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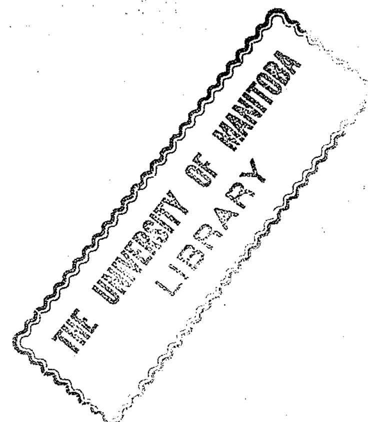
THE DEVOLUTION OF ESTATES IN ATHENIAN LAW.

By

Clive K. Tallin.



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INTRODUCTION.

Before we embark upon a detailed study of the Athenian law of succession it may be in order to draw the readers's attention to the difficulties of the subject, to define the object of the present essay and to explain its structure.

One principal difficulty is the mass of authority both ancient and modern which must be read and digested. In the present instance this problem was considerably simplified by the impracticabilty of consulting certain modern works which could have been obtained, if at all, only with the greatest difficulty. Our enquiry has, therefore, been restricted to the re-examination of the chief ancient sources with some help from the standard modern authorities and our conclusions should be conditioned by these limitations. It should further be noted as will be shown in the sequel, that upon some of the ancient authorities no implicit reliance can be placed.

Despite the difficulties this topic has been chosen for a first venture into the province of Athenian law because of the importance of administration actions at Athens in classical times (1) and because of the importance of the subject of succession not only at Athens but elsewhere in both ancient and modern times. Succession to

(1) Aristotle, <u>Ath. Res.</u> 42 (5), 56 (6), 67 (2),
Plata: <u>Laws</u> 922B to 922E.

property upon its owner's death is one of the very important methods of acquiring and transferring ownership of property and the rules governing the transmission of the property of a deceased person have a great potential effect upon the economic and social life of a people. For example, it is a possible hypothesis that if property is divided upon the death of its owner among his several surviving relatives and the wealth is thereby diffused among many a democracy results or is maintained as at Athens; whereas on the other hand if it descends only to the eldest son alone and is thereby concentrated from generation to generation the wealth tends to centralise in a few hands and an aristocracy develops as in European countries of the Middle Ages. This hypothesis, if tenable, suggests only one of the economic possibilities of inheritance. Perhaps on the other hand the rules of succession follow in their nature from the political changes of a state instead of the political constitution being affected by any rules of succession.

It shall be our first consideration to set out clearly the provisions of the law. We have not found all the rules of Athenian succession law or even any considerable part of them set out in English in a convenient consecutive form. It is, therefore, the object of this essay to set out briefly the substantive law at Athens

which dealt with inheritance. In doing so we shall not attempt to discuss at length the possible alternatives where a point of law is in dispute, but instead we shall be content to formulate our own conclusion and refer in notes to treatises where a full discussion of the controversial point can be found.

The adjective law or rules of procedure will be dealt with only very briefly. Its importance in the study of the law of succession and its effect upon the results of the law are fully recognized but are not here emphasized because there are already several clear expositions of the law of procedure which are easily accessible in English (2).

The treatment of the subject will fall into two main parts dealing respectively with the two great branches of inheritance law, namely succession upon intestacy and succession by will. There was a third method of disposing of property after death in the practice of adoption, but with this we shall deal only incidentally, inasmuch as, while it was a method by which an heir was chosen and was therefore in its nature testamentary, once the heir was chosen the succession passed to him as upon any ordinary intestacy. This essay will not enter into the mechanics or formalities necessary to make a valid adoption.

(2) See Wyse's article on Greek Law in A Companion to Greek Studies, and C. R. Kennedy, Vol. III Appendix IX pp. 372 sqq.

The structure of the essay as a whole is sufficiently indicated in the table of contents which must also serve the purpose of a general index. The appendix on proof or disproof of legitimacy deals chiefly with matters of evidence and is an interesting sidelight on Athenian private life. The second appendix contains a complete bibliography which also gives the key to any abbreviations or references used in the footnotes. The third appendix is provided for convenience in reference and lists all the speeches of the Orators here employed in numerical order with the name of the speech.

It remains to appraise shortly the authorities upon which the discussion is based. They consist primarily of the speeches of the Athenian Orators, the works of Athenian Philosophers and Biographers and one or two plays. Secondarily there are one or two Latin sources and a large number of modern commentaries. Lipsius gives a fairly complete list of both classes of authorities including lost speeches of the Orators (3).

First of the Orators as an authority we must place Isaeus who was probably the greatest Athenian expert on the law of succession. Eleven of his twelve extant speeches and most of the fragments and lost speeches dealt with matters

(3) Lipsius p. 538 - 539 and note 5.

of inheritance directly or indirectly. Wyse vehemently assails Isaeus' trustworthiness as a source because of the contradictions and inconsistencies in his arguments. Certainly he, like all the other Athenian orators, was brilliantly unscrupulous in warping, suppressing or embellishing facts to suit his clients' case and he may on occasion have put the law in a false light by his method of citing it. Nevertheless it is most improbable that he would misquote a law or attempt to suppress it and incur the inevitable risk of being discovered. The laws were common knowledge to the citizen jurists and such a practice if detected would do his clients' cause more harm than good. Furthermore the penalty for misquoting a law was death and he would not be likely to jeopardize his clients' lives (4).

Demosthenes, who is reputed to have been the pupil of Isaeus, has several speeches dealing with inheritance. In them we meet difficulties similar to those in Isaeus though perhaps less frequently. Several laws are quoted in the speeches of Demosthenes about the authenticity of which there is considerable controversy but which for want of better authority or any authority to the contrary we have taken as authentic (5).

(4) Bonner p. 59, note 13.
(5) Bonner p. 59.

The value of Lysias is obvious. Reference has also been made to a speech of Isocrates which deals with a case at Aegina but probably gives a fair idea of both Athenian substantive law and Athenian procedure.

The biographer, Diogenes Laertius, cites several wills which he claims to quote verbatim and which prove very helpful in the section on wills. Plutarch is not very reliable as a source but we have referred to one or two of his *Lives*.

Plato's *Laws* while they are an idealization of law as he thought it should be, give us some clue to the actual law at Athens in his time. Aristotle's *Atheniensium Respublica* wherever it touches upon our subject is a first rate authority and can be wholly trusted.

Aristophanes offers some comments upon matters of inheritance which may be taken as correct in substance. Terence, insofar as he reports the Athenian comic poet Apollodorus can be used as a guide but we must recognize and allow for the additional factor of error to be expected in a paraphrase.

Of the modern commentators to whom we refer, Wyse is somewhat prejudiced against Isaeus but his criticisms are acute and the result of deep study; his valuable comments are buried in a mass of erudition immaterial to

the present enquiry and which exhausts even an eager searcher to sift. Caillemer writes a clear, intelligible narrative and his book on intestacy proved very helpful. We could wish that his essay on Athenian testementary law had beenavailable here. J. H. Lipsius is the most recent commentator on the Athenian law whom we have consulted but his careful work is often disappointing in its brevity. The weight of his opinions is sufficiently indicated by the number of times they have been quoted. Many other works have been consulted most of which are referred to in the bibliography.

INTESTATE SUCCESSION.

A. General Principles.

Before proceeding to lay down the particular rules which prescribed who was to receive the property of a deceased person we should glance for a moment at the general principles which underlay the rules which governed intestate succession. The great principle which at Athens as at Rome led to an involved and comprehensive system of rules for succession was the preservation of the family (6), at Athens for the proper worship of the household gods (7), and for the less spiritual and mundane purpose of preserving the great families in undiminished numbers to pay the taxes of the state. To make certain that there would be no failure the principle of adoption was invoked and encouraged to keep the descent of property in a direct line. Out of the eagerness to preserve the family there also grew the principle of preference of male issue to female which we shall have to notice in length below, because such a preference made the line of descent more direct and kept the family name and customs entirely intact.

Also before we can properly understand the rules set out below we must distinguish between two terms which are used in Athenian law to denote two conceptions of re-

(6) See Caillemer p. 132.
(7) Caillemer p. 132.

lationship. The terms ἀγχιστεῖς and συγγενεῖς both, in their ordinary meaning, denote nearness of kin or relationship, but in the law of succession they have distinct technical meanings.

(a) συγγενεῖς means blood relations; that is all the relations of a deceased person on either his mother's or father's side, legitimate or illegitimate, descendants, ascendants and collaterals to the most remote degrees(8).

(b) ἀγχιστεῖς means those persons, blood relations or relations by adoption, who were entitled by law to succeed to the property left by a deceased person. We can see that the two expressions are not co-terminus for many blood relatives had not the legal right to inherit from a deceased person, as for example an illegitimate son, or even perhaps the father or mother of the deceased (9) and there were persons who were not blood relatives who might have the legal right to succeed, for example adopted sons (10).

The relatives included in the term ἀγχιστεῖς are set out in a law quoted by Demosthenes (11) and the omissions from this law are supplied from other sources (12). Just what these passages mean is a bone of contention, enthusiastically gnawed by ancient lawyers, and commentators both ancient and modern, for upon their interpretation depends

(8) See Caillemer p. 7 sqq.
Lipsius p. 558, and see the note following.
(9) See below p.12 for a discussion of this question.
(10) See generally Caillemer pp. 7, 8 and 9,
Lipsius pp. 552 to 560.
(11) Demosthenes XL111 51, See also Lipsius p. 553.
(12) Demosthenes XL111 51; 57; 62.
Isaeus V111 39; Xl 2-3; 17.

the whole system of Athenian intestate succession. In what follows we will be concerned in analyzing the law enunciated in the said passages and in considering what it means in the light of other passages where its application is directly or indirectly the concern of the litigant or commentator.

Some further definitions are desirable for the proper understanding of the subsequent discussion;

(a) Descendants are the legitimate children of a deceased person and their legitimate issue.

(b) Ascendants are the father and mother of the deceased and his (or her) grandparents and great-grandparents and so on in the direct line back.

(c) Collaterals or collateral relatives (13) are persons born of the same stock as the deceased and include legitimate brothers, sisters, nephews, nieces, and their issue, and uncles, aunts, cousins, and their issue, and relatives in remoter degree through ascendants or other collaterals.

B. Rules Governing the Order of Succession.

With these definitions in mind we may consider who could succeed to the estate of a deceased person, and this we shall do by simply setting out each degree of relationship in the proper sequence of eligibility and discussing it as we go along.

(13) See Corpus Juris. Vol. Xl p. 959.

1. Descendants.

The first persons entitled by law to succeed to the goods of a deceased person were the descendants, The order in which they succeeded was as follows:

(a) Sons, legitimate or adopted. The law is stated thus; "the law of itself gives his father's estate to the son" (14). How strong this law was in operation we will see below when we deal with wills. This rule of law is referred to by Isaeus as "incongrovertable" (15).

(b) Grandsons, great grandsons and their legitimate issue in the male line (16).

(c) Daughters and daughters' issue.

If there were no sons or issue in the male line then daughters and their issue were entitled to the succession (17). There are some qualifications to the daughter's right to succeed which will be more fully discussed in a later section on the rights of women generally to inherit.

The rights of descendants to the property of a deceased, like the rights of all other classes of relatives eligible for an inheritance were affected by three general rules, the first providing for the preference of males to females, the second providing for representation, and the third providing for equal distribution of an estate between

(14) Isaeus, Vl, 28.
(15) Isaeus Vlll 34.
(16) (3) Isaeus Vlll 34. Caillemer pp. 10-11.
Lipsius pp. 541-542.
(17) Isaeus Vlll 31; 111 50. Demosthenes XLVl 20.
Generally see Wyse. pp. 608-610.
Lipsius 543-546.

heirs of the same degree; these three rules must be considered more fully later, but we must keep before us the fact that these rules are not unqualified.

2. Ascendants.

In our modern conception of intestate succession if there are no descendants the next persons entitled to succeed are the mother and father of the deceased (18), but whether ascendants had any right to succession at all in Athenian Law is very doubtful and has been much debated. Three considerations have been advanced to support the view that a father could inherit his son's property:

(a) The first is a passage from Isaeus of which the following is the essential part: "Euctemon and his son Philoctemon possessed so large a fortune that they were able to undertake the most costly public offices After the death of Philoctemon, on the other hand the property was reduced to such a condition, etc." (19), and further on another passage which says "If, as they assert, Philoctemon had no right to make a will, and the Estate was Euctemon's, who have a better right to inherit Euctemon's property?" (20) The inference those who argue in favor of the father's right would draw from these two passages, is that since Philoctemon predeceased his father

(18) See Manitoba Devolution of Estates Act.
1913 R.S.M. Cap. 54 Sec. 7 (1) as amended by 1927 S.M. Cap. 5. Sec. 1.
(19) Isaeus Vl 38.
(20) Isaeus Vl 56.

Euctemon (as it appears from the rest of the speech he did) and as Euctemon actually had all the property after Philoctemon's death, Euctemon, the father, must have had a right to inherit his son's share and further was actually able to prevent his son making a will. But there is another view which questions whether Philoctemon ever had any share in the property except an expectation contingent upon his father's death. This latter view seems the correct one and has even found support among some of those who favor the father's rights (21); if the latter view is right then it is clear that the passage proved nothing and we are where we started.

(b) The second is a part of the law quoted by Demosthenes in the Speech Against Macartatus (22): "If there are brothers by the same father, and if there are children of brothers lawfully born, the latter shall take the share of the father". (1) Here those who argue the case of the father of the deceased take the last two words of the quotation to mean the deceased's father and argue that he must therefore have a right of succession; but it seems obvious that "the father" means the father of the "children of brothers," that is one of the brothers of the deceased, and the passage refers only to representation. Once more then the point is not proven and the father's

(21) See Caillemer p. 65.
(22) Demosthenes XLlll 51.

right to succeed is not established by this passage (23).

(c) The third is an argument from probabilities which Caillemer gives at some length, backed by other authorities of considerable weight (24). But we must look for some passages which definitely prove the father's right before we can set it up as established. We can find none which are not open to serious objection, but we do find some which point to no such right being recognized (25). Until something more convincing than probabilities and sentiment is produced we must hold to the opinion that the father was merely a link connecting collaterals to the deceased but himself had no right to inherit.

The case for the mother is no more favorable than that of the father; one passage, of considerable ambiguity, is quoted to support her claim (26), but it is contradicted in a very plain passage in the same speech where the speaker says: "the mother of the deceased - the nearest possible relationship by blood, but admittedly conferring no rights as next of kin", This seems conclusive against the mother's right, but there are opinions to the contrary. Both Caillemer (27) and Wyse (28) have interesting comments on the problem as also has Lipsius (29). With the denial of the right of the father and mother we may also deny any right to ascendants further removed.

(23) See Caillemer pp. 67-68.
(24) See Caillemer pp. 69 to 75.
(25) Isaeus XI 2. Demosthenes XLIV 26;33.
(26) Isaeus XI 30.
(27) See Caillemer pp. 120 sqq.
(28) Wyse P. 693.
(29) Lipsius pp. 549 - 552. See especially p. 550. Note 34.

However if one should conclude that ascendants are eligible to inherit then it seems only logical that the mother and father would rank immediately after the descendants, but this is an even more obscure problem than settling their right to inherit. Caillemer puts the matter very well: "Mais succédait - il seul, immédiatement après les descendants et avant tous les collateraux? Venait - il en concours avec les frères et soeurs ou descendants d'eux? Était- il obligé de laisser passer avant lui tous les collatéraux du premier degré? Devait-il même entrer en partage avec des collatéraux plus éloignés, tels que les oncles du défunt? Nous ne connaissons aucun texte qui nous permette de résoudre avec certitude cette difficulté. La variété des solutions que nous venons d' énumérer suffirait pour prouver que les orateurs sont muets, et que chaque historien du droit attique obéit, en présentant une solution, à des impressions personnelles."

3. Collaterals.

In the absence of descendants, and perhaps of ascendants, collaterals were entitled to succeed in the order set forth below, the relatives of a higher class excluding those of a lower. The law on this subject generally is found quoted in Demosthenes' "Speech against Macartatus", paragraph 51 (XLIII 51) and apparently the same law is amplified and paraphrased by Isaeus in his speech "on the Estate of Hagnias", paragraphs 1 and 2 (30).

(a) First of the collaterals come brothers of the deceased by the same father and their issue; that is nephews or nieces of the deceased and their children (31).

(30) Isaeus XI 1-2.
(31) Demosthenes XLIII 51; Isaeus XI 1;
Isaeus III 72; Isaeus I 4; 44-47.
Lipsius p. 554. Caillemer p. 80.

Isaeus (32) does not include nieces but the law in Demosthenes (33) says "children" regardless of sex and it is very likely that nieces would succeed in the absence of nephews being subject as usual to the rule of law discussed fully below (34) preferring males to females.

(b) If there were no brothers nor issue of brothers surviving a deceased person then the sisters of the deceased by the same father or their issue succeeded (35). The law in Demosthenes (36) does not mention sisters but Isaeus names them specifically (35) and several explanations are offered to account for the omission in Demosthenes (37). It seems certain that sisters could succeed as of right and we have many examples of claims to estates based upon such a right (38). There is also a rule mentioned by Isaeus which lays down that where a sister has a right to succeed to her brother's estate she must divide it equally with the nephew or nephews, if any, of the deceased, the child or children of another sister or other sisters who have predeceased her or their brother (39). This

(32) Isaeus XI 1-2.
(33) Demosthenes XLIII 51.
(34) See page 23 seq.
(35) Isaeus XI 2.
Lipsius pp. 554 - 555. Caillemer 81 - 82.
(36) Demosthenes XLIII 51.
(37) For some of these see Caillemer pp. 81 and 82.
(38) For example: Isaeus III 72 and
Isaeus V 9 and 16.
(39) Isaeus VII 19 and 22. But see Wyse p. 588.

This is merely the ordinary rule of representation which will be discussed below (40).

There is some difference of opinion among authorities about how far representation can go in these last two classes of heirs. There is a question whether only brothers and sisters of a deceased person and their children (i.e. nephews or nieces of the dead man) could succeed or whether their grand children and great-grandchildren (i.e. grand-nephews etc. of the deceased(could also inherit as representing their ancestors. There is a lacuna in the law in Demosthenes (41) and there being no other authorities the matter cannot be definitely settled one way or the other, though the gap has been filled in various ways by the conjectures of several eminent scholars but with little actual profit. We could conclude along with Lipsius (42) and Caillemer (43) that there is good reason to believe that representation is unlimited.

(c) In the absence of brothers and sisters of the deceased or their issue the paternal uncles of the deceased, that is his father's brothers, and their children and grandchildren (cousins and second cousins of the dead

(40) See p. 22.
(41) Demosthenes XLIII 51.
(42) Lipsius pp. 554-555.
(43) Caillemer pp. 84-87.

person) would inherit the estate (44), but the children of second cousins could not inherit (45).

The right of uncles and aunts to inherit has been challenged because they are not mentioned specifically in the lawnquoted in Demosthenes' speech "Against Macartatus" paragraph 51. This however is probably due to a lacuna in the text and the missing words are perhaps those which gave them their statutory right; this is the view taken by Lipsius with whom Wyse agrees (46). Nor does Isaeus mention them in his speech "on the Estate of Hagnias" but as pointed out by Wyse (46) he had good reason for not doing so. Elsewhere they are stated to have rights of inheritance by law (47) and certainly uncles had the right to claim the hand of an heiress in marriage, which was only a corrollary to the right to inherit (48). Furthermore uncles at least and probably aunts had to assume certain responsibilities which would indicate that they would in certain circumstances enjoy corresponding

(44) Isaeus 1 44;45;46. Isaeus IV 23.
Isaeus IX 3; 31-33. Isaeus XI 2;4-5; 10; 12.
Demosthenes XLIII 27;51;57. Demosthenes XLIV 26.
Plato, Laws. pp.877; 878; 924e; 929.
Terence, Andria 797, 802.
Caillemer pp. 105-108. Lipsius pp. 554-556.
Wyse p. 680.

(45) Isaeus XI 11; 12; 29.
Wyse pp.566-569. Lipsius 556 Note 44.
For the view that the issue of second cousins ad infinitum could inherit see Caillemer p. 108.

(46) Wyse pp. 680; 687.

(47) Isaeus 1 44, 45, 46.

(48) Isaeus III 63; 64; 65; 74. Isaeus VIII 31.
Isaeus X 5.

privileges (49). For a complete discussion of the whole problem see Caillemer (50) and Wyse (51).

(d) After the paternal uncles come the paternal aunts of the deceased, that is his father's sisters, and their children and grandchildren (cousins and second cousins of the deceased(52). For the children and grandchildren of aunts the same authorities apply as for those of an uncle, no distinction between the two classes of cousins being made in the majority of the texts. Here, of course, as above issue of second cousins could not inherit by law.

When all the foregoing degrees of relationship were unrepresented at a person's death then the right to inherit accrued to collateral relatives on the deceased's mother's side of the family in the same order as those on the father's side would have inherited had there been any survivors (53). The order, then was as follows:

(e) Brothers by the same mother (uterine brothers of the half blood) and their issue, probably without limitation (54).

(f) Sisters by the same mother (uterine sisters of

(49) Isaeus I 0.
(50) Caillemer pp. 105-108
(51) Wyse p. 680.
(52) Demosthenes XLIII 29; 33.
Plato, Laws p. 925.
Lipsius p. 556.
(53) Isaeus XI 2; 30. Demosthenes XLIII 51.
And for a general discussion with further authorities see Wyse at page 567.
(54) Wyse p. 626.

the half blood) and their issue, probably without limitation.

(g) Maternal uncles, that is mother's brothers, and their children and grandchildren (55).

(h) Maternal aunts, that is mother's sisters, and their children and grandchildren.

This completes the classes of relatives who were entitled by law to succeed and we have all but exhausted the law set out in Demosthenes (56). There is an additional clause in the law which provides even for the unlikely contingency of all the above classes failing. In the event of their failing then, the law directs that more remote kindred may succeed, namely, the final class:

(i) Next of Kin on the father's side. This would include, it is conjectured, descendants of the grandfather or great-grandfather of the deceased, and perhaps even more remote relations (57).

C. Primogeniture, Representation and Preference of Males.

Before proceeding to deal with the rights on intestacy of certain Athenian social classes we shall deal with three rules of law which modify and govern all intestate succession and will in some measure explain the foregoing rules.

(55) Isaeus IX 23-24. Isaeus XI 30.
Demosthenes XLV 75.
(56) Demosthenes XLIII 51.
(57) Demosthenes XLIII 51.
Wyse p. 302. Caillemer p. 129.

1. The first problem which presents itself is this: What will happen if there is more than one person of a given degree of relationship when a relative of that degree becomes eligible to succeed to the estate? Will the eldest relative of that degree take all the property? For example if a man dies leaving two sons will the elder take everything to the exclusion of the younger or will both receive some part of their father's property? From the earliest times it seems to have been the Greek custom to divide the property between the sons of the deceased (58). The rule of law at Athens was that the sons must divide the estate of their deceased father equally among them (59); that is, the rule of primogeniture did not exist (60). The division, assigning particular pieces of property to each, was probably decided by lot (61). In practice, the sons always divided the property equally between them (62), or if it were more convenient, carried on or held the property as partners, sharing in the profits (63). The only privilege an older brother might perhaps have had was first choice from the property, but even this privilege seems to have been capable of being bestowed upon him only by the

(58) Homer. _Odyssey_ XIV 11. 208-209.
(59) Isaeus VI 26.
(60) Lipsius p. 542.
(61) Caillemer p. 31.
(62) Isaeus VII 5. Demosthenes XXXVI. 11. Demosthenes XLIII 19.
(63) Lysias XXXII 4.

Express terms of a testamentary disposition (64). Relatives in remoter degrees than sons, e.g. sisters, collaterals, etc. would a fortiori have to divide the estate equally as between those of the same degree subject to the rule preferring males to females and to the rule of representation which will be discussed next.

2. The next question which confronts us is: Suppose a person dies leaving a son and grandsons, children of a son who has predeceased him, does the surviving son exclude not only his own children (65) but also the children of his dead brother (66)? According to the order of succession set out above it would appear that sons exclude grandsons, since they are one degree nearer the deceased, but another principle interferes, the principle of representation. Simply stated the rule of representation merely provides that the children of a son who has predeceased his father will get the share of the father's estate the son would have received had he survived his father. For example: if A dies leaving a son X and B. C. and D. grandsons, children of a son Y who has predeceased A, the estate will be divided thus:

(64) Demosthenes XXXVI 35. Caillemer p. 30.

(65) As he undoubtedly does; also a daughter who inherits would, I think, exclude her children. (see special section on "Women").

(66) (3) Another interesting field for speculation is what happens where there are posthumous children. The situation must frequently have arisen at Athens but we have been able to locate no authority on the point unless references such as Demosthenes XLIII 75, And Aristotle <u>Ath. Res.</u> 56 (7) can be taken to indicate that the <u>rights of</u> posthumous children were considered.

X will get one half (as he would have had Y survived) and B, C, and D will get one sixth each, or an equal share of the half of A's estate which their father, Y, would have received had he survived his father, A. This rule of representation was a rule of law in force at Athens (67) subject to the rule preferring males to females, and extended to all degrees of relationship; that is, at Athens, inheritance was "per stirpes" down to the degree of children of cousins (68) (after which there was no representation) and there was no change to a system of inheritance "per capita" as there is in our law (69). This question of whether there were degrees of relationship where inheritance was "per capita" had been argued on both sides, but it is now generally agreed that all inheritance at Athens was "per stirpes" and not "per capita". The matter is exhaustively discussed by Lipsius (70), Caillemer (71), and Wyse (72) where all the authorities ancient and modern are gathered together and criticised, and all three come to the same conclusion.

3. Finally, the Athenian law provided that males and the issue of males should be preferred to females (73).

(67) Demosthenes XLIII 51. Isaeus VII 20.
Caillemer pp. 32-33, 51.
(68) Isaeus III 3, 5. Isaeus VII 19.
(69) Devolution of Estates Act. R.S.M. 1913 (ap. 54
Sec. 7 (2) as amended by S.M. 1927, Cap. 5. Sec. 1.
(70) (1) Lipsius pp. 553-555. p. 542.
(71) Caillemer pp. 32, 33, 51, 95 to 104.
(72) Wyse pp. 420, 442 ff., 533, 692.
(73) Demosthenes XLIII 51, 78. Demosthenes XLIV 12, 62.
Isaeus XI 17. Wyse p. 563.

This rule at first glance looks clear and simple, and indeed we believe, that it really is simple, and perhaps so simple that it leads to obscurity and doubt for lack of explanation; at any rate some of the orators and all the commentators restrict or expand its meaning to suit their own fancy. Its simple and logical meaning when interpreted along with the rule of representation is that within the same classes (i.e. (a) descendants, (b) ascendants, (c) collaterals with various sub-divisions) the males and issue of males exclude females and their issue; then brothers would exclude their sisters, and brother's children would exclude their aunt or her children and so on, which put concretely means that if A dies leaving a son "B", and a daughter "C", "B" excludes "C"; or if "B" predeceases "A" leaving a son "D" then "D" too will exclude "C" or her issue (74). Some have sought to prove that sons and daughters of a deceased person shared equally, basing their argument on a statement of Isaeus (75) but this theory is successfully and satisfactorily disposed of by Caillemer (76) and is indeed opposed to other statements of Isaeus. To this point the effect of the rule is clear, but there are difficulties; what happens for instance where a male of one class seeks to

(74) Aristophanes, Birds lines 1653-4.
(75) Isaeus V 9.
(76) Caillemer pp. 18-20. And see also Wyse pp. 416-417.

oust a female of another and higher class, for example when a brother's son tries to oust a daughter? Here the rule probably does not apply. Though Isaeus goes to considerable trouble to show that it does not apply, in his speech <u>On the Property of Ciron</u> (77), the person who wrote the introduction to the speech remarks that Isaeus had a weak case in law. Nevertheless we cannot help feeling that on the ground of preference at least, if Ciron's daughter was legitimate, Isaeus had a splendid case in law (78). It is also interesting to speculate upon what would happen if the son of one maternal aunt was contending with the daughter of another maternal aunt; would the law allowing representation govern or would the male cousin exclude the female? Wyse thinks that here the rule of representation would prevail (79). This does not by any means exhaust the problems which could be found, but the examples serve as an indication of the kind of questions which arose.

Isaeus also tries to establish that the rule preferring males to females applied only to the degree of cousins and cousins' children (80) but that proposition is against all other authority, including other speeches of Isaeus, which show that the rule was of universal application (81).

(77) Isaeus VIII passim.
(78) But see Wyse pp. 585-586.
(79) Wyse p. 565. See also Lipsius p. 559.
(80) Isaeus VII 20. Wyse p. 561.
(81) Demosthenes XLIII 51, 78.
Demosthenes XLIV 62. Wyse p. 561.
Lipsius pp. 558-559.

D. Rights of Certain Classes of Persons on Intestacy.

1. Adopted Sons:

The subject of adoption in Greek Law is a fairly large one and as stated in the introduction it will not be fully dealt with in this essay, but we must glance for a moment at the rights of an adopted son upon his father's dying intestate. In such circumstances the adopted son had the same rights as a natural son would have (82) except that he could only transmit the property he received from his adoptive father to his natural and legitimate children, and could not in his turn adopt a son who would have any right to inherit the property (83). There could, of course be no adoption made if the person desirous of adopting a son had legitimate natural sons living (84) but if a son was adopted by a man having no children at the time of the adoption and later legitimate natural sons were born to him then the adopted son had the same rights on intestacy as the sons subsequently born (85). A son, if adopted into another family could not inherit from his natural father (86) unless he renounced the adoption which he could do only under certain conditions (87) but there was no such limitation upon his right to inherit from or through his natural mother, the latter relationship being regarded as

(82) Isaeus VI 63. Isaeus VII 13.
(83) Demosthenes XLIV 64. Wyse p. 328.
(84) Isaeus VI 63. Isaeus II 13.
(85) Isaeus VI 63.
(86) Isaeus IX 33; 2. Isaeus X 4.
Demosthenes XLIII 76-77.
but see Demosthenes XLII 21 and Caillemer p. 22.
(87) Isaeus IX 33. Isaeus XI.

unaffected by adoption (88).

2. Women.

We have considered above the order in which women were entitled to succeed to the estates of deceased relatives and we have discussed the rule of law preferring males to females. We shall now look at the special conditions governing a woman's right to succeed which qualified this rule. Firstly a widow had no right to succeed to the property of her deceased husband (89) but she could remain as a widow in his house if there were children of the marriage, in which case her dowry became the property of her husband's heirs (i.e. her own children) (90) or she might stay if she declared herself pregnant (91). If there were no children of the marriage and if she was not pregnant then she would return to her own family (92) with her dowry and would probably remarry (93).

Secondly, daughters had to be provided with a dowry either by their father before his death or by their brothers after the death of the father (94); unless a man provided for his legitimate daughters any disposition he might make of his property would always be subject to their rights (95).

(88) Isaeus VII 25.
(89) Compare our law. 1913 R.S.M.Cap.54. Secs. 5 and 6, as amended by 1927 S.M. Cap.5, Sec. 1.
(90) Demosthenes XLII 27.
(91) Demosthenes XLIII 75.
(92) Isaeus VIII 8.
(93) Demosthenes XL 6. See generally Wyse p. 296.
(94) Isaeus X 13.
(95) Demosthenes XLIII 51. Demosthenes XXXVI 32. Isaeus VII 20. Isaeus VI 30. Isaeus III 5; 68-69.

Thirdly, apart from any other provision females generally of any class, could take the whole estate of a deceased relative in the order indicated above (96). Furthermore, the rights of heiresses were especially protected by the enforcement of rigorous penal laws providing immunity for those informing on behalf of heiresses and providing heavy punishments for those convicted of offences against them (97).

However, when a woman succeeded to an estate as an heiress she did so subject to being claimed in marriage by the nearest male relative of the deceased (98). The right to claim her so far as degree of relationship went was governed by the same rules as governed the order of precedence of those entitled to succeed to a person dying without issue. The nearest collateral male relatives had the right to claim a daughter (99). If female collaterals succeeded the claimant would be the nearest male relative of the deceased who would of course be a collateral of a degree further removed from the dead man than the heiress. When an heiress was so claimed and married her husband had the income from her estate for life or untilmale issue of the union came of age as will be

(96) Demosthenes XLIII 3; 17; 32. Isaeus III 73. Isaeus X 4-5; 7. Isaeus XI 49. Isaeus VI 56.
(97) Demosthenes XLIII 75. Isaeus III 46-48. Wyse p. 329.
(98) Demosthenes XLVI 18; 22. Demosthenes XLIII 13. Isaeus VI 46. Isaeus VIII 31. Isaeus III 50;73-74. Isaeus X 4-5. Isaeus Fragment 26. Terence Phormio 11. 125-126. (I ii. 75-76.)
(99) Caillemer pp. 36-38.

further explained below (100). This right of the next of kin to claim the heiress' hand could probably be enforced even if she were already married, at least to the extent that she could be forced either to divorce her husband and marry the claimant or give up her claim to the estate (101).

In reality, as it appears, an heiress was not so much a successor in her own right as an instrument whereby the family of the deceased was kept in existence, the result being that she was able to keep the property only till her sons came of age when they became the legal owners of the estate (102). The usual procedure was for the first son of an heiress to be adopted by a posthumous adoption into the family of the deceased whereupon he would take up and assume the whole personality of his ancestor and perpetuate the family (103). If no such adoption took place and the heiress had more than one son then, apparently, all her sons shared equally (104). Certain laws of doubtful existence are mentioned which were evidently meant to ensure that sons would be born to an heiress, laws whose drastic terms indicate how great was the importance attached to continuity of the family and its perpetuation (105).

(100) Isaeus Fragment 26.
Lipsius p. 546 Note 23.

(101) Isaeus III 64-65. Isaeus X 19.
Wyse 351-352.

(102) See (10D) above.

(103) Demosthenes XLVI 20. Isaeus VI 30; 56.
Isaeus VII 31. Isaeus VIII 31.
Isaeus X 12. Isaeus Fragment 26.

(104) Lipsius 546.

the family (105). If there were more than one female of the same degree of relationship then they became heiresses of equal shares of the estate and here too succession was per stirpes (106).

If the next-of-kin was unwilling to marry the heiress (as he might well be, especially if he was already married or the estate to which the heiress succeeded was bankrupt) then he was forced to give her in marriage and provide her with a dowry according to his means, or if he would not provide a dowry then, willing or unwilling, the Archon would force him to marry the heiress. There are elaborate provisions for the amount of the dowry to be given and for enforcing its payment (107).

3. Illegitimates.

Illegitimate children had, in Athenian law no right to succeed to the property of either their father or mother (108). At Athens any child was illegitimate which was the issue of a marriage or connection between an Athenian citizen and a non-citizen, or of a connection between two Athenian citizens if they were not married at the time of the connection or if all the proper formalities

(105) Plutarch _Solon_ 20.
(106) Isaeus VII 20. Lipsius p. 546.
but see Wyse pp. 608-609.
(107) Demosthenes XLIII 54. Terence _Phormio_ 11 296-297 (II 1 66-67)
Lipsius pp.547-548. Caillemer pp. 56-60.
Wyse p. 329.
(108) Demosthenes XLIII 51. Demosthenes LVII 53.
Demosthenes XXXVI 32. Isaeus VI 47.
Aristophanes _Birds_ 11. 1642 - 670.
Wyse pp. 534-536.

had not been observed at their marriage (109). For a discussion of how legitimacy was proved see the Appendix I. Some writers of note have held that illegitimate children could be legitimated at Athens as they could be at Rome (110) but neither Caillemer nor Wyse agree with this theory (111). It is to be noted that legitimation only became possible at Rome well on in the Christian era (112) and it is only recently by statute that it has become possible in our law (113). In view of these facts and in consideration of the view generally adopted in antiquity it would be very rash to state legitimation was possible in a city so jealous of the purity and integrity of its ancestral blood as was Athens unless we had very clear evidence of such a privilege existing and since reliable evidence is entirely lacking we do not believe that legitimation was possible at Athens.

4. Aliens and Freedmen.

If the person who died was not a citizen nor yet a slave, he must have belonged to one of three classes: illegitimates, with whom we have already dealt, freedmen or aliens. On the death of a freedman intestate

(109) Demosthenes XXXVI 32, Aristophanes Birds 11 1650; 1665-1667.
Sandys and Paley Vol. II p. 32.
(110) See for names and references Caillemer p. 27 sqq.
(111) Caillemer pp. 27-29. Wyse p. 280.
(112) Leage pp. 69-71.
(113) In Manitoba in 1920, see 1924 C.A. Cap.113, and in England as late as 1926 by Imperial Statute 16-17 George V Cap. 60.

his property would descend to his issue if they were free or in the absence of free issue his property would go to his erstwhile master or master's heirs and successors (114). The right to the property of an alien upon his decease was governed by the same laws as the right to the property of a citizen, so far as we can ascertain, the relatives of an alien becoming entitled to his property in the same order as relatives of a citizen. The difference between aliens and citizens was that the law was administered for aliens by a different magistrate from the one who had jurisdiction in the estates of citizens (115). Probably if the alien had no relatives his patron would succeed to his property upon his death (116).

5. Slaves.

Slaves had in Athenian law no rights of succession, and inasmuch as at Athens they were considered property and nothing else it was logical that they should have no such right. Some distinction may be drawn between the private slaves, i.e. slaves who were the property of individual citizens and public slaves, i.e. slaves of the state, the latter having greater privileges and perhaps the right of succession, though it is very doubtful (117).

(114) Isaeus IV 9. Lipsius p. 560.
(115) Demosthenes XLVI 22. Terence _Andria_ 1 799 (LV v.4) Aristotle _Ath.Res._ 58:3. Caillemer pp. 135-140. Lipsius p.560.
(116) But see Lipsius p. 560.
(117) Lipsius p. 561.

Caillemer treats the subject of slaves at length but comes to much the same conclusion (118).

6. The State.

Upon a citizen at Athens dying without relatives entitled by law to succeed, which must have happened very infrequently since the law was very wide, the property did not apparently escheat to the state as it would under our law, but the Archon was charged with the duty of finding someone to carry on the family of the deceased which would of course include the possession of his property (119). Nevertheless, even if escheat was not inevitable on failure of relatives entitled by law to succeed, property might escheat to the state for a variety of other reasons to the exclusion of heirs who would be entitled if it were not for the escheat (120). Chief among these reasons was the indebtedness of the deceased to the estate, or his having been found guilty of treason.

E. The Estate.

We now come to consider of what the estate of a deceased person might consist to which his heir or heirs would succeed. In the eyes of the Athenian law the

(118) Caillemer pp. 144-147.
(119) Isaeus VII 30. Demosthenes XLIII 75. But Wyse does not agree with this view and there may be considerable merit in his contention. See Wyse p. 576.
(120) Lysias XVII 4-5. Lysias XVIII 14. Lysias XIX 8.

heir or heirs stepped into the shoes of the deceased and with minor exceptions succeeded to all his rights, privileges, duties, disabilities, assets and liabilities (121). In other words it was a universal succession and is analogous to the Roman idea of succession (122) but it differs widely from modern English law especially in its effect upon an heir who succeeds to an insolvent estate.

The assets of an estate translated into the language of English law might include real property, that is lands and houses (closely corresponding to the res immobiles of Roman Law (123), personal property (res mobiles) such as slaves, furniture, clothing, debts due the deceased, mortgages and other things (124). The liabilities would include any debts, secured or unsecured, owed by the deceased to private individuals (125) any religious contributions he had undertaken to make (126) and any debts owed to the state, which latter liability carried with it consequences which we shall shortly note (127).

There may have been some hereditary rights and

(121) Isaeus X 15-17. Demosthenes XXXV 4.
Lysias XVII 3 sqq. Caillemer p. 179 sqq.
Lipsius p. 572.
(122) Cf. Leage p. 168.
(123) Leage p. 121.
(124) Isaeus VIII 35.
(125) Demosthenes XLVII 32. Demosthenes XXXV 4.
Demosthenes XXXVIII See the argument.
Lysias XVII 3 and 5. Caillemer p. 180.
Lipsius p. 572.
(126) Isaeus V 44.
(127) See below p. 36 Note (134)

privileges to which an heir or heirs could succeed (128) and certainly there were several duties which he had to perform, the more important being the performance of the public services for which the deceased had been liable, if the heir were not a minor, and the due performance of the proper burial and funeral rites for the dead ancestor, which was part of the worship of the family cult (129). The proper honors (130) had to be meticulously and regularly carried out by the heir or heirs or if he or they were infants or were otherwise disabled then by the guardians or friends of the heir (131). The importance of this duty is manifest for when there was any dispute about the right to succeed then the claimants always emphasized their having performed the funeral rites as corroborative evidence of their right to succeed or the fact of their opponents not having performed them as a reason why their opponents should fail (132).

Any disability under which the deceased labored was inherited by his heirs, the disability usually taking the form of disfranchisement for some offence of the deceased which remained unexpiated at the time of his death; such offences might consist in the failure to carry out some religious duties (133) or of owing money to the state

(128) See Caillemer pp. 187-189. Lipsius p. 574.
(129) Isaeus II 46. Isaeus VI 51.
Isaeus IV 19. Isaeus IX 4.
Caillemer pp. 182-183. Lipsius pp. 574-575.
(130) Isaeus II 37. Isaeus VIII 39.
(131) Isaeus I 10. Isaeus IX 4.
(132) Isaeus IV 19. Isaeus IX 4.
Isaeus II 37. Isaeus VIII 39.
(133) Demosthenes XLIII 58.

treasury for some fine or other penalty (134). If an heir succeeded to an estate he could in no way escape the liabilities and as will be pointed out hereafter some classes of heirs had no choice of whether or not they would enter into the inheritance.

F. Administration:

1. Classes of Heirs:

Having discussed who is entitled to take an estate upon intestacy and of what an estate consisted we must now see how the persons entitled actually came into possession of the property to which they claimed a right. The legal process by which entry upon an inheritance was effected differed somewhat with different classes of heirs and so we must first make a classification of persons who could take an estate different from any we have so far made. Further we must keep in mind that at Athens the beneficiary or heir entered directly upon the estate without the intervention of any administrator.

(a) The first class under our new classification consists of relatives of the deceased who had to enter upon their inheritance whether they wished to do so or not and no matter what disadvantages or disabilities the inheritance carried with it due to the insolvency or disfranchisement of the ancestor leaving it. Natural

(134) Demosthenes XXII 33-34. Demosthenes XXIV 200-201. Demosthenes LVIII 17-19. Demosthenes LIX 6-7.

sons or sons adopted during the lifetime of the deceased, grandsons and other male and perhaps female descendants were the "necessary heirs" (135). There have been some writers who, on the authority of one passage in Demosthenes (136) have wondered whether there were any class of heirs which could not refuse to enter upon an inheritance but the great weight of authority (137) points to the conclusion that those mentioned above could not refuse an inheritance, and the latest authorities agree in this (138).

(b) The second class consists of voluntary heirs who were all the rest entitled to inherit, that is to say the ascendants (?) and collaterals. These relatives had the right to accept or refuse an inheritance as they saw fit and they could therefore escape the consequences of their relative's misfortunes or misdeeds.

(c) The third class consists of infants; that is persons under the age prescribed by law at which citizens could enter upon the management of their own affairs. Infants could enter upon estates to which they were entitled only through their guardians. Many

(135) Isaeus III 59-61. Isaeus X17. Demosthenes XLIV 19. Demosthenes LVIII 17.
(136) Demosthenes XXXVIII 7.
(137) Isaeus X 17. Demosthenes XXII 34. Demosthenes XXIV 201. Demosthenes LVIII 17.
(138) Lipsius p. 540 and p. 577. Caillemer p. 150.

such cases are on record (139). The duty of guardians was to administer the property of the infant (140) and they were apparently appointed by a magistrate upon supplying security satisfactory to him (141). All infants who were orphans, i.e. heirs and heiresses, were under the special care and jurisdiction of the Archon (142) or Polemarch. For citizens the magistrate was the Archon, for aliens the Polemarch.

(d) The fourth and last class consists of women. While women were only conduits for an inheritance, still they entered upon estates, probably through their guardians (143). At any rate they must be considered as a class because they could be claimed in marriage and their estate along with them in the same manner as the estate alone could be claimed (144). Women's rights were just as carefully guarded as those of infants and any attempt to defraud them, if discovered, was severely punished. They too were under the direct supervision of the Archon or Polemarch who had a special duty to protect them and their interests (145).

(139) Isaeus I 9. Isaeus V 10.
Isaeus VI 36. Aeschines I 103.
(140) Isaeus V 10-11. Isaeus VI 36.
(141) Isaeus VI 36. Wyse p. 258.
(142) Is. VI 36. Demosthenes XLIII 75.
Aristotle Ath.Res. 56 (7).
(143) Isaeus VI 13.
(144) Isaeus III 74. Aristophanes *Wasps* 583 sqq.
Lipsius p. 585. Caillemer p. 17 sqq.
Wyse pp. 348-349.
(145) Demosthenes XLIII 75. Demosthenes XLVI 22-23.
Demosthenes XXXV 48. Isaeus III 62.
Aristotle Ath.Res. 56 (7).

2. Entry Upon the Estate.

There were two methods of entering upon an estate at Athens depending upon the class of heir.

(a) Entry without applying to the court was confined to "necessary heirs" (146) who simply took possession of the vacant estate (147). If any other person was in possession unlawfully ~~his~~ the remedy was to take formal possession and bring an action for ejectment (148). After a "necessary heir" was in possession he could meet any adverse claims with a special plea (under the old English practise" a plea in bar") setting out that the estate was not adjudicable, which cast the whole onus of proof upon the claimant (149). Thus the "necessary heirs" were well protected.

(b) The second method of entering upon an estate was by making application to the court and the procedure was necessary for everyone except "necessary heirs". The procedure is analogous to that under our law when a person entitled on intestacy applies for letters of administration, with the difference that at Athens the applicant must have been entitled to the estate on

(146) Isaeus III 59 to 61. Isaeus VIII 34. Isaeus IX 3. Wyse p. 303 and p. 345. Lipsius p. 578 note (108).
(147) Isaeus III 59. Demosthenes XLIV 19. On the whole subject of Entry see Wyse pp.232 to 234.
(148) Lipsius 578.
(149) Isaeus V 16. Isaeus VI 4.

intestacy. Under our law the applicant need not be entitled, and becomes only the agent or personal representative of the deceased, whereas at Athens the successful applicant became the alter ego of the dead man. The proper procedure at Athens was to apply to the court to adjudicate the estate to the applicant (150); the application was presented to the proper magistrate, for citizens the Archon, for aliens the Polemarch (151) who posted a notice of the application (152) and proclaimed it in the assembly (153). If no other claims were made and the application was not attacked then the Court awarded the estate to the applicant (154).

However, any person who wished and as many as wished could object to the petition and set up an adverse claim (155) by protesting against the application to the Archon or Polemarch (156). Then security by way of a deposit was required by the magistrate, probably from all the applicants (157) and an appointment for trial was made (158). At the trial all the claimants were given a hearing by the court and the award was given to the one

(150) Isaeus III 58. Aristotle Ath. Res. 43 (4).
(151) Demosthenes XLIII 8-9. Demosthenes XLVI 22. Aristotle Ath. Res. 56 (6).
(152) Lipsius p. 579.
(153) Demosthenes XLIII 5, Aristotle Ath. Res.43 (4).
(154) Demosthenes XLVIII 26.
(155) Isaeus IV 11. Demosthenes XLVIII 10.
(156) Isaeus V 16.
(157) Demosthenes XLIII 5. Wyse pp. 374-375.
(158) Demosthenes XLIII 8,15, Demosthenes XLVI 22.

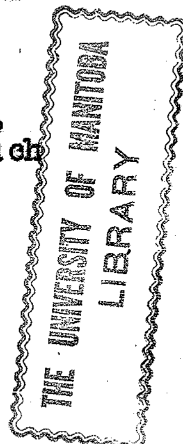
who proved his case (159).

3. The Amount of and Division of an Estate.

The amount of an estate would ordinarily be determined by an account being taken shortly after the death of the person leaving the property, or if not then at least before partition was made, and all documents of title and evidence of debts due by and to the deceased would then be produced (160). If there were more heirs than one, then all debts owing the deceased by any of the heirs or any advances made to any of them by the deceased in his lifetime had to be brought into the estate and reckoned in the total assets before distribution (161). All the property was gathered together and due search and inquiry were made to make sure that none was missed (162).

Once the amount of the estate was determined it was then divided proportionately among the heirs who had proved their right to share in accordance with the laws which we have set out above (163). The property was divided as it stood; that is to say the estate was not in ordinary circumstances liquidated and then divided (164). There was, so far as it appears, no priority of choice given to an older heir unless there was some

(159) Demosthenes XLIII 6,8-9. Isaeus VI 51. Isaeus XI 26. Aristophanes *Wasps* l. 583 sqq. For a description of the ordinary course of such a trial see Caillemer at pp. 160 to 165.
(160) Demosthenes XXXVI 19.
(161) Demosthenes XLI 8, 9, 11, 20.
(162) Demosthenes XLVIII 9.
(163) Demosthenes XLIII 8,9. Demosthenes XLIII 19. Lysias XVI 10.
(164) Demosthenes XLVIII 13. Demosthenes XXXVI 11.



testamentary direction in that behalf (165) but sometimes one of the heirs would give the other or others their choice of portions (166). Disputes over the division were probably common as they are today; certainly they were often even violent (167) and a regular procedure for settling a division existed by way of an action brought before the Archon who probably settled the right to a division and the proportion in which the parties should share and appointed assessors or valuators to see that each one received the correct amount in the division (168).

If the property was real property, that is land or buildings or other things attached permanently to land, it was not, it seems, necessary that it should be divided but it might be enjoyed jointly by the co-heirs and they would divide the profits (169). Sometimes one co-heir would act as manager of the joint estate and remit a share of the profits to the other or others (170).

4. Claims to an Estate After the Entry of an Heir.

Even after an heir had lawfully entered upon

(165) Demosthenes XXXVI 11, 34.
(166) Demosthenes XLVIII 13.
(167) Isaeus IX 17.
(168) Aristotle 56:6. Caillemer p. 197 seq. Lipsius p. 576 and Note 107.
(169) Demosthenes XLVII 34. Demosthenes XLIV 10. Lysias XXXII 4. Wyse p. 259. Lipsius p. 575.
(170) Aeschines I 102.

an estate in one of the ways already mentioned other claimants could attempt to oust him by bringing an action in the court through the Archon (171). The grounds upon which such an action could be based were i, that the claimant was more closely related to the deceased than the person then in possession of the estate (172) or ii. that the person in possession had obtained the estate because of the perjury of some one or more of the witnesses at the time the estate was first adjudicated (this claim was usually ~~brought~~ made ~~on~~ by way of a prosecution of the alleged perjurer (173). or iii, that the claimant was now claiming either for the first time or in a different capacity from that in which he had claimed in any former action on the same estate: e.g. he might first claim under a will and if that was upset then claim as upon intestacy (174) or finally iv. that the former judgment went by default and could be reopened (175). There was apparently no estoppel by conduct (176).

The action had to be brought within five years of the death of the heir or the last of the co-heirs in possession or it could be avoided by pleading the statute

(171) Demosthenes XLIII 16. Demosthenes XLIV 11. Demosthenes XLVIII 23, 29-31. Isaeus VII 7. Lipsius pp. 582-3.
(172) Demosthenes XLIII 34. Demosthenes XLIV 11. Isaeus IV 25.
(173) Demosthenes XLIV 1. Demosthenes XLVI 25 & 27. Isaeus V 14-17. Isaeus XI 45-46.
(174) Demosthenes XLIII 4,7-8. Isaeus VII 7. Caillemer p. 137.
(175) Demosthenes XLVIII 25, 29-31.
(176) Demosthenes XLVIII 43, 44.

of limitations (177). There is some controversy among commentators, who mistrust Isaeus, about the time from which the statutory period began to run but Wyse and Lipsius agree with Isaeus and in the absence of any better authority we shall have to accept Isaeus' statement as correct (178). It is important to note further that the plaintiff or claimant had to furnish a deposit of a substantial sum as security for good faith which in the event of his losing the case was forfeited (179).

(177) Isaeus III 58. Demosthenes XLIII 16.
(178) Lipsius p. 584. Wyse p. 340.
Caillemer p. 169 ff. Jebb _Attic Orators_ Vol. II p. 334. n.1.
For the limitation in cases where the hand of an heiress was being claimed see the remarks of Lipsius at p. 585 and note 134.
(179) Demosthenes XLIII 16.
Demosthenes XLIV 39,40,42,53.
Pollux VIII 38, (See this passage quoted in Lipsius p. 825 note 76.
Aristophanes _Clouds_ 11, 1136 and 1197.
Xenophon, _Constitution of Athens_ I 16.
Isaeus III 47. Isaeus IV 4. Isaeus XI 13,15,27.
Isaeus VI 12. Demosthenes XLVII 64.
Demosthenes XLIX 46. Wyse pp. 374; 330-331.
Lipsius pp. 933-936, 308, 580, 824-827, 857.

III.

WILLS.

A. Origin, Growth and Influence of Athenian Will.

In dealing with Wills, while we do not propose entering fully into their origin we shall briefly consider their growth in Athenian law and the place of the Athenian will in the history of testamentary succession. Generally speaking, in primitive societies personal disposition of property after death was not possible for the right of an individual over property of any kind was not recognized but rather property was regarded as belonging to the family or tribe as a whole. Gradually however the right of the individual to control his property began to be asserted and was finally established and then after that right was obtained men began to chafe at their inability to do with their property as they saw fit after their death as they did in their lifetime and so attempted to dispose of it or at least govern the manner in which it would be used after their death by giving directions in that behalf during their lifetime. The first wills were perhaps instruments executed or acts done during the lifetime of the testator by way of conveyance, (as at Rome per aes et libram) or by means of a contract (as was possible at Athens (180). A will as we know and understand it is secret, revocable and takes effect only

(180) See Wyse p. 384.

upon the death of the testator, but these early so-called wills had none of these attributes but were notorious acts of conveyance or contract which were irrevocable and took effect immediately upon the act being done (181). Another act, which had the effect of a testament, consisted in adopting someone as the testator's son and heir, which at first was done during the testator's lifetime. The custom of adoption was carried on and extended and it persisted throughout the whole history of ancient testamentary succession as one of the chief methods of disposing of one's property. In time the will developed its modern characteristics and became secret, revocable and effective only upon the death of its maker as we shall see when we consider in detail the testament of classical Athens. The evolution mentioned above was in process at Athens and will making was probably common and the will as a recognized method of passing property was at least beginning to take form in the customs of the people when current custom and practice were crystallized and codified by Solon in the years 594-591 B.C.(182). That Solon provided that the making of wills should be legal at Athens there can be little doubt as there is considerable authority to prove it (183), but that wills

(181) For a discussion of this matter see Maine pp.188 seq.
(182) Bury History of Greece p. 182.
(183) Plutarch: Solon XXI Demosthenes XX 102. Demosthenes XLVI 14. etc.

were impossible or unknown at Athens before his time is stated by Plutarch alone (184) and it is incredible that a provision such as we find in the Code of Solon with its limitations and distinctions, all of which bespeak some basis in experience, could have been an innovation especially in so early a code. It is much more probable that Solon's provision for wills was a codification of existing custom as was the rest of the code, with perhaps some remedial clauses to rectify known and recognized abuses of the limited customary right which had grown up slowly to dispose of property by will. This hypothesis agrees with the well recognized principles which govern the making of codes of law among primitive peoples which is exemplified in the Roman Twelve Tables. Therefore in their implicit and ingenuous reliance upon Plutarch's unsupported testimony we cannot follow either Maine (185) or Grote (186).

Whatever were its characteristics at the time of Solon, the Athenian will had developed the main attributes of wills, as we conceive them, by the time of Aristophanes in 422 B.C. (187) at least and probably much earlier, and in the time of Isaeus and Demosthenes a generation or two later was fully developed as we shall set out below. In the time between 591 B.C. and 450 B.C.

(184) Plutarch: Solon XXI.
(185) Maine, 209
(186) Grote, Part II Cap. XI.
(187) Aristophanes: Wasps 11 575 seq. but it must be noted that this passage is a gross satire and is probably very uncertain evidence for details.

the Athenian Will, the first of its kind definitely known in Europe (though it is possible that Wills were known in Egypt at a considerably earlier date) had spread its influence over the rest of the Greek world and had been adopted by several Greek states (188). It probably even affected the Roman will by reason of the influence which the Code of Solon had upon the Twelve Tables through the embassy which the Romans sent out to investigate the laws of other states prior to the promulgation of their own code about 450 B.C. (189). If, as we think, the provisions of Solon's Code concerning wills, influenced Roman Wills then the Athenian Will is a direct, though remote, ancestor of our modern will, through its more recent Roman model, and our will shows marked traces of its venerable heredity.

Although the legal power to dispose of property by will was given to Athenians and though it seems to have been widely used the will was never freed from restraint (190) and was always regarded with suspicion and jealousy (191) not only by the popular courts but even by well informed and well educated men (192) because of the strong tendency at Athens to preserve the direct continuity of

(188) The Athenian legislation was either adopted with modifications in other Greek states or there was a simultaneous growth of similar testamentary law; probably the former. See Plutarch: Agis V. and Isocrates XIX 12.
(189) See Mommsen Book II Cap. 2. (Vol. I p. 280).
(190) Except once, in theory, by the Thirty, Aristotle Ath. Res. 35(2)
(191) Isaeus I 41. Isaeus IV 15-16. Isaeus VII 2.
(192) Plato Laws, 922 B. seq.

the family; anything which might interrupt such continuity was looked upon with disfavour and so we need not be surprised to find that the courts upset and annulled wills on the slightest pretexts (193). Wills were commonly attacked by those who would have been entitled to succeed on intestacy (194) upon very meagre grounds which ranged from merely "natural rights" (195) to just attacking the will on general principles (196). Our modern eyes look with amazement at the spectacle of a beneficiary under a will to which no exception can be taken on any legal ground, being forced to defend and bolster up his legal claim by all manner of moral and ethical considerations and arguments which have no technical bearing upon the matter in issue, which in strict law could only be the validity of the testament (197).

B. Restrictions on the Right to Make a Will:

In the time of the Orators the law of Solon providing for the disposition of property by will was still in force (198) and we find the restrictions set up therein still regarded as good law; indeed the law had been applied continuously so far as we can learn since

(193) Isaeus I 38,41. Aristophanes _Wasps_ 11, 575 seq.
(194) Isaeus I 42, Isaeus XI 9.
Isocrates XIX 17, 31.
(195) Isaeus I 2. Isaeus IV 18.
Isocrates XIX 17.
(196) Isaeus I 29-31.
(197) Isocrates XIX 17,30,34, 42-43, 46-50.
(198) Plutarch: _Solon_ XXI. Demosthenes XLVI 14.
Isaeus IX 11,13.

the promulgation of the Code, except for a short time under the Thirty when the right to make a will was entirely unfettered (199). All the restrictions are easily explained by merely considering the state of Athenian society and the political and religious ideas of the Athenians, and indeed many of the restrictions solidly based as they were on sound principles of jurisprudence find their counterpart in our present day testamentary laws. We shall deal with the limitations separately as follows:

1. The first restriction was that a man who had legitimate male issue alive could not make a will as he liked (200). This limitation was of course the result of the Athenians' overwhelming desire, heretofore explained, to keep the family line intact (201). To interpret the law to mean that the presence of male heirs was an absolute bar to the right to make a will is a possible and common interpretation (202) but we doubt whether it is the correct reading of the law. We think that the law merely says that a man with legitimate sons cannot make a will "as he likes"; that is he can make a will, but he cannot dispose of his property without reference to his sons' rights. He must make

(199) Aristotle: Ath. Res. 35 (2).
(200) Plutarch: Solon XXI. Demosthenes XLVI 14. Isaeus VI 9.
(201) See also Lipsius pp. 562 seqq.
(202) Isaeus VI 28. And see Lipsius p. 562.

provision and substantial provision for his sons. Our contention is supported by the constant inclusion in the quotations from and paraphrases of the law of the important qualifying words "as he likes" (203). Our interpretation too, if accepted, explains without further difficulty the wills known to have been made by men who had sons living at the time the wills were made, all of which wills amply provide for the sons but make other dispositions as well, as for example to charity (204).

However even if the restriction was originally intended and interpreted as an absolute bar and if the law be taken with that meaning, by the time of the orators in the process of the law's evolution exceptions had grown up at some time or other, perhaps only by virtue of custom, whereby men with sons did make wills which were recognized as valid. One might, for instance, suggest as such an exception that if a man had infant sons he might make a will disposing of his property and providing for their education and upbringing. We have at any rate instances of this actually being done in practice (205). Plato, even in his conservative old age, admits the right of a father who has sons to make a will (206). Wyse in commenting on the matter does not confine

(203) Demosthenes XLVI. Isaeus II 13.
Isaeus III 68. Isaeus X 9.
See Sandys and Paley p. 138.
(204) See next note infra.
(205) Demosthenes XXVII 5: Demosthenes' own father made a will.
Demosthenes XXXVI 34: Pasion made a will having two sons, one of them an infant. See also Demosthenes XLV 28.
(206) Plato: Laws, 923 C seq.

the right to fathers who had infant sons, as we suggest might have been the case, but thinks the right extended to any father, a conclusion which may be accepted as reasonable (207).

Finally if a man having sons made a will and the sons whom he left and whose presence would have annulled the will died before attaining their majority then upon their death the will again became operative and whatever provisions were made in it were valid just as if there had never been any legitimate sons (208).

2. In keeping with the first restriction set out above a second also was intended to insure that a man would provide for his lawful children. This provision imposed upon a testator, if his will was to be valid, the necessity of disposing of or providing for his legitimate daughters either by setting aside a sum of money as a dowry for them or providing as a condition of inheriting that the testamentary heir should marry the daughter(209). If there was more than one daughter then a combination of these provisions might perhaps be necessary. If there were sons and daughters both then the sons whether they inherited by virtue of a will or on intestacy had the duty

(207) Wyse p. 515. Among other authorities he cites Lysias XIX 39-41 where Conon's will is mentioned; in using this as an authority we must bear in mind that the will in question was made at Cyprus. See also Lipsius p. 565.
(208) Demosthenes XLVI 24.
(209) Isaeus III 42, 68. Isaeus X 13. Wyse p. 246. For the manner in which the philosopher Plato would improve upon this law see Plato: Laws p.923 E.

of caring for their unmarried or divorced or widowed sisters.

3. The two restrictions on testamentary capacity just named might be termed external disabilities inasmuch as they did not find their source or reason in the testator's own person but were only incidents in his external affairs which affected nothing, generally speaking, but his right to make a will. The restrictions upon testamentary capacity to be discussed hereafter, might be called personal disabilities and as the first of these we may discuss Insanity.

There is no doubt whatever that in Athenian as in English law an insane person could not make a valid will (210). The difference between the Athenian and the modern rule consisted in what was regarded as constituting insanity. In Athenian law insanity meant an aberration of the mind such as would affect the actions of a person so as to render him abnormal. The aberration might have been due, to one of a ~~variety~~ number of causes, the following being mentioned in the passages of the Athenian orators indicated.

(a) Mental incompetence might be caused by some disease which attacked the reason (211). Mere illness, even though it later proved fatal, which did not affect the mind or had not done so at the time the sick man made

(210) Isaeus I 11,19-21,34,43. Isaeus IV 14-16. Isaeus VI 9. Isaeus IX 37. Demosthenes XLVI 14, 16. Lysias XIX 41. Aristotle Ath. Res. 35 (2).
(211) Demosthenes XLVI 14,16.

his will was not enough in itself to make a will executed during the illness invalid (212).

(b) Dotage brought on by old age was considered a sufficient mental incapacity to constitute insanity and was a bar to testamentary capacity (213).

(c) A person whose mind, by reason of drugs, was temporarily incapable of appreciating the nature and quality of what he was doing was considered as insane (214). Though there are no specific indications of what constituted drugs in the legal sense we may suppose that wines may have been classed as drugs even in ancient Athens. More likely real drugs were meant, such as could be obtained from apothecaries for the purpose of putting the victim under their influence; an example of such a drug is the love philtre which forms the subject matter of the case in Antiphon's first speech.

(d) Anger or passion was looked upon, at least it is represented in the arguments of the orators as a form of insanity sufficient to invalidate a will made in a fit of anger (215).

(212) Lysias XIX 41. Becker *Charicles* p.167, note 19. Sandys and Paley II p.139.
Other authorities are quoted below in the discussion of the occasions upon which wills were made.

(213) Demosthenes XLVI 16.
Cf. Cicero *De Senectute* 22 where Sophocles was called upon to defend his mental competency in the courts by his sons who sued for the estate.

(214) Isaeus IX 37. Demosthenes XLVI 16.

(215) Isaeus I 11, 43.

Cf. Horace, Ep. 1.2.62 Ira furor brevis est.

(e) Finally mere unreasonableness of conduct might be regarded as an indication of insanity (216). The definition of insanity here implied is considerably broader than that which is recognized by English Law (217). Insanity was proven in Athenian courts for the most part by inference from the alleged unreasonable acts of the deceased at the time he was making his will (218) but though no examples have come down to us cases must have arisen in which much more satisfactory evidence could have been given and was supplied.

4. Though the testator was not insane, nevertheless if he had been unduly influenced in making his will then the will was invalid (219). That undue influence was commonly exerted is clear from the testimony of Plato (220) even if his suggested means of preventing it does not appeal to our modern minds. Undue influence at Athenian law consisted in

(a) Mental stress or pressure brought upon the testator by means of threats or blandishments to induce him to act as the person applying the pressure desired (221).

(b) Physical duress consisting of imprisonment or

(216) Isaeus I 19,34. Isaeus IX 37.
(217) For a short discussion of what insanity meant in Athenian law see Wyse p. 203.
(218) Isaeus I 19-21, 34. Isaeus IX 37. Demosthenes XLVI 17.
(219) Demosthenes XLI 12, 16-17. Demosthenes XLVI 14,16.
(220) Plato: Laws 923 B.
(221) Demosthenes XLI 12, 16. Demosthenes XLVI 14,16.

other forcible detainer or confinement (222), or

(c) the influence of a woman, which though it might well have been included in (a) above is particularly mentioned in the orators (223) perhaps on the theory that a woman's influence was more pernicious and insidious or that a man's wife or mistress had greater opportunities of warping his judgment than other persons.

5. Passing from the restrictions placed upon testamentary capacity because of mental derangement or duress we come to restrictions placed upon persons because of their political or social status. The first of these is that a man who was under an obligation to account to the state auditors for the manner in which he had performed the duties of his office and expended public moneys under his control was, while he was so subject to deliver up an account, precluded from disposing of his own property by will (224).

6. Infants were unable to make a will disposing of their property (225).

7. Women were under the same disability as infants (226) though an attempt has sometimes been made to interpret a passage of Demosthenes (227) as indicating that they could execute a will. But there is nothing to

(222) Demosthenes XLVI 14,16.
(223) Demosthenes XLVI 14-16.
(224) Aeschines III 21.
(225) Isaeus X 10.
(226) Isaeus X 10.
(227) Demosthenes XLI 9-10, 21.

show that "the writings" mentioned in the passages cited were testamentary nor that they were valid if they were testamentary. In fact it seems rather that "the writings" were probably mere depositions taken at the deathbed of the woman to be used later as evidence under the rules allowing dying declarations to be so used and it is now generally agreed that they were not a will (228). The gifts of Appollodorus' mother to her grandchildren mentioned in Demosthenes' speech "For Phormio" (229) must have been made during her lifetime with her husband's (Phormio's) permission. An unmarried woman would be under the guardianship and control of her next of kin and would have no part in managing her own property. It is absolutely opposed fo the general attitude of the Athenians toward women that they should have any right to make a valid disposition of any considerable property either inter vivos or upon death.

8. The next class whose testamentary capacity was restricted was that of adopted sons. They could not dispose of property by will which they had inherited from their adoptive father by reason of the adoption (230). There is also reason to believe that adopted sons could not will away any property they may have had before their adoption or which they themselves acquired after it, though of course they could always recover their right to

(228) Lipsius p. 566 note 68.
(229) Demosthenes XXXVI 14.
(230) Demosthenes XLVI 14. Demosthenes XLIV 67-68.

make a will by renouncing the adoption and returning to their original family (231).

9. It might be thought that aliens could not make a valid will at Athens but there is really nothing to show that they could not and at Aegina which was very close to Athens it seems clear that they could do so (232). In the absence of any evidence to the contrary we may suppose that the Athenian law was similar and that aliens could dispose of their property by will.

10. Freedmen who were citizens also seem to have had the power to make a will (233). There is a passage which states the contrary (234); but this passage is generally regarded as mere sophistical argument and the fact that wills were actually made by freedmen citizens seems to deprive it of most of its weight (235).

11. The last restriction upon disposing of property by will affected a person who had inherited under a will which directed how the property was to be used by the testamentary heir and what was to happen to it after the heir's death. No will made by the heir would be valid to dispose of such property. This would seem to make the heir a trustee or tenant for life only but it is very doubtful if such a relationship could be set up and therefore if any such restriction actually existed (236).

(231) Sandys and Paley II pp.138-9. Wyse pp.248,650.
(232) Isocrates XIX 12. Lipsius p. 568.
(233) Demosthenes XXXVI 46. Pasion was a freedman.
(234) Demosthenes XLVI 15.
(235) Lipsius p. 567. Note 73.
(236) Isaeus I 4. Wyse pp. 185-186.

C. The Execution and Attestation of Wills.

1. When and how was a will made at Athens in Classical times? Any man who had attained his majority might make a will at any time he chose so far as the law was concerned subject only to the limitations already mentioned. But it appears from the ancient sources that, as with us, many Athenians who were either careless or afraid that their death might be hastened by over solicitous and greedy beneficiaries, left making their wills until the last moment. So we find that serious illness was a common occasion for making a will (237) and another was ~~immediately before~~ imminent departure upon a military expedition (238). Common as these occasions were they were ill chosen as appears from the many disputes which arose over wills made at such times. On this head we shall have more to say later. It is perhaps merely because disputes arose over wills made on the death bed of the testator (239) that an undue proportion of wills seem to have been made at that time and very probably if the whole truth could be known, far the greater number of wills made were executed while the testator was still in good health and well able to give his best attention to so important a document.

(237) Isaeus VII 1. Lysias XIX 41.
Diogenes Laertius V 69. Plato *Laws*. 922 B.
Demosthenes XXVIII 15. Demosthenes XXXVI 7.
(238) Isaeus VII 9. Isaeus IX 14.
(239) Isaeus VII 1.

2. No matter when an Athenian will was made its characteristics were much the same, and the first of these was secrecy. Like English wills, Athenian wills could be made and their contents kept a secret (240) though this need not be the case. The terms of the will must often have been well known if the testator had no particular reason for secrecy. We find the fact that wills could be secret used as a ground for attacking them because secrecy left the door wide open to forgery (241) which could be detected only with difficulty. But as we shall see shortly precautions were taken to guard against forgery by several devices which did not infringe upon the secrecy of the document. Secrecy is one of the main characteristics of a true will as we conceive it and its presence indicates the high stage of development which the Athenian will had reached.

3. It has been contended that writing was probably not necessary (242) and it may not have been necessary for a valid will but it is certain that it was common and we may say that in fact a will was almost invariably written (243). He would have been a fool indeed who could expect an Athenian court to prove an alleged verbal will in the face of any next-of-kin

(240) Isaeus IV 13. Isaeus VII 2.
(241) Isaeus IV 13-14. Isaeus VII 2.
(242) Lipsius p. 568. Note 78.
(243) Isaeus VII 2.

however remote, and so far as we can judge most Athenians who had property to dispose of were fairly shrewd, with the result that a verbal will must have been rare if it occurred at all.

4. There was no particular form prescribed by law at Athens in which a will had to be drawn (244), and in this we find another resemblance to English wills. However in the course of development a form of sorts grew up and from examples of Athenian wills which have come down to us we can distinguish certain features which are common to all of them. First of all there was an introductory sentence sometimes setting up the circumstances in which the will was made (245) and indicating at least the nature of the instrument (246); a common formula seems to have been "All will be well; but in case anything should happen I make the following dispositions" (247). This corresponds to the usual introductory clause of our own wills which runs "This is the Last Will and Testament of me A.B. etc.". After the introductory clause there might follow directions for the welfare of any female relatives such as daughters, wife or sisters of the testater (248). Then various pieces of property were mentioned and described and disposed of by the testator (249) with directions

(244) Lipsius p. 586.
(245) Diogenes Laertius V 69. Becker: Charicles p. 167. Note 19.
(246) Diogenes Laertius III 41. Diogenes Laertius X 16.
(247) Diogenes Laertius V 11; 51. Trans. by R. D. Hicks.
(248) Diogenes Laertius V 12.
(249) Demosthenes XXVII 40. Demosthenes XXIX 42. Diogenes Laertius III 41-43. Diogenes Laertius V 51, 69 sqq. Diogenes Laertius X 16 sqq.

for the payment of debts and funeral expenses (250). There was usually a clause appointing an executor or executors or guardians which was sometimes at the beginning (251) sometimes at the end (252). Finally at the end of the will the names of the witnesses were sometimes mentioned but this must not be taken to correspond to our attestation clause at all (253).

From this general scheme or arrangement individual wills might vary somewhat in detail but most of the clauses here enumerated appear somewhere or other in all the wills of which we know or hear as can be seen by an examination of the passages upon which these conclusions are based.

5. As we have said there were usually witnesses to a will at Athens , but it is not at all certain that the absence of witnesses would of itself invalidate a will and it may be that they were not necessary (254). And yet the slightest knowledge of the manner in which Athenian Courts treated wills, will indicate to us how small a chance there was that the terms of an unwitnessed will ~~had of being~~ would be followed and how very unwise it would have been to have neglected this safeguard. It is a reasonable conclusion that even if witnesses were not essential they were almost invariably present at the execution of a will as many passages

(250) Diogenes Laertius III 43, Diogenes Laertius V. 53; 70-71.
(251) Diogenes Laertius V 11.
(252) Diogenes Laertius III 43.
(253) Diogenes Laertius V 57; 74.
(254) Isaeus IX 12.

indicate (255). The names and residences of the witnesses were often set out in the will (256).

The witnesses to a will might be selected from any persons who would be eligible to give evidence in a court later concerning it (257) but it was usual to have present as witnesses relatives and friends of the testator and especially those who might expect to benefit under the terms of the will (258). The obvious reasons for having witnesses are succinctly stated by Becker in his Charicles (259) and in a word it was merely a precaution against forgery and against disputes which might arise after the testator's death.

The witnesses did not necessarily know, indeed probably seldom knew the contents of the will (260). They were there merely to witness the fact that a will was made, perhaps never saw it open, and did not need to concern themselves with the contents. How this ignorance on the part of the witnesses might affect their evidence when they were later called upon to identify the will will be discussed later when we are considering

(255) Isaeus IX 8, 13. Isaeus VI 7. Isocrates XIX 12. Lipsius p. 568. and many other passages quoted below in other notes.

(256) Diogenes Laertius V 57; 74.

(257) That is there would be no point in having as witnesses persons who at the time of execution of the will were already precluded from appearing in court as witnesses or who were likely to be precluded later.

(258) Isaeus IX 8-10; 12. Demosthenes XLI 17. This is contrary to modern law under which a witness to a will cannot take any benefit therefrom. See The Manitoba Wills Act 1913 R.S.M.Cap.204 Sec.12.

(259) Becker: Charicles p. 166. Note 18.

(260) Isaeus IV 13-14. Sandys and Paley II p. 129.

seals. On the other hand witnesses did sometimes know the terms of the will and even assented to them (261). Whether the witnesses signed the will is a disputed point. Lipsius holds that it was not necessary for them to sign (262) but there is no evidence to show that they never did. The fact that the witnesses did not know the contents of the will is no reason to suppose that they did not sign it, for witnesses who sign wills today very seldom read them or know what is in them. Those who, on the strength of Isaeus' <u>On the Estate of Nicostratus</u> (263) have taken the view that witnesses did not sign the will have, we think, based their opinion on no real evidence. Wyse gives at least one example of a will which was signed by the witnesses as well as the testator (264) though this was a very late will and may well have been influenced by the Roman practice. There is no reason why the witnesses should not have signed the will but there are many cogent reasons why a prudent testator would have had them do so.

6. There is no evidence to prove that it was necessary at Athens for a testator either to sign or seal his will; there is not much evidence beyond inference to show that a testator ever did sign his will though we

(261) Demosthenes XLI 17.
(262) Lipsius p. 579.
(263) Isaeus IV 13.
(264) Wyse p. 387.

have examples of what appear to be holograph wills (265). But there is evidence to show that testators sealed their wills (266). Seals at Athens were used for identification and were duly impressed with the individual devices of the persons applying them and they probably took the place of signatures for the most part (267). These seals were it seems made of some sort of clay and caps were placed over them to protect them (268). Sealing at Athens never degenerated into a mere formality as it has in English law, which can be satisfied by affixing a bit of gummed paper. It is quite certain that the testator usually sealed his will. Whether the witnesses did so too is disputed but we think it is most probable that they did. We have examples of wills where seals are mentioned in the plural (269). It is of course possible that the testator's seal might have been put on in more than one place but it is more probable that the seals include the seal of the testator and seals of the witnesses. Sealing was a method of identification which was especially convenient in the case of wills in that the witnesses could seal a will without knowing its contents and still make a certain identification of it if the document was later produced with its seals intact and there is evidence that this method was actually used (270). Therefore

(265) Isaeus VII 1. Wyse p.552. See 1913 R.S.M. Cap.204 Sec. 10.
(266) Diogenes Laertius V 57. Isaeus VII 1-2.
(267) Diogenes Laertius V 57. Lysias XXXII 7 (not a will).
(268) Aristophanes <u>Wasps</u> 11 584 seq.
(269) Demosthenes XLV 17. Aristophanes <u>Wasps</u> 11 584 sqq.
(270) Demosthenes XLV 17.

witnesses' ignorance of the contents of a will discussed above could not in our opinion have any bearing upon their identifying it, if as we think the witnesses usually attached their seals (271).

7. When a will had been executed it was usually deposited for safe-keeping with some person or persons, often friends or relatives, whom the testator considered trustworthy (272). They would produce it after the death of the testator, although it is not clear to whom they were bound to produce it (273). Rarely, unless the state had some interest in the property of the testator, a will was deposited with a magistrate in his official capacity or in a temple (274). This practise of depositing with a magistrate if employed was merely followed for safe keeping and must not be considered as being a registration of the document in any way. Such a conception seems to have been entirely foreign to Athenian law.

8. We have it stated in one passage that no more than one copy, that is the original, of a will was ever made (275) but this passage is disproved by very clear and undisputed evidence to the contrary. It seems that nearly always several copies were made and deposited with differ-

(271) On the subject of seals and sealing generally and for examples of late wills which witnesses had undoubtedly sealed see Wyse pp.386-387.
(272) Isaeus VII 1. Isaeus IX 5,6,18.
Isaeus VI 7, 27. Demosthenes XXXVI 7.
Diogenes Laertius V 57. Lysias XXXII 5.
(273) Demosthenes XLV 19,21.
(274) Isaeus I 3,14. Wyse pp. 185, 194.
Sandys and Paley Vol. II p. 11.
(275) Demosthenes XLVI 28.

ent persons as another safeguard against forgery or suppression (276). We know too that sometimes different copies of the same will were witnessed by entirely different sets of witnesses (277).

9. We are told that forgery of wills was common at Athens (278) which is probably true. All the precautions outlined above were taken to insure that no forgery or suppression could be successfully accomplished; the will was witnessed, signed (?), sealed and deposited for safe keeping just as we deposit ours today in safety deposit boxes, but we still hear of many actions where forgery of a will is one of the issues, the frequency of which shows how real a risk it was and how careful a prudent testator had to be (279).

D. Alteration and Revocation of Wills.

The subject of alteration and revocation of wills at Athens is a difficult one and there are as a result several different opinions about it (280). Nothing is reasonably clear or admitted except the possibility of such revocation (281) or alteration (282). The difficulty arises when we come to consider how it

(276) Diogenes Laertius V 57. Diogenes Laertius IV 44.
(277) Diogenes Laertius V 57. Becker _Charicles_ p. 171 Note 37.
(278) Isaeus I 41. Isaeus V 15. Wyse p. 222.
(279) Isaeus VII 2. Isaeus IX 2. Isaeus Fragment 4. Demosthenes XXXVI 33. Demosthenes XLIII 4. Demosthenes XLV 27,34.
(280) See Wyse pp. 208-209.
(281) Isaeus I 14. Isaeus VI 30.
(282) Isaeus I 18.

could be carried out.

In the first place a will might be contingent that is, certain people might take under the terms of a will only if some specified event happened or did not happen; then if the contingency contemplated did not occur, by a quasi alteration of the testator's will (foreseen by him) the persons whose rights were subject to the contingency could not acquire any property under the will (283).

So much is quite clear and simple but what happened when a testator had made a will absolute in form and later wished to modify or change it? Could he do as a testator can do under English law and effect his intention by a codicil? Lipsius and some others on the strength of one passage in Isaeus (284) think codicils were possible and existed as such. If they were possible then what form would they take? Lipsius says that this special document would follow the customary form of a will (285) but as we have seen there was no ordinary or legal or even customary form of will which had of necessity to be used and so it could not have been followed. Wyse (286) criticizes the whole theory that a codicil was possible. It seems very probable that a will could be altered or even revoked, at least in effect, by a later

(283) Isaeus XI 8.
(284) Isaeus I 25.
(285) Lipsius p. 571 and note 85.
(286) Wyse pp. 208-209.

document which ~~needed to have no~~ did not need any special formalities any more than a will needed to have them, other than those dictated by the common sense of a prudent testator (287). Certainly even if there were no rules of law allowing such a method of changing a will the production in court of a document which could be proved to have been executed by the testator after the execution of his will and which changed its provisions would have been ample to upset a will in the Athenian courts where they were always suspected anyway. The same argument could be applied with the proper changes in terminology to the question of revocation by a new will. We may fairly conclude that, all questions of law aside, which so far as we can see, cannot be settled, effect would be given to the later instrument unless duress or fraud or insanity or some other legal objection to its validity could be shown (288).

There is some evidence to show that a will could be changed by the testator recalling it from the persons with whom it and its various copies had been deposited and thereupon changing it before witnesses in the same manner in which it had originally been executed (289) or by destroying it in the presence of witnesses (290).

It is contended in a speech of Isaeus (291) that

(287) Such as the presence of witnesses and the use of seals.
(288) Wyse pp. 208-209; 415; 423.
Lipsius p. 571.
(289) Isaeus I 14. Isaeus I 18.
(290) Isaeus VI 30-32. Wyse p. 518.
Sandys and Paley Vol. II 78-79.
(291) Isaeus I 3; 43.

if a testator definitely made known to witnesses his intention of annulling a will which he had made, that intention should be implemented by the courts and that they were legally bound to declare the will void even on the failure of the testator either through ignorance, carelessness, or inability to carry out any of the measures enumerated above for the proper revocation of the will. We cannot think that such a position is tenable and we think that even in Athenian law some overt act must have been necessary to alter or annul a properly constituted will.

One other problem arises and that is the effect upon a will of the birth to the testator of children after its execution. We know that if a testator had both children and had made a will and the children died after the death of the testator but before they attained their majority then the will became operative (292). If one of several children attained his or her (293) majority after the death of the testator then the will would not become operative at all. It seems a logical corollary to this rule that a will existing at the time the child was born must be annulled by the birth of a child of the testator, unless if such child were a girl, he altered the will to provide for her, and subject to the possi-

(292) Demosthenes XLVI 24.
(293) If the child were a girl then if the will provided for her it would be valid.

bility of reviver (294) under the rule stated.

E. Acts Which Could Be Done By Will.

It will now be in order to consider the many provisions it was possible for an Athenian to make by will for the disposition and management of the property he left. Naturally one of the first things it was necessary for him to do was to appoint some person or persons to take his place in managing the property and to see that his wishes were carried out, that is an executor or executors. There is nothing to indicate that a "guardian" appointed under an Athenian will was in any sense a personal representative of the testator, his *alter ego* as it were, as in English law. The origin of executors in Athens was no doubt merely the appointment of guardians for relatives of the testator who were minors at the time of his death. However by the time of which we speak the "guardians" had really become "executors" and it was their duty besides looking after any children or other beneficiaries of the deceased who were still minors to manage his property and dispose of it as he directed in his will. Their duties the testator usually set out in his will. We shall presently discuss the nature of these duties. Guardians, therefore, in most cases were expected to

(294) i.e. unless it should happen that the child never lived to attain its majority.

assume the duties of Executors (295). Then we have examples of the appointment of Executors solely to deal with the property of the deceased where no question of guardianship could have arisen (296). The executors might be the residuary legatees and no doubt often were (297) and they might be executors in fact even if they were not especially named as such, having been directed to do all the things an executor is ordinarily called upon to do (298). Under English law such a person would be called an "Executor according to the tenor".

There seems to have been no restriction upon the number of executors who could be appointed nor upon the class of persons who could act, but it would be reasonable to suppose that they had to be of age and capable mentally and legally of performing the duties assigned to them. The basis of their appointment, as it is with us, was the trust and confidence which the testator placed in their ability and integrity (299).

2. The next, and probably in Athenian eyes the most important, thing, which it was possible to do by will was to adopt an heir, usually a son. In practically every will of which we hear where the testator was

(295) Demosthenes XLV 37. Demosthenes XXXVI 8,22,51. Demosthenes XXVII 4-5. Demosthenes XXIX 47. Isaeus V 10.
(296) Diogenes Laertius III 43. Diogenes Laertius V 11; 56. Lipsius pp. 565-566.
(297) Diogenes Laertius X 17-21.
(298) Diogenes Laertius V 70-74.
(299) Demosthenes XXIX 47.

childless or had only a daughter there is a son adopted, that being the customary thing to do (300). A few examples of such wills are given in the notes (301) but wills in which no adoption was provided for were very rare (302) except where the testator had legitimate sons alive. The adopted son was usually a relative but not necessarily one; he might be a friend who might or might not become a posthumous relative by marrying a daughter or sister of the deceased (303). It was also possible it seems for a man to adopt a daughter if he saw fit (304). As we have remarked before no such adoption could be made lawfully if a testator had legitimate sons, and if he had legitimate daughters an adoption could only be made if he duly provided for them (305).

3. This brings us to another thing an Athenian testator not only could but had to do (306) and that was to provide for his legitimate daughters if he had any. This he usually did by arranging or directing their marriage to his proposed heir (307) or providing a suitable dowry for them. He might also arrange for the marriage or welfare of other female relatives such as his wife, sisters and nieces (308). There is no record of a

(300) Isaeus II 14. Isaeus VIII 40.
(301) Isaeus V 6. Isaeus VI 6-7. Isaeus IX 5.
(302) Wyse p. 555.
(303) Isocrates XIX 12-13, 49.
(304) Isaeus XI 8,41. Wyse p. 557.
(305) Isaeus III 42; 68.
(306) Isaeus III 42.
(307) Plato: Laws 923 D. Isaeus VII 9.
(308) Diogenes Laertius V 12. Demosthenes XLV 28. Demosthenes XXXVI 8.

man ever having provided for his mother-in-law so far as we can find (309).

4. All the evidence which we have points to the conclusion that it was impossible for an Athenian to disinherit absolutely his legitimate children (310).

5. An Athenian testator very often gave directions in his will for his funeral, specifying where he was to be buried, who was to conduct the funeral and how much should be spent upon it (311). Directions might also be given for the burial beside the testator of persons whom he especially liked (312) and for the funeral honours which were to be paid to the testator and his ancestors (313).

6. Sometimes an Athenian testator would make provision in his will for paying his debts as is usually done at the present day. It was, however, no more necessary to do so then than it is now. But the reasons which rendered such a clause unnecessary at Athens were different from those which would do so to-day. There the beneficiary under a will who was the residuary legatee, usually a son adopted by the will, stepped into the testator's shoes and immediately upon proving the will became personally liable for the debts as well as

(309) The reader is here permitted to smile.
(310) Lipsius pp. 562-564, see note 60.
(311) Diogenes Laertius V 53, 69, 70, 74.
(312) Diogenes Laertius V 16.
(313) Diogenes Laertius V 54. Diogenes Laertius X 18.

entitled to the assets of the testator. This is analogous to the "universal succession" of Roman Law (314) and the heir was liable for the whole amount of the debts even if it exceeded the value of the assets to which he became entitled. Since, therefore, inheritance involved liability no provision for debts was necessary in the will. The result was of course that if a testator's estate was insolvent the beneficiaries simply refused to prove the will and would, unless they were also "necessary heirs " (315) on the resulting intestacy, thereby escape the liability. Under English law an executor must pay all the debts of the deceased up to the whole value of the estate before he pays over to the beneficiaries any of the gifts or legacies given by the will and in default of his so doing he will himself become personally liable to pay the debts, and this being a rule of law no clause is needed in any will. However testators sometimes did direct that particular moneys or property be used to pay a debt (316) and that certain debts were to be set off by legacies (317). Or the testator might mention that he had no outstanding debts (318).

7. The prime motive for making a will is to dispose of property which the testator owns, and it will now be

(314) See Leage pp. 168 et. seq.
(315) See p. 36.
(316) Diogenes Laertius V 69,71,72.
(317) Diogenes Laertius V 71.
(318) Diogenes Laertius III 43. This of course could only apply as at the time the will was made.

necessary to consider what sort of property a testator at Athens could devise or bequeath. It appears from the contents of wills mentioned by ancient authors that Real Property could be devised and that such property might consist of houses (319), factories (320), land in various places (321) often carefully described. Usually the property was given absolutely but was sometimes given contingently or was limited by some condition (322). Sometimes also gifts were made of money charged upon specified lands (323).

Personal property could also be bequeathed by will and we find a wide variety of possessions disposed of, a list of which is of interest as giving an insight into the business and personal life of the ancient Athenians. Bequests were made, for example, of slaves (324), money (325), books (326), sheep, goats, horses, barley, wine, fruits (327), ivory, iron, wood, gall, copper (328), olive oil (329), furniture and silver and

(319) Demosthenes XLV 28. Demosthenes XXVII 10. Demosthenes XXXVIII 7. Diogenes Laertius V 14,52,70.
(320) Demosthenes XXVII 9. Demosthenes XXXVI 37-38.
(321) Isaeus XI 41. Diogenes Laertius V 52. Diogenes Laertius III 41, 42.
(322) Diogenes Laertius V 52. Diogenes Laertius X 16-17.
(323) Demosthenes XLV 28 and see Kennedy's note at Vol. V p. 53.
(324) Demosthenes XXVII 9. Demosthenes XLV 28. Diogenes Laertius III 42. Diogenes Laertius V 13,54,55.
(325) Demosthenes XXVII 9. Diogenes Laertius V 13,54,73. Lysias XXXII. Lysias XIX 39. Isaeus XI 43.
(326) Diogenes Laertius V 52,73. Diogenes Laertius X 21.
(327) Isaeus XI 41, 43.
(328) Demosthenes XXVII 10, 43.
(329) Diogenes Laertius V 71.

gold plate (330), jewels and ornaments (331), wearing apparel (332), book debts from various kinds of business (333) and as a corrollary to these what would now be called "choses in action" such as agreements to pay in the nature of bills of exchange, etc. In a word all kinds and varieties of property could be devised and bequeathed in the same manner as can be done to-day.

8. Such legacies may be conveniently, if arbitrarily, divided into classes in the same way as they are classified in English law. First there are Specific legacies; that is legacies of particular pieces of property specially named and described such as a named slave (334), furniture in a given place (335), olive oil from certain trees (336), or the testator's library (337), Secondly there are Demonstrative legacies; that is gifts of money where a certain piece of property (338) or a definite fund (339) is named from which or from the income of which the legacy is to be satisfied. Thirdly there is

(330) Demosthenes XXVII 10. Diogenes Laertius III 42,43. Diogenes Laertius V 14, 55, 69, 72, 73. Lysias XXXII 15. Isaeus XI 41,42.
(331) Demosthenes XXVII 10. Demosthenes XLV 28. Diogenes Laertius III 42.
(332) Demosthenes XXVII 10.
(333) Demosthenes XXVII 11. Diogenes Laertius III 42. Lysias XXXII 5-6. Isaeus XI 43.
(334) Diogenes Laertius V 14,54. Demosthenes XLV 28.
(335) Diogenes Laertius V 69. Lysias XXXII 6.
(336) Diogenes Laertius V 71.
(337) Diogenes Laertius V 52. Diogenes Laertius X 21.
(338) Demosthenes XLV 28.
(339) Demosthenes XXVII 40. Diogenes Laertius V 51 seq.

the great body of legacies, called general legacies, which were payable out of the estate as a whole and of which numerous examples could be given (340). It is not meant by the above classification to suggest at all that the same incidents or privileges attached to the classes of Greek legacies named as attach to the English equivalents.

There seems to have been very little if any restriction in the choice of legatees. Usually a son or adopted son was the residuary legatee and devisee while in the same will legacies were commonly set aside for the testator's wife (341) and for his daughters (342) to provide for their dowries. Legacies might even be given to illegitimate children but there seems to have been a limitation in amount to 1000 drachmas for such a legacy (343). Friends too were commonly the recipients of a testator's generosity, from the wills quoted by Diogenes Laertius. Finally gifts were frequently given to charity for religious and educational purposes (344).

Legacies might be given conditionally: as for example on condition that the testator had no children

(340) Diogenes Laertius V 15, 15,54, 73.
Diogenes Laertius X 9.
Demosthenes XXVII 42-45. Demosthenes XXIX 42-45.
Lysias XIX 39 - 41.
(341) Lysias XXXII 6.
(342) Isaeus III 68-69. Lysias XXXII 6.
(343) Wyse p. 333.
(344) Diogenes Laertius V 51-52. Diogenes Laertius X 17.
Lysias XIX 39.

born to him after he had executed the will (345) or on condition that the legatee work for a stated length of time for some third person (346) or hand over certain property to a third person (347) or live in a certain place (348) or on condition of the legatee's good behaviour (349). If the condition was fulfilled then the legatee took; if it was not fulfilled then the legacy lapsed and would go to the residuary legatee.

Peculiarly enough there appears to have been no way of forcing an executor or residuary legatee, if there was no executor, to pay over the legacies as directed by the will, for if there had been we should almost certainly have heard of actions having been brought to compel payment of legacies even though no example of it survived (350).

9. A testator could do a few other things by his will besides those enumerated above. He could free any or all of his slaves as examples show (351) and provide for their future welfare (352). He might direct that statues be set up, either of himself or of other people (353).

(345) Isaeus VI 7.
(346) Diogenes Laertius V 55.
(347) Diogenes Laertius X 17-18.
(348) Diogenes Laertius X 19.
(349) Diogenes Laertius X 21.
(350) Lipsius p. 566. Wyse however thinks an action could have been brought to compel administration but whether such an action could be brought by anyone but the residuary legatee and devisee is very doubtful. 4. N. 378.
(351) Diogenes Laertius III 42. Diogenes Laertius X 21. Diogenes Laertius V 14, 15, 55, 72, 73. Becker: Charicles p. 169, note 29.
(352) Diogenes Laertius V 15.
(353) Diogenes Laertius V 51,52, 71.

Finally, one testator provided for the disposal of his unpublished works (354).

F. Probate.

1. Necessity of Probating Wills.

The question whether wills were probated or rather had to be probated at Athens is a very difficult one. While there are passages which definitely say that wills had to be proven there are also examples in which this apparently was not done. It at least appears clear that probate was not an essential preliminary to dealing with the property of a deceased testator as it is to-day.

Directions which were given for the burial of the testator in many ancient wills indicate that it was usual for wills to be opened immediately after the death of the testator and later probated, as is still the practise today (355). Contrary however to the present practice an Athenian will was opened in the presence of several witnesses who then sealed it up again for later identification (356). As has been said there is some evidence to show that probate was necessary. The course of a probate as it was probably carried out will now be traced.

It is definitely stated that applications must be made to the court for all inheritances and no exception is made or suggested where the inheritance happens to pass

(354) Diogenes Laertius V 73.
(355) Becker: Charicles p. 165 note 17 and the passage there.
(356) Demosthenes XXVIII 5-6.

by will (357). The authorities further indicate how the court was to deal with these applications where there was a will. The court examined the will and decided upon its authenticity after hearing the witnesses to it and determining the truth or falsehood of their testimony (358). If the will was found to be genuine then the property devised and bequeathed under its terms passed to those who received probate (359).

If it is assumed that this procedure was proper and necessary to deal lawfully with the property of a deceased testator then there is an embarrassing question to answer. How did the guardians of Demosthenes gain control of all his father's property without probating his father's will, or if they did probate it (as executors and guardians must have had the power to do) why was there any difficulty in getting production of the original will when Demosthenes brought his action (360)? The same difficulty and doubt arise in the matter of Pasion's will (361). Two explanations may be offered both of which would allow of probate being necessary. The first is that the guardians of Demosthenes and Phormio respectively did actually prove the wills in dispute but that it was not necessary to leave the original will in the custody of the court. This

(357) Demosthenes XLVI 22-23. Aristotle Ath.Res. 43 (4).
(358) Isaeus IV 22.
(359) Isaeus IV 25.
(360) Demosthenes XXVIII 5-6. Demosthenes XXIX 57. Demosthenes XXVII 6, 13.
(361) Demosthenes XLV 8,10,17-19,25-26, 37-39.

explanation is not unreasonable because there was not any complete court filing and record system at Athens so far as is known. If the original will was not left in the custody of the court, that is to say of the Archon, then it could easily have been suppressed later. The other explanation is that the guardians of Demosthenes and Phormio simply ignored the law requiring the wills to be proven and there being no penalties, or at least no adequate penalties provided to prevent people from handing over property of the deceased to executors who had not proved the will or from receiving good title to property from such executors, they proceeded to do as they pleased with the testators' property until they were called upon to account for it.

The alternative to the proposition that probate was necessary is that the beneficiary or guardian or executor who could or would ordinarily take probate could proceed to deal with the property of the testator in the manner provided in the will unless his disposition of the property was questioned when the validity and genuineness of the will would become one of the main issues in the resulting action. In favor of this view are the cases of the will of Demosthene's father and of Pasion cited above, and one case mentioned by Isaeus (362). The stumbling block to this alternative is the evidence quoted which

(362) Isaeus V 6.

tends to show that probate was necessary.

The most reasonable conclusion seems to be that probate was necessary in point of law, but that owing to defects in sanctions compelling those responsible to obtain it promptly it was in fact frequently not obtained. Since the evidence of Demosthenes and Isaeus conflicts no reliance can be placed upon either of them as they are both equally capable of deceit. The conclusion just set forth rests upon the statements of Aristotle (362-a) who was a disinterested and unprejudiced observer, and held that probate would be necessary.

2. Effect of Probate Upon Executors.

As has been remarked already the executors probably had the right to take probate of a will, but there are no passages which prove such a right beyond question (363). In this respect as in some others the exact position of the executors is obscure, though it seems to our English point of view elementary that this right would be essential; on the other hand experience teaches that to rely upon our English viewpoint in matters of Greek law is illusive or inconclusive and can be of little help to us here.

There is too the question whether an executor had a right to be paid for his services. The most likely theory is that executors were expected to carry out

(362-a) See 357.

(363) Wyse p. 524.

the wishes of the deceased without remuneration merely because of the regard and friendship they had for him and were legally not entitled to be paid. In practice however testators, being loath to rely upon the weak reed of friendship and esteem which is apt to wither with accelerating rapidity as the memory of the dead fades with time, were wont to leave legacies to those whom they appointed executors so that the pecuniary reward might aid the comfort of a good conscience and act as a reminder from time to time to a lagging memory. Sometimes even this expedient was inefficacious as the case of Demosthene's father clearly shows (364).

If an executor properly administered the estate of the deceased, as many must have done even if we take the most pessimistic view of Athenian honesty, then he had a right to be released from further liability by the beneficiaries under the will (365) and this release would be effective to bar any future action by the beneficiaries for an account or restitution.

There is some doubt whether an executor could legally purchase or lease the property of a testator whose property he was administering. Probably there was no law prohibiting such transactions but as Wyse points out it would have been a transaction uberrimae fidei (366)

(364) Demosthenes XXVII 5.
(365) Demosthenes XXXVI 10. Demosthenes XXXVIII 18. Wyse p. 642.
(366) For the legal signification of this word in English law see Anson On Contracts p. 197, and Snell's Equity p. 438.

and an executor would have been very rash to have entered into it (367).

It was an executor's duty to administer the estate of the testator according to the directions of the will so far as it laid down how the property was to be handled and he must use reasonable care and diligence in administering the assets (368). If there were no directions in the will about how to manage the estate then the executor's duty was to administer it according to law and custom (369). There was a law directing how estates should be managed (370). What its exact provisions were is not clear but it seems certain that it provided for the leasing of real property and probably set out what investments were permissable for personal property in much the same way as our Trustee Acts do today. If an executor followed the rules laid down by the law he was presumably protected from liability if anything went wrong (371). Apparently it was one of the cardinal rules of administration that capital should be preserved intact and only interest used (372).

The executor's final duty was to account to the beneficiaries for his administration (373) and to pay

(367) Wyse p. 418 and p. 526.
(368) Demosthenes XXVIII 16. Wyse p. 703.
(369) Demosthenes XXIX 57. Demosthenes XXXVIII 23. Isaeus VI 36. Lysias XXXII 23. Wyse p. 526.
(370) Demosthenes XXVII 58.
(371) Demosthenes XXVII 58.
(372) Demosthenes XXVII 50, 64.
(373) Demosthenes XXVII 50. Demosthenes XXXVI 20. Demosthenes XXXVIII 15. Lysias XXXII 12-14, 20-21.

over the legacies to the beneficiaries at the proper time (374).

If an executor failed in performing any of these duties he was liable first to account, which he could be compelled by an action to do (375). If he had previously by any act of his led the beneficiaries or any of them to believe that he had assets belonging to the testator's estate whether he really had them or not, he would be ~~taken to have~~ regarded as having admitted the assets and be required to account for them as if they were in his possession (376). If there was more than one executor then their liability was joint and not joint and several (377).

The administration was also liable to an action to force him to administer the assets under his control if he was procrastinating, or to administer them in a certain way if he was incapable or perverse, or he might be removed (378). The commonest remedy sought against a defaulting executor or guardian was the payment of damages for breach of trust. The procedure so far as can be ascertained was the same as in any other action for damages (379).

3. Attacks on the Probate of a Will.

(374) Demosthenes XXVII 50. Demosthenes XXVIII 12. Wyse p. 702.
(375) Demosthenes XXVII 50.
(376) Demosthenes XXVIII 4. Demosthenes XXIX 59-60.
(377) Demosthenes XXVII 12, 29.
(378) Wyse discusses these actions at length and quotes pertinent passages. See: Wyse p. 526. Demosthenes XXXVIII 23.
(379) Demosthenes XXXVIII 4,8. Demosthenes XXVII 67. Demosthenes XXIX 59-60. Wyse p. 703.

Even if a will had been probated ~~that~~ such action might not finally settle the estate. Any person who had not opposed the proving of the will might later attack it on any of the grounds which would invalidate a will. For example he might allege that it was forged or executed while the testator was insane or under duress or otherwise incapacitated. This action was subject to the law preventing relitigation of a dispute between the same parties, that is the rule of res judicata (380). It was subject also to the statute of limitations (381). The latter rules applied to all actions against executors and guardians. In an action attacking a probated will the procedure was similar to that in an action to oust an heir who had been granted an estate by the court upon an intestacy (382).

There does not appear to have been any succession duty at Athens. On the contrary if the heirs under a will, or upon intestacy, were infants they had special exemption from taxation (383).

(380) Demosthenes XXXVIII 4, 16, 22.
(381) Demosthenes XXXVI 26. XXXVIII 17, 18. See pp.43-44. For further authorities see Sandys & Paley p. 27.
(382) See p. 42 above. For a short discussion of procedure generally in Athenian Courts see Kennedy Vol. III Appendix 9, pp. 372-395.
(383) Lysias XXXII 24. This passage is an authority for the proposition stated only if it is understood to state a law of general application. Shuckburgh p. 353 takes it in this manner and cites Hermann par. 162. However if the exemption be taken as a special dispensation in favor of the particular orphans mentioned then the passage proves nothing.

APPENDIX I. ON PROOF OF LEGITIMACY.

In ancient Athens proof of legitimacy required a person to show: 1. That his or her father was an Athenian citizen; 2. that his or her mother was the legitimate daughter of an Athenian citizen (384); 3. that his or her father and mother had been lawfully married to one another at the time he or she was born (385). This often involved a lengthy enquiry into the pedigree of the person whose legitimacy was impugned and also into the formalities (386) surrounding the wedding of his or her parents.

Besides these three essential constituents of legitimacy a person might prove as corroboration the following facts which would raise a strong presumption of legitimacy: 4. that he or she had been properly named with due ceremony at the tenth day feast and had been recognized by his or her father as his child (387); 5. that he or she had been introduced by his or her father into his phratry and that his or her name had been entered in the register (388); or 6, that he had been introduced to the demesmen and his name

(384) Isaeus VII 16.
(385) Isaeus III 4. Isaeus VII 16. Demosthenes XLIV 49. Demosthenes XLVI 18. Demosthenes LVII 54.
(386) Wyse p. 289 sq.
(387) Isaeus III 30. Demosthenes XXXIX 20.
(388) Isaeus III 73. Isaeus VII 16. c.f. Aristophanes _Birds_ 1669-70.

entered in the deme register (389). The last two facts were especially valuable because at the time of a child's introduction to either the phratry or deme the father had to swear that it was his legitimate child and in addition the citizens made a very careful investigation (390).

In proving or disproving legitimacy evidence was offered to the court by depositions in the ordinary way (391). The depositions in Demosthenes' speeches may be taken to be correct in most material respects though many of them are forgeries (392). The evidence offered includes direct (393), hearsay (394), and circumstantial (395), but not documentary evidence (396).

In the Orators direct evidence was used to prove _inter alia_ (a) that a person's father was an Athenian citizen (397), (b) that a woman was a prostitute and that her children were therefore illegitimate (398),

(389) Aristotle _Ath. Res._ 42 (1).
(390) Isaeus VII 16-17.
(391) Bonner p. 54.
(392) Bonner p. 55. Blass, _Die attische Beredsamkeit Vol. III 467._
(393) Direct Evidence is evidence of a fact actually perceived by a witness with one of his own senses or an opinion actually held by himself. (Cockle p.2.)
(394) Hearsay Evidence is evidence of a fact not actually perceived by a witness with one of his own senses, but proved by him to have been stated by another person (Cockle p. 3.).
(395) Circumstantial Evidence is evidence of a fact not actually in issue, but legally relevant to a fact in issue (Cockle p. 3.).
(396) Documentary Evidence is evidence of a fact brought to the knowledge of the Court by inspection of a document produced to the Court. (Cockle p. 3).
(397) Demosthenes LVII 20-22. Probably part of this evidence was direct and part hearsay.
(398) Demosthenes LIX 16, 24, 25, 28, 32, 34, 40, 47-49, 52, 61, 71, 87, 89, 92, 93, 124.

(c) that a marriage had been performed in the proper way (399), (d) that no marriage had taken place (400), (e) that a child had not been introduced to the phratry (401), (f) that a child was legitimate (without any further allegations) (402).

Although hearsay evidence was generally forbidden at Athens (403) there was an exception in matters relating to pedigree (404). There is the same rule and exception in English law (405). This sort of evidence was used chiefly to prove family relationships and marriages which had taken place but of which no person living at the time the case was being heard had been a witness (406). Hearsay evidence on these matters was usually given by relatives of the deceased (407) or by members of the same deme (408). Hearsay evidence was

(399) Isaeus III 4, 26. Demosthenes LVIII 43. Demosthenes XL 6, 7, 19. Some of this evidence may have been hearsay.
(400) Isaeus III 76. Isaeus VI 10-11.
(401) Isaeus III 76. Demosthenes LVII 46.
(402) Isaeus VI 26.
(403) Isaeus VI 53. Demosthenes LVII 4. Demosthenes XLIV 55.
(404) For discussion see Bonner p. 22.
(405) The English law is found in the following leading cases:
Berkeley Peerage Case, (1811) 4 Campbell 401,14 R.R. 782.
Butler vs. Mountgarrett (1859) 7 H.L.Cases 633, 115 R.R. 306.
Haines vs. Guthrie (1884) L.R. 13,Q.B.D.818, 53 L.J.Q.B. 521.
Johnson vs. Lawson (1824) 2 Bingham 86, 9 Moore 183.
Doe vs. Griffin (1812) 15 East 293, 13 R.R. 474.
Goodright vs. Moss (1777) Cowper 591.
(406) Demosthenes XLIII 35, 36, 37, 42-46. Demosthenes LVII 37-40. Isaeus VIII 6.
(407) Demosthenes XLIII 36, 37, 42-46. Demosthenes LVII 37-40, 68, 69.
(408) Demosthenes XLIII 35. Isaeus VIII 14.

also used to prove that a father always treated a child as legitimate (409).

Circumstantial evidence was used extensively to prove behaviour of parents or alleged parents which was inconsistent with their having been married and thereby to prove their children illegitimate (410). The behaviour thus proven might show that the mother of the person alleged to be illegitimate was a courtesan (411) or that his alleged mother had never been pregnant (412)., or that the proper marriage ceremonies had not been observed (413). Or it might be used to show behaviour which would be consistent only with a child's illegitimacy (414).

Documentary evidence seems to have been produced seldom in Athenian courts. Although there were official registers both in the phratry and deme where the names of citizens were entered after their pedigree had had been established (415) there is no record of one being produced to the court to prove an entry. Nor does there appear to be in the Orators any record of any document being produced to prove or disprove legitimacy,

(409) Isaeus VIII 15-18.
(410) Isaeus III 13-14, 15.
(411) Isaeus III 13-14.
(412) Isaeus III 15.
(413) Isaeus III 28-29, 35-39.
(414) Demosthenes LVII 28-30, 46, 53.
(415) Demosthenes LVII 46. Demosthenes XXXIX 4-6. Isaeus VII 16. Aristotle <u>Ath. Res.</u> 42 (1).

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APPENDIX III. A KEY TO THE SPEECHES OF THE ORATORS CITED HEREIN.

Demosthenes:	XXII	Against Androtion.
	XXIV	Against Timocrates.
	XXVII	Against Aphobus I.
	XXVIII	Against Aphobus II.
	XXIX	Against Aphobus III.
	XXX	Against Onetor I.
	XXXI	Against Onetor II.
	XXXV	Against Lacritus.
	XXXVI	For Phormio.
	XXXVIII	Against Nausimachus.
	XXXIX	Against Boetus I.
	XL	Against Boetus II.
	XLI	Against Spudias.
	XLIII	Against Macartatus,
	XLIV	Against Leochares.
	XLV	Against Stephanus I.
	XLVI	Against Stephanus II.
	XLVII	Against Euergus and Mnesibulus.
	XLVIII	Against Olympiodorus.
	XLIX	Against Timotheus.
	LII	Against Callippus.
	LVII	Against Eubulides.
	LVIII	Against Theocrines.
	LIX	Against Neaera
Isaeus:	I	On the Estate of Cleonymus.
	II	On the Estate of Menecles.
	III	On the Estate of Pyrrhus.
	IV	On the Estate of Nicostratus.
	V	On the Estate of Dicaeogenes
	VI	On the Estate of Philoctemon.
	VII	On the Estate of Apollodorus.
	VIII	On the Estate of Ciron.
	IX	On the Estate of Astyphilus.
	X	On the Estate of Aristarchus.
	XI	On the Estate of Hagnias.
Lysias:	XVII	On the Property of Eraton
	XVIII	On the Property of the Brother of Nicias.
	XIX	On the Property of Aristophanes
	XXXII	Against Diogeiton.
Isocrates:	XIX	The Aegineticus.