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at the market price for the account of the buyer.⁷⁰ The seller may recover from the buyer the difference between the contract price and the amount received on resale.⁷¹ After notice to the buyer of his intention to sell for the buyer's account, the seller may use his discretion as to the time and place of such resale.⁷²

Although West Virginia has been comparatively slow in enacting new legislation to deal with problems which arise in sales transactions, the cases indicate that this state, in resolving these problems by the application of accepted common law principles, is not out of line with the other states where such legislation has been adopted.

L. P. P.

THE SCOPE OF AUTHORITY OF THE COUNTY COURT AND THE
COMMISSIONER OF ACCOUNTS IN THE PROBATE OF ESTATES

The scope of authority of the county court and its commissioner of accounts in regard to the probate of estates seems to have caused a great deal of consternation of late among the lawyers of West Virginia. This note makes no attempt to clarify that confusion, but serves only to put into print the problem as it exists today. Any clarification must necessarily be made by the West Virginia Legislature.

Courts of chancery and ecclesiastical courts were the original courts of jurisdiction over probate matters in England.¹ In the United States, however, the courts of probate have been regulated by statute.² In West Virginia, by the constitution of 1880,³ and by legislative enactment in 1882,⁴ exclusive jurisdiction over probate

⁷⁰ *Allen v. Simmons*, 90 W. Va. 774, 111 S.E. 838 (1922).

⁷¹ *Ibid.*

⁷² *American Canning Co. v. Flat Top Grocery Co.*, 68 W. Va. 698, 70 S.E. 756 (1911).

¹ See *WORKS, COURTS AND THEIR JURISDICTION* 431-460 (1894).

² *Ibid.*

³ W. VA. CONST. art. VIII, § 24.

⁴ The West Virginia Legislature in their regular session of 1872-3, by chapter 136, placed concurrent jurisdiction in the circuit court along with the county court on probate matters. In 1882, the repealing clauses of chapters 68 and 84, revoked the concurrent jurisdiction and gave the county court exclusive jurisdiction over probate.

was vested in the county court.⁵ The constitution, in conferring such authority on the county court, nevertheless limited their jurisdiction by saying that "such court may exercise such other powers and may perform such other duties, *not of a judicial nature*, as may be prescribed by law."⁶ Though the constitution does not prohibit regulation of the county court by statute,⁷ the constitution is controlling notwithstanding any statute.⁸ The West Virginia Code, correspondingly, has prescribed the method of settling accounts and the probate of estates in the county courts, and has established the commissioner of accounts as the right arm of the court in settling these matters of probate.⁹ Under the statute, the commissioner of accounts has the authority, among others, to decide "any other matter necessary and proper for the settlement of the estate."¹⁰

The question, and topic of this note, is how far can the commissioner of accounts go in settling estates and still stay within the constitutional limitation of "not of a judicial nature." An examination of the West Virginia cases would ordinarily seem the natural and logical way to reach a solution of the problem but it is quite another thing to thread together the cases into a comprehensible pattern.

In *Hansbarger v. Spangler*,¹¹ the West Virginia court held that the commissioner of accounts had no jurisdiction to decide descent and distribution and that the West Virginia Code¹² was meant to handle primarily debts against the estate of deceased persons. Though not in so many words, the court by implication said that descent and distribution is a judicial matter over which the commissioner of accounts has no jurisdiction.

The West Virginia court in *Hawley v. Falland*,¹³ held that the commissioner of accounts had no jurisdiction to enforce an attorney's lien against the interest of the beneficiary of a decedent's estate and in so holding said, "probate courts possess only such jurisdiction as is conferred by statute within constitutional limita-

⁵ See *Stone v. Simmons*, 56 W. Va. 88, 48 S.E. 841 (1904).

⁶ W. VA. CONST. art. VIII, § 24.

⁷ *Boone v. Boone*, 123 W. Va. 696, 17 S.E.2d 790 (1941) emphasis supplied.

⁸ *In re Long's Estate*, 122 W. Va. 473, 10 S.E.2d 791 (1940).

⁹ W. VA. CODE c. 44, art. 2 (Michie 1955).

¹⁰ *Id.* c. 44, art. 2, § 1.

¹¹ 117 W. Va. 373, 185 S.E. 550 (1936).

¹² W. VA. CODE c. 44, art. 2 (Michie 1955).

¹³ 118 W. Va. 59, 188 S.E. 759 (1936).

tions."¹⁴ Does this mean that the enforcement of the attorney's lien is a "judicial matter" outside the constitutional limitation, or does it mean that it is not within the scope of the statutory limitation of matters "necessary and proper for the settlement of the estate?"

In *Steber v. Combs*,¹⁵ where the question of conflicting claims to the estate of an intestate arose, the West Virginia court said that a claim against the administrator of an estate for failure to account for personal property of the deceased is a judicial question, and the constitution withholds the adjudication of judicial questions from the county court. Following the reasoning in the *Steber* case, the supreme court in *In re Long's Estate*,¹⁶ held that the county court had no jurisdiction under the constitution to adjudicate the title to property wrongfully included in the decedent's estate by the commissioner of accounts.

The county court was held to have no jurisdiction to construe a will in *Hustead v. Boggess*,¹⁷ and the court in so holding said, ". . . despite his [commissioner of accounts] broad powers, as recited in the statute, it must be construed as not intending that he, an auxiliary of the court, should determine questions beyond the jurisdiction of the court."¹⁸ The majority opinion was subject to a strong dissent by Judge Kenna, who maintained that the majority opinion throws too much unbearable burden on the circuit courts, which he feels the framers of the constitution did not intend when they established the county court and vested it with probate jurisdiction.¹⁹

In *Dawson v. Dawson*,²⁰ the supreme court went outside the West Virginia cases in obtaining precedent in saying, "on probate or contest, the court [county court] may construe the instrument which is offered for probate, for the purpose of determining whether or not it is testamentary in character, and should be admitted to probate as properly executed."²¹ They held the construction of

¹⁴ *Id.* at 62, 188 S.E. at 762.

¹⁵ 121 W. Va. 509, 5 S.E.2d 420 (1939).

¹⁶ 122 W. Va. 473, 10 S.E.2d 791 (1940).

¹⁷ 122 W. Va. 493, 12 S.E.2d 514 (1940).

¹⁸ *Id.* at 495, 12 S.E.2d at 515.

¹⁹ See Comment, 47 W. VA. L.Q. 331 (1941).

²⁰ 123 W. Va. 380, 15 S.E.2d 156 (1941).

²¹ *Id.* at 383, 15 S.E.2d at 158. The court relied on *Cartwright v. Cartwright*, 158 Ark. 278, 250 S.W. 11 (1923); *Reeves v. White*, 136 Va. 443, 118 S.E. 103 (1923); *Baker v. Baker*, 51 Ohio St. 217, 37 N.E. 125 (1894).

the instrument to be incidental to the power granted by the constitution to the county court but evaded the question of whether it was of a judicial or nonjudicial nature.

Judge Kenna's dissent in the *Hustead* case, seems to have had little weight in *In re Brown's Estate*,²² where the court held, "the construction of the deed involved is a judicial question, and beyond the jurisdiction of a county court or commissioner of accounts, and within the jurisdiction of courts possessing general judicial powers. . ."²³ In the same year, the supreme court, in *Boone v. Boone*,²⁴ said ". . . this court is of the opinion that county courts in all matters of probate, . . . are courts of record vested with *judicial power and unlimited in their jurisdiction* where in regular session, jurisdiction of both subject matter and parties is had."²⁵ These words imply that if it is a probate matter, the county court has judicial power, in which case the construction of a will is, in common understanding, a probate matter and subject to judicial action by the county court.

Notes given by the deceased during his lifetime and in dispute after his death was the problem in *Ritchie v. Armentrout*,²⁶ and the supreme court held that the controversy here was an incident to, and within the ordinarily accepted jurisdiction of the county court over probate matters. The supreme court said that the creditor had the alternative of presenting his claim to the commissioner of accounts or instituting an action at law against the personal representative,²⁷ and that since he chose the former he is not entitled to start his action at law anew in the circuit court. But if a matter is judicial in nature and if the constitution can be relied on when it states that the county court has no jurisdiction over judicial matters, the parties may not acquiesce to the commissioner of accounts taking jurisdiction over and deciding these judicial questions. In a like vein, if the matter involves the probate of an estate and is not of a judicial nature, then the county court has exclusive jurisdiction and the circuit court may not adjudicate the claim except on writ of error from the county court. So, though the approach in the *Ritchie* case is correct according to the facts of the case, the rule is of limited applicability.

²² 123 W. Va. 504, 16 S.E.2d 801 (1941).

²³ *Id.* at 508, 16 S.E.2d at 805.

²⁴ 123 W. Va. 696, 17 S.E.2d 790 (1941).

²⁵ *Id.* at 704, 17 S.E.2d at 794, emphasis supplied.

²⁶ 124 W. Va. 399, 20 S.E.2d 474 (1942).

²⁷ W. VA. CODE c. 44, art. 1, § 2 (Michie 1955).

In *Lajoie v. Bellomy*,²⁸ the supreme court reaffirmed the authority granted the county court by the constitution and went on to say that "where there is involved some question of equitable cognizance as for example 'the construction of a will, fraud, waste and the like' a court of equity may intervene."²⁹ The assignment of dower was held to be of "equitable cognizance."

Though the cases examined so far have been confusing and of little value when an attempt is made to apply a test for the scope of authority of the county court in probate matters, they do emphasize the belief that some affirmative and immediate action is necessary by the West Virginia Legislature to resolve the conflict.

Since the turn of the half century, a flickering of light has made its way through the maze of incomprehensible decision with three rulings which may show a trend in the field of probate jurisdiction.

In *Charlton v. O'Brien*,³⁰ the supreme court used these words in holding that the commissioner of accounts had jurisdiction to decide who were and who were not the heirs to a deceased's estate: "We think of no method whereby there could be a settlement of the accounts of an administrator without first a determination of the parties entitled to participate therein. This would necessarily require an adjudication as to who are the distributees of an estate Without such determination there could be no settlement of an estate."³¹

In the case of *In re Boggs' Estate*,³² when the question of advancements arose, the supreme court said that it was incidental to the settlement of an estate and within the county court's jurisdiction.

An unliquidated and disputed claim for personal services was the problem in *Furman v. Hunt*,³³ and the court there said, "the mere fact that a claim against an estate may be disputed does not bar the county court from passing upon the same in the first instance, although the question arising thereon may ultimately reach

²⁸ 129 W. Va. 685, 41 S.E.2d 349 (1947).

²⁹ *Id.* at 688, 41 S.E.2d at 351. The court relies on *Travis v. Travis*, 116 W. Va. 541, 182 S.E. 285 (1935); *Page v. Huddleston*, 98 W. Va. 104, 126 S.E. 579 (1925).

³⁰ 135 W. Va. 263, 63 S.E.2d 512 (1951).

³¹ *Id.* at 276, 63 S.E.2d at 523.

³² 135 W. Va. 288, 63 S.E.2d 497 (1951).

³³ 135 W. Va. 716, 65 S.E.2d 1 (1951).

a court possessing full judicial power on appeal. *It is only in cases where title to property is at stake or other intricate matters arise, not necessarily involved in the settlement of accounts of personal representatives that the aid of courts possessing judicial power is necessarily invoked.*³⁴

If the last three cases can be relied on, there is no question but that the supreme court is widening the scope of authority of the county court over probate of estates. The question remains, how far will the supreme court go in extending this authority? It is submitted that there are lawyers in West Virginia who would not agree with these conclusions and that such action is not necessary to free the already overburdened dockets of the circuit courts of probate matters in favor of more pressing and equally if not more important litigation. The county court may not be the complete answer as it exists today but it may be a medial solution if the scope of its authority would be better defined than the present ambiguous limitations of "not of a judicial nature" and "any other matters necessary and proper for the settlement of the estate."

I. A. P.

³⁴ *Id.* at 718, 65 S.E.2d at 3, emphasis supplied.