The modern rule seems to be to impose some kind of liability without fault upon the manufacturer so that he will exercise greater care in the manufacture of articles of food for human consumption. If the public is to be protected from inefficient and unsanitary methods of production some manner of penalizing the manufacturers for their mistakes is necessary. Dean Pound expressed his ideas on the subject some years ago when he said that the best way to protect the public is to impose liability without fault upon the manufacturers of food.[19] Only in this way will the manufacturers continue to improve methods of production.

G.O.A.

WILLS

Collateral Attack on the Admission to Probate of a Will — Execution — Signing in the Attestation Clause as Signing at the End under General Code Sec. 10504-3.

An instrument dated April 16, 1927 was admitted to probate on June 9, 1930, as the last will and testament of W. L. Eakins. The signature of the testator, Eakins, appeared only in the attestation clause. On July 14, 1938, another instrument, dated November 15, 1926, was offered to probate as the last will and testament of Eakins, and was refused on the ground that the 1927 instrument had already been admitted. On appeal a collateral attack was made on the admission of the later instrument, on the ground that the probate court had no jurisdiction to admit to probate an instrument not signed at the end, as required by the Ohio statute.[1] The court sustained the attack, and held that the jurisdiction of the probate court is limited to wills as prescribed by the Constitution and statute; and where it is apparent on the face of the instrument that such instrument does not even purport to be a will, the probate court has no jurisdiction to admit it as such. *In re Matter of Will of Eakins.*[2]

The right to make a testamentary disposition is purely of statutory creation, and is available only upon compliance with the requirements of the statute.[3] A usual provision and one which appears in the Ohio statute, is that a "will must be signed at the end." The apparent reason for this rule is to insure identity of the instrument, and to prevent fraudulent

[19] Pound, *The End of the Law* (1914) 27 Harv. L. Rev. 195, 233.

[1] Ohio G.C. sec. 10504-3.
[2] 63 Ohio App. 265, 26 N.E. (2d) 219, 16 Ohio Op. 586 (1939).
[3] Tyrrel's Case, 17 Ariz. 418, 153 Pac. 767, 768 (1915).

additions to or alterations of the instrument.[4] However, in applying this rule, many problems have arisen in determining when in fact a will is signed at the end within the legislative intent. Two general lines of interpretation have developed: one emphasizes a spatial aspect, in that it requires that the signature be at the "physical end" or that part farthest from the beginning;[5] the other requires that it be at the close of the language, read in its natural and logical order.[6] Under either of these two views the signature must come after the last disposing provision of the will.[7] The Ohio courts take the more liberal view, in recognizing the line of interpretation which holds the will to be signed at the end, when it is signed after the last disposing provision, as determined by the natural and logical order of reading.[8] It has been held in another state,[9] and in some inferior Ohio courts,[10] that where the testator has signed in the body of the attestation clause, as in the present case, with the intent that it be his signature in the execution of his will, such signature may be properly regarded as signed at the end. But on these facts the Supreme Court of Ohio has held[11] that where the signature appears only in the body of the attestation clause, the will is not properly signed at the end.

In the principal case an attack was made on the admission to probate of the 1927 will. This was in an independent action, brought for the sole purpose of establishing a prior will. Such an attack is a collateral attack on the judgment of the probate court.[12] Had this proceeding

[4] Glancy v. Glancy, 17 Ohio St. 134 (1886); Baker v. Baker, 51 Ohio St. 217, 37 N.E. 125 (1894).

[5] *In re* Andrews, 162 N.Y. 1, 56 N.E. 529, 48 L.R.A. 662, 76 Am. St. Rep. 616 (1900); *In re* Whitney's Will, 153 N.Y. 259, 47 N.E. 272, 60 Am. St. Rep. 616 (1897); *In re* O'Neil's Will, 91 N.Y. 516 (1883).

[6] Chandler v. Dockman, 8 Ohio App. 113, 28 Ohio C.A. 297, 29 Ohio C.D. 405 (1917); Irwin v. Jacques, 71 Ohio St. 395, 73 N.E. 683, 69 L.R.A. 422, 11 Ann. Cas. 1008 (1904); Sears v. Sears, 77 Ohio St. 104, 82 N.E. 1067, 17 L.R.A. (N.S.) 353 (1904); Mader v. Apple, 80 Ohio St. 691, 89 N.E. 37, 23 L.R.A. (N.S.) 515, 131 Am. St. Rep. 719 (1908).

The real distinction is that in the second view, a will is validated where the pages are not in consecutive order or are deranged, and yet the end is determined by the "logical order" of reading. ATKINSON, WILLS, p. 257.

[7] The signature must come after all disposing provisions, but the presence of a blank space above the signature is immaterial if the signature is immediately below the *testimonium* clause. Mader v. Apple, 80 Ohio St. 691, 89 N.E. 37, 23 L.R.A. (N.S.) 515, 131 Am. St. Rep. 719 (1908); Chandler v. Dockman, 8 Ohio App. 113, 28 Ohio C.A. 297 (1917).

[8] See note 5, *supra*.

[9] *In re* Rudolph's Estate, 180 App. Div. 486, 167 N.Y.Supp. 760 (1917); *In re* Jarvis' Will, 124 Misc. 563, 208 N. Y. Supp. 796 (1925).

[10] Estate of Arminda S. Wilson, 2 Ohio N.P. (N.S.) 189, 39 Ohio L. Bull. 379 (1904); *In re* Case's Will, 214 N.Y. Supp. 678, 126 Misc. 704 (1926).

[11] Sears v. Sears, 77 Ohio St. 104, 82 N.E. 1067, 17 L.R.A. (N.S.) 353, 11 Ann. Cas. 1008 (1907).

[12] Where "the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral." 1 BLACK, JUDGMENTS (2d ed.), sec. 252, p. 276.

been an action to vacate the judgment of the probate court, it would have been a direct attack.[13] As a general rule, the judgment of the probate court is not open to a collateral attack, since it is a court of record, when the court has jurisdiction of the parties and subject matter in any particular case.[14] Assuming jurisdiction, a party must bring a direct proceeding to contest the judgment, and this judgment is not open to a collateral attack, even though the determination of the cause is erroneous.[15] Want of jurisdiction, however, would render such a judgment void.[16] In this event a collateral attack would be proper.[17] Therefore, in the principal case, it would seem that if the court was justified in sustaining the collateral attack this would have to be because the admission to probate of a will signed in the attestation clause was beyond the jurisdiction of the court. But it would seem that this is not a jurisdictional fact, for jurisdiction is the power to hear and determine a cause.[18] The question remains whether the place of the signature is jurisdictional, and for this we must look to the statute. Section 10504 of the Ohio General Code provides that "if it appears that such will was duly attested and executed. . . . the court shall admit to probate." In determining what will constitute due execution, we must refer to section 10504-3 of the General Code where we find the requirement "signed at the end." The determination as a matter of law that a will is or is not signed at the end is a question of interpretation and construction. Here the probate court had found as a matter of law that where the signature appeared in the attestation clause it was validly signed, and being so signed, admitted it to probate. If we wish to follow consistently the law of judgments, the challenge of such conclusion should not be by collateral attack, but only by a direct proceeding brought for that purpose. The probate court is of limited jurisdiction,[19] and can only exercise such powers as the Constitution and statutes confer upon it.[20] But the limitation relates chiefly to subject matter, and if the

[13] OHIO G.C. sec. 10501-17.

"A direct attack on a judgment is an attempt to avoid or correct it in some manner provided by law, in a proceeding instituted for that very purpose. . . ." 34 C.J. 520, sec. 827. Also see 1 BLACK, JUDGMENTS, sec. 252, p. 376.

[14] Bigelow v. Bigelow, 4 Ohio 138, 19 Am. Dec. 323 (1829); Newman v. City of Cincinnati, 18 Ohio 323 (1849); Cochran v. Loring, 17 Ohio 409 (1848); Dunham v. Jones, 159 U.S. 584, 16 Sup. Ct. 108, 40 L. Ed. 267 (1895).

[15] The Union Savings Bank and Trust Co. v. The Western Telegraph Co., 79 Ohio St. 89, 100, 86 N.E. 478 (1908).

[16] Lessee of Pain v. Mooreland, 15 Ohio, 436 (1846); Nye v. Stillwell & Co., 12 Ohio C.C. 40, 5 Ohio C.D. 335 (1896); Commercial Gazette Co. v. Dean, 11 Ohio Dec. Rep. 207, 25 Ohio L. Bull. 250 (1891).

[17] Nye v. Stillwell & Co., 12 Ohio C.C. 40, 5 Ohio C.D. 335 (1896).

[18] Sprankle v. Odell, 78 Ohio St. 404, 85 N.E. 1132 (1908).

[19] Estate of Ferguson, 81 Ohio St. 58, 89 N.E. 1070 (1909).

[20] Mansfield v. Cole, 16 Ohio N.P. (N.S.) 209, 25 Ohio D. (N.S.) 231 (1914).

subject matter is within the jurisdiction, it is not, as to it, a court of limited jurisdiction.[21] As another Ohio case held,[22] the probate courts have full power to adjudicate fully and finally all questions arising in matters properly before them.

Therefore, it would seem that in the principal case the appellate court should not have permitted the collateral attack on the judgment of the probate court in regard to the will of 1927, but rather should have denied such an attack, leaving the plaintiff to his right to bring a direct proceeding attacking the judgment. The fact that the statute of limitations has run on such a direct proceeding,[23] leaving the plaintiff without a remedy, does not justify the rendering of an erroneous decision in sustaining the present attack on the admission to probate of this later dated will. S.D.G.

Intent to Execute an Instrument Incomplete on Its Face

The Probate Court of Montgomery County recently rendered a decision admitting to probate as a valid will an instrument in which the residuary devise terminated with an incomplete sentence. The name of the devisee had not been inserted in the blank left by the testator for that purpose. The remainder of the will appointed an executor but made no other dispositions. The court found that the instrument was executed *animo testandi* and admitted it to probate, in the face of the contention that since it was incomplete on its face, the testatrix must not have regarded the instrument to be the final embodiment of her intent, but had contemplated some further act to complete it. The only evidence outside of the instrument itself in regard to the testatrix's intent was that she had called the two subscribing witnesses to her home and stated to them that she had made out her will and had requested them to act as witnesses.[1]

There are several classes of cases similar to the principal one in which the court must decide whether or not the instrument before it reflects the final testamentary intent of the deceased. Such classes include cases in which a partially executed will is formally executed in regard to personalty, but not complete in regard to devising realty; cases in which the testator has become physically incapacitated before completing the will, in jurisdictions which do not require signing; cases in which a

[21] Brown v. Reed, 56 Ohio St. 264, 46 N.E. 982 (1897).
[22] Wilberding v. Miller, 90 Ohio St. 46, 106 N.E. 665 (1914).
[23] Ohio G.C. sec. 11640.
[1] *In re* Crowe, 17 Ohio Op. 8, 31 Ohio L. Abs. 35 (1940).