals of the country taking cognizance of the devises of real estate. Into the reasons which originally existed for such a distinction, it would be a needless digression now to enter; we shall hereafter see that there are now no valid reasons for perpetuating it. Bearing in mind, then, that through the rest of this section I am speaking only of wills of personal estate, let us see what the law is with respect to their proof.

The proof of the will, then, must be made in an Ecclesiastical Court, which grants probate of it. The first question for the executor, or other person seeking probate, is, "In what Ecclesiastical Court ought I to prove the will?" There is an Ecclesiastical Court attached to the diocese of every bishopric in Ireland, besides one or two courts which have a peculiar local jurisdiction. Suppose the testator has always resided in Cork, and died there, and his executor also resides there, he will probably bring the will to a proctor, *i. e.* an ecclesiastical attorney, residing and practising in Cork, and tell him to take out probate for him. The will is then deposited in the Ecclesiastical Court of Cork; affidavit is made of its due execution; an affidavit is made by the executor of the value of the effects of the testator, in order to ascertain the stamp duty payable on the probate; and if the will is regular upon the face of it, probate is granted, which consists of a copy of the will, certified under the seal of the court, and a statement that the executor has duly proved the same. The amount of stamp duty is regulated by

the value of the property sworn to, not including therein the real estate. The full stamp duty must be paid on the entire value before the probate can issue; and if in any subsequent legal proceedings the stamp on the probate appears to be too small, it cannot be received in evidence, and the executor must fail in the proceedings. The expenses, then, of taking out the probate are composed of the stamp duty, the payment of the fees of the court, and the costs of the proctor. It may, however, turn out that all this proceeding has been worthless, and that the probate so obtained is void; for it is a rule of law, that if the testator had goods to the value of £5, called *bona notabilia*, in any other diocese out of Cork where he died, the diocesan court had no jurisdiction to grant the probate, and probate should have been obtained in the Prerogative Court, *i. e.* the Court of the Archbishop of Armagh. For instance, if the testator had a simple contract debt due to him by a party residing in Dublin, or if he had a judgment on record recovered in the courts at Dublin, neither of which facts the executor might have been acquainted with when he applied for probate, the effect would be that the diocesan probate would be void, and a prerogative probate should be obtained in order to give the executor a valid title. I have seen an executor who brought an action to recover a clear debt due to the testator, and sung on a diocesan probate, non-suited by the production of an attested copy of a judgment obtained by the testator against some third party, though it did not appear that anything was due, or could be recovered on foot of it. For safety, therefore, in all cases where the assets are considerable, or where there is a chance of the existence of *bona notabilia* elsewhere, a prerogative probate is taken out; the course to obtain it is the same as that already pointed out; the will is transmitted to Dublin to a proctor, and the probate is obtained there. The amount of stamp duty is the same, but the expense of a prerogative probate is somewhat higher than that of a diocesan probate. When this has been done, the title of the executor to the personal estate is complete; he has the absolute power of disposing of it; it all vests in him, and no legatee can take except by his assent.

Section 2.—*Defects in the present law and practice with respect to the proof of wills.*

The defects and inconveniences arising from the state of the law above detailed are obvious, and can be readily enumerated; and the actual injury and loss produced thereby is considerable.

The multiplicity of separate and independent courts, each exercising a distinct jurisdiction.

The fact that it is uncertain whether a local court has jurisdiction to grant the probate, and the liability to loss in consequence of a mistake in that respect.

The fact that all these courts are governed, and justice administered there upon principles different from those which regulate the ordinary tribunals of the country; and that therefore a separate

and distinct class of practitioners, proctors, and advocates, is required.

The necessity of paying the stamp duty upon the full amount of the property, as a condition precedent to obtaining probate, and frequently before funds are received applicable to that purpose.

The result is, that in a vast number of cases the will is never proved at all. The wills of small farmers and persons in that rank of life, whose personal property amounts to £100 or £200, are rarely proved; as every lawyer and attorney knows by experience of the multitude of such cases, where litigation is caused by the will remaining unproved. The family agree, after the death, to act upon the will, and avoid the expense of proving it, and the payment of stamp duty; the consequence is, that there is no person legally entitled to the ownership of any part of the property, and therefore if any member of the family becomes disposed to act unjustly, and to deprive the others of their fair portion, there is no redress whatever for such parties at law; and when they do not seek to right themselves by the strong hand, the clergyman or the agent of the estate is made the judge to decide upon the rights of the parties; and many times the office of the agent is a *quasi* Court of Chancery, to decide upon the division of the land amongst the members of the family under the unproven will. The litigation also created in respect of the debts due by the testator is very considerable. Where there is no will proved, any person intermeddling with, or in possession of any part of the goods or property of the testator, is liable to be sued as "an executor in his own wrong," by any creditor of the testator; and our Civil Bill Courts every day furnish examples of multitudes of such actions, where on the one hand the creditor is liable to be defeated by not knowing where he ought to look for payment of his debt; and on the other hand, a person innocently intervening in the management of the property may be held liable to pay demands which he did not anticipate, and which, though legally, he is not justly answerable for.

The revenue itself, for whose benefit the regulations as to the payment of duty were made, suffers very much by the number of small wills thus left unproven. The Stamp Acts indeed impose a penalty of £100, and £10 per cent. on the amount of the stamp duty payable, upon any persons taking possession of or administering any personal estate and effects without obtaining probate. This provision has, however, in practice, been found to be insufficient to prevent the state of things I have pointed out; and I have never heard of any proceedings taken to recover a penalty under this clause.

### Section 3.—*The registry of wills.*

Under our Registry Acts in this country, wills affecting land are capable of being registered like other instruments which purport to convey land; and the penalty for not registering is, that a subsequent purchaser, claiming under a duly registered instrument, will

obtain priority over those claiming under the unregistered one. There is nothing, however, to compel parties to register wills; it is optional with them to do so or not; subject, of course, to the liability of being postponed, or set aside, in favour of a subsequent registered instrument. There is no provision for the registration of wills relating to personal estate. Registration is effected by the lodgment of a memorial or short description of the will mentioning the lands affected by it, which memorial is accompanied by an affidavit of the execution of the will by one of the witnesses.

Under the provisions of the 13th and 14th Vic. c. 72, the new Registration Act, the registration of wills is to be effected by depositing the original will, or, if it be proved in an Ecclesiastical Court, by depositing a memorial or an office copy of the will. This act has not as yet come into operation, the maps required by it not having been as yet completed, but I believe they are in course of preparation.

Section 4.—*Defects in the present law with respect to the registry of wills.*

Assuming, as I do, the expediency of a register of all acts relating to land, there is no doubt that it is a very incomplete system to leave it optional whether wills are to be registered or not. The same reasons which have convinced those who have considered the subject of the necessity of a land register, lead to the conclusion that wills should be subject to the same regulations in this respect as deeds. There is seldom a title to land which does not in part depend upon a will, and a person searching against land should be able to find the estates, interests, and incumbrances created by wills, as readily as those created by deeds.

It would lead me too far from the present subject to discuss here the principles on which a land register should be based. I shall advert to them when I proceed to suggest alterations in our present system. For the present, it is sufficient to observe that all the objections urged against the system of registering deeds hitherto adopted apply to wills, in addition to those I have already adverted to.

Section 5.—*The custody of wills.*

I have already mentioned that when a will is proved in the Ecclesiastical Court, the original is deposited there, and remains there; a copy only being issued, under the seal of the court, to the person who proves it.

If a will is not proved, the original remains in the custody of the party acting under it, the deposit of the original not having been heretofore required in registering a will.

Section 6.—*Defects in the law relating to the custody of wills.*

The existence of a great number of places where wills are and may be deposited, and the consequent uncertainty if you desire to.

search, are obvious defects in the present system. Complaints, too, have been made, and with justice, that wills are not kept with that care which the importance of such documents requires. Many of those courts have no proper place, and no suitable arrangements for the custody and classification of wills; and wills have in consequence been frequently lost or destroyed. When a will which has been proved is required at a trial at law or in equity relating to lands, as the probate copy is not recognized there, it is necessary to bring to the trial an officer of the Ecclesiastical Court, with the will; a course which is attended with great expense and inconvenience.

The originals of wills relating to real estate, and which have not been proved, are left at the disposal of those who happen to have them, and there is no provision made for their safe custody.

Section 7.—*The decision of questions respecting the validity of wills.*

These questions are decided in a manner entirely different as respects personal and real estate; the former being decided by the Ecclesiastical Courts; the latter by the ordinary tribunals. In the great majority of cases where probate is applied for, if the will be formal on the face of it, and appear to have been executed and attested as required by law, probate issues as a matter of course, if no opposition is given. Where a contest arises, the parties interested may come in and lodge a caveat against the grant of probate; the validity of the will is then called into question, and put into a train of investigation in the Ecclesiastical Court. The parties state their case in their pleadings, *i.e.* in written documents, filed in the court; witnesses are examined by written interrogatories in support of the allegations in those pleadings, and the case is adjudicated on by the Judge of the Ecclesiastical Court. If the parties are dissatisfied with his decision, they can bring the case before a Court of Delegates, an appellate tribunal composed of some judges and other learned persons, named for each occasion; and if that decision be unsatisfactory, a petition may be presented to the Lord Chancellor, who may, if he thinks it right so to do, grant a Commission of Review, sending the case for adjudication to another Court of Delegates named by him for the purpose. These proceedings are very tedious and very expensive.

On the other hand, questions relating to the execution of wills of land are determined by the ordinary tribunals; the heir at law, who alleges the will to be invalid, brings an ejectment for the recovery of the estate; and the question of the due execution of the will is tried by a jury. If the question is brought into a court of equity, the Lord Chancellor generally directs an issue as to the validity of the will to be tried before a jury,—a tribunal in my opinion the best suited for determining disputed facts, and for pronouncing upon the competency or sanity of a testator, or the conduct of those who have set up the will or who dispute it.



Section 8.—*Defects in the present mode of deciding questions respecting the validity of wills.*

It is obviously absurd and inconsistent to have in the same country two different modes of deciding the same question, with respect to the very same instrument; the incongruity follows, that a will is often established as to personal property, and annulled as to real property, and *vicé versâ*. The validity of all wills should be determined by the same tribunal, according to the same principles and mode of procedure, and the mode of bringing the question to trial should be rendered less expensive and more expeditious.

Section 9.—*The decision of questions arising upon the construction of wills.*

Of all the departments of our jurisprudence, this, in my opinion, is the one least open to cavil or censure. The questions that arise upon the construction of wills are adjudicated upon by the judges of our courts of equity and law, and with them the Ecclesiastical Courts do not interfere. The principles upon which wills are expounded and construed by them are, with a very few exceptions, based upon the soundest principles; their professed aim is to arrive at the intention of the testator, and to give effect to that without regard to form or technicality. Every one who has had experience in the matter can testify how difficult it often is to discover the intention of the testator; and we can frequently predicate with certainty that he did not know his own intentions, or express how they were to be carried out in certain events, the happening of which he probably did not anticipate. The problem, therefore, of discovering the intention is often a difficult one to solve; but in order to arrive at it, our courts have laid down certain general rules, which are the result of the collective wisdom of the great lawyers of all ages, and which serve as a key to the interpretation of these instruments. The result is, that if the intentions of the testator are communicated to a lawyer, a knowledge of those rules will enable him to carry the intention into effect with accuracy and certainty; while if a testator chooses to make his own will, and expresses himself in plain language, intelligible to ordinary men, his intentions will seldom be defeated. The great danger is, where a will is made by a person knowing a little law and familiar with technical terms; for when technical terms are used, they must be taken in their proper sense; and thus the intentions of many testators are disappointed, and a great deal of litigation created. I trust that no attempt will be made to alter this branch of our law, or to transfer to less competent tribunals the adjudication of questions arising upon the construction of wills. The effect of such a change inevitably would be to introduce confusion and uncertainty into that which is now defined and settled.

I notice no defects in this department, because I believe there are none, except those which apply to our system generally; namely,

that the administration of justice is clogged with burdensome taxes and restrictions, which render it oppressively expensive to the suitor. If these obstacles to the attainment of justice were removed, there could be no complaint as to the mode of deciding questions upon the construction of wills.

Section 10.—*The administration of assets.*

Under this head comes the disposition of the estate of those who die without a will, a branch of the subject we have not yet adverted to. It comprehends, however, also, the management of the estates of testators, the payment of debts and legacies, the taking of the accounts of executors and administrators, and the ultimate distribution of the property amongst those entitled to it, according to those rules of construction mentioned in the preceding section. This is a very extensive subject, and it will be necessary briefly to advert to the present state of the law respecting it.

Any creditor of a testator, or intestate, may proceed by action at law for the recovery of his debt against the executor or other personal representative of his debtor; and in that action the question whether the representative has received funds applicable to the payment of that debt, will be tried in the ordinary way before a judge and jury. A legatee is, however, placed in a different position; he cannot maintain any action at law for his legacy, unless the representative has actually settled an account with him, and promised to pay it. He must institute proceedings in Chancery for the recovery of his legacy, and the account of the payments and receipts of the executor will be taken there. A person entitled to a share of the assets of an intestate stands on the same footing in this respect as a legatee. The only exception to this is the class of cases provided for by the Civil Bill Acts; namely, where the amount of the assets does not exceed £200, or where the legacy does not exceed £20. In these cases, proceedings may be taken before the Assistant Barrister for the recovery of a legacy, or a distributive share of the assets. A proceeding in Chancery for the purpose is now commenced by presenting a short petition, on which an order is at once made, without notice to the executor, if it appears that the sum sought to be recovered has been previously demanded from him; the account is then taken before one of the Masters, and an order made for payment if the legatee establishes his case.

Section 11.—*Defects in the law respecting the administration of assets.*

Most of the remarks which I made under the last head seem to me to be applicable to this part of the subject; the law connected with the administration of assets is well settled and defined, and the accounts are now taken in the Court of Chancery as cheaply and expeditiously as is consistent with the continuance of a system of taxes imposed upon every step taken in the Court; and until these are removed, the real grievance will be left untouched. Those whose idea of a Chancery suit suggests a course of litigation con-

tinued for a century, and never concluded, would be surprised to learn that with us a Chancery suit is often disposed of in one or two months; a petition is presented, an order is made on it in the course of a week; in a month after, the parties are at issue in the Master's Office; and in ordinary administration cases, two or three meetings in the office suffice to dispose of the case, and to enable the Master to make a final order; and all this is done with as little expense as the system of taxation renders possible. No real improvement would, in my opinion, be effected by creating new local tribunals for such cases; or by transferring this branch of law to the jurisdiction of the Civil Bill Courts. The cases brought before them, under the provision I have referred to, are, as far as my experience goes, very few. The tribunal is not one suited for the investigation of accounts; they cannot in the hurry of a sessions receive that careful and minute attention which they require; and inasmuch as a case of the kind could not be disposed of at one session, in consequence of the necessity of permitting each party to reply to the case of the other when it is put forward, and to produce vouchers and evidence, the delay that would necessarily occur in the adjournment from one session to another would be productive of great inconvenience to the suitors.

In the case of a person dying without a will, the right to administer belongs to the nearest of kin; and when they refuse, a creditor or other person having an interest may obtain letters of administration. The grant of these belongs, like the grant of probate, exclusively to the Ecclesiastical Courts, and there all questions as to the person entitled to administration must be adjudicated upon; although when the grant is made, the administrator is liable to be called to account before the ordinary tribunals, and to be compelled to make a fair distribution of the assets. There seems to be no well-grounded reason for the distinction between the right of a creditor and a legatee to maintain an action against the executor; but this subject will more properly come under our notice hereafter, and indeed it involves very much the question as to the necessity for the distinction which exists between Courts of Law and Equity.

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## CHAPTER II.

I now proceed to suggest the alterations in the present law which appear to me to be expedient, in order to remove the defects and remedy the evils which I have pointed out.

### Section 1.—*The proof of wills.*

That the distinction between wills of real and personal property should be abolished, and that all wills should be proved in the same manner.

The reasons that existed for making a distinction between wills of real and personal property have long since disappeared, and accordingly we find that the tendency of modern legislation has been to assimilate them. By the late Wills Act, 1 Victoria, c 26, they are now required to be executed and attested in the same manner. It was felt to be an anomaly, that the same instrument should be suffered to dispose of all a man's personal property; and yet, in consequence of the law requiring a different kind of attestation, should be inoperative as to the real estate, which it professed to dispose of. This anomaly was accordingly abolished; but surely it is a greater anomaly that the same instrument should, as to the two subject matters contained in it, be adjudicated upon in a different manner, and by tribunals wholly different, and, may be upheld by one, and invalidated by the other.

Assuming, then, that every will is, as to all its parts, to be adjudicated upon by a single tribunal, the question next arises, To what tribunal should the proving of wills be entrusted?

I suggest, then, that probate of wills should be obtained from our ordinary courts of law

This involves the abolition of the functions of Ecclesiastical Courts as Courts of Probate and Administration. It is necessary either that all wills should be referred to that tribunal, or that their jurisdiction in respect of wills should be altogether abolished. I have already said something of the nature of these courts, and of the inconvenience which results from their number, and from the form of their procedure, and the great expense attending litigation there. The system there pursued, of proving a case by written depositions, has now been justly condemned as a most imperfect mode of arriving at truth; and if those courts were to be at all maintained, a sweeping alteration should be made in their machinery and mode of administering justice, in order to assimilate them to our common-law tribunals. This it would be difficult and expensive to accomplish, and if it were done, it would naturally be asked, why have a separate and independent set of tribunals for adjudicating upon wills, why not make use of the machinery already in operation in our Courts of Common Law, and apply to the solution of questions about wills the same tests that are applied to determine questions as grave.

The next inquiry is, how is the machinery of the Law Courts to be applied to the proving of wills? With respect to far the greater number of wills, no conflict arises, no question is raised as to their due execution and as to the freedom and competency of the testator; the proof of uncontested wills ought to be rendered cheap, simple, and expeditious. I have considered the matter carefully, and I do not think it necessary or expedient to establish local courts for the proof of wills, and for the determination of questions relating to their validity or their construction. I propose that officers should be appointed by our Courts of Law in all the principal towns in Ireland, whose duties should be merely ministerial,



tionary with the Court, either to decide the question themselves or to send it to a jury, if any jury question arise. This probate should in all incidental proceedings be received as conclusive evidence of the title of the party in whose favour it was granted, and should be only questioned by a specific proceeding taken for that purpose.\*

In cases of intestacy, a course somewhat different should be pursued; it would be there requisite that before administration was granted, notice should be given to the next of kin; and that until such notice was given, no final grant of administration should be made, although when required, an *ad interim* administrator should be appointed to preserve the property.

I would require, therefore, from the person seeking administration, a statement in his petition of who were the next of kin; and notice of the application should, as far as practicable, be given to them by newspaper advertisement, or through the post. If no other claimant appeared, then the grant should be made within a limited time, say fourteen days; subject, like the grant of probate, to be recalled, cancelled, or varied, on any application made for that purpose. I do not propose to make any change in the laws now in force with respect to the rights and liabilities of executors and administrators; this is but a change in the form of procedure required to be taken, in order to clothe a party with the representative character.

Great injustice is at present committed by the suppression and spoliation of testamentary papers; and there is no summary mode of dealing with these cases. I would propose that it should be in the power of any party alleging that another has a testamentary paper, upon making an affidavit to obtain from the Commissioner a summons, calling on him to answer the affidavit, and upon his doing so, and upon both being submitted to the judge, that he should have power to make a summary order to bring in the document, or such other order as he thought fit; and that these orders should, when necessary, be entrusted for their enforcement to the ordinary magistracy and police of the district.

It is an essential part of this plan that the grant should be unfettered with the payment of stamp duty as a condition precedent; but I would enable the Stamp Commissioners to obtain from a judge a summary order that the party should account and pay the tax, and also give them the same power to require security from the representative as is given to individuals. It should only be obligatory on the representative to pay the duty out of the property actually realized; and I think it would be prudent that the Stamp Office should authorize their distributors, from time to time, to receive any sums offered to be lodged on account of probate duties,

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\* Probates granted in England should be available for Ireland and *vice versa*, upon being *vised* at the Stamp Office, where any additional duty which might be payable in respect of the property not before included could be paid.

and that the parties should have credit for such payments when they furnished their final accounts.

Section 2 — *The registry of wills.*

This is a question which it is unnecessary for me to enter upon at large. Wills affecting land should be made subject to the same regulations with respect to registry as deeds. A register based upon a map is in my opinion the best mode of registering; and I would suggest that all wills should be registered centrally and locally: at the Central Registry Office in Dublin, in the same manner as the instruments affecting land: that they should be also locally registered in each poor-law union where lands lie comprised in them; it would be necessary, in order to make this registry accurate, to require a statement from the person proving the will, of the names, &c. of the lands which the testator purported to devise; otherwise, where a party disposed of his estate by general words, it would be impossible accurately to register it. It should be also registered at the domicile of the deceased. The system of a local and central register would be found to work well, I conceive; each would act as a check upon the other. The Clerk of the Poor Law Guardians might be appointed the registrar of each Union. A safe place of deposit should be provided, and it should be his duty to deposit the copies there, and to keep the books and indexes, and make the necessary searches. It should be the duty of the Commissioner, when probate was granted, to register the will by transmitting a copy of the probate to the clerk of the union in which the lands lay; and another to the clerk of the union in which the domicile of the deceased was situate; and the officer of the Law Courts in Dublin should do the same to the Central Registry there.

Section 3.—*The deposit of wills.*

I would propose that all original wills be deposited in a central office in Dublin, properly constructed for that purpose, and there kept and chronologically arranged, with indexes. An office-copy of any will deposited there should be received in every court as evidence, without the production of the original; except in any proceeding taken directly for the purpose of questioning the will. At present, great inconvenience is felt by reason of the necessity which exists of bringing down an officer of the Prerogative Court, with the original will in his custody, whenever a will disposing of real estate is required to be given in evidence, even for any collateral purpose; a proceeding entirely useless, and entailing great expense on the suitor.

Section 4.—*The decision of questions respecting the validity of wills.*

I have already expressed my opinion that such questions should be disposed of by the ordinary tribunals of the country. It would

be necessary for this purpose to alter and enlarge the jurisdiction of the law courts. At present, proceedings there must be commenced by a writ framed in one of the usual forms of action; none of which, of course, would be applicable to cases of wills. I have already suggested how wills should be proved there. I would propose that any party propounding a will should be at liberty to issue a summons to be served on the parties interested, calling on them to show cause why the will should not be admitted to proof; and in like manner to any party disputing a will, to issue a summons to show cause why the probate should not be recalled, and the will cancelled and declared void; and let such proceedings be had thereon, as the Judges, by general rules to be made by them, may direct. I would not disturb the jurisdiction which the courts of equity at present exercise, in entertaining questions and directing issues respecting wills; but would extend that power to all wills, instead of being confined, as now, to wills of real estate. It is obvious that such a jurisdiction would be required, as questions respecting the validity of wills arise incidentally in the course of other proceedings. The Court of Delegates would of course cease, so far as wills are concerned, and the same right of appeal would exist in wills as in other cases.

It might, perhaps, be considered by some simpler to constitute a new court of probate and administration than to alter our common law courts, or to engraft this jurisdiction upon them. This would be matter for consideration. I would prefer the course I have suggested; but the distinguishing features of any reform should be, the assimilation of the mode of proving all wills, and the introduction of the simple process which I have suggested, whether that be done under the control of one judge, or of all our law courts.

Section 5.—*The decision of questions arising on the construction of wills.*

I have already given my opinion that it would be unwise to entrust these to any other tribunals than those which at present have cognizance of them.

It is impossible to disguise from oneself the probability of a fusion of our Courts of Law and Equity taking place at no very distant period; and if that be done, the adjudication of these questions will take place in all our superior courts alike; but at present I think it must be left to the Court of Chancery, taking care to cheapen and simplify its proceedings.

Section 6.—*The administration of assets.*

For the reasons I have already given, I do not propose to create new local tribunals for the administration of assets, or to enlarge the jurisdiction of the Civil Bill Courts in this respect.

The question, as proposed, suggests the expediency of proving and registering wills at the domicile of the deceased; and of consolidating and vesting in the same tribunal the jurisdiction with respect



to legacies, devises, the administration of assets, and the validity of wills. The suggestions which I have made will show that I propose to have wills proved in effect, and registered at the domicile of the deceased; but upon the best consideration which I have been able to give the matter, and divesting my mind altogether of any prejudice in favour of our superior courts, I cannot arrive at the conclusion that it would be a wise or an expedient thing to have those questions decided at the domicile of the deceased; although I think the jurisdiction ought to be consolidated. I distinguish between acts merely ministerial, such as the granting of probate in unopposed cases, and the registering of wills, and such acts as involve an adjudication upon conflicting rights and the decision of complicated questions of law and fact. The former should be done at the domicile; they are formal, and the machinery requisite for carrying them out is simple and inexpensive. The latter, if they are to be locally adjudicated upon, will require very different functionaries and very expensive machinery; and I therefore do not think it safe and expedient to propose to have these questions determined in the locality. I have shewn how, (without the necessity of creating new tribunals, but merely by the appointment of officers, whose duties would not be very onerous, and who would be remunerated by a small fee paid on each case,) wills may in effect be proved and registered at the domicile of the deceased, without rendering it necessary for the person seeking the probate to leave his home, or even to incur any expense of employing professional persons, except where the will was contested. This would be carried out by the adoption of the means I have suggested, without expense, and with no greater delay than a communication by post with Dublin would entail. If any more than this is sought to be done; if every case, whether it be a litigated case or not, is to be disposed of and adjudicated upon at the domicile of the deceased; and if the various questions as to the construction of wills are also to be adjudicated upon there; then such officers as I have suggested would not be competent to discharge these functions; and either those questions should be adjudicated upon by the Assistant Barrister of each county, or new tribunals should be created. If local tribunals are to be established for the decision of questions of such importance, they should be presided over by men of the highest legal character and attainments; they should also be continuous in their sitting, and this would involve an enormous amount of expense, which I think would not be attended with any advantage at all corresponding. I would not, therefore, venture to recommend the establishment of a number of new local permanent courts for this purpose. With respect to the other alternative, of engrafting this jurisdiction upon the Civil Bill Courts, I have already observed that the sittings of courts for the disposing of such questions should be continuous and unintermitting; and therefore the Civil Bill Courts could not embrace this jurisdiction unless their constitution was entirely altered, and their judges made local func-

tionaries, and the courts always open. If this were done, it would be in effect the creation of new local courts, which proposal I have already discussed.

I do, however, think that if the suggestions I have made, or similar ones, were acted upon, no inconvenience would be felt from the necessity of resorting to a superior court in litigated cases; issues could be sent for trial at the Civil Bill Courts, or at the Assizes, as might appear expedient; and in this way the question would, in effect, be decided near home, without the necessity of constituting new tribunals, and thus introducing confusion and uncertainty into the administration of the law.

### CHAPTER III.

#### CONCLUDING OBSERVATIONS.

I have now given an outline of the reform which I would venture to recommend, and which, I believe, may be fairly called for. Some will doubtless think I have gone too far, and that the changes I suggest are too sweeping, while others will think I have not been a thorough reformer. My aim has been to make no unnecessary change in the principles of our law, but in every possible way to simplify forms of procedure, and diminish the expense to the suitors. I cannot agree to the doctrine which I have heard put forward, that law should be made dear, in order to deter persons from going to law, and to render it a scourge to those who are defeated.

I decidedly advocate cheap law. I hold that when men abandon the power of righting themselves, as they do in the social state, it is the duty of government to provide proper and adequate tribunals for the decision of rights and the redress of wrongs. Such tribunals should be provided and maintained at the public expense. A man who is unfortunately obliged to be a suitor, should not, in addition to that misfortune, be operated with the payment of any part of the expense of maintaining those tribunals whose existence is necessary for public peace and order; he should be visited with no expenses save those which he is obliged to incur in procuring professional persons to conduct his case, or in securing the attendance of witnesses. These are expenses which the unsuccessful party ought to be obliged to pay; but the payment by the suitor of the salaries of the judges or officers of the court is vicious in principle, and unjust and oppressive in practice; and while the soundness of this principle is apparent to any one who considers the subject, and indeed is now generally admitted, what shall we say of our legislature, which in the last session of Parliament, in the new Civil Bill Act,—an act ostensibly intended to benefit suitors, and espe-

cially poor suitors,—for the first time imposed stamps on Civil Bill proceedings, avowedly to defray the salaries of the Assistant Barristers; and now every suitor in those Courts, as a condition of his obtaining justice, must pay his 2s. 6d. or 1s. or 6d. as the case may be, to the revenue, in the form of a stamp upon the process!

Cheap law consists not only in the removal of all such expenses, but also in the removal of delay and inconvenience; and if suitors are obliged, with their witnesses, to go to a distance from their homes, this inconvenience amounts to dearness, it is an obstacle which a man would pay to get rid of; hence the propriety of having local tribunals, which our law has recognized by making the superior courts ambulatory for certain purposes, and by the establishment of local tribunals. Let us, however, recollect that in these days of rapid locomotion and increased facility of communication, this is a consideration which is and will be every day entitled to less weight; for instance, the division of the County of Tipperary into two ridings for the purposes of the administration of justice, would never have been carried out, if it could have been foreseen that the county would be traversed by a railway. Let, however, this consideration of distance have its due weight, but no more.

I do not consider law as being cheap, unless it be also good; if you bring justice near a man's door, it ought to be justice of as good quality as he could obtain elsewhere; if the law be badly, rashly administered by inefficient instruments, injustice, not justice, will be done; and I think a subject who has a small right to be decided on, all important it may be to him, is entitled to have the same care and ability exercised by the Judge who decides his case, as the wealthiest subject is entitled to.

In suggesting changes in the law, we should carefully distinguish between the principles of law, and arbitrary rules of practice. The great doctrines and principles of our law are founded on justice and good sense; they have been matured by the wisdom of successive generations; and the decisions based upon them furnish the means of guiding and directing the student. To unsettle these would answer no good end; it would be to destroy that which it has cost much time and labour to construct. But our practice and forms of administering justice ought, I conceive, to be dealt with in a different spirit, and should not be allowed to exist where they impede or thwart the ready attainment of justice. Guided by this view, I have not proposed to open or unsettle the many branches of law which came under review in this paper; I leave them untouched; I deal mainly with the mode of calling them into operation and applying them.

I trust I am duly sensible of the care, caution, and deliberation required on the part of those who suggest law reforms. Nothing is easier than to find fault with existing legal institutions. Springing as they do very often from fortuitous circumstances, based on principles which have ceased to exist, or at least to command any reverence, and moulded and altered from time to time to suit the

necessities of each age, they present, no doubt, many imperfections and are open to just criticism. It is easy to demolish and destroy, difficult to reconstruct; and many who are keen-sighted enough to see the faults in our laws, would yet shrink from the task, if proposed to them, of constructing a faultless system instead of the old one. Others, however, less honest, or less capable of appreciating the real difficulties of the task, are quite as ready to create as they are to destroy; and from this source proceeds the hasty, ill-considered legislation which is a reproach to our age. In truth, there is no department in which we have so much reason to blush at our ignorance and presumption, as in the science of making laws. Every session of Parliament presents us with a mass of absurd and inconsistent legislation, the work of men who are incapable of understanding the system they condemn, and of predicting the results of the *improvements* they introduce; while, if we look over a series of years, and see what the legislation on a particular subject has been, we shall too often, where legal questions are involved, find the policy vacillating and uncertain, and each succeeding Act undoing the work or repairing the blunders of the preceding. There appears to be some radical defect in our present system of legislation, as far as law reforms are concerned. Measures of this kind are brought forward, sometimes by persons ignorant of the subject, and suffered to pass by reason of the apathy or indolence of the other legislators. Sometimes a well-considered, carefully-prepared measure is brought forward; but in its passage through the house, it undergoes many transformations, and the result of the amendments too often is, that its fair proportions are destroyed, and its provisions rendered inconsistent and contradictory.

To be a successful law reformer requires, indeed, a rare combination of qualities; profound, extensive knowledge of the law itself, familiarity with its practical working, and at the same time a freedom from professional prejudice, which so often leads us to consider the system we are familiar with as the best that could be devised, and to see excellence in those very obstacles which gave scope for the exercise of our ingenuity to overcome them. How rarely do we find such qualities united, and the person in whom they are so united, placed in a position in which he can render service to the community. It may, perhaps, be suggested that our legislators should receive some better training; or that when they have expressed their opinion in favour of a certain change in the law, the task of executing it and carrying out the details, should be entrusted to more competent hands; but it is out of my province at present to enter into considerations of that kind. But whether it proceeds warily and wisely, or not, this we may at least confidently say, that our Legislature will follow the direction of public opinion, and that sets strongly in favour of a sweeping law reform. Those who understand the subject and are capable of guiding the public mind, ought to bestir themselves and use their energies, not in checking this zeal, but in tempering it with knowledge and guiding it in a

right direction. We should never lose sight of this, that there is a wide distinction between the principles of law and the forms of procedure. When the facts of each case have been evolved, and those which were in dispute decided, it then becomes the duty of the judge to apply to these facts the general principles of law, and so arrive at a conclusion. Upon the abstract principles of our law no great attack is made; it is directed against the forms of procedure. The legitimate use and object of these forms is, to present as soon as possible the material points in dispute to the mind of the Court, and to furnish all the evidence which can throw light upon those points. When forms are allowed to retard instead of expediting that end,—when they who should be the servants of the Court become its masters, a change is called for; and the forms must be re-moulded, so as to answer the intention of their being. Any step taken in a cause which does not conduce to this end, entails loss and inconvenience to him who has a just demand, while it furnishes an opportunity for evasion and delay to the fraudulent and litigious. The result of the rage for law reform we may predict, ere long, will be to produce changes such as these:—

The abolition of the distinction between Courts of Law and Equity.

The assimilation of real and personal property.

The abolition of all forms of action or suit, each party's legal adviser being allowed to state the substance of the complaint in ordinary language, and the other side the matter of defence.

The abolition of the law of evidence, and the reception of everything that bears upon the issue.

The removal of taxes on law proceedings, so that the suitor will incur no expense but the payment of his own attorney and advocate.

Even if all this be effected, those concerned in the administration of the law will have no just ground to complain of such changes. Every thing which renders the attainment of justice easy, benefits the community; and no class has a right to set up its own interests in opposition to the general good. There is, however, I believe, no real conflict of interests here. How many rights now remain unasserted, how many injuries unredressed in consequence of the high price of justice? It is the interest of all that this reproach should be taken away, and that the attainment of justice should be rendered as easy as the nature of things will admit. The determination of rights and the redress of wrongs will always be a difficult and arduous task; for if all artificial obstacles be removed, there remains the complexity and doubt incident to the transactions themselves, which no law reform can ever simplify or remove.

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