

Washington University Law Review

Volume 4 | Issue 2

January 1919

Probate Jurisdiction of Federal Courts

William F. Woerner

St. Louis Bar Association

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Courts Commons](#)

Recommended Citation

William F. Woerner, *Probate Jurisdiction of Federal Courts*, 4 ST. LOUIS L. REV. 069 (1919).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol4/iss2/2

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

PROBATE JURISDICTION OF FEDERAL COURTS

The jurisdiction of Federal Courts is conferred upon them by the Constitution of the United States and the laws of Congress in pursuance thereof; and where the requisites of jurisdiction exist, this

Federal Jurisdiction Affecting Admini- stration.

jurisdiction cannot be ousted or annulled by statutes of the States, though assuming to confer it exclusively on their own courts.¹ It is held that the equity jurisdiction in administration suits, conferred on the Federal courts, is like unto that which the High Court of Chancery in England possessed; that it is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union.² Hence, where the circumstances are such that jurisdiction attaches by reason of diverse citizenship of the parties,³ a citizen of another State may establish a debt against the estate in a Federal court;⁴ or, if he is not chargeable with laches, maintain a bill after final settlement, to charge heirs, devisees, and legatees to the extent of assets received by them, with ancestral debts, though the claim was not presented against the estate within the time limited by the special statute of non-claim provided by the State law; but failure so to establish the claim is evidence of laches which should be satisfactorily explained;⁵ and if the local law could have been complied with the non-resident's remedy is lost;⁶ or a foreign distributee may establish in the Federal court his right to a share in the estate, and enforce such adjudication against the administrator personally and his sureties, or against any other parties subject to liability, so long as the possession of the property by the State court (holding through the administrator) is not interfered with;⁷ or, under similar conditions, the Federal courts have jurisdiction to protect the beneficiaries against fraud, or fraudulent conveyances.⁸ If the complainant asks for relief part of which is within and part without Federal jurisdiction, the court will shape its decree accordingly.⁹ And the Federal court may declare an attorney's lien (given by the State law) on a distributive share in an estate being administered in the Probate court;¹⁰ or, it seems, foreclose a mortgage given by the deceased in his lifetime.¹¹ It has even been held that in an exceptional case where assets in an ancillary State are in danger of being lost to a creditor because of non-administration resulting from neglect and litigation, preventing protection by the probate court, a Federal court in the exercise of its chancery jurisdiction may appoint a temporary receiver pending action by the Probate

court in the State where the assets are situate.¹² Where the right of a foreign administrator to sue is recognized by the State law he may do so in the Federal courts.¹³ It is also to be observed that the State statutes regulating the time and manner of establishing claims against estates cannot affect the claims of the Government itself, nor their priority of payment. And the national bankruptcy law being in the exercise of supreme power of Congress granted by the Constitution, untrammelled by State laws,¹⁴ the death of the bankrupt does not abate the proceedings, and although under that law the widow and children are entitled to all rights of dower and allowances as fixed by the laws of the State of the bankrupt's residence,¹⁵ such rights are governed by the bankruptcy law, and the bankruptcy court has exclusive jurisdiction to determine the same.¹⁶

But, as established by the Supreme Court of the United States in an exhaustive opinion delivered by Justice Brewer, the Federal courts

Federal Courts Cannot Assume Control of the Administration Itself, but Only Decide the Status of Non-Residents to the Estate.

have no original jurisdiction with respect to the administration of estates of deceased persons; they cannot draw to themselves, by reason of any of the powers enumerated, the *res*, or administration itself; nor make any decree looking to the mere administration of the estate; nor can they in any way disturb the possession of the decedent's property held by administrator appointed by a State court, and

thus, through him, dispossess that court of its custody.¹⁷ These courts properly recognize the importance of fully according to the convenient forum of the State Probate courts, jurisdiction over purely probate and administration proceedings, where for more than a century such jurisdiction has been understood to belong.¹⁸ The rights of parties as

Claims Allowed by U. S. Courts Are Enforced by Proceedings in Probate Courts Like Other Claims.

given or restricted by the probate jurisdiction of the State courts are fully recognized by the Federal tribunals.¹⁹ Hence the claim established by a resident of another State in the United States court cannot be enforced by direct process against the decedent's property, but must take its place and share in the estate as administered in the Probate court.²⁰ A

non-resident who delays until the period of proving claims fixed by

Claims Barred in State Probate Courts Are Also Barred in U. S. Courts.

the State statute has expired, the representative's final account passed, and the order of distribution made in the Probate court, will be barred from proceeding to have his claim allowed in a Federal court;²¹ and it is too late for one claiming as assignee of a distributee to invoke Federal jurisdiction after an order of distribution has been made by the State Probate court.²² Nor can action be taken in the United States courts to compel the closing of an administration,²³ or to restrain, at the instance of the executor and legatee residing in the testator's foreign domicile, an administrator ordered to distribute an estate, from so disposing of the assets in disregard of the provisions of the will.²⁴ A Federal court will not set out the widow's statutory year's support;²⁵ nor will it entertain a bill in equity by a residuary cestui que trust legatee to set aside a sale by the executor, before the latter has settled his account in the State Probate court.²⁶

So also it is firmly established that the Federal courts have no jurisdiction to grant original probate or letters, such jurisdiction being exclusively in the State Probate courts.²⁷ Such proceeding for probate or contest of probate of a will in the testamentary court (including a direct review or continuation thereof by appeal or otherwise) is in rem, and, not being between parties, cannot be removed to the Federal courts: yet, where such will may under the State law be contested by original proceedings in a court of general jurisdiction, in pursuance of statutory provisions, and becomes an independent action or suit inter partes, residing in different States, the Federal courts take jurisdiction as they would in any other controversy between the parties.²⁸ After a will has been established in the State court the Federal courts have jurisdiction to interpret its provisions in an action between citizens of different States.²⁹ But it is held that where the exercise of Federal jurisdiction depends upon diverse citizenship it must be confined to the administration of the rights of such diversely domiciled citizens, and them alone.³⁰

Federal Courts no Jurisdiction to Grant Letters or Original Probate of Wills.

But Otherwise on Contest and Interpretation of Will.

The rules of evidence as to the competency of parties, in actions

Evidence in Actions in Federal Courts.

Jurisdiction Over Territories

in the courts of the United States, are controlled by the act of Congress, unaffected by the State statutes upon the same subject. And so far as the territories of the United States are concerned, the jurisdiction in probate, as in other matters, is of course subject to the acts of Congress and laws in pursuance thereof.

It may be added that, since the devolution of the estates of deceased persons and the qualifications required of executors and administrators are matters exclusively within the control of the several States, the Federal Reserve Act of Congress (prior to the amendment of September 26, 1918) authorizing national banks on application to the Board, to act as executors, administrators and trustees (when not in contravention of State laws) was held unconstitutional in this respect by State courts.³¹ But a different view is taken by the United States Supreme Court and the act (even before the amendment) was upheld as being within the authority of Congress in conferring the powers designated on the National Banks as incidental to the successful discharge of their public functions.³²

WM. F. WOERNER.

³¹ *Hess v. Reynolds*, 113 U. S. 73, 77, and cases cited; *Waterman v. Canal-La. Bank Co.* 215 U. S. 33, 43-44 (in which the court adds that "it is to be presumed that the Probate court will respect any adjudication which might be made in settling the rights of parties in this suit in the Federal court. It has been frequently held in this court that a judgment of a Federal court awarding property or rights, when set up in a State court, if its effect is denied, presents a claim of Federal right which may be protected in this court: p. 46); *McClellan v. Carland*, 217 U. S. 268, 281. A proceeding to sell lands to pay decedent's debts was held to be within the act for the removal of suits to Federal courts, in *Elliott v. Shuler*, 50 Fed. R. 454.

³² *Borer v. Chapman*, 119 U. S. 587, 600; *Payne v. Hook*, 7 Wall. 425, 430; *Spencer v. Watkins*, 169 Fed. (C. C. A.) 379. See also *Lawrence v. Nelson*, 143 U. S. 215, *Hayes v. Pratte*, 147 U. S. 557, 570, and *Arrowsmith v. Gleason*, 129 U. S. 86, 98. Judge Thayer, in *Walker v. Brown*, 27 U. S. A. 291, observes that "the jurisdiction of these courts [Federal] over the administration of estates is less extensive than that which was formerly exercised by the English chancery courts. Their jurisdiction at best is but a limited one," etc.: p. 303 of the opinion. It is also held that in addition to the jurisdiction exclusively conferred on them the State Probate courts may have some of the general equity powers: "Whenever, in the exercise of this concurrent jurisdiction, the Probate court has adjudicated upon a matter within the scope of its authority, such effect will be given in the courts of the United States to that judgment as by the laws of the State it is entitled to; subject to any such adjudication, the complainant is entitled to have the matter involved adjudicated by the court whose jurisdiction is invoked": *Comstock v. Herron*, 5 C. C. A. 266, 275; 6 U. S. App. 626; 55

Fed. 803; and see that where the Federal court takes jurisdiction ordering a sale of land, the Probate court not having theretofore done so, the jurisdiction is exclusive: *Brun v. Mann*, 151 Fed. (C. C. A.) 145. The rule is recognized that the pendency of an action in the State court is no bar to proceedings in the Federal courts, where they have concurrent jurisdiction over the controversy, and when arising between citizens of different States the Federal courts may carry the cause to judgment, notwithstanding the State court may also have taken jurisdiction: *McClellan v. Carland*, 217 U. S. 268. Where one co-executor who is a non-resident sues the other, under circumstances where a U. S. court has acquired jurisdiction, to enjoin a threatened danger, no subsequent change in the personnel of the executors, and substitution by the Probate court of an administrator c. t. a. will oust the Federal jurisdiction; nor does the fact that another executor may have qualified in the State of the situs of the estate disqualify him from suing there, if he is in fact a non-resident citizen; *Monmouth Inv. Co. v. Means*, 151 Fed. (C. C. A.) 159, 164-165. A Federal court is not bound by a judgment of a State court when the latter had no jurisdiction, and on this point a State court and a Federal court, although sitting in the same State, are to each other courts appointed by different sovereignties: *Phoenix Bridge Co. v. Castleberry*, 131 Fed. (C. C. A.) 175, 177.

⁴ The citizenship of the personal representative (not of the ultimate distributee, nor the locality of the court granting letters) determines whether citizenship is diverse; hence a citizen of Maine, who is appointed administrator of an estate in New Hampshire, cannot sue another citizen of Maine in a Federal court on the ground of diverse citizenship: *Wilson v. Hastings Co.*, 103 Fed. (C. C.) 801. See also *Gallivan v. Jones*, *infra*, and *Hess v. Reynolds*, *infra*. (But see *Schneider v. Eldredge*, 125 Fed. (C. C.) 638). And this rule is sometimes applied in suits for damages for death by wrongful act: *Cin. H. & D. Ry. v. Thieband*, 114 Fed. (C. C. A.) 918; *Bishop v. Boston & M.* 117 Fed. (C. C.) 771. Respecting an executor or administrator it is said that "there is no absolute separation of his artificial from his natural personality" and a domiciliary administrator appointed and domiciled in one State, afterwards becoming ancillary administrator in another, remains domiciled in the former State and does not acquire a residence in the latter State so far as affecting the question of discharge of a defendant in bankruptcy when sued by him as ancillary administrator: *Adams v. Batchelder* 173 Mass. 258.

It has been held that in suits by wards (acting through curators, who do not, like administrators, have the title in themselves) the domicile of the infant or incompetent under guardianship, not that of the curator or guardian, controls: *Stout v. Rigney*, 107 Fed. (C. C. A.) 545, 551; but the Supreme Court holds that legal representatives created by law such as administrators, guardians, etc., may stand upon their own citizenship, and that "if in the State of the forum the general guardian has the right to bring suit in his own name he is to be treated as the party plaintiff so far as Federal jurisdiction is concerned": *Mexican Central R. v. Eckman*, 187 U. S. 429, 434.

⁴ *Hess v. Reynolds*, 113 U. S. 73; *Yonley v. Lavender*, 21 Wall. 276; *Gallivan v. Jones*, 102 Fed. (C. C. A.) 423, 427 (where the non-resident creditor was a co-executor of the estate); per *Shiras, J.* in *Security Trust Co. v. Bank*, 187 U. S. 211, 227; *Schurmeier v. Ins. Co.*, 137 Fed. (C. C. A.) 42; s. c. 171 Fed. 1; and, notwithstanding that the Supreme Court holds that execution cannot be levied on such claim, nor the *res* of the estate drawn into the Federal Courts (see *infra*), it was held in *Brun v. Mann*, 151 Fed. (C. C. A.) 145, that where the State law permits application for the sale of realty to pay debts to either Probate or District court, and the administrator refuses to proceed, the creditor who has theretofore established his claim in the Federal Court, may obtain in the latter court an order for the sale of the realty to pay his debt, whenever the necessity therefor exists to enforce the Federal decree.

⁵ *Continental Bank v. Heilman*, 81 Fed. R. (C. C.) 36; s. c. affirmed on appeal; 86 Fed. (C. C. A.) 514; *Public Works v. Columbia College*, 17 Wall. 521; *Borer v. Chapman*, *supra*.

⁶ Mere non-residence being no excuse: *Hale v. Coffin*, 114 Fed. (C. C.) 567; s. c. affirmed 120 Fed. (C. C. A.) 470. So Shiras, J. in *Security Trust Co. v. Bank*, 187 U. S. *infra* on p. 231 of the opinion, observes, in holding a non-resident barred by the State statute from proceeding against the administrator, that such belated creditor could not "interfere with the rights of other parties, creditors or distributees, which had become vested" under the laws of the State, etc.

⁷ *Borer v. Chapman*, 119 U. S. 587, and *Payne v. Hook*, 7 Wall. 425, as explained in *Byers v. McAuley*, 149 U. S. 608; so held in *Waterman v. Canal Bank*, 215 U. S. 33; *Brendel v. Charch*, 82 Fed. (C. C.) 262 (action for a legacy). See also *Martin v. Seat*, 54 U. S. Ap. 316; *Bertha Zinc Co. v. Vaughn*, 88 Feb. (C. C.) 566 (permitting a suit by a distributee's assignee for the purpose of surcharging a final settlement confirmed by the State Probate court); *Davis v. Davis*, 89 Fed. (C. C.) 532 (upholding jurisdiction in Federal courts to decree of specific performance against heirs and their representatives, of agreements concerning property, although the property belong to the estate of a deceased person); *Spencer v. Watkins*, 169 Fed. (C. C. A. 379). *A fortiori*, the Federal court may require an accounting of testamentary trustees after it has determined the rights of the beneficiaries: *Herron v. Comstock*, 139 Fed. (C. C. A.) 370.

⁸ *Hale v. Tyler*, 115 Fed. (C. C.) 833 (upholding Federal jurisdiction to set aside a fraudulent conveyance made by a decedent before his death, although the creditors' suit was filed after letters of administration were issued by a Probate court, but where that court had not ordered a sale to pay debts). *McDaniel v. Traylor*, 196 U. S. 415 (upholding the right to prevent parties from profiting by a fraudulent combination in establishing illegal claims against the estate, by removing the cloud thereby cast upon the real estate inherited by the plaintiffs, and approving *Johnson v. Waters*, 111 U. S. 640, 667, where jurisdiction was recognized to set aside as fraudulent, sales made by an executor under order of the Probate court). *Eddy v. Eddy*, 168 Fed. (C. C. A.) 590 (setting aside election of non-resident widow procured by fraud of executor).

⁹ *Waterman v. Canal Co.*, *supra*; *Underground Co. v. Owsley*, 176 Fed. (C. C. A.) 26.

¹⁰ *Ingersoll v. Coram*, 211 U. S. 335.

¹¹ *Edwards v. Hill*, 19 U. S. A. 493; *Leahy v. Haworth*, 141 Fed. (C. C. A.) 850.

¹² *Underground Co. v. Owsley*, 176 Fed. (C. C. A.) 26. But the court recognizes the delicacy of assuming jurisdiction, lays stress upon the exigencies of the case, and the necessity of action, confines the receivership to the period before action by the State Probate court, so that it may not conflict with the latter; and *Coxe, J.* dissents. So in *Smith v. Jennings* 238 Fed. (C. C. A.) 48, the court points out that no receiver will be appointed or similar relief granted unless the administration be vacant and the authority of the Probate court be unaffected thereby.

¹³ *Popp v. R. R.* 96 Red. 465; *Cin. H. & D. Ry. v. Thierand*, 114 Fed. (C. C. A.) 918. But not otherwise: *Cornell v. Ward* 168 Fed. (C. C. A.) 51.

¹⁴ *Hurley v. Devlin*, 151 Fed. (D. C.) 919 and cases cited.

¹⁵ *In re McKenzie*, 142 Fed. (C. C. A.) 383.

¹⁶ *Hurley v. Devlin*, *supra*.

¹⁷ *Byers v. McAuley*, 149 U. S. 608, reviewing prior decisions, Justice Shiras and Chief Justice Fuller dissenting. Accordingly it is held that a Federal court in one State will not, on application of a foreign representative appointed in another, order the officer representing the estate to turn over a fund in the hands of the latter held for administration: *Graham v. Lybrand*, 142 Fed. (C. C. A.) 109; *Watkins v. Eaton* 181 Fed. (C. C. A.) 384. A *fortiori* if the estate has been finally settled so as to be out of the Probate court: *Hale v. Coffin*, 114 Fed. (C. C.) 567, 575. And see *Brun v. Mann*, *supra*. But see *Brown v. Ellis*, 86 Fed. (C. C.) 357, holding that assessments against the estate of a decedent on National bank stock held by him, made by a receiver, and accruing after the decedent's death, could be recovered in a Federal court.

¹⁸ In the course of an able opinion on this subject Judge Aldrich says: "It is a matter of no little consequence to the convenience of citizens and the ordinary administration of justice in the State courts, whether proceedings of this character are left with the convenient forum of the State probate courts, where for more than a century it has been understood they belong, or whether they are to be wrested therefrom and made subject to Federal jurisdiction and regulation; and as has been already observed, it is to be presumed that when the law-making power desires to accomplish such a result it will not leave its purpose in doubt" (p. 989), and in the same case in answer to the insistence of counsel that the court should take jurisdiction, he quotes (p. 984) Ch. J. Chase that "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the constitution and the law confer": *In re Cilley*, 58 Fed. (C. C.) 977, 984, 989. This case is approvingly followed by the Circuit Court of Appeals in *Wahl v. Franz*, 100 Fed. 680 and in other cases. A Federal court has no power to enjoin a sale of lands ordered by a Probate court to raise funds to pay debts, even if the desired injunction is ancillary to a proceeding to set aside the judgment of sale for fraud: *Evans v. Gorman*, 115 Fed. (C. C.) 399; nor to set aside an agreement of liquidation of a community between husband and wife, where the estate is still open in, and subject to the authority of, the local court: *Garzot v. De Rubis*, 209 U. S. 283, 302. Nor as above stated will it ordinarily appoint a receiver to take over the assets of the estate.

¹⁹ *Thayer, J.*, in *Walker v. Brown*, 27 U. S. Ann. 291, 303; *Sowls v. First National Bank*, 54 Fed. R. 564; *Bedford Co. v. Thomlinson*, 36 U. S. C. C. A. 272 s. c. 95 Fed. 208; *Security Trust Co. v. Bank*, 187 U. S. 211, 227 et seq; *Farmers' Bank v. Wright* 158 Fed. (C. C.) 841, 849; *McPherson v. Miss. Valley Trust Co.*, 122 Fed. (C. C. A.) 367, 372 (the court also quoting from *Byers v. McAuley supra*, that "no officer appointed by any court should be placed under the stress. . . . for his own protection to seek orders from two courts in respect to the administration of the same estate"); *Schurmeier v. Ins. Co.* 137 Fed. (C. C. A.) 42. So if the United States appear as claimant in a State Probate court, the proceedings are governed by the local law: *United States v. Hailey*, 2 Idaho, 26, 30.

²⁰ *Byers v. McAuley*, 149 U. S. 608, 620; *Yonley v. Lavender*, 21 Wall 276. (In the last-mentioned case Justice Davis adds an intimation that in case of possible State legislation purposely discriminating against non-resident creditors, the United States courts "would find a way, in a proper case, to arrest discrimination . . . even if the estate were seized by operation of law and intrusted to a particular jurisdiction.") See, also, *In re Kittson*, 45 Minn. 197; *Bedford Co. v. Thomlinson*, 95 Fed. (C. C. A.) 208; *Thiel Det. Co. v. McClure*, 130 Fed. (C. C.) 55;

²¹ Otherwise such delay would have the effect to devolve "a new responsibility upon the person who had acted as administrator, and to interfere with the rights of other parties, creditors or distributees, which had become vested under the regular and orderly administration of the estate,

under the laws of the State": *Security Trust Co. v. Bank*, 187 U. S. 211, 230, (reversing the Circuit Court of Appeals in following *Security Trust Co. v. Dent*, 104 Fed. 381). But see *Schurmeier v. Ins. Co.* 171 Fed. (C. C. A.) 1.

²² *McPherson v. Miss. Valley Trust Co.* 122 Fed. (C. C. A.) 367, 372.

²³ *Smith v. Worthington*, 10 U. S. App. 616, 627. And to ascertain the amount of unpaid claims against the estate, and to determine when the estate is in a condition for distribution, are matters within the jurisdiction of the State Probate courts, concerning which the Federal courts cannot interfere: *Davis v. Davis*, 89 Fed. (C. C.) 532, 539. And the Federal court will not entertain a bill for an accounting where the Probate court has jurisdiction to do so: *Moore v. Fidelity Co.*, 139 Fed. (C. C. A.) 1.

²⁴ *Gaines v. Wilder*, 13 U. S. App. 180.

²⁵ *In re Seabolt*, 113 Fed. (D. C.) 766. But it was held that if the property, out of which an allowance by the widow is asked, be already in the custody of the Federal court, she will be enjoined from proceeding in the Probate court, and required to present her claim in the Federal Court: *Brun v. Mann* 151 Fed. (C. C. A.) 145, 158. And this is the rule when the decedent's property is in bankruptcy at the time of his death. See text *supra*.

²⁶ *Jordan v. Taylor*, 98 Fed. (C. C.) 643.

²⁷ *Hargroves v. Redd*, 43 Ga. 142, 150; *Comstock v. Herron*, 5 C. C. A. 266, 275; s. c. 6 U. S. App. 626; *Reed v. Reed*, 31 Fed. (C. C. Ohio) 49; *In re Cilley*, 58 Fed. 977; *Copeland v. Bruning*, 72 Fed. 5; *Ellis v. Davis*, 108 U. S. 485.

²⁸ *Farrell v. O'Brien*, 199 U. S. 89, 110, authoritatively settling the question (the court saying that the words "inter parties" as here used "must relate only to independent controversies inter parties, and to mere controversies which may arise on an application to probate a will because the State law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the State law is a mere continuation of the probate proceeding, that is to say, merely a method of procedure ancillary to the original probate, allowed by the State law for the purpose of giving to the probate its ultimate and final effect": p. 110. In this case the jurisdiction was denied under the Washington Code) *Gaines v. Fuentes*, 92 U. S. 10, (three judges, however, dissenting); *Ellis v. Davis*, 108 U. S. 485, 497; *Richardson v. Green*, 61 Fed. R. (C. C. A.) 423; *Brodhead v. Shoemaker*, 44 Fed. R. (C. C.) 518 (distinguishing between *ex parte* and solemn probate); *Sawyer v. White*, 122 Fed. (C. C. A.) 223, 227; *Williams v. Crabb*, 117 Fed. (C. C. A.) 193, expressly approving *Brodhead v. Shoemaker*, *supra*, as drawing "the proper distinction between a proceeding to probate a will in common form and contesting the validity in equity after being probated." (corresponding to solemn probate); the court holds that jurisdiction exists "if the State courts of general equitable jurisdiction may, under the statute, entertain these cases by suit originally brought there and not coming up on appeal from the Probate court so as to form part and parcel of the probate proceedings." The court also distinguishes *Oakley v. Taylor*, 64 Fed. (C. C.) 245, holding that the U. S. courts could not set aside probate, because that case arose under the Missouri law where the contest is in the nature of an appeal from the Probate court, and *Wahl v. Franz* *supra*, was also distinguished as having been the continuation of a Probate court proceeding removed by appeal. The same distinction is emphasized in *Carrall v. O'Calligan*, 125 Fed. (C. C. A.) 657, (apparently the same case determined on appeal to the Supreme Court, as *Farrell v. O'Brien*, *supra*) where jurisdiction of the Federal Court was denied because under the law of the State there in question (Washington)

the contest of the will was strictly a probate proceeding, brought on the probate side of the Superior court, and not maintainable in that State by independent equity proceeding, and *Richardson v. Green*, *supra*, and *Gaines v. Fuentes*, *supra*, were distinguished. In *Franz v. Wahl*, 100 Fed. R. (C. C. A.) 680, even the jurisdiction on solemn probate was challenged, and Federal jurisdiction said not to extend to any proceeding solely to contest a will, but to exist only as incidental to the prosecution of some suit of which the Federal courts may take cognizance; the court makes an elaborate examination of the authorities bearing on the subject, both in the majority and dissenting opinions; the majority distinguish the prior Supreme Court decisions, rely on *In re Cilley*, *Copeland v. Bruning* and other cases *supra*, and disapprove *Brodhead v. Shoemaker*, *supra*.

²⁹ *Wood v. Paine*, 66 Fed. R. 807. *Sherman v. Amer. Cong. Ass'n*, 113 Fed. (C. C. A.) 609, 613. All persons in interest must be parties: *Stevens v. Smith*, 126 Fed. (C. C. A.) 706; and of course if the State courts have passed on the question in an action to which the foreign legatee appeared, the decision is binding and cannot be relitigated in the Federal Court: *Spencer v. Watkins*, 169 Fed. (C. C. A.) 379.

³⁰ *Security Co. v. Pratt*, 65 Conn. 161. As to when a person interested who cannot be brought in, may be dispensed with, see *Waterman v. Canal B. Co.* 215 U. S. 33, 47.

³¹ *Attorney General v. National Bank*, 192 Mich. 640, 159 N. W. 335; *People v. Brady*, 271 Ill. 100, 110 N. E. 864.

³² *First National Bank v. Union Trust Co.*, 244 U. S. 416, reversing *Attorney General v. National Bank*, *supra*.