March 1921

Probate Administration and the County Court

T. Brooke Price

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Estates and Trusts Commons

Recommended Citation

T. B. Price, Probate Administration and the County Court, 27 W. Va. L. Rev. (1921). Available at: https://researchrepository.wvu.edu/wvlr/vol27/iss3/4

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
In matters of judicial organization, giving a dog a bad name does not always suffice to hang him. Sometimes the more friendless and indefensible the abuse, the more impossible it seems to abolish it. For years the predecessor of this publication, The Bar, carried on a vigorous warfare against the justice-of-the-peace system in this state, and none but the very devil's advocate dared espouse the opposite side. Yet the justice of the peace still waxes fat like Jeshurun and kicks. Without friends or champions, yet he defies every effort to dislodge him from his seat of comfortable prerogative. In entering the lists against an equally friendless creature, therefore, I dare not rely upon the bad name of the dog. If he is to be hanged, it behooves us to try to convict him of his crimes, rather than Lynch him for his unpopularity.

The county court seems, indeed, to have no friends. As a court of probate it has, moreover, not even the support afforded by the existence of similar institutions elsewhere. Many states endure justices of the peace; West Virginia alone commits probate jurisdiction to a board of fiscal commissioners.\(^1\)

Nor does the history of the institution justify its continuance. It has neither the sacredness of antiquity nor the novelty of recent experiment. Not that the county court lacks antiquity. A court of that name is as old as Virginia herself, but there is little similarity between that venerable tribunal and the one we are now considering.

The county court of Virginia's early history was a body of country gentlemen squires, appointed by the governor for life and ex-

---

\* Member of the Charleston, W. Va., Bar.

\(^1\) So far as a cursory examination reveals, no other state places probate matters in the hands of a tribunal of a character so entirely non-judicial as our county courts. This jurisdiction is usually conferred upon either a strictly probate court or the general nisi prius tribunal corresponding to our circuit court. A few states combine probate matters with petty civil or criminal jurisdiction in an inferior county court. In Kentucky and Oregon the judge of this court is ex officio president of the county fiscal board. In Tennessee the county court itself has both the probate and administrative business, but its membership includes a county judge who lends some judicial character to the body.
ercising a general jurisdiction, civil and criminal, at law and in chancery. It was peculiarly a colonial institution and it waned with the eighteenth century. In 1788 the professionally trained judges of the General Court began to hold district courts at designated towns throughout the state, and in 1809 these became the superior circuit courts. From the outset, the new courts had a concurrent but slightly broader jurisdiction than the county courts, and they seem to have quickly gained favor at the expense of the latter. A change in the character of the county courts is reflected by the substitution in 1851 of elective for appointed judges. By the Carpet-Baggers’ Constitution in 1869 and subsequent legislation, their ancient form was modified and they were shorn of most of their powers; and after a lingering decline they were finally in 1904 abolished.

At the formation of the new state of West Virginia, the decadent institution of the Virginia county court was completely omitted from the judicial scheme. Probate jurisdiction, which had been exercised concurrently by the county and circuit courts in Virginia, was given exclusively to the latter, with the routine vacation business entrusted to the county recorder, the prototype of the present county clerk. But in 1871 came a backward step. The constitution of that year created a county court composed of a president, elected as such, and of two justices of the peace, and to this body were given the fiscal administration of the county and a general legal and equitable jurisdiction, to be exercised at separate terms. Some doubt of the wisdom of this scheme is indicated by a provision authorizing the establishment of separate tribunals for the judicial and the administrative work. This foreboding seems to have been justified, for in 1879 the judicial functions of the county court were completely abolished, except that probate jurisdiction was left to that body in the mis-mated union with fiscal administration which has continued to the present day. At the same time the membership was changed to a board of commissioners as now constituted.

---

2 See 4 MINOR, INSTITUTES, 3 ed., 253; REvised CODE OF VIRGINIA OF 1819, c. 71.
3 ACTS OF VIRGINIA GENERAL ASSEMBLY OF 1788, c. 67; id. of 1807, c. 3; id. of 1808, c. 6.
4 CONSTITUTION OF VIRGINIA OF 1851, Art. VI, § 27.
5 CONSTITUTION OF VIRGINIA OF 1869, Art. VI, § 13. ACTS OF VIRGINIA GENERAL ASSEMBLY OF 1872-3, c. 395, 396; CONSTITUTION OF VIRGINIA OF 1902, Art. VI; ACTS OF VIRGINIA GENERAL ASSEMBLY OF 1902-3, c. 401. See MINOR, loc. cit. Professor Minor's indignation against the Carpet-Baggers seems hardly justified. It was the inevitable triumph of the trained judiciary over laymen judges.
7 CONSTITUTION OF 1871, Art. VIII, §§ 12, 23-34.
8 CONSTITUTION OF 1879, Art. VIII, §§ 24-25.
to exercise probate jurisdiction concurrently with the county courts since the creation of the latter, but in 1882 this concurrent jurisdiction was abolished by the legislature and since that time the jurisdiction of the county court has been exclusive.\(^9\)

As a probate court, then, the county court seems an anachronism. Nothing remains of the old-time judicial character but the name and this one function. In Virginia even these are gone. In the checkered history of the institution in this state, it has been rejected, restored and again rejected, so that its claim to exist as a court finds no foundation in historical continuity.

If we take up, count by count, the indictment of the county court, we are confronted first with the fact that it is in the worst sense a political body. In most counties it is the political body, \textit{par excellence}. The reason is evident. It controls the collection and disbursement of county funds, the letting of contracts, the management of county institutions, the hiring of numerous employees. In a word, it is the county plum tree. Consequently, the members of the county court are of all local officials the surest to be faithful henchmen of the local boss. It is unlikely that they will be qualified to exercise probate jurisdiction. If we must have probate judges who are not trained in the law, we might still do better than to choose for the purpose the hierarchy of the county political machine.

The present system makes the selection of suitable men almost impossible by failing to provide proper pay. The salary of two dollars a day during court terms now paid to the members of the county court is disgraceful.\(^{10}\) Better ask the services of capable men as a patriotic duty without pay, than dole out such a miserly pittance to the holders of a position that should rank among the loftiest in local dignity and responsibility. To any one familiar with the honorable position and standing of the probate judge or surrogate in the older states of the country, the contrast with the two-dollar-a-day political factotum to whom the same duties are committed in West Virginia is positively shocking. If nothing else led to corruption in our county courts, the failure to pay a proper salary would be almost sufficient cause. Only the wealthy

\(^9\)\text{Acts of 1872-3, c. 122, 136, 234; id. of 1882, c. 68, 84. See Stone v. Simmons,) 56 W. Va. 88, 48 S. E. 841 (1904).}

\(^{10}\)\text{Constitution, Art. VIII, § 23; Code, c. 39, § 8.}
and public spirited or those who are seeking something "on the side" can afford to hold the office.

In this connection it is worth noting that the evils resulting from the incompetence and corruption of judges are in one respect more serious in the probate court than elsewhere. In ordinary litigation the injured party usually can secure redress in a higher court and is prepared to avail himself of that privilege. The acts of the court are under the scrutiny and subject to the attack of an alert pair of opponents. But the probate judge is constantly invited to assist at the robbing of the widow and the orphan under circumstances that render criticism unlikely and appeal useless. There is constant pressure to appoint unfit persons to positions of trust as fiduciaries, to approve worthless bonds, to allow estates to be milked by exorbitant commissions and improper expenditures, to pass plausible but dishonest settlements of account. The ignorance and inexperience of wards and beneficiaries open the door to a host of abuses, from which probate court hangers-on secure rich pickings, and which can only be prevented by a capable and fearless judge.

The evils of incompetence or corruption on the probate bench are peculiarly serious also, because the questions arising in this field of the law include many of the most difficult and perplexing that the mind of man has ever had to contend with, and the breadth of the jurisdiction and powers of probate courts is necessarily quite extensive. It is generally recognized that in the construction of wills and the enforcement of testamentary trusts, questions occur that search the most profound learning and test the soundest judgment; but the variety of matters that must be adjudicated in probate proceedings may surprise one unfamiliar with the subject. Probate courts may have to pass on the title to real estate, the existence and priority of liens, the marshalling of assets, the validity and construction of contracts and a host of minor matters. In proper cases they may even render decrees of specific performance, and they constantly order judicial sales of real estate.11 All this should be borne in mind when discussing the wisdom of committing such jurisdiction to a court of questionable competence.

Even if the personnel of the county court were all that could be wished, the probate court work would still suffer from being sub-

---

ordained to the administrative duties of the court. The county
commissioner is first of all a commissioner, and his judicial duties
claim a minor share of his interest. Three-fourths of the time his
work is purely administrative; consequently, during the remain-
ing fraction the judicial atmosphere is lacking and the judicial
attitude is unnatural. Probate judges and their clerks should be
specialists. Our present county courts and county clerks have too
much else to do.

The unsuitability of such a body for exercising probate juris-
diction seems to have been recognized in some measure by the law-
makers of the state. While extending probate powers with one
hand, they have pretty effectively taken them away with the other.
The court has been rendered so nearly negligible as an instrument-
tality of justice, that its control of matters theoretically under its
exclusive jurisdiction is largely nominal. In view of the char-
acter of the average county commissioner, this might seem a happy
result; but reform can never be accomplished by making incomp-
petent courts weak. Some instances of the working out of this
policy are worth considering.

Personal representatives, guardians, curators and similar
fiduciaries are appointed and removable by the county court and
subject at all times to its jurisdiction for the supervision and con-
trol of their actions. Such is the basic scheme of our law. A
prime duty of these fiduciaries is to return inventories of the
property coming into their charge, and to file for settlement by
the county court annual accounts with vouchers covering their
financial transactions, and the county court is supposed to see that
this duty is performed. Now, a general grant to a court of juris-
diction over the affairs of such fiduciaries ordinarily carries with
it, expressly or by implication, the authority to compel perform-
ance of their duties under pain of punishment for contempt; but
our statutes provide a procedure that seems to repel the pre-
sumption of such incidental powers in the county court. To be-
gin with, this tribunal can punish for contempt only to the extent
of a fifty dollar fine, a somewhat inadequate sanction to vindic-
ate the rights of helpless beneficiaries. Moreover, in cases of de-
linquency in accounting, the statutory duty of the county court
is simply to notify the commissioner of accounts of the matter.

32 CONSTITUTION, Art. VIII, § 24; CODE, c. 39, § 9; c. 87, §§ 2, 6.
33 See 13 C. J. 42-43, 50-51; 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 326.
34 CODE, c. 39, § 13.
It then rests with the latter to summon the fiduciary to account and, in the event of his continued contumacy, to report the circumstances to the circuit court. Effective action depends upon the initiative of the circuit court in inflicting punishment, as for a contempt committed against itself, upon this appointee of the county court who has neglected a duty owed to the county court and its creature, the commissioner of accounts. The system seems admirably calculated to relieve both courts from any feeling of responsibility when accounts are not filed, and to make it virtually certain that the law will never be enforced unless an interested party brings a suit to require an accounting. That such is the practical effect is, of course, notorious. It would seem axiomatic that the power to appoint fiduciaries, the power to supervise their acts and settle their accounts, and the power to punish them for contempt and dereliction of duty should be vested in a single court.

Other illustrations of the impotence of the county court in probate matters come readily to hand. To administer an estate or a trust requires a determination of the persons entitled, the amounts of their several shares and a variety of incidental matters. The principal business of a court of probate is to decide such issues, and this jurisdiction is conferred upon our county court. The orders of the county court in such proceedings are binding adjudications upon all the issues involved and cannot be collaterally attacked. Sadly at variance with the respect to which such orders are entitled elsewhere, however, is the feeble authority they carry in the proceeding itself. In so far as they are not self-executing, the county court seems powerless to enforce them. The remedy of the unsuccessful party is not by appeal from the order, but by disregard of it. The successful party wins, not the benefit to which he has been adjudged entitled, but the privilege of bringing a chancery suit to obtain it. When he goes into the circuit court to secure a decree with teeth in it, he carries with him as the fruit of his previous victory only a presumption in his favor. Naturally, the practical result is that litigation of this character is instituted from the beginning in the circuit court whenever jurisdiction for the purpose can be found.

15 Code, c. 87, §§ 2, 6-8.
17 Code, c. 87, § 32.
Besides this enfeebling dependence of the county court upon the circuit court for the enforcement of its decrees, further weakness arises from the concurrent jurisdiction given by statute to the circuit court over special proceedings of strictly probate nature. This concurrent jurisdiction is in practice exclusive, for resort is always had to the circuit court in such cases for obvious reasons. Instances of this sort are the familiar suit to subject real estate of a decedent to the payment of debts,\textsuperscript{18} proceedings to apply the principal of a ward’s estate to his maintenance, and to direct the investment of the funds of such an estate,\textsuperscript{19} applications for the appointment of a guardian or committee of a lunatic upon adjudication of insanity,\textsuperscript{20} proceedings to transfer the property of non-resident decedents and persons under disability,\textsuperscript{21} certain matters between apprentices and their masters,\textsuperscript{22} etc. In addition, a real probate court should have jurisdiction of proceedings to sell or encumber lands of infants and those under disability and should be the proper agency to carry out the mass of semi-administrative duties connected with the custody and guardianship of dependent and delinquent children and the insane, which under recent humanitarian legislation have been largely added to the burden of the circuit court.\textsuperscript{23}

The truth is, of course, that with all its splendid constitutional powers and the elaborate statutory scheme of probate jurisdiction, the county court is for probate purposes a record office and little else. The theory that it is a probate court throws the increasing burden of this work upon the circuit court without the organization, the supervising authority and the responsibility that render possible efficient administration. The circuit courts and their commissioners in chancery are doing a large part of the work of probate judges. The remainder is mostly left undone.

The weakness of the county court, caused by division of its jurisdiction with the circuit court, is increased by a division in its own members. The accounting work is divided between the commissioners of accounts appointed by the court, of whom there may be as many as four in a county, each an autonomous power in himself, bidding against his rivals for the business of the fiduciary

\textsuperscript{18} CODE, c. 86, §§ 7-9.
\textsuperscript{19} CODE, c. 82, §§ 8, 12.
\textsuperscript{20} CODE, c. 58, §20
\textsuperscript{21} CODE, c. 84.
\textsuperscript{22} CODE, c. 81, § 11.
\textsuperscript{23} CODE, c. 46-A; c. 58, §§ 13, 20, 23-26; Acts of 1919, c. 111.
with an account to settle. The fiduciary may choose his own
commissioner before whom to make his settlements, and the
strength of the chain consequently is limited by that of the weak-
est link. It is a common experience of the more conscientious com-
missioners, when some suspicious item has prompted an investi-
gation of an account, to find the account withdrawn by the fidu-
ciary on some pretext, only to be presented to another commis-
sioner and readily passed without question. The settlement of
accounts and all other forms of supervision of fiduciaries should
be centralized, and definite and uniform standards of strictness
should be maintained. Every step of the work should be handled
through a public probate office instead of by lodging accounts and
objections in the private office of the commissioner. The public-
character of the proceeding should not be lost sight of through the
informality which at present often reaches indefensible laxity.

If we return now to the results of the present system of divided
jurisdiction, it should be remarked at the outset that the trouble
is not so much in the failure of the county court to function ef-
fectively as a probate court as in the pretense that it is such a
court,—the necessity that it go through the motions of a court.
The presence of a non-judicial agency in the administration of pro-
bate work is not objectionable. A large part of the business is
really not judicial in character and there is no need for every
uncontested matter of routine nature to receive the attention of
the judge. The real trouble with our system is that we have two
layers of such non-judicial matter instead of one, with resulting
confusion and waste of effort and division of responsibility. The
county clerk, in conjunction with the commissioners of account,
fills precisely the role of non-judicial administrator. Matters that
lie above the jurisdiction of these officials should be in the hands
of a competent and responsible tribunal. Instead they must pass
through the form of adjudication at the hands of a so-called court
that frequently is less qualified to decide them than the county
clerk or the commissioner.

The workings of this system are familiar to the profession,—so
familiar that they are accepted as normal and almost inevitable.
Our laws respecting fiduciaries are lax; their administration is
loose and irregular. It is useless to pass more stringent laws with-
out an adequate tribunal to administer them. At present fiduci-

24 Code, c. 87, § 6.
aries generally feel free to regard the estates committed to their charge as theirs to manage as they please so long as the beneficiaries make no protest. Speculative investment of trust funds is common. Accounts are filed for settlement or not at the pleasure of the fiduciary. The statutory requirement of annual accounts is almost a dead letter.

The failure of the county courts to require fiduciaries to settle their accounts promptly leads not only to neglect of duty and opportunities for defalcation, but encourages such interminable delay in winding up estates as is almost worse than dishonesty. Instances are of common occurrence in some counties of estates that could be disposed of in a short time dragging on for twenty or thirty years until the parties interested are themselves dead and their estates begin the same endless process, rendered even more hopeless by the tangled ties between them and the estates of earlier decedents.

What is needed, of course, is a probate court that will exercise an active supervision over the estates committed to its appointees. Such a court should have a docket of settlements required from fiduciaries and when an account fails to come in on time it should see that the delinquent immediately corrects the default or is removed to make way for one who will. Better still, the law should require all accounts to be filed for settlement by a fixed annual date, or during a given calendar month. Such a provision could be enforced with the certainty and regularity with which tax returns or reports of corporations are required. Such a court would have the authority and would feel the interest of compelling responsibility to enter a decree cutting the Gordian knot of difficulties when the settlement of an estate was tied up by a snarl of unsettled questions calling for adjudication. Active attention to business would be made the first requisite for holding positions of trust.

Another evil consequence of the present system is the irregular nature of the records of probate matters and the looseness with which records of this character are kept. Theoretically, the county court is a court of record. Actually, the gentlemen commissioners, with the best intentions, are often not qualified to require orders and proceedings in matters pending before them to conform to proper legal forms and comply with necessary requirements of

---

25 Compare, for example, NEW YORK SURROGATE COURT ACT (1920), §§ 190-192.
practice. One examining the record of a probate proceeding before the county court frequently finds it incomplete or irregular not because of any inherent difficulty in the proceeding but simply because it has been before an incompetent tribunal which failed to require things to be done and recorded in a proper way. Title examiners are the principal sufferers from this state of affairs. Wills and probate matters are in most counties the weakest feature of the county records. Tracing the administration of intestate estates is generally hopeless unless a chancery suit is involved. It is only familiarity that renders these conditions tolerable. There is no reason why every stage of a probate proceeding should not be as clearly and fully recorded and made as available as are the judgments and decrees of the other courts of record of the state. The public interest in the security of property and transactions cannot be satisfied with less.

The volume of probate work in West Virginia has grown to a size and importance that call for the same regularity and formality as the litigation in other courts. As the state becomes more densely populated and larger stores of wealth are handed down from each generation to the next, this branch of legal administration will acquire an importance and dignity such as it has already attained in many other states. Stricter and more systematic procedure, already needed, will become essential. Inheritance taxation will develop into a substantial source of state revenue, and the inquisition of the tax-gatherer, if nothing else, will bring regularity and responsibility, though the rights of beneficiaries were otherwise sacrificed to slackness and incompetence.

Not only a competent court will be required; the laws governing procedure in probate matters and even in some measure those fixing substantive rights require amendment. Progress is impossible without a better court, but even the best of courts would be handicapped by the present probate statutes. In general, the need is for a more specialized and detailed procedure, a reform hardly worth undertaking until the business is placed in the hands of judges trained in the law and skilled in its application. Thus, to refer to a few glaring defects in the present system, provision should be made for notice by summons, citation, advertisement, or otherwise, to all known interested parties before a will is probated, an administrator appointed or an estate ordered to be distributed. As the law now stands, no notice is given at any stage of the proceedings and if interested persons desire to appear for any pur-
pose they must learn as best they may of the pendency of the matter.\textsuperscript{26} For historical reasons probate without notice is held to be due process, but its obvious harshness and inconsistency with prevailing conceptions of justice have caused it to be abandoned in most other states.\textsuperscript{27}

Again, our law allows a fiduciary to escape the obligation to file his account and have it judicially settled by settling it directly with the beneficiary.\textsuperscript{28} One of the chief deterrents of fraud is lost, unless the fiduciary must in every case submit to public inspection and the examination of an experienced and impartial judicial officer a complete and satisfactory account and set of vouchers. Wards and beneficiaries are often too ignorant, too trusting or too timid to demand a satisfactory statement. The court should see every estate duly accounted for, not only as a protection to those entitled, but also in vindication of its authority as the protector of the helpless and the guardian of their rights.

Again, the jurisdiction of the county court of a particular county in a probate proceeding may depend upon the domicil or residence of a decedent or the situs of his property. A definite procedure for proof of these matters should be established, and the moving party should be required to show in the record all the pertinent facts concerning them when a proceeding is instituted. Failure to require this results frequently in two or more county courts assuming jurisdiction, with consequent confusion and conflict between rival fiduciaries.

Coming now to the practical problem of doing away with our \textit{bete noire}, the county court, the question immediately arises, what sort of probate court shall we establish in its place? We must have a court whose judge is a lawyer. It must be capable of handling the large business of the city counties, yet must not be too expensive or inaccessible for the rural districts. It must be always open for routine matters, yet competent to adjudicate questions of

\textsuperscript{26} A proponent may voluntarily institute a proceeding for probate on notice, but this is not compulsory or customary. See \textsc{Code}, c. 77, \textsection 26; c. 85, \textsection\textsection 1-5; c. 87, \textsection\textsection 29-31; \textsc{Roper v. Roper}, 78 W. Va. 225, 88 S. E. 834 (1916).

\textsuperscript{27} Probate without notice corresponds to the English practice of probate in the "common form". Modern American statutes require some form of notice to interested persons, roughly corresponding to the English probate in "solemn form". See 3 \textsc{Alexander}, \textsc{Commentaries on Wills}, 1998; 40 \textsc{Cyc.} 1233, 1263; \textsc{Page}, \textsc{Wills}, 365.

For discussion of the requirement of notice in probate proceedings, its effect on jurisdiction and its bearing upon the constitutional requirement of due process, see the following cases and annotations: \textsc{Re Sieker}, 89 Neb. 216, 131 N. W. 204 (1911); 32 L. R. A. (N. S.) 1055 and note; \textsc{Farrell v. O'Brien}, 199 U. S. 89, 116 (1905); \textsc{Estate of Davis}, 136 Cal. 590, 69 Pac. 412 (1902); \textsc{Barrette v. Whitney}, 36 Utah 574, 106 Pac. 522 (1909), 37 L. R. A. (N. S.) 368 and note.

\textsuperscript{28} \textsc{Code} c. 87, \textsection 7.
the greatest complexity and difficulty known to the law. Its decrees should be appealable directly to the court of last resort.

A glance at the principal systems of probate administration in other states may be helpful. They fall into three general classes. The first is the system of specialized probate courts which have no jurisdiction except in probate matters. Such a court is generally established either for each county or for each probate district within the county. Its decrees are usually appealable to the general nisi prius court and unless the county or district is populous, the judge is not likely to have enough work to occupy all his time. Consequently it is difficult to make the post carry salary and importance enough to secure judges of the highest class.  

The second system is the county judge or county court system properly so-called. It is better adapted to the needs of country communities than the preceding and is common in the south and west. The county judge in each county holds a court for probate and petty civil matters to which may be added the trial of misdemeanors. The civil jurisdiction consists principally of appeals from justices of the peace and original jurisdiction limited to some such sum as $1,000.00 or $2,000.00; appeal lies to the nisi prius court. Many states supplement this system by the establishment of separate probate courts in the cities, thus securing the advantages of both systems.

The third system consists in conferring probate jurisdiction on the general nisi prius court. This is probably the system best adapted to the needs of our state, and certainly the one most approved by present students of judicial organization. This could be adopted in West Virginia by transferring the probate business to the circuit courts, under the supervision and control in the first instance of a permanent commissioner or registrar for probate to be appointed by the circuit judge in each county. This official should have roughly the powers now exercised by the county clerk in vacation. He should handle all uncontested routine matters, while contested business would be heard by the circuit judge in term. The commissioner would have also the duties and powers of the present commissioners of accounts and for this work he should have in the larger counties such assistants or clerks as the volume of business required. His office should be the probate office of the county and his record of probate orders would par-

---

allel the law orders and chancery orders of the circuit clerk. He would also keep the records of wills, appraisals and fiduciary settlements now in charge of the county clerk.

The volume of litigated business thrown on the circuit judge under this plan would be little larger than at present. Every controversy arising from probate matters is now tried in the circuit court as a court of first instance. This would still be true, but by having such cases originate in that court, instead of coming up on appeal from the county court, some procedural matters might be simplified and the enforcement of the decrees of the court made easier and more direct. True, a more vigorous handling and closer supervision of the doings of fiduciaries through the efforts of the commissioner might bring a larger grist to the mill of the court, but such a result is altogether desirable. The court cannot complain if it is called upon to do justice in cases where now through neglect injustice is allowed to prevail. Nevertheless, in at least a few counties it is to be hoped that an additional circuit judge might be secured. Such a judge, while he might specialize in probate cases and lend a hand with the more serious matters before the probate commissioner, should be free to help with any class of the work of the court.30

If this plan were adopted, we should immediately cut away one of the two non-judicial layers through which a contested probate proceeding may now have to pass. The proceeding would be instituted and tried in one and the same court and could be appealed thence directly to the court of last resort. We should also escape the evil of another politically elected official, the usual type of judge of an inferior probate court. By substituting a judicial appointee for this functionary the chance of securing a capable and independent man is increased. Also, we should thus secure a system flexible enough to meet the needs of counties of varying size and character of population. The sparsely settled and poorer counties would not be burdened with an additional judge, whose title and dignity might cost more than the traffic would bear; while the larger towns could have probate offices ample for their needs. Finally, we should avoid the incidental expenses that go

30 It would be highly advantageous if the common pleas or similar courts in some counties could be done away with and their judges made additional circuit judges. The constitutional requirement of appeal from these courts to the circuit courts drives litigants to the latter in the first instance. Thus, these inferior courts fail in the purpose of holding up the hands of the overworked circuit judges for which they were established, while if the court were consolidated the two judges could dispose of a far greater volume of business than they do separately. Only a constitutional amendment can help the situation.
with an additional court *qua* court,— salaries of ornamental attaches and expenses for court rooms and judges’ chambers.

The line of demarcation now drawn between the jurisdiction of the circuit court and that of the county court is irregular and hard to follow with certainty. This difficulty will never be entirely cleared up so long as probate powers are placed in an inferior tribunal whose decrees are appealable to the circuit court. The tendency to transfer important classes of matters to the original jurisdiction of the latter will always persist so long as it is necessary in practice to carry them to that court on appeal for authoritative decision. This tendency in our legislative history has caused the duplication and confusion of jurisdiction that now exists, and the tendency will increase with the growth of probate practice. The only escape from it lies in abolishing the inferior court as such and placing the entire jurisdiction in the circuit court by some such plan as just suggested. To wipe out this line of separation between the two courts would eliminate a large body of troublesome jurisdictional questions and put probate practice on a sure and firm foundation.

It need hardly be said that a thorough-going constitutional amendment will be necessary before the probate jurisdiction can be removed from the unfortunate tangle of functions performed by the county court under Article VIII of the Constitution. Two makeshifts may be suggested for the consideration of the legislature and the bar, but neither is adequate. The first is to confer concurrent probate powers on the circuit court. Such a course might in practice throw all the business to the circuit court, but as a matter of judicial administration it promises only confusion worse confounded. The second makeshift is to establish by county local option, tribunals in lieu of the present county court, as authorized by Section 29 of Article VIII.31 Such tribunals must have all the powers of the present county courts, but an adroit legislative draftsman might contrive so to subdivide the new court that its administrative business should be handled by commissioners somewhat as at present, while the probate matters should be left to a county judge who should be the figure head of the administrative board. Such a system, virtually, is now employed in

31 "The Legislature shall, upon the application of any county, reform, alter or modify the county court established by this article in such county, and in lieu thereof, with the assent of a majority of the voters of such county voting at an election, create another tribunal for the transaction of the business required to be performed by the county court created by this article; . . . ."
Tennessee and Oregon, and with all its defects, it would be vastly better than what we now have.

But the thing is so well worth doing that it is worth doing well. It can only be done well by cutting off the probate powers of the county court, root and branch, by a constitutional amendment. It should then be left to the legislature to confer this jurisdiction either upon the circuit court as just suggested, or upon a specialized probate court. Whichever system is tried, the way should be left open to change to the other if experience shows the necessity of doing so. The predicament in which we now find ourselves should be proof enough of the unwisdom of tying the hands of future generations by constitutional bonds lest they should change the system of courts to meet conditions we can no more foresee than the framers of the Constitution of 1879 could foresee the unsuitableness of the county court for the needs of the present generation.