PART THREE

MONOGRAPHS

ON

PROBLEMS IN PROBATE LAW
The Organization of the Probate Court in America*

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This is a study of contemporary American legislation concerning probate courts, with particular reference to their jurisdiction over the probate of wills and the administration of estates of deceased persons.

By the term “probate courts” is meant all judicial tribunals which exercise such jurisdiction. As will subsequently appear, they are otherwise variously designated as surrogates’ courts, orphans’ courts, prerogative courts, courts of ordinary and county courts. In one state all the functions of probate and administration are exercised by courts of chancery. In other states, chancery has concurrent jurisdiction over many of these functions. Sometimes the register of probate exercises some of the functions of a probate court, while an orphans’ or other court acts in other probate matters. Again, two separate courts may each exercise a part of the functions of a probate court. In one group of states, probate and administration is merely a separate function of the trial court of general jurisdiction or of its judge. But, regardless of its name, every tribunal which exercises jurisdiction over the probate of wills or the administration of decedents’ estates, from its initiation to the time of final distribution, is within the scope of this study.

In view of the great influence of the English pattern in the formative period of American probate law, we shall begin with a brief survey of the English system of probating wills and administering the estates of deceased persons. This will be followed by a consideration of the types of American probate

court organizations, the subject matter of their jurisdiction, and the personnel of these courts.

The subject of appellate procedure, as such, is not within the scope of this discussion, but will be considered only as it tends to indicate the character of original jurisdiction.

I. Some Significant Aspects of the English Law of Decedents' Estates

A. Probate and Administration in England in the Eighteenth Century

It is not the purpose of this brief discussion of certain aspects of the English law of decedents' estates to give a complete account of the entire course of its development. Rather its object is merely to present enough of that development to explain the principal source from which American probate law was drawn. While doubtless there were borrowings at an earlier period, the English probate law of the eighteenth century is so typical of that which existed for a century before that a consideration of its significant aspects will furnish us with an adequate picture of the well from which much of our probate legislation was drawn. Moreover, since there were few im-

1 In general on this period see the following: Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. Rev. 107 (1943); Reppy and Tompkins, Historical and Statutory Background of the Law of Wills, Descent and Distribution, Probate and Administration (1928); Report by the Commissioners Appointed to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales (1832); Langdell, Brief Survey of Equity Jurisdiction (2d ed. 1908) 125-191; Holdsworth, History of English Law (1922) 625-630; Maitland, Equity (Rev. ed. 1936) 248-276; Williams, Executors (1st Am. ed. 1832); Story, Equity Jurisprudence (1st ed. 1836); Conset, The Practice of the Spiritual or Ecclesiastical Courts (3d ed. 1708); Toller, Executors and Administrators (2d Am. ed. 1824); Burn's Ecclesiastical Law (9th ed. by Phillimore, 1842).

portant changes in that law up to the legislation of 1857, it is assumed that sources which describe the English probate system of the early half of the nineteenth century are equally pertinent to our study.

Matters pertaining to the administration of decedents' estates were dealt with in three kinds of tribunals, namely, the ecclesiastical courts, the common-law courts and chancery. Our study of English probate law will discuss the functions of these courts in that order.

1. Jurisdiction of the ecclesiastical courts

The jurisdiction of the ecclesiastical courts has been classified under three general heads: pecuniary causes, arising from "withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff"; matrimonial causes; and testamentary causes, including "the probate of wills, the granting of administrations, and the suing of legacies." In matters relative to wills and administration, the jurisdiction of the ecclesiastical courts was limited to the disposition of personal property. As to the probate of wills and the granting of letters testamentary and letters of administration, their jurisdiction was exclusive.

It would not be helpful in this connection to set forth in detail a description of the bewildering varieties of ecclesiastical courts having jurisdiction, original or appellate, such as the diocesan courts, the prerogative courts, the court of arches, the court of peculiaris and the court of delegates. Suffice it to say that the original jurisdiction as to decedents' estates was, in general, exercised by consistory courts of the dioceses and the

\[\text{\textsuperscript{20-21}}\text{Vic.},\ c.\ 77\ (1857)\].

\[3\ \text{BLACKST.\ COMM.}\ *88,\ *89.\]

\[\text{Id.}\ *98.\]

\[\text{HOLDSWORTH, HISTORY OF ENGLISH LAW (1922) 598.}\]
prerogative courts of Canterbury and York. The judge of the consistory court was called the ordinary judge, or merely the ordinary. The deputy of the judge of an ecclesiastical court was sometimes called the surrogate.

The ecclesiastical courts were not courts of record. Just precisely what is meant by a court of record is none too clear. Probably at the present time its most important characteristic is its power to fine and imprison. But, as Professor Holdsworth says: "It is the infallibility of its formal record which is the earliest mark of a court of record." Thus the decrees of an ecclesiastical court did not import the same infallibility as the judgment of the King's Bench. Moreover (and this may have had something to do with the conclusion that it was not a court of record) it did not proceed according to the common law. Rather, its procedures were evolved from the civil and canon law, as such strange terms as citation, libel or significavit might well indicate.

When a person died testate, his executor could either have the will probated in common form (sometimes called noncontentious form) or in solemn form. If he chose to prove it in common form, the procedure was simple, indeed. No notice or process was issued to anyone. Strictly speaking, no actual evidence of the due execution of the will was required. The will was admitted to probate on the oath of the executor,

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8 Burn's Ecclesiastical Law (9th ed. by Phillimore, 1842) 39.
9 Burn's Ecclesiastical Law (9th ed. by Phillimore, 1842) 667; and see 3 Stroud's Judicial Dictionary (2d ed. 1903) 1996 quoting from Termes de la Ley as follows: Surrogate "is he who is appointed in the stead of another, most commonly of a Bishop or his Chancellor."
12 5 Holdsworth, History of English Law (1924) 158.
13 In general as to procedure in an ecclesiastical court, see Report by the Commissioners to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales (1832) 14.
which ordinarily amounted to nothing more than hearsay and opinion. According to Conset,\(^1\) writing near the end of the seventeenth century, the oath was as follows:

"You shall swear, that you believe this to be the last will and testament of the deceased, and that you will pay all the debts and legacies of the deceased, so far as the goods will extend, and law shall bind you; and that you will cause all the said goods to be apprized, and make a true and perfect inventory of the said goods, (at a day appointed by the judge, if none be then exhibited) and likewise a true and just accompt of the said goods, when you shall be thereto lawfully called. So help you God."

The will then at once being admitted to probate, letters testamentary were issued to the executor who proceeded to administer the personal estate of the testator.

At any time within thirty years the executor or some other interested party could have the will proved in solemn form. This was spoken of as the contentious procedure. Notice to interested parties was given by citation;\(^1\)\(^5\) the attesting witnesses were called and testified as to the due execution of the will. The order admitting the will to probate was binding on all parties who appeared in the proceeding or who were cited.

Proceedings to administer the goods of a person who had died intestate were similar in form. They might be either with or without notice to interested parties. But Conset tells us that "if there is no widow or relict of the deceased (to whom the administration of the goods of the intestate ought to belong of course) then the nearest of kindred, coming to obtain letters of administration, must first have a citation against all and singular next of kindred to the deceased."\(^1\)\(^6\) One method of

\(^{1}\) Conset, Practice of the Spiritual or Ecclesiastical Courts (3d ed. 1708) 12. The first edition was dated 1681.

\(^{15}\) See note 13, infra.

\(^{16}\) Conset, Practice of the Spiritual or Ecclesiastical Courts (3d ed. 1708) 14.
requiring notice, which might be employed either in the case of a testate or of an intestate estate, was for an interested party to file a paper known as a caveat. This required notice to be given to the caveator before any further steps could be taken in the case. Thus the caveat might lead to the proof of the will in solemn form. It should also be noted that the caveat could be filed before any other proceedings had been taken with respect to the estate of the deceased.

After the issuance of letters, there might be little or nothing more in the way of judicial proceedings in the ecclesiastical court. It is true, a statute of the reign of Henry VIII required the personal representative to render an inventory of the goods of the deceased. And the Statute of Distribution required the administrator to give a bond to render an inventory and to account. But it appears that this was not always done. Certainly there was no order of distribution such as is common in American probate courts today. The personal representative merely paid the debts and then distributed the residue to the legatees or next of kin.

It should be pointed out that, throughout its procedure, the ecclesiastical court conducted a case quite differently from a common-law court. Oral testimony was not heard at the trial but depositions were taken and were read by the judge previous to the hearing. Orders of the court would ordinarily be enforced by excommunication only, or, if this be ineffective, chancery might be asked to issue an attachment so that the refractory party might be imprisoned until he obeyed the order of the court. Review of decisions of the ecclesiastical

17 21 Henry 8, c. 5, p. 167 (1529).
18 22-23 Car. 2, c. 10, p. 347 (1670).
19 Toller, The Law of Executors and Administrators (2d Am. ed. 1824) 249, 492; 2 Williams, Executors (1st Am. ed. 1832) 1263-1265.
20 Report by the Commissioners to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales (1832) 19.
court was by appeal, not by writ of error, and the appellate court could re-examine questions of fact as well as of law and come to a decision de novo. 21

One other feature of the procedure in the ecclesiastical courts with respect to decedents' estates should be noted. It appears that it was relatively easy to secure the revocation, in the ecclesiastical court of original jurisdiction, of an order admitting a will to probate or appointing an executor or administrator. 22 And even though the will had been proved in solemn form, this did not prevent a revocation of probate on a later hearing. 23

2. Jurisdiction of the common-law courts

As has already been indicated, the ecclesiastical court had no jurisdiction over devises of land. That was ordinarily a matter for the common-law courts. 24 This does not mean that wills of land were probated in the common-law court, for they were not. But, with respect to the land devised by it, a will was operative without any probate whatever. Title passed to the devisee immediately on the death of the testator, just as title passes to the grantee in a deed immediately upon its delivery. If a will disposed of both personalty and realty, the action of the ecclesiastical court, in admitting it to probate or in refusing to do so, did not determine whether the will was a valid devise of real estate. And, if a will disposed of real estate only, the ecclesiastical court had no jurisdiction to admit it to probate. 25 When an heir or devisee wished to test the validity of a devise of land, he brought some action to try title, such as ejectment or trespass. Even a judgment in such

21 Pound, Appellate Procedure in Civil Cases (1941) 67-70.
22 1 Williams, Executors (1st Am. ed. 1832) 347, 359.
23 1 Williams, Executors (1st Am. ed. 1832) 359.
24 2 Page, Wills (3d ed. 1941) § 563.
25 In the Goods of John Bootle, L. R. 3 P. & D. 177 (1874).
an action did not prevent further actions of ejectment or trespass in which the validity of the will might be adjudicated anew.

Contract actions which survived the death of the decedent could be brought in a court of common law, whether on behalf of or against the decedent. The personal representative could sue and be sued in his representative capacity. Unless chancery interfered, a creditor of the decedent might recover judgment against the executor or administrator in a court of law which was enforceable only against the goods of the estate. Thus, the judgment would be "de bonis testatoris."

In the case of a specific legacy, such as a collection of silver plate or an oil painting, the executor must first "accept the legacy," that is perform some overt act indicating that the chattel was set aside for the legatee. Then title vested in the legatee and he could bring an appropriate action at law, such as replevin or trover, to assert his rights in it. If, however, the legacy was general—that is a gift of a sum of money—there was apparently a difference of opinion as to whether an action of assumpsit at law was proper, but it was eventually determined that this could not be brought. The remedy was by action in the ecclesiastical court. And, if a legatee chose to file a bill to have the estate administered in chancery, he could secure a determination of his rights in that tribunal, regardless of the character of his legacy.

Before concluding with the discussion of the function of the court of law something should be said about the use of the writ of prohibition. If a party to a proceeding in the ecclesiastical

26 Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. Rev. 107 at 118, 121 (1943); Langdell, Brief Survey of Equity Jurisdiction (2d ed. 1908) 166, 167.
27 2 Williams, Executors (1st Am. ed. 1832) 843 ff.
29 Langdell, Brief Survey of Equity Jurisdiction (2d ed. 1908) 154, 157.
court thought that court had exceeded its jurisdiction, he might obtain a writ of prohibition in the common-law court. Since it was conceded (to use the language of an early case) that the ecclesiastical courts "had but a lame jurisdiction," these writs must have been frequently issued. For example, the King's Bench had held that, after an inventory was exhibited, the ecclesiastical court could entertain no objections to it by a creditor.

3. Jurisdiction of chancery

While the writs of prohibition crippled the jurisdiction of the ecclesiastical courts, the common-law courts from which they issued had no machinery adapted to the administration of estates. The net result was that chancery, with its more flexible procedure, tended more and more to take over matters of administration. Though the will would be admitted to probate and the personal representative appointed by the ecclesiastical court, a creditor or distributee might file his bill to have the estate administered in chancery. This jurisdiction might be sought for the purpose of discovering assets; because a trust was involved, or, though no actual trust was involved, because the estate was regarded as a kind of trust fund and the personal representative as a kind of trustee. But, for whatever reason jurisdiction was assumed, chancery ordinarily continued with the administration until it was complete. Notices to creditors were published; actions by creditors in common-law courts were enjoined; assets were brought in and distributed to creditors and legatees or next of kin.

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31 Matthews v. Newby, 1 Vern. 133 at 134 (1682).
32 See 2 WILLIAMS, EXECUTORS (1st Am. ed. 1832) 644, 645 and cases cited therein.
33 1 STORY, EQUITY JURISPRUDENCE (1st ed. 1836) §§ 530 et seq.; LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION (2d ed. 1908) Arts. VI and VII; MAITLAND, EQUITY (Rev. ed. 1936) 248-257.
And not only did chancery administer personalty of the decedent, but it might also take charge of some or all of his real estate. Thus, if a testator had devised his lands to his executor in trust for the payment of debts, or for the payment of debts and legacies, the court of equity would take charge of the land and administer it as directed by the testator.\textsuperscript{34}

Chancery never assumed jurisdiction to probate a will or to appoint an executor or administrator. But, as to all subsequent steps in the process of administration, it might take jurisdiction if an interested party filed a bill asking for it. The concurrent jurisdiction of the ecclesiastical courts continued, it is true; but the chancery procedure was regarded as so much more satisfactory that administration in equity became a common practice.

Moreover, the chancery court might find itself confronted with a question of the validity of a devise of land. The issue could arise merely incidentally in connection with some related matter. Or the parties might come into chancery solely for the purpose of establishing the will and having the heir enjoined from interfering with the enjoyment of the devisee. Story thus describes the procedure in these two situations:\textsuperscript{35}

"If the will is of real estate, and its validity is contested in the cause, the Court will, in like manner, direct its validity to be ascertained, either by directing an issue to be tried, or an action of ejectment to be brought at law; and will govern its own judgment by the final result. If the will is established in either case, a perpetual injunction may be decreed.

"But, it is often the primary, though not the sole, object of a suit in Equity, brought by devisees and others in interest, to establish the validity of a will of real estate.... In such cases the jurisdiction, exercised by Courts of Equity, is somewhat analogous to that exercised in cases of Bills of Peace.... In every case of this sort, the Court will, unless the heir waives

\textsuperscript{34} Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 at 119 (1943).

\textsuperscript{35} 2 Story, Equity Jurisprudence (1st ed. 1836) 671.
it, direct an issue of *devisavit vel non*, (as it is technically, though, according to Mr. Woodeson, barbarously expressed,) to ascertain the validity of the will. . . . When, by this means upon a verdict the validity of the will is fully established, the Court will, by its decree, declare it to be well proved, and that it ought to be established, and will grant a perpetual injunction.55

B. STATUTORY REFORM IN ENGLISH PROBATE LAW AND ADMINISTRATION

In the first half of the nineteenth century there were various evidences of dissatisfaction with the existing system of probate as administered by the ecclesiastical courts. A commission appointed to inquire into the practice and jurisdiction of the ecclesiastical courts recommended a number of reforms in its report in 1832.36 The Fourth Report of the Real Property Commissioners, filed in 1833, recommended the complete abolition of the jurisdiction of the ecclesiastical courts over testamentary matters.37 In 1857 legislation was enacted which actually provided for this important change. A statute enacted in that year 38 established a court of probate presided over by a judge having “rank and precedence with the Puisne Judges of Her Majesty’s superior courts of common law at Westminster.” This court was designated as a court of record, and was vested with the voluntary and contentious jurisdiction in relation to the granting or revoking probate of wills and letters of administration. If a will disposed of both land and chattels, probate was made conclusive as to real estate just as it was with respect to chattels. It was provided, however, that the newly established court of probate should have no jurisdiction as to suits for legacies or for the distribution of residues.

55 *Report by the Commissioners Appointed to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales (1832).*

36 *Fourth Report by the Commissioners to Inquire into the Law of England Respecting Real Property (1832) 65.*

By the first Judicature Act,\textsuperscript{39} enacted in 1873 and effective in 1875, most of the various courts were consolidated to form a single unified court known as the Supreme Court of Judicature. This was composed of two parts, the High Court of Justice and the Court of Appeal. The jurisdiction of the High Court of Justice included jurisdiction formerly exercised by the Probate Court and the High Court of Chancery, as well as the jurisdiction of other courts. For administrative convenience, the High Court was divided into the following divisions: the Chancery Division; the King's Bench Division; the Common Pleas Division; the Exchequer Division; the Probate, Divorce and Admiralty Division. To the latter division was assigned the jurisdiction formerly belonging to the Probate Court.

The Land Transfer Act of 1897\textsuperscript{40} provided that "Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate." It was further provided by the same enactment that the personal representative should hold title to and administer the real estate of the decedent.

The Supreme Court of Judicature Act of 1925, as amended,\textsuperscript{41} provides for a High Court of Justice of three divisions, namely, the Chancery Division, consisting of the Lord Chancellor and six puisne judges; the King's Bench Division, consisting of the Lord Chief Justice and nineteen puisne judges; and the Probate, Divorce and Admiralty Division, consisting of a President and four puisne judges. A puisne judge of the High Court must be qualified by being a barrister of ten years' standing. He receives a salary of £5000; but the Lord Chancellor receives £10,000 and the

\textsuperscript{39} 36-37 Vict., c. 66, p. 191 (1873).
\textsuperscript{40} 60-61 Vict., c. 65, p. 184 (1897).
\textsuperscript{41} 15-16 Geo. 5, c. 49, p. 1197 (1925); 25 Geo. 5, c. 2, p. 15 (1935); 1-2 Geo. 6, c. 2, p. 4 (1937); 1-2 Geo. 6, c. 67, p. 804 (1938); 4 Halsbury, Statutes of England 146, with amendments in 28 id. 33, 30 id. 129 and 31 id. 84.
Lord Chief Justice receives £8,000. Judges of the Court of Appeal receive the same salaries as the judges of the High Court.

Jurisdiction in the matter of decedents' estates is distributed among the three divisions of the High Court in much the same fashion as it was divided among the ecclesiastical courts, the court of chancery and the common-law courts, prior to the act of 1857. The Probate Division has exclusive jurisdiction of the probate of wills and the issuing of letters. Actions at law for or against the personal representative may be brought in the King's Bench Division. But administration may be had in chancery after letters are granted. In that case, actions at law against the personal representative would be stayed and creditors' rights would be settled in connection with the administration in equity. Appeals in matters of decedents' estates are taken from the High Court to the Court of Appeals just as in other matters.

There is a concurrent jurisdiction to admit to probate and grant letters in the county courts in the case of small estates, but judicial statistics would seem to indicate that this has rarely been taken advantage of.

It is, of course, inconceivable that five judges could handle, alone and unassisted, all the probate business for all the people of England. In fact, judicial statistics indicate that the great bulk of proceedings to admit wills to probate and for letters take the form of noncontentious proceedings and are heard before probate registrars. This is, obviously, an administrative matter which does not require, in most cases, the actual personal supervision of the judge. But, of course, the judge

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42 24–25 Geo. 5, c. 53, §§ 60, 61, p. 531 (1934).

43 CIVIL JUDICIAL STATISTICS, ENGLAND AND WALES, 1938 (1939) pp. 20, 21. This report shows that in 1938 there were 121 contentious probate actions tried and 258 motions heard by a judge. In noncontentious proceedings, in 1938, in the registries there were the following grants: 94,944 probates and letters of administration with the will annexed; 54,808 letters of administration.

44 CIVIL JUDICIAL STATISTICS, ENGLAND AND WALES, 1938 (1939) p. 43.
and the registrar are both a part of the unified judicial system, and some judicial supervision is always possible where it is needed.

There are four probate registrars assisted by a staff of clerks. In addition, there are sixteen groups of district registrars, with a chief registry in each group and certain sub-registrars. To qualify as a probate registrar, one must be a practicing barrister or solicitor of ten years' standing, or a district probate registrar of five years' standing, or have served ten years as a clerk in the principal probate registry.

In considering the English system as a whole, one cannot fail to note the extensive changes that have taken place within the last hundred years. All matters of decedents' estates are now handled by one court. There is no possibility of conflicting rulings by different courts on questions of jurisdiction depriving a litigant of relief. This court is not an inferior court as was the ecclesiastical court, but is a court of general jurisdiction, whose judges receive a salary comparable to that of justices of the Supreme Court of the United States. The English system, however, distinguishes sharply between contentious and noncontentious business of the court. The latter being largely of an administrative character, is handled by probate registrars and their assistants. But if a contentious proceeding is necessary, either in the Chancery or the King's Bench Division, it may be heard by judges of the one great trial court of general jurisdiction of England.

The separation of jurisdiction between the Probate Division and the Chancery Division would seem still to be a mark of inefficiency. Indeed, in recent years there was an unsuccessful movement to transfer the probate of wills and granting of letters to the Chancery Division. Nevertheless, since matters may be freely transferred from one division of the High

II. Development of an American Counterpart of English Probate Jurisdiction

A. The Transition Process

We have traced thus far the evolution of probate courts in England from a system in which the complete administration of an estate could and frequently did require judicial proceedings in three courts to the modern organization under which probate business is handled in a single court—the High Court of Justice. We turn now to the establishment of probate courts in America. Some of the English historical influences are to be noted in the early development of our own probate court organizations. But mixed with these influences were some courageous attempts to establish one court possessing the combined powers of the English ecclesiastical, common-law, and chancery courts. The objective was a system under which an entire probate proceeding could be conducted and supervised, in one court, from the probate of a will and grant of letters to the final distribution of the estate. Due to variations in populations, community needs, considerations of expense, and natural local differences in opinion, different systems of probate courts have developed.

In very early colonial times testamentary jurisdiction was commonly given to the General Courts or vested in the governors and their councils. Somewhat later it was given to county or other trial courts as they were established, although the General Courts frequently continued to exercise some testamentary jurisdiction. By the middle of the seventeenth

47 A large portion of probate business is handled in the Probate Division; and recourse to the Chancery and King's Bench Divisions yet remains for certain contentious matters in the administration of decedents' estates. But all are in the same High Court of Justice.
century numerous variations had developed in the colonies.48

In some instances the governor was made the ordinary, although it was common for him to commission deputies or surrogates to probate wills and grant letters, reserving to himself supervisory control over their acts by way of appeal.49 Orphans’ courts were created in several states to include jurisdiction over executors and administrators as well as guardians.50 Elsewhere probate jurisdiction was lodged in the established courts—superior courts in some places,51 inferior courts in others.52

The first plan of having the governor appoint deputies or surrogates to probate wills and grant letters constituted but a slight departure from the practice of the English ecclesiastical courts. The creation of separate orphans’ courts with many of the powers possessed by all three courts under the English system was a step in recognizing the need for a unification of the processes of probate and administration. And conferring

48 For a summary of these developments and variations, see Pound, Organization of Courts (1940) 26-80.
50 See notes 54-58, infra.
51 See notes 68-70, infra.
this jurisdiction upon general trial courts already established served to unite probate jurisdiction with general judicial administration.

B. AMERICAN INNOVATIONS

In observing the evolution of probate courts in America, three aspects in their development are to be noted: the range of their powers, the scope of their jurisdiction, and the particular forms assumed by them.

The powers lodged in the various bodies, persons or courts were extremely limited in the early stages of probate development. In many cases they consisted merely of the power to probate wills and grant letters, following the practice of the ecclesiastical courts. Very gradually these powers were extended to include a needed control and supervision over executors and administrators in their administration of estates. But the process of increasing powers of control in probate courts cannot yet be called complete in any state. All too often resort must be had to equity or common-law courts to sell land to pay debts, to partition land in connection with distribution, to contest wills, to construe them, or even to adjudicate contested claims against an estate.

In Pennsylvania, Maryland, Delaware, Virginia

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53 For substantiation of this development in particular states see opinion of Daly, J., in Brick's Estate, 15 Abb. Pr. 12 (N. Y. 1862); opinion of Werner, J., in Matter of Runk, 200 N. Y. 447, 452-456, 94 N. E. 363 (1911); Redfield, Surrogates' Courts in New York (4th ed. 1890) 1-17; Atkinson, "The Development of the Massachusetts Probate System," 42 Mich. L. Rev. 425 (1943); opinion of Woodward, J., in Horner & Roberts v. Hasbrouck, 41 Pa. 169, 177-179 (1862); Reppy and Tompkins, Historical and Statutory Background of the Law of Wills (1928) 174-177 (for New Jersey); Woerner, Administration (3d ed. 1923) 478, 489.

54 Act of 1713, in 1 Laws of Pennsylvania, 1700-1781, edited by Dallas (1797) 98. See also Abridgment of Laws of Pennsylvania, 1700-1811, edited by Purdon (1811) 407. This act re-established orphans' courts which had been discontinued in Pennsylvania. Reference to their existence as early as 1693 may
and New Jersey separate orphans' courts were early established.

"The idea was taken from the Court of Orphans of the city of London, which had the care and guardianship of children of deceased citizens of London in their minority, and could compel executors and guardians to file inventories, and give securities for their estates. . . . The Court of Orphans was one of the privileges of that free city; and that the people of Pennsylvania might enjoy the same protection, it was transplanted into our law, at first without any change of name, but afterwards called the Orphans' Court. The beginnings of this court were feeble. But it grew in importance with the increase of wealth and population, was recognized in our Constitution of 1776, and in each of our subsequent constitutions, and has been the subject of innumerable Acts of Assembly." 59

Thus a jurisdiction over the persons and estates of minors came to include the administration of decedents' estates. Elsewhere guardianship and curatorship (or conservatorship, as it is sometimes called) has been appended to probate jurisdiction. And in many states there has been added adoption proceedings, change of name, solemnization of marriages, and even the granting of divorces. More closely connected with the administration of estates, the administration of state inheritance or transfer taxes, supervision of testamentary trusts, and more
recently of inter vivos trusts, have been added. The extent of these superimposed functions will be discussed later.

From the summary already given it is apparent that there was no general agreement as to the form of tribunal for the administration of estates. This function, bestowed upon the town councils by Rhode Island, remains there to this day, although each council may elect a probate judge to preside in the local probate courts. Probate judges are still appointed by the governor in New Hampshire, following the early practice when the governor appointed commissioners to probate wills. The surrogates in New York and New Jersey, originally appointed by the governor or prerogative court, are now elected by the electors of each county. In New York the extent of their powers and scope of their jurisdiction have been vastly increased. New Jersey, on the contrary, has restricted the surrogate to the probate of wills and grant of letters only when there is no contest; in case of contest and in most other matters resort must be had to the orphans' or prerogative court. The separate orphans' courts early established in Pennsylvania, Maryland and Delaware, and later in New Jersey, are still continued. And the separate probate courts established elsewhere have in the main persisted.

But significant innovations were launched in three states. As early as 1721 South Carolina conferred upon its county and precinct courts "full power to determine the right of adminis-

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61 N. H. Const., arts. 46, 73.
63 See Brick's Estate, 15 Abb. Pr. Rep. 12 at 24-28 (N. Y. 1862); and In the Matter of Coursen's Will, 4 N. J. Eq. 408 at 413-414 (1843).
64 N. Y. Const., art. 6, § 13; N. J. Const., art. 7, § 2, par. 5.
tration of the estates of persons dying intestate . . . and also all disputes concerning wills and executorships, in as full and ample manner as the same have or might have been heretofore determined by any Governor, or Governor and Council." 68 In 1778 Georgia conferred jurisdiction upon its superior courts "to determine in all matters of dispute concerning the proving of wills and granting letters of administration." 69 In 1773 North Carolina conferred jurisdiction upon its superior courts in "all Suits and Matters relative to Legacies, filial Portions, Estates of Intestates." 70 Here in courts of general jurisdiction, compounded with civil and criminal jurisdiction, was the administration of estates. However, this plan of conferring powers of probate and administration upon courts of general jurisdiction was not to be permanent in any of these three states. 71 It remained for other states to initiate a movement which would unite probate jurisdiction with law and equity.

One minor phenomenon of consolidation occurred early, however, which has had an unfortunate effect upon probate courts. Under the stress of quantity of judicial business the establishment of inferior county courts with a limited civil and criminal jurisdiction was common. Probate powers were added to their jurisdiction in several states. 72 In thirteen

68 Statutes at Large of South Carolina, edited by McCord (1840) 172 (act of 1721).
69 Digest of the Laws of Georgia to 1799, edited by Watkins (1800) 226.
70 Complete Revaisal of all the Acts of Assembly of the Province of North Carolina, printed by Davis (1773) 511. See also Laws of North Carolina, edited by Iredell (1791) 296-297 (act of 1777).
71 In South Carolina the office of ordinary was established in 1799. See Acts of South Carolina, 1795-1804, printed by Faust (1808) 315.
In Georgia probate powers were vested in a register of probate appointed by the legislature in each county beginning in 1777. Georgia Constitution of 1777, compiled by Marbury & Crawford (1802) art. 52. See also Redfearn, Wills and Administration of Estates in Georgia (1938) 153.
North Carolina conferred probate powers upon county courts in 1837. Laws of North Carolina, 1836-37, printed by Lemay (1837) 55.
72 Pound, Organization of Courts (1940) 83-85, 137.
states at the present time probate matters come under the jurisdiction of county courts. Often these courts are presided over by judges who are untrained in law. As a consequence their decisions are usually reviewable on appeal by a trial de novo in courts of general jurisdiction. Certainly this fusion of probate courts with county courts has not produced any elevation of probate courts in the public esteem. On the contrary, it has undoubtedly been a factor in minimizing the importance of probate matters.

III. Classification of American Probate Courts

A. Variations of Probate Court Organization in the Same State

Before attempting a classification of present-day probate courts, it should be emphasized that the system of probate courts in several states is not unitary and hence not susceptible of a single classification. Under some systems two separate tribunals have been created to supervise the complete administration of an estate. In other states different kinds of tribunals exist in different counties of the same state for administering probate matters. Where either of these situations exist, each court or kind of court must be considered separately in the appraisal to follow, and may require one, two, or even three classifications for the probate courts of a single state.

1. Probate courts as single or multiple units

In a number of states certain remnants of the tri-court system under the English ecclesiastical practice still persist. The New Jersey system suggests considerable early English influence. Its intricacies can only be appreciated by a detailed

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73 Colorado, Florida, Illinois, Kentucky, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, West Virginia and Wisconsin.
description. Three courts have probate jurisdiction: the surrogate's court, the orphans' court and the prerogative court. There is one prerogative court for the entire state presided over by the chancellor sitting as ordinary or surrogate general.\textsuperscript{74} There is one surrogate in each county\textsuperscript{75} and also one orphans' court in each county.\textsuperscript{76} The surrogate is both the judge and clerk of his own court;\textsuperscript{77} he is also clerk of the orphans' court.\textsuperscript{78} The prerogative court has jurisdiction throughout the state to probate wills, grant letters and to hear and finally determine disputes that arise thereon.\textsuperscript{79} The surrogate of each county also has power to probate wills and grant letters except when doubt appears on the face of a will or a caveat is filed against a will or a dispute or contest arises as to the existence of a will or the right to letters.\textsuperscript{80} In any of these cases the matter is transferable to the orphans' court.\textsuperscript{81} In general the orphans' courts have no original jurisdiction to probate wills or grant letters. Their sole jurisdiction to do so arises on transfer from the surrogate in case the matter is disputed or contested.\textsuperscript{82} The orphans' courts also have power to grant allowances to widows and children pending a will contest,\textsuperscript{83} to determine heirship of an intestate where real estate is involved,\textsuperscript{84} to approve compromises of will contests or claims of the estate against a third person,\textsuperscript{85} to order the sale of real estate for the payment of debts,\textsuperscript{86} determine rights of

\textsuperscript{74} N. J. Const., art. 6, § 4, par. 2.
\textsuperscript{81} Ibid.
\textsuperscript{82} Ibid.
\textsuperscript{84} N. J. Rev. Stat. (1937) §§ 3:4-1 to 3:4-3.
beneficiaries under a will or of the next of kin in an estate,87 and determine controversies respecting allowances of accounts.88 In short, the jurisdiction of the surrogate is limited to the probate of wills and issuance of letters in nonadversary proceedings. The remainder of the administration is had in the orphans' court. The probate of a will may be either before the surrogate of the proper county or in the prerogative court.89 Thus, if a proceeding is initiated before the local surrogate, the services of the orphans' court will certainly be required; but if a proceeding is initiated in the prerogative court in the first instance that court has power to conduct the entire proceeding.

In North Carolina there is a similar division of probate jurisdiction between the clerk of the superior court and the superior court itself. Indeed the clerk is himself a court90 and handles most of the details of administration. However, in the case of a contest on probate of a will or grant of letters, the matter is transferred to the superior court for the hearing.91 The clerk may order the sale of personal property,92 but resort must be had to the superior court for the sale of land.93 Also the clerk has jurisdiction with respect to the inventory and accounting.94 Much the same division of jurisdiction prevails in Virginia. The clerk, as well as the court, has power to probate wills and grant letters.95 But any decision of the clerk may be appealed to the circuit court or its equivalent.96 Probably the clerk does not have as much power as the clerk in North

Carolina. It is sufficient to note, however, that in both of these states the clerk has judicial powers and shares with the court of general jurisdiction the control over the administration of estates. Likewise in Delaware the register of wills in each county has power to probate wills, grant letters, remove representatives, approve bonds, pass upon accounts and settlements of representatives and to grant discharges. But a proceeding to sell land to pay debts must be had in the orphans' courts. Pennsylvania also has a register in each county who has power to probate wills and grant letters. Other matters in connection with the administration of an estate are handled in the orphans' court.

The important thing to observe in all these cases is the division of jurisdiction between two tribunals. The first of these, variously called the surrogate, the register of wills, or the clerk, performs a function limited for the most part to the probate of wills and grant of letters; and, under the practice of some states, only when the matter is not contested. In other states, such as Delaware, the register of wills has quite broad powers, making it possible for most of the administration to be done under his supervision. The second of these tribunals, variously called the orphans', the superior, district, or circuit court, supervises the remainder of the administration and especially in matters that are more likely to be contentious or involve more than ministerial functions.

In several other states the clerk of the probate court has power to admit wills to probate and grant letters on exceptional occasions, such as in the absence of the judge or in

101 See discussion under VII-B, infra.
vacation of the court, but these are regarded as extraordinary rather than ordinary powers.

2. Different kinds of probate courts in the same state

From the very beginning there was a tendency to establish a probate court in each county. But variations in population and considerations of expense have led to the establishment of different kinds of probate courts within the same state.

In Indiana probate jurisdiction has been conferred upon the circuit courts of each county. However, in Marion and Vanderburgh counties, two populous counties of the state, separate probate courts have been established to handle the administration of estates. These probate courts are separate from the circuit courts of these counties but are fully coordinate with them.

In Oregon the county courts have been given probate jurisdiction, but, in counties having a population of over 30,000, county courts have been abolished and county judges made circuit judges to preside over the “department of probate” in the circuit courts of those counties. The probate courts in these larger counties are not unlike those in Indiana except that the former may be said to be an integral part of the court of general jurisdiction, rather than coordinate with it.

In New Mexico the district court has had concurrent jurisdiction with the probate court in all probate matters since 1941 and any estate of $2,000 or more may be “appealed” to the district court. Thus probate jurisdiction is optional in either of two courts.

102 Pound, Organization of Courts (1940) 136, 250.
103 Ind. Stat. (Burns, 1933) § 4–303.
104 Ind. Stat. (Burns, 1933) §§ 4–2901, 4–3001.
106 Ore. Const., art. 7, § 12.
In Alabama the probate court does not have exclusive jurisdiction. Administration in equity remains optional; or a proceeding commenced in the probate court may be removed to the circuit court. Thus probate jurisdiction in Alabama is possible in any one of three courts, each of which has adequate and complete power to function.

In Tennessee probate jurisdiction is vested in the county courts composed of all the justices of the peace of the county. Judicial powers are exercised by the chairman who is, in effect, the probate judge. However, when no person has applied or can be procured to administer upon an estate, chancery has jurisdiction to appoint a representative after six months. A proceeding to sell real estate may be had either in the county, the circuit, or the chancery court. Appeals from the county court ordinarily lie to the circuit court, but to the court of appeals or the supreme court if jurisdiction in the particular matter appealed from is concurrent with the circuit or chancery courts.

In Vermont most appeals from the probate court go to the county court, but an appeal on a question of law goes directly to the supreme court. In this one respect the probate courts of Vermont require a double classification.

In Wisconsin probate jurisdiction has been vested in the county courts throughout the state. The judges of these county courts, however, must be members of the bar except in counties having a population of less than 14,000 in which

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109 Ala. Const., art. 6, § 149.
110 Ala. Code (1940) t. 13, §§ 138 through 144.
111 Tenn. Code (Michie, 1938) §§ 10193, 10225.
112 Tenn. Code (Michie, 1938) §§ 10202, 10204.
113 Tenn. Code (Michie, 1938) § 8155.
114 Tenn. Code (Michie, 1938) § 10226.
115 Tenn. Code (Michie, 1938) §§ 9028, 9060.
119 Wis. Stat. (1943) § 253.01.
case they may be lay judges.\textsuperscript{120} Appeals from county courts in counties having a population of more than 15,000 go directly to the supreme court and are heard upon the record of the proceedings below, but in counties having a population of 15,000 or less (of which there are some twelve counties) appeals lie to the circuit court and are heard de novo.\textsuperscript{121}

Ohio provides for separate probate courts in each county, but counties of less than 60,000 population are authorized to "consolidate" their probate court with the local court of common pleas, such "consolidated court" to be presided over by the judge of the common pleas court.\textsuperscript{122} This does not operate to extinguish the probate court but merely to provide for a unified personnel.\textsuperscript{123} Appeals from probate courts in Ohio go directly to a court of appeals, provided that a record has been made of the probate proceedings; but if a record has not been taken of the proceedings an appeal lies to the court of common pleas of that county, where there is a trial de novo.\textsuperscript{124} It is a matter of common knowledge among lawyers in Ohio that parties avail themselves of this second trial in the common pleas courts in most cases. Where there has been a "consolidation" of the probate courts with common pleas courts, this may mean a trial de novo before the same judge—a useless and futile gesture, it would seem. But because of this variation in the method of appeal, the probate courts of Ohio occupy two positions in the hierarchy of courts.

A similar "consolidation" of courts exists also in New York and Pennsylvania. Separate surrogates' courts in New York and separate orphans' courts in Pennsylvania exist in every

\textsuperscript{120} Wis. Stat. (1943) \$253.02.
\textsuperscript{121} Wis. Stat. (1943) \$324.01.
\textsuperscript{122} Ohio Const., art. 4, \$7; Ohio Gen. Code (Page, 1937) \$\$10501-4, 10501-47.
\textsuperscript{123} State ex rel. Sattler v. Cahill, 122 Ohio St. 354, 171 N.E. 595 (1930).
\textsuperscript{124} Ohio Gen. Code (Page, Supp. 1943) \$10501-56.
county. But in counties of less than 40,000 population in New York the county judge also presides over the surrogate court of that county, whereas in counties having a larger population the legislature may provide for a separate surrogate. Similarly in counties of not more than 150,000 population in Pennsylvania the common pleas judge presides over the orphans' court, but in larger counties the legislature must, and in any other county may, establish separate orphans' courts. In both of these states the courts performing probate functions are distinct. The "consolidation," as in Ohio, is one of judicial personnel, prompted in each case by economical considerations in the less populous communities.

B. NORMS TO BE APPLIED IN ANALYZING AMERICAN PROBATE JURISDICTION

Up to this point we have considered the multiple character of probate court organization in some states and the variations of organization in the same state. It is now our purpose to classify all probate court organizations on the basis of their most important characteristics. Before doing this, however, it is desirable to discuss the norms to be applied in making this classification.

Probate courts have been variously classified as courts of "limited," "inferior," "special and limited," "limited though not special," or "limited though not inferior" jurisdiction; and also as courts of "general," "superior" or "coordinate" jurisdiction. These descriptives are not only inconsistent but are likely to represent but partial views. It is true that their predecessors, the ecclesiastical courts, were not courts of gen-

125 N.Y. Const., art. 6, § 13; Pa. Const., art. 5, § 22.
126 N.Y. Const., art. 6, § 13.
128 See references cited in Woerner, Administration (3d ed. 1923) 484; Cleaveland, Hewitt and Clark, Probate Law and Practice of Connecticut (1929) 132.
eral jurisdiction.129 Nor were they courts of record. Nevertheless, they were "courts," and their judgments were subject to recognition and obedience through the process of excommunication.130 The establishment of probate courts in America was made without any such limitations on their powers.131 Nevertheless, a number of reasons have contributed to their characterization as "inferior" in certain respects.

As will be seen from the discussion which follows, it is not easy to classify probate courts under our systems of court organization. By creating them and giving them power to probate wills and supervise the administration of estates, we have set off to them a specialized function. Because of this specialized task assigned to them, we have been inclined to call them courts of "special or limited jurisdiction," and, therefore, of "inferior jurisdiction."132 Upon a little consideration, it will be seen that this conclusion is not warranted. In giving this jurisdiction to the probate courts, we have in the same process not given it to the general trial courts which we call "courts of general jurisdiction." In matters probate, therefore, probate courts truly have "general jurisdiction."

To courts of general jurisdiction, we have indulged a presumption in favor of the regularity of their proceedings and the validity of their judgments. No such presumption is made in the case of courts of inferior jurisdiction.133 In actions at law, general trial courts have general jurisdiction. In probate matters it can equally be said that trial courts do not have, but that probate courts do have, general jurisdiction. In these respective fields, it should be clear that each court is a court of original jurisdiction, not superior or inferior in the first

129 1 Woerner, Administration (3d ed. 1923) §140.
131 1 Woerner, Administration (3d ed. 1923) 481.
132 For an early example of this type of reasoning, see Strouse v. Drennan, 41 Mo. 289 at 297 (1867).
133 For a concise summary of this doctrine and its origin, see 1 Woerner, Administration (3d ed. 1923) §143.
instance, as to any other court. Despite this seemingly simple statement, there has not been general agreement that a probate court is one of general jurisdiction within its field of operation. Indeed, the constitution of Missouri at one time provided that “inferior tribunals shall be established in each county for the transaction” of probate matters. By the same constitution, they were also made courts of record. Despite the inferiority intended for them, it was held that “their jurisdiction pertaining to wills and administrators is general . . . and the same may be said of the circuit court; but their action, on subjects exclusively and originally confided to them, is entitled to the same weight as that of any other court of record.” Thus, despite the commands of the constitution, probate courts in Missouri were held courts of general jurisdiction within a defined sphere and their jurisdiction “as general as that of the circuit court.” Accordingly, their proceedings and judgments operating upon subjects within a defined sphere were entitled to the same presumptions of regularity and validity as those of courts of general jurisdiction.

The inferior position accorded to probate courts historically has left its indelible mark upon the effect accorded to their proceedings. The rule was early developed that “inferior jurisdictions and special authorities, must show their jurisdiction, and must pursue their authority strictly.” The result has been that every stage of a probate proceeding must laboriously recite each fact upon which its jurisdiction is predicated. Otherwise a sale or judgment is void and is subject to collateral attack—a vulnerability well known to every title

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134 Mo. Const. of 1820, art. 5, § 12.
136 Morrow v. Weed, 4 Iowa 79 at 124 (1856). This case contains an excellent statement of the foundations of this doctrine, its unfortunate consequences, and a résumé of the authorities at that date.
examiner. The resulting blemish upon land titles and consequent relitigation of all the matters supposedly concluded in the probate court are facts too well known to require comment. After this rule became well intrenched, remedial measures were commenced. First, probate courts were made courts of record. Then presumptions were made as to the regularity of their proceedings and validity of their judgments. The importance of these two steps cannot be overstated.

By statute in a number of states at the present time proceedings of probate courts are now accorded the same presumptions of regularity and validity as those of courts of general jurisdiction. Elsewhere such a presumption has been made even in the absence of statute. In Connecticut, Florida, Maine, Maryland, Vermont and Wisconsin, however, no such pre-


138 Arizona. Varnes v. White, 40 Ariz. 427 at 431, 12 P. (2d) 870 (1932);
Arkansas. Massey v. Doke, 123 Ark. 211, 185 S.W. 271 (1916); Graham v. Graham, 175 Ark. 530, 1 S.W. (2d) 16 (1927);
California. Luco v. Commercial Bank, 70 Cal. 339, 11 P. 650 (1886);
Burris v. Kennedy, 108 Cal. 331 at 338, 41 P. 458 (1895);
Georgia. Stanley v. Metts, 169 Ga. 101, 149 S.E. 786 (1929); Wood v. Crawford, 18 Ga. 526 (1855);
Illinois. Illinois Merchants' Trust Co. v. Turner, 341 Ill. 101, 173 N.E. 52 (1930); Housh v. People, 66 Ill. 178 (1872); People v. Cole, 84 Ill. 327 (1876); People v. Gray, 72 Ill. 343 (1874); Matthews v. Hoff, 113 Ill. 90 (1885);
Indiana. Sims v. Gay, 109 Ind. 501, 9 N. E. 120 (1886);
Iowa. McFarland v. Stewart, 109 Iowa 561, 80 N. W. 657 (1899);
Kansas. Denton v. Miller, 110 Kan. 292, 203 P. 693 (1922);
Kentucky. Goss' Exr. v. Ky. Refining Co., 137 Ky. 398, 125 S. W. 1061 (1910);
Michigan. Church v. Holcomb, 45 Mich. 29, 7 N. W. 167 (1880); Chapin v. Chapin, 229 Mich. 515, 201 N. W. 530 (1924);
Minnesota. Davis v. Hudson, 29 Minn. 27, 11 N. W. 136 (1881);
Mississippi. Gillespie v. Hauenstein, 72 Miss. 838, 17 So. 602 (1895);
Missouri. Johnson v. Beazley, 65 Mo. 250 (1877); Desloge v. Tucker, 196 Mo. 587 at 601, 94 S. W. 283 (1906);
Nebraska. Foote v. Chittenden, 106 Neb. 704 at 707, 184 N. W. 167 (1921);
New Hampshire. Kimball v. Fisk, 39 N. H. 110 (1859);
This presumption, according to the judicial acts of probate courts the same force and effect as to those of courts of general jurisdiction, represents a noteworthy and important step in their development.

A second important test of a court’s position in any judicial organization is whether it has been made a “court of record.” Most, but not all, probate courts in this country have been created or subsequently made courts of record. This being

**New Jersey.** Plume v. Howard Savings Inst., 46 N. J. L. 211 (1884) (as to orphans’ court);

**New York.** Van Deusen v. Sweet, 51 N. Y. 378 (1873); Bears v. Gould, 77 N. Y. 455 (1879); Harrison v. Clark, 87 N. Y. 572 (1882); O’Conner v. Huggins, 113 N. Y. 511 (1889);

**Ohio.** Shroyer v. Richmond, 16 Ohio St. 455 (1866);

**Oklahoma.** Hunter v. Wittier, 120 Okla. 103, 250 P. 793 (1926); Drum v. Aetna Cas. & Surety Co., 189 Okla. 307, 116 P. (2d) 715 (1941);

**Oregon.** Russel v. Lewis, 3 Ore. 380 (1872); Slate’s Estate, 40 Ore. 349, 68 P. 399 (1902);

**South Carolina.** Clark v. Neves, 76 S. C. 484, 57 S. E. 614 (1906);

**Tennessee.** Townsend v. Townsend, 44 Tenn. 70 (1867);


**Virginia.** Saunders v. Link, 114 Va. 285, 76 S. E. 327 (1912);

**Washington.** In re Upton’s Estate, 199 Wash. 447, 92 P. (2d) 210 (1939);

**Chrislianson v. King County, 239 U. S. 356, 36 S. Ct. 114 (1915);**

**West Virginia.** State ex rel. Conley v. Thompson, 100 W. Va. 253, 130 S. E. 456 (1925);

**Wyoming.** Lethbridge v. Lauder, 13 Wyo. 9, 76 P. 682 (1904).


**Florida.** State ex rel. Everett v. Peteway, 131 Fla. 516, 179 So. 666 (1938), 135 Fla. 757, 185 So. 619 (1939);

**Maine.** Appeal of Waitt, 140 Me. 109, 34 A. (2d) 476 (1943);

**Maryland.** Talbot Packing Corp. v. Wheatley, 172 Md. 365, 190 A. 833 (1937);

**Vermont.** Probate Court v. Indemnity Ins. Co. of No. America, 106 Vt. 207, 171 A. 336 (1934); Abbott v. Abbott, 112 Vt. 449, 28 A. (2d) 375 (1943);

**Wisconsin.** Estate of Anson, 177 Wis. 441, 188 N. W. 479 (1922); Estate of Ott, 228 Wis. 462, 279 N. W. 618 (1938). This last Wisconsin case is based on Wis. Stat. (1943) § 310.045 which requires the petition for letters to allege and the order to find the facts necessary to the jurisdiction of the court. But see Wis. Stat. (1943) § 316.33 which prevents the invalidation of a sale by a representative except for causes that would invalidate it had it been made pursuant to an order of a court of general jurisdiction.


140 Ala. Const., art. 6, § 148; Ariz. Const., art. 6, § 10; Cal. Const., art. 6, § 12; Colo. Const., art. 6, § 23; Fla. Stat. Ann. (1941) §§ 36.02, 36.14, 732.07; Idaho
true, and, since all courts of general jurisdiction are likewise courts of record, this test alone cannot be very significant. The fact that a probate court is not a court of record is a distinct indication that it is regarded as inferior.

Even though a probate court be termed a court of general or coordinate jurisdiction, in many cases appeals from it are taken to the courts of general jurisdiction and heard de novo. Behind this plan of procedure on appeal lies a mistrust in probate courts, at least in contentious matters. In relation to the appellate court in this instance, the probate court is an inferior court. And, even though the appeal is not heard de novo, the inferiority, though not so pronounced, still exists.

Another test to determine the status of a probate court is the extent to which jurisdiction has been conferred upon it in probate matters. As has been seen, the jurisdiction of the ecclesiastical courts was to probate wills, grant letters and entertain suits for legacies; but the jurisdiction of probate courts in America has not been so narrow. Probate courts usually have power to hear and determine issues on disputed claims, accountings, legacies, the sale of land to pay debts, etc.
partition of land, and a multitude of matters relating to the management of the estate. However, in some states resort must be had to the court of general jurisdiction for the enforcement of claims, for authority to sell land for the payment of debts or legacies, or for partition of lands. To the extent that its jurisdiction is incomplete and resort must be had to other courts, the probate court remains, in a sense, inferior.

Furthermore, the functions of probate courts have frequently been combined with certain minor jurisdictions in civil and criminal matters such as is exercised by county courts. At the same time, the qualifications of judges presiding over such combined courts have frequently coincided with those required of judges of such inferior courts. A degradation of the probate court has resulted rather than an elevation of the inferior court with which it was combined.

Finally the caliber of judicial personnel has not been unrelated to the organization of courts and the respect which we have for them. A large portion of probate business in England receives the attention of the chancellor, the vice-chancellors and judges of the common-law courts, each of them eminently qualified for these tasks. In vesting all probate jurisdiction in one court in America, we have lost sight of the qualifications and ability possessed by English judges who have presided over probate matters. The qualifications for the office of judge of county and other similar courts of an inferior status in this country have been notoriously low; and qualifications for the office of probate judge in a large number of states are not much higher. If a lay judge is allowed to preside over an inferior court, appeals with a trial de novo are likely to be the answer to objections against lay personnel. Inefficiency and loss of prestige are the prices paid for such a system. Administrative ability and a specialized legal knowledge on the part of modern probate judges are

\[143\] Pound, Organization of Courts (1940) 137, 180–181.
indispensable qualifications necessary to bring the American probate courts to a position fully equal to that of our courts of general jurisdiction. 144

C. GENERAL SURVEY OF AMERICAN PROBATE COURTS

No single formula is adequate to describe the present-day organization of probate courts in America. Furthermore, a single characterization of the probate court system of a given state would be an inaccurate description in a number of instances. But, despite an inability to generalize broadly, some useful classifications are possible; and from these classifications, some conclusions may be drawn with respect to the status, the powers, and other incidents that an ideal probate court should possess.

It is the purpose of this study to consider the present-day probate court or courts of each state and appraise them in terms of their relation to the court organization of that state. In making the classification that is to follow it is obviously impossible to appraise all probate courts on the basis of all the tests outlined above. Some one test alone must be used as a yard stick. Most probate courts are now courts of record; and in a substantial number of states there is the same presumption of jurisdiction in favor of probate proceedings as is made in favor of courts of general jurisdiction. 146 If appeals from the probate court are taken to the court of general jurisdiction, the former certainly occupies an inferior position in relation to the latter; but if appeals lie to the same tribunal as do appeals from the court of general jurisdiction, then the two courts occupy coordinate positions. It is believed that this one factor of the court to which an appeal lies from a probate court is the most significant criterion in determining

144 See VII and VIII, infra.
145 See note 140, supra.
146 See notes 137 and 138, supra.
the position or status to be ascribed to the latter. Consequently this one test is employed to the exclusion of all others in the analysis which follows.

Without attempting to trace the history or development of probate courts in any state, it may be said generally (and perhaps none too accurately) that probate courts exist in four different forms in the United States today. First, the most numerous group of states has separate courts, but with definitely inferior attributes in the local hierarchy of courts. This form of court exists in twenty-three jurisdictions and also has some kind of partial existence in ten other jurisdictions. Second, there is the system typified by California, where the court of general jurisdiction embodies both the trial court and the probate court; in other words, there is combined in one judge and one court the two functions of presiding over the ordinary trial court of general jurisdiction and also of supervising the administration of probate matters. This unified system exists in nine states and prevails in part in seven others. Third, there is the somewhat less numerous group of states in which there exist separate probate courts, without the inferior status of those mentioned in the first category, but having a place in the local court system more or less coordinate with the court of general jurisdiction. Appeals from their judgments are taken to the same courts and in the same manner as are appeals from courts of general jurisdiction. This form of court prevails in five states, and also has a partial existence in six others. Fourth, there are a few states in which probate matters are or may be committed to the jurisdiction of chancery—a legacy of the former English practice.

These variations within these four categories are sufficient to indicate the impossibility of generalizing and, also, to warrant the observation that our present product of probate courts is the result of additions and subtractions, impacts and influences, of each generation. Many of these changes have been
wrought in the interest of improving the efficiency and operation of probate courts; others have been made in the interests of economy or for the avowed purposes of bringing the probate court closer to the people and thus making it more democratic; or to make it available at all times. All of these may seem worthy objectives in themselves, and they should be so considered as long as they are not made at the expense of efficiency and simplicity in the administration of estates.

1. Separate probate courts with inferior status

In about two-thirds of the states the probate court is a separate court but relegated to an inferior position in the judicial organization of those states. As already indicated, the separate probate court was an early institution in America. The specialized nature of probate proceedings readily justified its separability. Furthermore, while it may have been agreed that the transmission of property from one generation to another required some judicial supervision, yet the process of effecting its transmission was so close and personal to the parties concerned that some court with less of the technical procedure employed in trial courts—a court which was open at all times and where the parties interested could go at any time and discuss their affairs in an informal atmosphere—seemed a necessary part of every community. The separate probate court in every county answered these requirements.

But with this separate court in every county also came in most instances a relaxation of the qualifications of the probate judge. This suggested the necessity of closer scrutiny and supervision over his judicial acts when dispute or contest arose. The supervision of uncontested matters by a probate judge

147 Statutes in nearly all states provide that the probate court shall be open at all times.
148 POUND, ORGANIZATION OF COURTS (1940) 262.
149 For a summary of this development see POUND, ORGANIZATION OF COURTS (1940) 136–137, 250.
422 MONOGRAPHS ON PROBATE LAW

without legal training or judicial experience, but with rights secured by an appeal, usually in the form of a trial de novo before a court presided over by a judge adequately trained, became the established practice.\textsuperscript{150} This procedure of a trial de novo on appeal from probate courts amounts to nothing less than a method of control over their proceedings without the supervision of a competent judge in the first instance. Thus created as inferior tribunals, there is little incentive to improve their judicial position. A trial de novo in the court of general jurisdiction on appeal is thought to be cheaper than to have the affairs of the probate court directed by competent personnel in the first instance. Twenty-six states\textsuperscript{151} have created probate courts in this image. In seven others\textsuperscript{152} appeals lie

\textsuperscript{150} POUND, ORGANIZATION OF COURTS (1940) 140, 250.


In this study we have not attempted to study those statutes which provide for probate jurisdiction to be exercised by other courts in exceptional cases. See, for example, Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 208, providing for administration to be carried on in the county or circuit court in estates in which the probate judge is interested; and Mich. Stat. Ann. (1937) § 27.1204 providing for the probate in the circuit court in chancery of foreign wills not required to be probated in order to be effective in the foreign jurisdiction. Such jurisdiction is the exceptional, not the normal, one.

\textsuperscript{152} Ala. Code (1940) t. 7, §§ 783, 784; Del. Const., art. 4, §§ 33, 34; Del. Rev. Code (1935) §§ 4418, 4419 (on record if taken, otherwise de novo); Fla.
to the court of general jurisdiction upon the record made in the probate court. This may imply a little more confidence in the probate court. At least it eliminates the necessity of a complete rehearing, but does not eliminate the court of general jurisdiction as an intermediate court of appeal.

2. Probate courts unified with courts of general jurisdiction

Under the California Constitution of 1849 the exercise of probate jurisdiction was conferred upon county courts. There were separate county courts in each county, but the state was divided into districts with only one district judge for each district of several counties. It was found that many county judges did not have sufficient work to keep them busy at all times; and also that, when a district judge was needed in civil or criminal matters, he was frequently far away in another county and not readily accessible. It was observed that, frequently, large estates came under the jurisdiction of the county courts and required able and capable supervision. Simple calculations were sufficient to show that no substantial expense would be incurred if a separate judge were provided for each county and the jurisdiction of the county courts consolidated with that of the district courts. Accordingly, it was proposed in the Constitutional Convention of 1878-79 to consolidate these two courts and have a separate "superior court" and "superior judge" for each county. Judicial ability, accessibility, responsiveness to the local community, elimination of competition between the different counties in the same district as to the selection of the judge—all at no increased expense—were believed to be thus available, although


Cal. Const. of 1849, art. 6, §§ 5, 6.
there was some dissent voiced to these alleged advantages. Nevertheless, after some debate, this plan was embodied in the California Constitution of 1879 and has been in operation since that date. Thus the county courts were abolished and their jurisdiction transferred to the newly created superior courts—courts of general jurisdiction.

The same system had been inaugurated in Nevada some fifteen years earlier in the Constitution of 1864 and with hardly a dissenting voice. The arguments in favor of the plan were succinctly stated in the debates of the Nevada Constitutional Convention and are worth restating here:

“In the first place, under such a system, we have all the judicial business done in the county which could be done by the District Judge and by the County Judge of that county; that is to say, we have ample force on the bench, in each county, to discharge all the duties that could be discharged in that county by the District and County Judges, and we have those duties performed, too, more expeditiously, and more economically; and we, at the same time, obviate the necessity of an appeal from the County Judge, or, if you please, from the Justices of the Peace to the County Judge, and from the County Judge to the District Judge, and then again from the District Judge to the Supreme Court. We rid ourselves of all this delay and difficulty by adopting this resolution, and thus we avoid, as it were, two intermediate stumbling-blocks in the way of justice, wiping them out of our judicial system altogether. In each of those inferior courts, expenses are necessarily incurred, and time wasted by litigants, before they can reach the court of final resort.

“Not only that, Mr. Chairman, but if you adopt the system proposed, you dignify the character of your judiciary in the several counties, and secure the respect of litigants for the courts, to a degree which, I humbly submit, they do not always challenge at the present time. Further than that, you also

155 Cal. Const., art. 6, § 5.
156 Nev. Const. of 1864, art. 6, § 6.
secure the services on the bench, of men of ability—men in whom the community can confide. You get men whose qualifications are known, coming from the neighborhoods in which they are elected, and known to all the citizens within their counties, and you avoid the great struggle which, aside from political considerations, would always be sure to arise, to a certain extent, under the old system of judicial districts comprising several counties in each, between the different counties of those respective districts, where men would naturally be combatting and struggling over the question of which county should present the candidate for District Judge. 157

Whether California was influenced by the reform in Nevada is not clear. At least no reference to the system already in operation in Nevada is to be found. From the discussions on this proposed system, it is probable that California was influenced solely by considerations peculiar to itself. 158

This plan of conferring probate jurisdiction upon the courts of general jurisdiction was widely copied from California, especially in the western states. In addition to California and Nevada, it has been adopted in Montana, 159 Utah, 160 Washington, 161 Wyoming, 162 and Arizona. 163 But this plan is not confined to the west. It also exists in Iowa, 164 Indiana, 165 and Louisiana. 166 Moreover, this system may be said to prevail in Alabama 167 and New Mexico 168 insofar as an administration

159 Mont. Const., art. 8, § 11.
160 Utah Const., art. 24, § 9.
161 Wash. Const., art. 27, § 10.
162 Wyo. Const., art. 5, § 10.
163 Ariz. Const., art. 6, § 6. In Arizona and California there is a separate court and judge for each county. Other states in which probate matters are handled by courts of general jurisdiction, are divided into districts with one judge presiding over courts in several counties except in the most populous places.
164 Iowa Code (1939) §§ 10763, 11819.
165 Ind. Stat. (Burns, 1933) § 4–303.
166 La. Const., art. 7, § 35.
proceeding may be removed to the circuit or district courts of those states. Insofar as a probate proceeding is under the supervision of the circuit courts (or the hustings courts or law and chancery courts in certain cities) in Virginia or of the superior courts in North Carolina, the same may be said of these courts. In a certain sense this is also true in those counties of Oregon having a population of over 30,000 in which the probate court has been made a division of the circuit court. In the three counties of Ohio in which the probate court has been "consolidated" with the common pleas courts, there may be an appearance of a unified court, but this is not so. The probate courts there have neither been extinguished nor merged with the common pleas courts. Rather there has been a union of the personnel of the judge presiding over those two courts. Indeed a decision of the probate court may be reviewed de novo on appeal before the same judge sitting as a common pleas judge.

The old county courts in California in exercising their probate jurisdiction had been regarded as courts of limited and special jurisdiction. What was the nature of this fusion with the court of general jurisdiction? It has been described thus: "It may be said that the probate court is gone, but that the probate jurisdiction remains. And that jurisdiction is now vested in the same court that exercises jurisdiction in cases of law and equity." In exercising that jurisdiction, however, the court of general jurisdiction does not have general powers, but only those powers formerly exercised by courts of probate. Except for the power to exercise equitable juris-

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173 State ex rel. Sattler v. Cahill, 122 Ohio St. 354, 171 N. E. 595 (1930).
175 Pryor v. Dówney, 50 Cal. 388 at 400 (1875).
176 In re Estate of Davis, 136 Cal. 590 at 597, 69 P. 412 (1902).
diction as an incident of its probate functions, the superior court in probate is entirely distinct from the same court in a civil or criminal proceeding. It remains essentially a probate court and must confine its movements to probate matters. A remedy sought in the wrong side of the court may be as fatal as though sought in the wrong court.\textsuperscript{177} This same conception of divisible jurisdiction prevails also in Montana \textsuperscript{178} and Wyoming.\textsuperscript{179}

The Constitution of Washington, not unlike that of California, provides that “the superior court shall have original jurisdiction in all cases in equity and in all cases at law . . . and all criminal cases . . . of all matters of probate.”\textsuperscript{180} But it is said that “the Constitution does not make the superior courts probate courts. On the contrary it vests the superior courts with jurisdiction of ‘all matters of probate’; hence the court is not shorn of its general powers simply because the cause before it may be one which was cognizable formerly in

\textsuperscript{177} In re Estate of Davis, 136 Cal. 590, 69 P. 412 (1902); In the Matter of Estate of McLellan, 8 Cal. (2d) 49, 63 P. (2d) 1120 (1936); Fisher v. Superior Court, 23 Cal. App. (2d) 528, 73 P. (2d) 892 (1937). In the last case cited, a proceeding to contest a will after probate was declared ineffectual because filed in the general, rather than the probate, jurisdiction of the superior court, as required by the California probate code. This means that only probate matters must be tried on the probate side and non-probate matters on the non-probate side of the court. Three cases may seem to violate this principle: In re Thompson’s Estate, 101 Cal. 349, 35 P. 991 (1894); In re Clary’s Estate, 112 Cal. 292, 44 P. 569 (1896); and In re Riccomi’s Estate, 185 Cal. 458, 197 P. 97 (1921). In each of these cases, however, relief essentially equitable in nature was sought on the probate side of the court, whereas it should have been sought on the equity side of the court. The estate of a deceased person was involved in each case, which probably accounts for the mistaken choice of forum. Nevertheless in each instance the parties submitted and the matter was tried as an equitable matter and the adjudication upheld. The pleadings also supported the equity jurisdiction which justified the court in ignoring the fact that the remedy was formally sought under the probate jurisdiction. If the parties had objected before trial, however, a different result might have been obtained. See Hampshire v. Woolley, 72 Utah 106, 269 P. 135 (1928) as an example of this procedure.

\textsuperscript{178} In re Sprigg’s Estate, 68 Mont. 92, 216 P. 1108 (1923); State ex rel. Hahn v. District Court, 83 Mont. 400, 272 P. 525 (1928).

\textsuperscript{179} Church v. Quiner, 31 Wyo. 222, 224 P. 1073 (1924).

\textsuperscript{180} Wash. Const., art. 4, § 6.
a court of probate." It has been repeatedly held that the superior court sitting in probate matters loses none of its powers as a court of general jurisdiction. It is said that "the constitution simply throws probate matters into the aggregate jurisdiction of superior courts as courts of general jurisdiction, to be exercised along with their other jurisdictional powers, legal and equitable, and as a part of those general powers." This unitary notion of the superior court has likewise been followed in Oregon, Utah, and Arizona.

182 State ex rel. Keasal v. Superior Court, 76 Wash. 291, 136 P. 147 (1913); In re Martin's Estate, 82 Wash. 226, 144 P. 42 (1914); State ex rel. Neal v. Kaufman, 86 Wash. 172, 149 P. 656 (1915); In re Wren's Estate, 163 Wash. 65, 299 P. 972 (1931); In re Kelley, 193 Wash. 109, 74 P. (2d) 904 (1938).
183 State ex rel. Keasal v. Superior Court, 76 Wash. 291 at 298, 76 P. 147 (1913).
184 In re Will of Pittock, 102 Ore. 159, 199 P. 633, 202 P. 216 (1921); In re Faling's Estate, 113 Ore. 6, 228 P. 821, 231 P. 148 (1924). This is confined to those counties in Oregon now having a population in excess of 30,000 and in which probate jurisdiction is vested in the circuit courts, department of probate. In the first case cited the court construed a will and decided a will contest in the same proceeding. In the second case it allowed attorneys' fees in connection with a will contest, which could not have been done had the court had jurisdiction solely over probate matters. The court said that its mode of proceeding was in the nature of a suit in equity. Completeness of administration in one proceeding was the objective.
185 In Utah it is said: "We therefore have no courts which are known as probate courts, or as law courts, or as equity courts; but we have courts possessed of general original jurisdiction, which are known as district courts. The district courts of this state, therefore, administer the estates of decedents as a part of their original jurisdiction, the same as they hear and enter judgments on promissory notes, or enter decrees in equity, foreclosing mortgages or quieting titles." Weyant v. Utah Savings & Trust Co., 54 Utah 181 at 204, 182 P. 189 (1919). Other cases implying or holding that the court's jurisdiction is independent of the nature of the subject matter are: In re Tripp's Estate, 51 Utah 359 at 363, 170 P. 975 (1918); In re Reiser's Estate, 57 Utah 434 at 440, 195 P. 317 (1921); In re Agee's Estate, 69 Utah 130, 252 P. 891 (1927); In re Thompson's Estate, 72 Utah 17 at 32–35, 269 P. 103 (1927). But see Hampshire v. Woolley, 72 Utah 106, 269 P. 135 (1928) where a writ of prohibition was granted to restrain exercise of non-probate jurisdiction by district court sitting in probate. In re Rogers' Estate, 75 Utah 290, 284 P. 992 (1930) where the pleadings were held insufficient to invoke the non-probate jurisdiction of the court sitting in probate.

In In re McLaren's Estate, 99 Utah 340 at 346–47, 106 P. (2d) 766 (1940) the question of the power of a district court sitting in probate to pass upon a non-probate matter was held waived by the parties. The court said that the
This conception of jurisdiction has several noteworthy consequences. For many purposes the line of demarcation between the equity and probate jurisdiction of the court need not be observed. In either case it is in the same court and before the same judge. Thus the court of general jurisdiction may do many things in connection with a probate proceeding that would otherwise have required a separate action or proceeding addressed to its non-probate side. It can construe a will or make partition of property, even though not essential to the exercise of its probate jurisdiction. But, where the matter is one in which there is a right to trial by jury, it must not be impaired by calling it a probate matter—in which there is ordinarily no right to a jury trial. The fusion of probate with law and equity cannot so easily abolish their essential differences. Furthermore courts must be ever alert not to proceed by citation or publication against a person in an alleged probate proceeding—a proceeding in rem—and end up by a judgment or decree in personam, for such may violate the requirement of due process.

proper procedure “when a contested question arises in a probate proceeding involving the determination of disputed facts, is to strike the matters from the probate calendar and transfer it to the calendar of civil cases to be heard and determined as a contested civil matter. ... The matter of transferring a cause from the probate calendar to a civil calendar in the same court is not a matter of jurisdiction but one of procedure.”

186 Estate of Hannerkam, 51 Ariz. 447, 77 P. (2d) 814 (1938) in which the district court in an action in which administratrix was substituted as party plaintiff approved a settlement of the action, which it could only do under its probate power.


188 In re Wren’s Estate, 163 Wash. 65, 299 P. 972 (1931).

189 Id.

190 The importance of keeping this distinction clear is well brought out in In re McLaren’s Estate, 99 Utah 340 at 354-355, 106 P. (2d) 766 (1940) in which the court said: “But again, warning should be sounded regarding the situation where a civil case is tried as a probate matter and probate matter tried as a civil case when they are respectively purely matters cognizable only as civil and as probate. It is one thing to determine a civil matter as a probate matter or a probate matter as a civil case and quite another thing to try a probate matter as a probate matter and a civil case as a civil case, although they may be addressed
3. Separate probate courts but coordinate with those of general jurisdiction

Several developments in Massachusetts have resulted in a profound change in the essential character of the probate court in that state. By a statute in 1862 the probate courts were made courts of record. In 1891 another statute made them "courts of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction." The method of accomplishing this was not left to a mere designation. The statute indicates how this is to be done, viz., by a presumption "in favor of the proceedings of the probate courts as would be made in favor of the proceedings of the other courts of superior and general jurisdiction." Both of these changes were in the right direction, but still the procedure on appeal was left untouched. Trials de novo on appeal remained before one justice of the Supreme Judicial Court under whose direction there could even be a trial by jury. Final appeal from the decision of the single justice was heard before the full Supreme Judicial Court sitting as the Supreme Court of Probate. Finally in 1920 appeals were taken directly to the full bench of the Supreme Judicial Court. The hearing before the single justice was eliminated. And the appeal has been since treated as an appeal in a suit in equity under the

to the wrong divisions of the court. The first is a matter of substance; the second a matter of labels and ministerial adjustment. . . . The probate division by virtue of its jurisdiction of the estate and the heirs for general purposes of administration could not in probate proceedings wherein the party was served by the mailing to him of a probate notice of the contest, have given judgment against him in a matter essentially civil in its nature." See also In re Martin's Estate, 82 Wash. 226, 144 P. 42 (1914); and In re Kelley, 193 Wash. 109, 74 P. (2d) 904 (1938).

193 Newhall, Settlement of Estates and Fiduciary Law in Massachusetts (3d ed. 1937) § 250.
general equity jurisdiction. Questions of fact as well as of law are considered with respect to the evidence given in the probate court. Thus the procedure on an appeal from the probate court was substantially the same as from the superior courts, i.e., on the record made in the court below and without a trial de novo. This last step was the most fruitful in elevating probate courts to a stature fully coordinate with that of the superior courts in Massachusetts.

Several other states have felt that the character of probate proceedings was such as not only to justify separate probate courts, but also that their function was of such moment that they be given the same standing as courts of general jurisdiction. Thus in Pennsylvania the orphans' courts are courts of record; and their proceedings are entitled to the same recognition and presumptions of validity as those of common pleas courts; and appeals are prosecuted to the superior or supreme court in the same manner as are appeals from the common pleas courts.

In New York substantially the same comparison may be made. The surrogates' courts are courts of record, and their proceedings and decrees are entitled to a presumption of regularity and validity. Appeals lie to the Appellate Division of the Supreme Court, in the same manner as from the Supreme Court.

A similar summary may be made in Maryland. The orphans' court is a court of record; appeals are taken di-

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197 Ibid.
198 Id. c. 215, § 12.
201 N. Y. Judiciary Law, art. 2, § 2.
204 Md. Const., art. 4, § 1.
rectly to the Court of Appeals of Maryland where they are heard on the record made in the orphans' court. 205

The administration of probate matters in New Jersey by the surrogate's court, the orphans' court, and the prerogative court has already been detailed. Appeals from orphans' courts lie to the prerogative court and from the latter to the court of errors and appeals. 206 The common pleas courts are the courts of general jurisdiction and appeals from them lie to the supreme court and from the latter to the court of errors and appeals. 207 In this respect, the orphans' courts may be termed coordinate with the common pleas courts.

The probate courts of Ohio, like the common pleas courts, are courts of record, 208 and are accorded a presumption in favor of their proceedings. 209 Appeals lie directly to the courts of appeals in the same manner as do appeals from the common pleas courts, 210 unless no record was made of the proceeding in the probate court, in which case appeals are heard de novo in the common pleas court 211 from which an appeal will then lie to the court of appeals. To the extent that appeals lie and are taken to the courts of appeal directly from probate courts, the latter are coordinate with the common pleas courts; but, to the extent that no record is made in the probate court and appeals are taken to the common pleas courts with a trial de novo, the probate courts are definitely of an inferior status.

In Wisconsin probate matters come under the jurisdiction of the county courts, 212 which also handle a limited amount of civil and criminal matters in some counties under special legis-

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205 Md. Code (1939) art. 5, §§ 64, 66.
208 Ohio Const., art. 4, § 7.
209 Shroyer v. Richmond, 16 Ohio St. 455 (1866).
211 Ibid.
212 Wis Stat. (1943) § 253.01.
lalion.213 These courts are courts of record.214 In counties having a population of 14,000 or more the county judge must be a member of the bar or have previously occupied the office of probate judge.215 In other counties no such qualifications are required. A layman may be county judge.216 Appeals from counties having a population of more than 15,000 lie to the Supreme Court; 217 in the remaining twelve counties appeals lie to the circuit court with a trial de novo.218 In the former case, the hearing on appeal is on the record of the proceedings in the county court, and otherwise has the same procedure as do appeals from circuit courts.219 Thus in counties having a population of more than 15,000 the county courts occupy a position coordinate with the circuit courts in the matter of appeals. In other counties, their position may only be described as inferior.

In Indiana administration of decedents’ estates is had in the circuit courts by circuit judges for the most part,220 similar to the California system. In Marion221 and Vanderburgh222 counties, however, separate probate courts have been created and designated as courts of record.223 Appeals from the circuit court in probate matters lie to the supreme court or one of the courts of appeals.224 As might be expected the appeal is not heard de novo but on the record, since the matter originally was heard by a circuit judge. Similarly appeals from these

214 Wis. Stat. (1943) § 253.08.
216 Wis. Stat. (1943) § 253.02, except in counties where civil or criminal jurisdiction has been conferred upon county courts.
217 Wis. Stat. (1943) § 324.01.
218 Ibid.
219 Wis. Stat. (1943) § 324.04.
220 Ind. Stat. (Burns, 1933) § 4-303.
221 Ind. Stat. (Burns, 1933) § 4-2901.
222 Ind. Stat. (Burns, 1933) § 4-3001.
223 Ind. Stat. (Burns, 1933) §§ 4-2902, 4-3002.
two separate probate courts lie to the supreme court or a court of appeals. Thus these two probate courts may be said to have the same standing as circuit courts in Indiana.

In the District of Columbia there is a separate probate term each year of the United States District Court there. That term of court is presided over by the district judge. Nevertheless there is a separate probate court, with a union of personnel. Appeals are taken to the United States Court of Appeals for the District of Columbia in the same manner as appeals from the district court. Hence the probate court for the District of Columbia is fully coordinate with the district court there.

In Tennessee the chancery courts have concurrent jurisdiction with the county court to appoint an administrator six months after the decedent's death. The county courts have concurrent jurisdiction with the chancery and circuit courts in proceedings to sell real estate of decedents, and for distribution and partition. Appeals from the county courts lie to the circuit courts with a trial de novo except that, if the jurisdiction of the county court in the matter appealed from is concurrent with that of chancery and circuit courts, an appeal lies directly to the court of appeals or supreme court. Insofar as appeals from the county court lie directly to the court of appeals or supreme court, the former may be termed coordinate with the courts of general jurisdiction in the present classification.

A Vermont statute provides that appeals from probate courts lie directly to the supreme court on questions of law, but

225 Ind. Stat. (Burns, 1933) §§ 2-3218, 2-3222, 2-3223.
227 Ibid.
229 Tenn. Code (Michie, 1938) § 10182.
230 Tenn. Code (Michie, 1938) §§ 8263, 10326, 10380.
231 Tenn. Code (Michie, 1938) §§ 9028, 9033, 9060.
otherwise to the county courts. To the extent that appeals lie directly to the supreme court, the probate courts of Vermont are coordinate with the courts of general jurisdiction.

In Illinois, appeals from a final order of the probate court in a proceeding for the sale of real estate lie to the appellate or supreme court of that state, rather than to the circuit courts. In this one instance, probate courts in Illinois are clearly coordinate with those of general jurisdiction.

In each of the first five states discussed here, probate proceedings are believed to be of such a character and volume as to justify a separate probate court substantially on a par with those of general jurisdiction. Certainly in Massachusetts, New York and Pennsylvania, and in certain communities of New Jersey, Maryland and Ohio, the population and amount of probate business is large enough to warrant the establishment of separate courts.

4. Probate matters handled in chancery

In most states the aid of chancery may be sought only when the power of the probate court is insufficient for the desired end. In Alabama any person interested in an estate may, at any time prior to final settlement, take the proceeding into chancery. Even under the early decisions of that state, no reason need be given. It was a matter of absolute right. This was probably a broader jurisdiction than was exercised by English chancery courts over decedents' estates. In this was embodied in a statute there. Under the present practice an estate may be removed either to the circuit court or to chancery. In effect then, there is concurrent juris-

236 See Sims, Chancery Pleading and Practice in Alabama (1909) § 658 and cases there cited.
238 Ala. Code (1940) t. 13, §§ 138, 139.
239 Ala. Const., art. 6, § 149.
diction in the probate, circuit and chancery courts to administer estates in Alabama.

In Mississippi jurisdiction over probate matters in the county courts was abandoned in 1890 and conferred entirely upon the chancery courts. This put probate jurisdiction in a court which had exercised it upon special occasions previously and which had ample equipment and personnel capable of the new task assigned to it. Furthermore, it eliminated any question as to the amount of equity powers possessed by the probate court or whether the circumstances of a particular administration proceeding warranted the intervention of chancery.

Prior to 1939 there were separate probate courts in Arkansas. By a constitutional amendment, effective January 1, 1939, the judges of the chancery courts have been given the added duty of presiding over the probate courts. It is said that the probate courts have not lost their identity by such consolidation, but that they remain probate courts in chancery. However, the effect of transferring this function to the judges of the chancery courts cannot be merely formal; it will likely import into probate proceedings some of the equitable practices and doctrines known and practiced in courts of chancery.

In addition to these three states where chancery has a hand regularly in the administration of probate matters, there are numerous situations that arise in the administration of estates where it is thought that the machinery of probate courts is inadequate to deal with the problem; and that because of special circumstances, the invocation of equity jurisdiction is justified. This is an established practice in most states at the present time. The occasions for this special jurisdiction of

240 Miss. Const., art. 6, § 159.
241 Some idea of the extent as to the uncertainty of equity powers possessed by probate courts is described in Pound, Organization of Courts (1940) 140.
equity over the administration of estates are not within the primary purpose of this study and cannot, therefore, be treated here.244

IV. Court Organization in Relation to Controversial and Noncontroversial Business

In any matured system of law the administration of a decedent’s estate may involve both contentious and noncontroversial matters. Thus, first, it is entirely possible that all interested parties are agreed that a will is valid, or that there is no will and that the property should be distributed to creditors and to devisees or heirs on some fair basis. Or, second, there may be a dispute as to whether the will propounded is valid; there may be adverse claims to the office of executor or administrator; a creditor’s claim may be disputed by an executor or administrator; a dispute may arise as to priorities in the payment of legacies when the estate is insufficient to satisfy all. As to this second type of administrative matter, it is difficult to escape the conclusion that it involves the judicial determination of controversies of the same general character as are handled by the civil side of a trial court of general jurisdiction. It calls for the same capacity to supervise impartially the trial of contested issues, the same ability to determine accurately the application of complicated rules of law to the transmission of property interests. In short, it would seem that the contentious business of the court should be handled by a judge with as high qualifications as the trial judge.

As to noncontentious matters, the situation may be different. Here it is conceivable that the estate could be distributed without any judicial intervention at all. Indeed, the Roman law system, with its conception of universal succession,245 accom-

244 As to the jurisdiction of equity to administer estates, see 1 Woerner, Administration (3d ed. 1923) §156; “Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees,” 48 Yale L. J. 1273 (1939).
245 Buckland, Textbook of Roman Law (2d ed. 1932) 282 ff.
plished just that. And the modern tendency of legislation in the United States to dispense entirely with administration in the case of small estates is to the same effect. Nevertheless, there are many cases where some judicial action is desirable even though there are no controversies among the interested parties. This becomes particularly important in view of the current trend, elsewhere noted, to provide that the probate court distribute land by its decree. In spite of the lack of disagreement among persons interested in the estate, they may well need the aid of a court to determine what is a just basis of distribution; they may wish to distribute in such a way as to avoid disputes in the future; and, to further that end, they may desire to have an official record of the distribution which has been made. Thus, the noncontentious business of the court is an important function of the judicial organization. No statistics are required to justify the observation that the vast majority of smaller estates is handled by American probate courts without any controversies whatever. Administration in court is then desired solely for the purpose of having the property of the decedent disposed of in an orderly way.

As to the noncontentious business of the court, it is not so clear that an efficient trial judge is needed. Certainly, by hypothesis, there are no disputed issues to try. And much of the noncontentious business is mere routine which can well be handled by a superior type of clerk or probate register. Of course, insofar as the action of the court in noncontentious business involves the avoiding of potential disputes, it would seem to call for the same understanding of the intricacies of property law as is necessary when there is an actual dispute.

It is the purpose of the discussion which follows to consider how far the court organization in typical jurisdictions is adapted

246 See Atkinson, Wills (1937) 529-540.
247 See Subdivision V of this monograph.
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to a differentiation between contentious and noncontentious business. The sharp differentiation in English law will first be pointed out. Then the probate judicial organizations of various typical states will be considered in connection with the questions: How far have they retained the distinction between contentious and noncontentious business emphasized in the English system which served as their model? How far have they developed a basis of differentiation unlike the English model? The answer to these questions will involve some consideration of the matter of will contests and of appeals by trial de novo in the court of general jurisdiction. But it must be pointed out that the handling of contentious and noncontentious business is under consideration here only as a matter of court organization and not as a matter of probate procedure.

In the English ecclesiastical courts, the line between contentious and noncontentious business was pretty much the line between probate in common and in solemn form, heretofore referred to. If a will were probated in common form there was no notice to interested parties; proof generally consisted merely in the executor taking oath that he believed the instrument presented was duly executed by a competent testator. If a caveat were filed by the next of kin, proof in solemn form then had to be made; interested parties were cited; and the attesting witnesses testified as to the execution of the will. The hearing was before the ordinary. Contested issues as to the account of the personal representative and as to a legatee’s right to his legacy could also be tried in the ecclesiastical courts. As to the real estate, noncontentious business would seem to have been handled without any judicial assistance whatever; and contentious matters were dealt with either in the courts of law or of equity, depending upon the nature of the controversy.

Doubtless the distinction between the probate of a will in solemn form and in common form was not developed primarily
for the purpose of judicial efficiency. One reason for it must have been the belief that the decedent's estate required management from the moment of his death; and that to wait for notice before the appointment of an executor or administrator would result in a wasting of the property of the decedent. This idea is voiced in the Report of the Commissioners Appointed to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts, which appeared in 1832. Concluding that the probate in common form should be retained, the report states:

"For Probate so granted in common form, the only security is the Oath of the Executor; and experience has proved that for the immense majority of cases it is amply sufficient. A very little consideration will show that it would be absolutely impossible to establish any a priori guards or cautions, which would not, from the delay and expense, occasion an infinitely greater loss to the Public, than may sometimes arise from what is called snatching Probate of a paper, afterwards found not entitled thereto. Any notice to Heirs-at-law, next of Kin, prior Devises, or Legatees, would be found utterly incompatible with the expedition and economy, which are the most essential ingredients in the administration of every-day justice."

However, it must have seemed both inefficient and unduly expensive to require citations to interested parties and proof by both attesting witnesses before the ordinary in a case where there was no controversy whatever as to the due execution of the will.

The present English probate organization distinguishes sharply between contentious and noncontentious business; and it would seem that this distinction bears a direct relation to the maintenance of efficiency in the court organization. Noncontentious business is defined in the Supreme Court of Judicature

\[^{248} \text{p. 37.}\]
Consolidation Act of 1925, in almost exactly the same terms as are used in the Court of Probate Act of 1857, as follows:

"'Noncontentious or common form probate business' means the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated, and all business of a noncontentious nature in matters of testacy and intestacy not being proceedings in any action, and also the business of lodging caveats against the grant of probate or administration."

The Principal Registry of Probate at London has jurisdiction of noncontentious business, and legislation also provides that grants may be made in common form by district probate registrars. Without doubt the bulk of the probate business of England is handled as noncontentious business by probate registrars. Otherwise it would be quite impossible for five judges to handle all the probate business for the people of England. In the latest edition of Tristram and Coote's Probate Practice this noncontentious procedure is described.

"The solicitor, in order to obtain a grant of representation to a deceased person in the Principal Registry, must leave at the Receiver's Department the 'papers to lead the grant,' viz. the will and codicils (if any); the oath; the bond (if any); the Inland Revenue affidavit, duly stamped, and such affidavits, renunciations, certificates, etc., as may be necessary. The Receiver gives a receipt for the papers...

"In the registry, the calendars are searched to ascertain that no other grant has been made in respect of the same estate, the papers are examined at the 'Seats' Department, and, if approved, a form of grant is prepared, and attached

249 15-16 Geo. 5, c. 49, § 175, p. 1197 at 1286 (1925).
251 15-16 Geo. 5, c. 49, § 150 (1925).
252 15-16 Geo. 5, c. 49, § 151 (1925).
253 Tristram & Coote's Probate Practice (18th ed. 1940) 14.
to a photographic copy of the will and codicils (if any). The grant is signed by the Registrar and sealed with the seal of the Probate Division.

"On the production of the receipt given by the Receiver the grant usually can be obtained at the Sealer's Department after 12:30 p.m. on the fourth day after the papers were lodged."

Contentious probate business is handled before one or more judges of the High Court.254

In the United States the form of probate court organization in the majority of jurisdictions appears to indicate some recognition of the difference between contentious and non-contentious business; though in others this differentiation has apparently been lost sight of. Thus, as is indicated later, in a large group of states an appeal from the decision of the probate court involves a trial de novo in the court of general trial jurisdiction. In those jurisdictions the probate judge ordinarily is not required to have as high qualifications as the trial judge. Not infrequently he is not required to be a member of the bar at all; his salary is, in practically all cases, less than that of the judge of the trial court of general jurisdiction. In a general way it may be said that noncontentious matters come before the probate judge and that, in those matters in which the contest is more serious, the issues are settled before the trial court of general jurisdiction. There is nothing to prevent the probate judge from hearing contentious matters. Indeed, ordinarily he must do so in the first instance. But, if a party is sufficiently interested to appeal, he can have the issues tried anew by the trial judge. In a considerable group of states there is more or less of an attempt to retain the old distinction between probate in common and in solemn form. That is to say, probate may be summary and

254 15-16 Geo. 5, c. 49, §§ 20, 55, 56 (1925); 18-19 Geo. 5, c. 26, § 6 (1928).
without notice; or it may be on notice to interested parties; and the proceeding on notice may be either the original hearing or a subsequent hearing on the issue before the same court. In many states provision is made for a proceeding known as a contest, which is a trial of the issue on the due execution of the will. It has sometimes been said that the contest is similar to the old probate in solemn form. However, in some states it would seem to resemble the device of framing the issue _devisavit vel non_ and sending it over to a court of law to be tried. Very commonly contest takes place in the trial court of general jurisdiction. A brief consideration of the procedure in a few typical states will illustrate the extent to which there is any differentiation of function with respect to contentious and noncontentious business.

Florida, although it has recently enacted a new probate code, is one of those jurisdictions which still retains something of the old distinction between probate in common and in solemn form. Probate is in the county judge's court. No citation to interested parties before probate is required unless a caveat has been filed by an heir or distributee. Then the caveator must receive notice. When a will is admitted to probate, the personal representative or any other interested person may take steps to have interested parties served with notice, including notice by publication. A subsequent hearing in the judge's court for revocation of probate (which apparently takes the place of the will contest or probate in solemn form found in some states) may be had on the petition of an interested party. The privilege of petitioning for revocation of probate is limited to any heir or distributee of the estate of a decedent except those who have been served.

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256 See Luther v. Luther, 122 Ill. 558, 13 N. E. 166 (1887); Shaw v. Camp, 61 Ill. App. 68 (1895); Collier v. Idley's Exrs., (N. Y. 1849) 1 Bradf. Surr. 94.
with citation before probate or who are barred under section 732.29 (the section dealing with the case where an heir or distributee has filed a caveat). 259

In Georgia the procedure follows much more closely the English ecclesiastical procedure. 260 Probate may be either in common or in solemn form before the court of ordinary. The statutes also provide for an appeal with trial de novo in the superior court, which is the trial court of general jurisdiction.

In Missouri the original hearing for probate of the will may be without notice, 261 but there is no provision for contest in the probate court. This takes place in the trial court of general jurisdiction and is in the nature of an appeal with trial de novo. 262 Unlike Florida, however, the Missouri statute permits any interested party to contest and does not limit the 'right to contest to persons who were not served with notice of the original application for probate in the probate court. 263 Missouri is also one of those states which recognizes that an appeal from a decision of the probate court involves a trial de novo of the issues in the circuit court. 264

In nearly half the states no grant of probate or administration, other than the appointment of a special administrator, is possible without notice to interested parties unless such notice is waived. In some of these there is a provision for contest after probate; in others there is not. In Michigan, for example, there is no provision for contest after probate, as such. But if interested parties file a contest before probate in the

probate court, the whole matter may be transferred to the circuit court for hearing.\textsuperscript{265} Moreover, provisions for appeal by trial de novo in the circuit court\textsuperscript{266} have the effect of a contest after appeal in the trial court of general jurisdiction.

In California the trial court of general jurisdiction, namely the superior court, is the court in which probate matters are heard. Moreover, appeals are not trials de novo but are heard by the same appellate courts which hear appeals in civil cases. In spite of the fact that the petition for probate or administration is always heard on notice to interested parties,\textsuperscript{267} statutes provide for a contest after probate, which takes place in the superior court sitting in probate.\textsuperscript{268} Contest after probate is permitted by an interested person, "other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein."\textsuperscript{269} In California, since notice is required before probate and since the trial court of general jurisdiction is the court handling probate matters, it would seem that the provisions for contest after probate are at variance with any attempt to differentiate between contentious and noncontentious business. Quite possibly contest after probate bears some slight resemblance to probate in solemn form. But if so, it merely means that there may be two hearings, instead of one, on the question of the due execution of the will.

In at least two important jurisdictions, New York and Massachusetts, where proceedings for probate or administration are initiated on notice to interested parties, there is, strictly speaking, neither contest after probate nor trial de

\textsuperscript{267} Cal. Prob. Code (Deering, 1941) §§ 327, 441.
\textsuperscript{268} Cal. Prob. Code (Deering, 1941) § 380.
\textsuperscript{269} Cal. Prob. Code (Deering, 1941) § 380.
novo on appeal. In New York, in order to contest the will, objections must be filed in the surrogate's court at or before the close of testimony for the proponent, or at such subsequent time as the surrogate may direct. But it is clear that this contest takes place in the surrogate's court before the will is admitted to probate. In Massachusetts, the only contest is one arising in the probate court before the will is admitted to probate. The probate judge, however, has the power to send issues to the superior court to be tried there before a jury.

To present an adequate account of the differentiation between contentious and noncontentious business, something should be said with reference to the function of clerks and registers of probate. This matter is discussed at some length in subsequent paragraphs. At this point it may be observed that, in most jurisdictions, the clerk or register has no judicial powers. But, even if he does not, the clerical business of the court may be so handled by him that the judge is enabled to supervise a very large volume of judicial business. This obviously is true in New York City, although the New York statutes do not give the clerk of the surrogate court judicial powers.

By way of conclusion on the general question of the distinction between contentious and noncontentious business, the following observations are presented for consideration: The common practice of having a probate judge with inferior

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271 N. Y. Surr. Ct. Act, § 147. It is true, however, that on an appeal upon the facts, the appellate court has "the same power to decide the questions of fact which the surrogate had" and may receive further testimony. See N. Y. Surr. Ct. Act, § 309.


qualifications handle all probate business in the first instance, with contest or trial de novo in the trial court of general jurisdiction, doubtless, in a rough way distinguishes between contentious and noncontentious business. It is true, the probate judge has jurisdiction over contentious as well as noncontentious business. But if a party to the contentious business regards the issue of sufficient importance, he can, by the device of contest or appeal, have it tried again in the trial court. However, it would seem that this is a very inefficient way of distinguishing between contentious and noncontentious business. The probate judge, in spite of his lack of superior qualifications, does try contentious matters in the first instance; and when they are tried anew in the trial court, the result is a wasteful duplication of judicial effort. The prevalent doctrine that there should be one trial and one appeal would seem to be applicable to issues in probate courts as well as elsewhere. Where there is adequate notice for the first hearing and a judge of sufficient ability, there would seem to be little or no justification for a retrial of the issues in the probate or any other court. Such is the result reached in New York and Massachusetts, where no contest after probate is provided for and a judge who is sufficiently qualified to make a final decision on the issues sits in the surrogate or probate court.

There are, however, strong arguments for an ex parte hearing without notice, somewhat like the old probate in common form. This prevents the expense and inconvenience of a special administratorship, and probably results in less wasting of the estate immediately after the death of the decedent. If such a hearing is permitted, it would be possible, as in England, to have its routine handled by clerks or registrars. But the whole matter could well be under the direct supervision of a judge of recognized competence. A further hearing on the issue involved at such summary hearing should
then be permitted before the same court, but only on the petition of interested parties who were not served with notice or did not appear in the first hearing.

V. JURISDICTION OF PROBATE COURTS OVER LAND

As has already been indicated, one of the most serious defects in the English probate system of the period prior to the middle of the nineteenth century was the great divergence in the treatment of real and personal estate. The ecclesiastical courts had no jurisdiction whatever over the decedent's land. They admitted wills of personalty to probate; but wills of land were not probated there nor anywhere else. The personal representative took title to personalty; the title to land passed to the heir or devisee immediately on the death of the decedent. But by English legislation previously described the treatment of land and personalty became practically uniform. A will of land is now probated just as a will of personalty. The jurisdiction of the Probate Division over the administration of the decedent's land was accomplished by the simple expedient of a statute which provides that interests in land pass to the personal representative just as chattels had passed theretofore.

We are now ready to consider the question: To what extent have American probate courts acquired jurisdiction over the lands of decedents? Certainly they have departed radically from the pattern of the English ecclesiastical courts; yet it is clear that the development has not been like that of the modern English probate jurisdiction.

The subject of our inquiry is obviously significant as a matter of procedure and due process. It is believed that the entire proceeding to administer the estate of a deceased person is a unit and is a proceeding in rem. If that be true, and if

274 See subdivision I, supra.
275 60-61 Vict., c. 65 (1897).
the probate court does in fact administer the real estate of the decedent, then a reasonable notice to interested parties at the time of the initial step in the administration proceeding would suffice for hearing on all subsequent matters. On the other hand, if the probate court has no general jurisdiction over land, but acquires it merely for the purpose of some particular step in the proceeding, such as land sales or the collection of rents, then notice to interested parties must be given at each such step.

Here, however, we are interested primarily in court organization rather than in procedure or due process as such. But in that connection also the question of jurisdiction over land is significant. It is commonly assumed that inferior courts, such as justice courts and county courts, are not to be entrusted with issues involving the determination of titles to land. These matters are normally placed in the hands of the trial judges or of others equally well qualified. If, then, the probate court has jurisdiction of the land of the decedent, that is a strong argument for a highly qualified judge in the judicial organization.

It is believed that in every jurisdiction in this country the probate court has some jurisdiction over land of the decedent. The extent of this jurisdiction, however, varies greatly. For convenience our subject of inquiry may be stated in the form of three questions. First, does the probate court have jurisdiction over the probate of a will of land? Second, to what extent, if any, does the personal representative have title to land during administration? Third, does the probate court exercise general control over the land of the decedent throughout the course of administration? In other words, is the decedent's land subject to the jurisdiction of the probate

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276 This, of course, refers to a minimum requirement. It would seem desirable, aside from questions of constitutionality, to have some sort of notice for sales of land.
court from the initial steps to have the will probated or to secure a grant of administration up to the time of the final order of distribution?

First, as to probate of wills of land, it is believed that the old English doctrine that a will of land is not subject to probate has almost entirely disappeared in this country. In nearly every jurisdiction a testamentary disposition of land must be admitted to probate before devisees can claim under it. This result in many states is based on statutes to the effect that no will is effectual to pass title to real or personal property without probate or that a will cannot be introduced in evidence until admitted to probate. In a very few jurisdictions the necessity for and effect of probate of a will of real property may not be the same as that of a will involving personalty; but it is believed that wills involving real property are subject to probate in all states.

Second, does the personal representative have title to land during administration? In general, the answer is that he does not. That is to say, the majority of jurisdictions adhere to the old English view that title to personalty passes to the

277 See, for example, Mich. Stat. Ann. (1943) § 27.3178(90): “No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court as provided in this chapter, or on appeal, in the circuit court or supreme court; and the probate of a will of real or personal estate, as above mentioned, shall be conclusive as to its due execution.”

Ky. Rev. Stat. (1942) § 394.130: “No will shall be received in evidence until it has been allowed and admitted to record by a county court; and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until superseded, reversed or annulled.”

In some states the courts have decided, without the aid of a statute, that a will devising land must be admitted to probate. Inge v. Johnston, 110 Ala. 650, 20 So. 757 (1895); Farris v. Burchard, 242 Mo. 1, 145 S. W. 825 (1911).

278 Thus, in New York (N. Y. Surr. Ct. Act, § 144) specific provision is made for the probate of a will involving real property. But it would seem that this is not necessary to prove title. See Bouton v. Fleharty, 215 App. Div. 180, 213 N. Y. S. 455 (1926); Corley v. McElmeel, 149 N. Y. 228, 43 N. E. 628 (1896).

In Tennessee the order admitting to probate may not have quite the same conclusive effect on real property which it has with respect to personalty. State v. Lancaster, 119 Tenn. 638, 105 S. W. 858 (1907); Grier v. Canada, 119 Tenn. 17, 107 S. W. 970 (1907).
personal representative, but that title to real estate passes to the heir or devisee.\textsuperscript{279} In no jurisdiction does title to all the decedent’s realty pass to the personal representative as is provided in the present English legislation. It is true, in Georgia, Oregon and Virginia, statutes provide that the title to land registered under land registration acts (that is, so-called Torrens system registration) passes to the personal representative.\textsuperscript{280} And a Georgia statute indicates that in that state for some purposes title to devised land passes to the executor and not to the devisee during administration; \textsuperscript{281} but legislation in the same state provides that title to intestate land passes to the heir.\textsuperscript{282}

In two states,\textsuperscript{283} California and Texas, are found statutes which indicate that title to both real and personal property

In general, on the necessity of probate of a will involving real property, see Appendix note to §§ 81–85 of Model Probate Code.

\textsuperscript{279} Hooker v. Porter, 271 Mass. 441, 171 N. E. 713 (1930); Richards v. Pierce, 44 Mich. 444, 7 N. W. 54 (1880); Roorbach v. Lord, 4 Conn. 347 (1822). For statutes providing that real estate passes directly to the heirs or devisees, see N. M. Stat. (1941) § 33–702; Wash. Rev. Stat. (1932) § 1366. In general, see ATKINSON, WILLS (1937) 528–530; 4 PAGE, WILLS (3d ed. 1941) § 1566.

\textsuperscript{280} Ga. Code Ann. (1937) § 60–508; Ore. Comp. Laws (1940) § 70–368; Va. Code (1942) § 5225 (this section provides that the acts establishing the Torrens system be continued in force. Section 61 of that act as amended provides that title to registered land vests in the personal representative).

\textsuperscript{281} Ga. Code Ann. (1936) § 113–801: “All property, both real and personal, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy.”

And see Peck v. Watson, 165 Ga. 853, 142 S. E. 450 (1927).

\textsuperscript{282} Ga. Code Ann. (1936) § 113–901: “Upon the death of the owner of any estate in realty, which estate survives him, the title shall vest immediately in his heirs at law, subject to be administered by the legal representative, if there is one, for the payment of debts and the purposes of distribution.”


In a few other states are found statutes which are to the effect that the property of an intestate person, both real and personal, passes to his heirs subject to the control of the court and to the possession of the administrator. The following are of this variety: Idaho Code (1932) § 14–102; Mont. Rev. Code (1935) § 7072; N. D. Comp. Laws (1913) § 5742; Okla. Stat. (1941) t. 84, § 212; S.D. Code (1939) § 56.0102.
passes to the distributee and not to the personal representative. The California statute is as follows:

“When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in Division 2 of this code: but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division 3 of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code.”

Much can be said for legislation of this character. Certainly, there is no real justification today for a distinction between real and personal estate with respect to the title of the personal representative. The explanation for it is purely historical. But it is doubtful whether the modern English rule giving the personal representative title to all property of the decedent, both real and personal, would work well in the United States. Frequently estates are not administered at all. And in such cases the matter of determining title would be simplified if legislation like the California statute just quoted were in force. The title is then in the distributees whether the estate has been administered or not.

Of course, the mere fact that title to realty is in the distributee or is in the personal representative, during administration, does not go far in describing the real situation. In all jurisdictions, regardless of what technical rule is in force as to the location of title, the distributee has some interest in the property as of the time of the decedent’s death.284 On the

other hand, even under the California type of statute, it is clear that the personal representative has a very substantial interest in the estate during the course of administration, though it may be described in terms of a right to possession or a power of disposition rather than in terms of title.

The third and most important question to be raised is: Does the probate court exercise jurisdiction over the decedent's lands throughout the course of administration? In many states there can be no doubt that the answer is in the affirmative. Thus, in the California statute as to the title of distributees, which has already been quoted, it is stated that such title is "subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division 3 of this code." Another California statute provides that the personal representative must take possession of all the estate of the decedent, real and personal. In other states the matter is not so clear; no such statutes as these are found. And it is necessary to consider the jurisdiction of the probate court over land in a number of specific situations, such as the contents of the inventory, judicial sales and the decree of distribution. In some of these states we shall find that the jurisdiction of the probate court is limited to particular proceedings with respect to land or to particular lands of the decedent. But in others we may conclude from these specific provisions as to jurisdiction that the court does have general jurisdiction over the decedent's lands during the whole course of administration.

In a majority of states, statutes require that lands be included in the inventory. It is believed, however, that this

286 The statutes in the following states so provide: Ariz. Code (1939) § 38-803; Cal. Prob. Code (Deering, 1941) § 600; Colo. Stat. (1935) c. 176, § 145; Conn. Gen. Stat. (1930) § 4911 (all the property except real estate situated outside the state); D. C. Code (1940) § 18-401 (inventory includes...
may not be of great significance in determining the question of jurisdiction. Its purpose may well be to enable the court to determine how large the estate is and whether it is solvent. Thus, in Massachusetts land must be included in the inventory. Yet the personal representative ordinarily has no right to the rents and profits during the administration. The decree of distribution does not deal with real estate. And, while sales of land take place under license of the probate court, the personal representative has no right to deal with any land until such license is obtained. One writer on the subject has summed the matter up by saying: "Ordinarily, unless the will provides otherwise, the executor or administrator has nothing directly to do with real estate." On the other hand, in New York state, where the inventory does not include real estate, the surrogate's court

**Footnotes:**

287 In Lindholm v. Nelson, 125 Kan. 223 at 229, 264 P. 50 (1928), the court said: "There are several reasons why it is advisable to have the real estate listed in the inventory, but this listing gives the administrator no authority over it, and gives the probate court no jurisdiction to dispose of it, except under conditions specifically provided by statute."


291 NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS (3d ed. 1937) p. 189, § 76.

292 See note 13 supra.

293 Towle v. Swasey, 106 Mass. 100 (1870).
is by statute given power "in the cases and in the manner prescribed by statute. To direct the disposition of real property, and interests in real property of decedents, and the disposition of the proceeds thereof" and perhaps it may be said that the court has at least potential, if not actual, jurisdiction over the decedent’s land during probate.

In most states, sales of land to pay debts and legacies are, or can be, handled in the probate court. In others, it is necessary to initiate an independent proceeding in the court of general jurisdiction for this purpose. If a state is of the latter group, it is clear that the probate court does not have general jurisdiction of land of the decedent. On the other hand, if the sale is in the probate court, it may be that, as in Massachusetts, only the specific piece of land to be sold comes under the supervision of the probate court for this purpose.

Other provisions in various states, dealing with the jurisdiction of the probate courts (or of personal representatives) over land in particular situations, are statutes as to the specific performance of land contracts, statutes as to the personal representative’s right to the possession of land, or to the rents

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294 Id. at § 40. The personal representative is given power to take possession of the real property and sell, mortgage or lease it. N. Y. Dec. Est. Law, §§ 13 and 123. In general, see 3 Warren's Heaton, Surrogates' Courts (6th ed. 1941) § 230.

295 States in which the probate court (or other court exercising probate jurisdiction) does not handle sales of land are Kentucky, Nebraska, New Mexico and West Virginia. In North Carolina the clerk of the superior court has the functions of a probate court, but sales of real estate are handled by the superior court itself. Indiana probably belongs to this group also. In that state the circuit court handles probate business, sitting as a probate court, and also has ordinary civil jurisdiction. Sales of land are handled in this court in a separate proceeding, but it may be questioned whether such a proceeding is in the probate or civil side of the court.

In other states the probate court (or other court exercising probate jurisdiction) has jurisdiction over sales of land. This jurisdiction may be exclusive, e.g., Ga. Code Ann. (1937) § 24-1901, or concurrent with some other court, e.g., Va. Code (1942) § 5396.

296 For a statute of this sort, see Neb. Comp. Stat. (1929) § 30-1102.

and profits of it, statutes as to his right to bring particular suits with respect to land, statutes providing for a specific decree of distribution to include interests in land, statutes providing for the partition of interests of distributees in land, and statutes providing for the determination of heirship.

Perhaps the most significant of these are the ones dealing with the personal representative’s control of real estate and with the decree of distribution. The California statutes requiring the personal representative to take control of real estate have already been referred to. The Indiana statute provides that the personal representative may take possession of the real estate if there is no heir or devisee to take posses-

298 Cal. Prob. Code (Deering, 1941) § 573: “Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon . . . may be maintained by and against executors and administrators.”

Fla. Stat. Ann. (1941) § 733.02 provides that the personal representative may bring actions with respect to real property for the purpose of quieting title for trespass, for waste, and against co-tenants. Provision is also made for heirs or devisees themselves, or jointly with the personal representative, to bring suits for the possession or recovery of real estate or to quiet the title thereto.

While presumably in neither of these states would the suit be brought as an action in probate, the personal representative would, in suing, be acting as an appointee of the court sitting in probate.

300 These are of two kinds: (a) Those providing for partition where the decedent was a co-tenant. Here the suit would not ordinarily be in the probate court. See Cal. Prob. Code (Deering, 1941) § 575. (b) They may provide for a partition in the probate court by heirs or devisees who take the decedent’s land as co-tenants.

301 In a jurisdiction where there is a specific order of distribution which includes land, the proceeding for the determination of heirship is likely to be an independent proceeding, whether it is in the probate court or not, because it is chiefly employed in a case where there has been no administration proceeding. See Minn. Stat. (1941) § 525.31, where the proceeding is in the probate court, and applies to unadministered land or to situations “when real estate or any interest therein has not been included in a final decree.” But compare Mich. Stat. Ann. (1943) §§ 27.3178(145) to 27.3178(149) where the determination is in the probate court and may be either independent of or a part of the administration proceeding. Where the personal representative does not take charge of land and the probate court does not purport to distribute it, it would seem that the determination of heirship is an independent proceeding. See Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 209-211 (probate court).

302 See notes 10 and 12, supra.
sion, but does not require him to do so. Still other states vest the right to possession of land in the heir or devisee. Some statutes expressly provide that the personal representative is entitled to rents and profits of land, and, indeed, this would seem to be implied where he is given a right to possession.

In a considerable number of states the decree of distribution must make a specific distribution of real and personal property of the estate. Thus, the Michigan statute on this subject reads in part as follows:

"... the probate court shall, by order for that purpose, assign the residue of the estate, if any, to such persons as are by law entitled to the same ..."

"In such order the court shall ... name the persons and the proportions or parts to which each shall be entitled."

It is not uncommon to have a statute such as the above followed by provisions for the partition of interests of codistributees. Thus the provisions in the Michigan probate code on this subject begin as follows:

"When the estate, real or personal, assigned to 2 or more heirs, devisees or legatees shall be in common and undivided, and the respective shares shall not be separated and distinguished ... the probate court may on the petition of any of the persons interested fix a date for hearing on the partition and distribution."

In other states the only provisions for a decree of distribution are restricted to personal property.

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302 See Ind. Stat. (Burns, 1933) § 6-1151.
304 E.g., Ariz. Code (1939) §§ 38-809.
Returning to our original question, it would seem that if statutes give the personal representative possession of the real estate during the administration and provide for a probate decree distributing the real estate to those entitled, the probate court does have jurisdiction over the decedent's lands throughout the course of administration. On the other hand we may in some instances reach the same conclusion without both of these types of statutes. But in other states, all we can conclude is that the probate court does have jurisdiction of the decedent's lands in certain matters during administration.

In conclusion, it is apparent that a majority of probate courts have a very considerable jurisdiction over land. While it is true that the mere filing of an inventory which includes land or the probating of a will devising land does not call for any extensive knowledge of land law, when it comes to making a specific decree distributing land, the same knowledge of the intricacies of the law of real property is required of the probate judge as is called for in the case of the trial judge who construes a complicated land trust agreement. Indeed, whether the statutes specifically empower the probate court to construe wills or not (and many of them in fact do so) the judge who makes a specific decree of distribution, such as is required by the Michigan statute already quoted, must be prepared to construe an intricate testamentary disposition of land. When we add to that the fact that many statutes also give the probate court jurisdiction of testamentary trusts involving land, and even, in some states, of inter vivos trusts involving land, the conclusion is hard to avoid that a judge is needed in the probate court who is as well qualified as the judge of the trial court of general jurisdiction. Indeed it might be said that he should be a specialist in the law of property in its broadest aspects.

VI. Jurisdiction of Probate Courts Over Matters Other Than Decedents' Estates

The scope of probate court functions has ever been a varying one. We have already traced one aspect of this in noting an expanding jurisdiction and control over the administration of decedents' estates. Jurisdiction in other fields has also been gradually added to that possessed by the probate court as an established institution. The totality of its functions today makes the maintenance of a probate court in every county almost a necessity.

Mention has been made of the origin of orphans' courts in this country. If it was a natural step for probate jurisdiction to be conferred upon orphans' courts, it certainly was not an unnatural step for a jurisdiction over minors and their estates to be added to organized probate courts elsewhere. The historical amalgamation of guardianship and curatorship with probate jurisdiction is readily understandable where occasioned by the administration upon a decedent's estate in which minors are interested.

In England guardians of the person and property of minors were appointed by the court of chancery and the court of exchequer. They were also appointed by ecclesiastical courts with respect to personalty. In America a general power to make such appointments has always been regarded as inherent in courts possessing equity powers. No interest in a decedent's estate is necessary to invoke this power. But the expensiveness and cumbersomeness of equity procedure early led to giving this jurisdiction—at least a concurrent one—to other courts. Guardianship of the persons of minors and of their

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309 See discussion under II-B at note 59, supra.
310 Woerner, Guardianship (1897) § 16.
311 Id. at § 3.
312 Id. at § 18.
313 See, for example, Complete Revisal of all the Acts of Assembly of the Province of North Carolina, printed by Davis, 285-291 (1773) and Laws of
estates has since become an established part of probate juris-
diction. A constitutional provision conferring general jurisdic-
tion upon probate courts in all probate matters has been
said to include the power to appoint guardians. Only in
rare cases does equity appoint guardians or assume a continu-
ning control over them.

Guardianship over insane persons, lunatics, idiots, imbeciles
or incompetents by whatever name they may be called, origi-
nally within the jurisdiction of the English chancery courts,
has also been lodged for the most part in established probate

North Carolina, edited by Iredell, 202-208 (1791) (act of 1762). See also
WOERNER, GUARDIANSHIP (1897) § 18.

This development is fully described in WOERNER, GUARDIANSHIP (1897)
§ 24. Jurisdiction over guardians of minors and their estates is vested in the
court exercising probate jurisdiction as follows: Ala. Code (1940) t. 13, § 278;
Code (Deering, 1941) § 1405; Colo. Const., art. 6, § 23; Colo. Stat. (1935)
c. 76, § 1, c. 176, § 83; Conn. Gen. Stat. (1930) §§ 4973, 4808; Del. Rev.
§ 36.01; Ga. Code Ann. (1936) §§ 24-1901; Idaho Const., art. 5, § 21; Idaho
Code (1932) § 1-1202; Ill. Const., art. 6, §§ 18, 20; Ill. Ann. Stat. (Smith-
Hurd, 1941) c. 37, § 303; Ind. Stat. (Burns, 1933) §§ 4-303, 4-2910,
Const., art. 6, § 7; Minn. Stat. (1941) § 525.54; Miss. Code (1942) § 404;
§§ 27-503, 27-504; Nev. Const., art. 6, § 6; N. H. Rev. Laws (1942) c. 346,
N. D. Const., art. 4, § 111; N. D. Comp. Laws (1913) § 8524; Ohio Const.,
art. 4, § 8; Ohio Gen. Code (Page, 1937) § 10501-53; Okla. Const., art. 7,
§ 13; Okla. Stat. (1941) t. 20, § 271; Ore. Comp. Laws (1940) §§ 13-501,
c. 426 and c. 569, § 1; S. C. Code (1942) §§ 208, 209; S. D. Const., art. 5,
§ 20; S. D. Code (1939) §§ 35.1801 et seq. and 32.0909; Tenn. Code (Michie,
Const., art. 8, § 24; W. Va. Code (1937) § 357; Wis. Stat. (1943) §§ 253.03,

United States Fidelity & Guaranty Co. v. Hansen, 36 Okla. 459, 129 P. 60
(1912); Monastes v. Catlin, 6 Ore. 119 (1876).

WOERNER, GUARDIANSHIP (1897) 52-53.
court in this country or in courts exercising probate jurisdiction.\textsuperscript{317}

Recognizing the need for some supervision over incompetents and to satisfy the requirement of the federal law designed to insure that the compensation and insurance paid by the U.S. Veterans' Bureau is properly conserved for their benefit, servicemen, their estates and dependents, thirty-four states have enacted the Uniform Veterans' Guardianship Act with some variations.\textsuperscript{318} A degree of uniformity has thus been attained in the appointment of guardians for such servicemen and the administration of their estates derived from the Veterans Administration. The original act as promulgated by the Commissioners on Uniform State Laws in 1928 provides


\textsuperscript{318} See 9 Uniform Laws Annotated (1942) 735.
for guardianship proceedings to be had in "any court of competent jurisdiction." 319 The revision of this act by the commissioners in 1942 makes no mention of any specific court.320 Nowhere is a reference to be found as to whether the probate, equity or court of general jurisdiction is referred to. Presumably the court where guardianships for other incompetents are cognizable is intended.

Jurisdiction over juvenile delinquents has involved totally different problems from general supervision over the property of minors or incompetents. Juvenile courts have been created in many places.321 In some states such jurisdiction has been merely added to that of courts of general jurisdiction. In Idaho, Michigan and South Dakota it has been tacked on to the jurisdiction of probate courts.322

More closely related to the primary function of the administration of estates is the supervision over testamentary trusts. While it is true that the administration of a decedent's estate ceases upon final settlement and distribution by the personal representative to the testamentary trustee, it is also true, in a very real sense, that the subsequent administration by the testamentary trustee is but a continuation of the administration by the executor or administrator. In any matter requiring it, the jurisdiction of equity might be invoked at the instance of the trustee or of any beneficiary either as a remedial or a declaratory process. Any such procedure could be repeated any number of times. The more often equity jurisdiction is invoked in the administration of a single trust, the

319 Uniform Veterans' Guardianship Act (1928) § 4.
320 Uniform Veterans' Guardianship Act (1942) § 5.
321 For a discussion of this jurisdiction and of the various courts established to handle such matters, see 5 VERNIER, AMERICAN FAMILY LAWS (1932) and Supplement (1938) § 277.
more nearly it approaches complete supervisory jurisdiction. Equity has the power to exercise and frequently does exercise such complete supervision. Because of the similarity of the problems involved, the close relationship between the probate administration of the decedent’s estate and the continued administration of the testamentary trust created by the decedent’s will, and the fact that the trustee is often the same person who has served as executor, there has been a marked tendency to subject the latter administration to probate, rather than equity, supervision. Such is now an integral part of the probate statutes of some twenty-four states. An examination of these statutes reveals that the amount of such supervision varies from a duty on the part of the trustee to account periodically to the court to a more or less complete supervision approximating that of the probate court over the executor in the prior administration of the estate of the decedent.

Many of the same arguments could be assigned for subjecting inter vivos trusts to the same supervision. Only a preceding probate administration is lacking. However, many settlors prefer not to subject the trust created by them

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to judicial supervision, but to rely upon the integrity and ability of the trustee whom they have selected. Indiana, Iowa, Massachusetts, Nevada and Pennsylvania have brought inter vivos trusts under the supervisory control of probate courts.\(^{324}\) In Maine such jurisdiction may be invoked either in the probate or superior court.\(^{325}\) In Kansas such jurisdiction is possible where the beneficiary is a person under guardianship.\(^{326}\) Recent legislation has extended this jurisdiction to include life insurance trusts in Pennsylvania.\(^{327}\)

A number of other functions have been added piecemeal to the broadening horizon of probate jurisdiction. Marriages may be solemnized by probate judges in some states.\(^{328}\) Divorces may be granted in the probate courts of Massachusetts,\(^{329}\) and in the county courts of Colorado\(^{330}\) if the amount of alimony sought does not exceed $2000. Adoption proceedings have been lodged here in more than one-third of the states;\(^{331}\) and proceedings for change of name in a few

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325 Me. Rev. Stat. (1930) c. 75, § 2; c. 82, §§ 14-16.


328 No attempt is made here to collect the legislation on this subject. Frequently this power is bestowed upon judges of courts of record.


The granting of writs of habeas corpus has also been given to some probate courts, presumably on the assumption that when the general trial judge is not available, the probate judge can function since he is a judicial officer.

The combination of small civil and criminal jurisdiction with probate matters has been alluded to in discussing the early history of probate courts. In a dozen states at the present time limited civil and criminal jurisdiction is lodged in the court having probate jurisdiction.

Some form of inheritance or estate taxes are now levied by every state except Nevada. The assessment of such a tax must needs occur more or less contemporaneously with the administration of the estate, because values at the date of death will determine the amount of tax, and payment by the personal representative out of assets in his hands is the most feasible and certain way of securing payment to the sovereign. In the determination of the tax the services and offices of the probate court in charge of the administration will be needed. The nature of the part to be played by the probate court in the accomplishment of this task varies all the way from furnishing


In Arizona, California, Iowa, Louisiana, Nevada, North Carolina, Utah, Virginia, Washington and Wyoming adoption proceedings are had in the court of general jurisdiction, which also handles probate matters.


See discussion under II-B and notes 72 and 73, supra.

A limited civil or criminal jurisdiction, or both, is vested in the court having jurisdiction in probate matters in Colorado, Florida, Georgia, Idaho, Kentucky, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Wisconsin.
information to those actually assessing the tax to the actual assessment of the tax itself. The former method of having the probate court furnish the information and data to those charged with the assessing function exists in Delaware, Oklahoma and South Carolina. In nearly half the states this task is performed by or under the direction of the probate court, while in a few others the probate court on appeal may hear and determine all questions relating to such tax.

VII. THE PERSONNEL OF THE PROBATE COURT

A. THE PROBATE JUDGE

The problem of probate court organization is not unrelated to the personnel of probate courts. Efficiency of operation demands competence on the part of those persons who are charged with the duty of administering the business of such courts. In the administration of decedents' estates probate courts have supervision of matters having a financial value far in excess of what is commonly believed. Justices of the peace are usually restricted to a jurisdiction of a few hundred dollars, whereas probate judges are given exclusive jurisdiction of estates that may be valued in the thousands or millions of

dollars. In approximately one-half of the states, it is possible to elect laymen to office. The probate court of one such state has been characterized as "a court that is not required to know any law and that does not know any more than the law requires." 339

1. **American failures to appraise the standards for the office**

   It is generally accepted that supreme court and trial judges should be capable men—"learned in the law," as is sometimes said. From the earliest time such a requirement has occupied a permanent place in the constitutions of most states. In the few states where this is not a constitutional or statutory requirement, persons elected or appointed to such positions have nevertheless been lawyers, due largely to the general feeling that such should be the case. Similar requirements were seldom made for probate judges. The reasons for this were several. In the first place, most of the work of probate judges was nonlitigious in character. It was also largely administrative. Secondly, the creation of separate probate courts in each county has given rise to a belief that each county could not support an office of probate judge with such qualifications. Furthermore, men with such qualifications have not always been available in every community. Lower requirements, shorter tenure, and smaller salaries have been the solution. 340

   In the meantime the economic and social elements of life have become more complex and technical. This is reflected in the complex provisions of wills and trusts, and the character of property ownership, all of which require the supervision of probate judges. The probate of wills, the granting of letters, and the approval of final settlements no longer constitute the bulk of their duties. A knowledge of business, investments

339 Caron v. Old Reliable Gold Mining Co., 12 N. M. 211 at 226, 78 P. 63 (1904).

and accounting are a necessary part of the equipment of a modern probate judge. Complicated wills require interpretation to assure proper administration and distribution. Under many statutes the equitable jurisdiction of probate courts has been increased in response to a need. Indeed our probate courts have always combined the jurisdiction and powers of the English ecclesiastical and chancery courts, but seldom have we stopped to consider the full implications of this latter jurisdiction. The modern probate judge needs to know, more than ever before, general substantive law in order to supervise the activities of fiduciaries and to insure justice to every class of beneficiaries. Furthermore the whole problem of the administration of decedents' estates needs to be viewed as one of transferring the various forms of wealth owned and controlled by the decedent to the persons ultimately entitled thereto, viz., creditors, the state (as entitled to inheritance taxes), heirs, devisees, and legatees. The task requires not merely a manual transfer, but an effective legal transfer so that there will be no cause to question its effectiveness in the future. The very fact of the nonlitigious character of the proceeding suggests that an additional competence and intelligence be exercised by those entrusted with this duty.

Another phenomenon has also occurred to increase and complicate the task of the probate judge. Guardianships and curatorships of minors, insane persons, incompetents and war veterans, adoptions, change of name, solemnization of marriages and granting of divorces in some few states, have been added gradually to that of administering decedents' estates. Each of these functions demands a penetrating and specialized understanding of human nature. In a number of states jurisdiction over testamentary trusts, and in a few instances

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341 For a recent summary of this development see note, "Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees," 48 YALE L. J. 1273 (1939).
342 See discussion under VI, supra.
over inter vivos and insurance trusts, has been added. Some part in the assessment of inheritance taxes has been added to probate duties in practically every state. In the midst of these added duties, no probate judge has been heard to complain of lack of sufficient work to do.

2. Standards for the office of probate judge

(a) Qualifications. The qualifications required for the office of probate judge have not been as exacting as those of general circuit or district judges. Admission to the bar or being learned in the law is a usual constitutional requirement for the latter. Legal or judicial experience is commonly an additional requirement. In the case of probate judges, however, the standards are but faintly comparable. In approximately one-half of the states\(^{343}\) probate judges are not required to be lawyers or to have had any legal experience. This makes it possible for laymen to administer the affairs of this office, and in many localities this is the case.\(^{344}\) It has been observed many times that a law school diploma and membership in the bar are not in themselves certifications of competence. It is equally true that the absence of these is not a mark of incompetence. The affairs of many probate courts presided over by laymen are administered with integrity and common sense. But it should be obvious that no layman, however efficient or conscientious, should be expected to appreciate and pass upon the multitudinous legal aspects involved in the administration of an estate. The fact that he can fill out the blanks in a printed form does not imply an intelligence necessary for the

\(^{343}\) Alabama, Colorado, Connecticut, Delaware (register of wills), Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey (surrogates' and orphans' court judges), Nebraska, New Mexico, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, West Virginia, and Wisconsin (in a very few counties).

\(^{344}\) As an example, see Smith, "Some Comments on the District Probate System," 7 CONN. BAR J. 56 (1933).
effective sale or lease of a piece of real estate owned by the decedent, nor the wisdom to adjudicate the conflicting claims of heirs or beneficiaries. Since many matters are not questioned at the time or subjected to the scrutiny of immediate appellate review, something close to perfection is desirable to eliminate any question of their efficacy at some distant time.

Maine, Maryland, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota and Wisconsin have seen fit to require that probate judges shall have become members of the bar as a prerequisite to holding office. In California, Nevada, Washington, Montana, Wyoming, Utah, Arizona, Iowa, Indiana, Louisiana, Virginia and North Carolina, probate matters are under the jurisdiction of the courts of general jurisdiction and hence administered by the judges of those courts. Among this group of states, all but Indiana and North Carolina make admission to the bar an essential requirement in order to qualify for this office. And in Arkansas and Mississippi, where probate matters come under the jurisdiction of chancery judges, a similar requirement is made of these judges. In Maryland, Massachusetts, New Jersey, New York and Pennsylvania, where probate courts are essentially on a par with the courts of general jurisdiction, the require-

345 Me. Rev. Stat. (1930) c. 75, § 3 (amended by Me. Laws, 1933, c. 62); Md. Const., art. 4, § 2; N. Y. Const., art. 6, § 19 (except as to county of Hamilton); N. D. Const, art. 4, § 111; Ohio Gen. Code (Page, 1937) § 10501-1 (or have previously served as probate judge immediately prior to election); Okla. Const., art. 7, § 11; Pa. Const., art. 5, § 22; S. D. Const., art. 5, § 25; Wis. Stat. (1943) § 253.02 (except in counties having a population of less than 14,000 or have previously served as probate judge provided the county court has no civil or criminal jurisdiction).


ments for the office of probate judge are in each instance the same as for trial judges and include admission to the bar, except in Massachusetts and New Jersey where no such requirement is made for any judicial office. It should be said, however, that the long record of successful judicial administration in those states indicates the presence of other factors in producing the high quality of their judges.

To inaugurate a system in any state designed to raise the qualifications for probate judges is easier said than done. In the first place the public is not fully appreciative of the necessity of such a move, for the reasons already discussed. Secondly, there are laymen already occupying these offices, some of whom are doing a creditable job, who feel that they have a vested interest in that office as long as their constituents are willing to elect them. Such a system was proposed in Kansas in 1939 in connection with the adoption of a new probate code which had been carefully studied and drafted to accomplish a needed improvement in probate administration. In order not to oust those who had previously held the office of probate judge, it was provided that only members of the bar or past probate judges should be eligible for that office. The pressure against this reform, however, was so great as to cause its elimination from the code upon its adoption. Such a provision did find approval in Ohio and Wisconsin, however.

(b) Method of selection. Originally surrogates or deputies held their offices by appointment from the governor. With an increasing need for permanent deputies of that kind, the office became assimilated to various other judicial offices for the purpose of selecting the occupant. In New York and

\[348\text{Md. Const., art. 4, \$ 2; N. Y. Const., art. 6, \$ 19; Pa. Const., art. 5, \$ 22.}\]

\[349\text{See note to \$ 3 of "The Kansas Probate Code," 13 KAN. JUD. COUN. BUL. (1939).}\]

\[350\text{Ohio Gen. Code (Page, 1937) \$ 10501-1; Wis. Stat. (1943) \$ 253.02.}\]
New Jersey, for example, the office of surrogate, originally appointive, later became elective. The judges of the orphans' courts in Delaware and New Jersey, and the probate judges of Massachusetts and New Hampshire are appointed by the governors of those states, as are the judges of courts of general jurisdiction. Circuit judges in Virginia, who exercise most of the control over the administration of estates are chosen by the legislature; but the clerks of the circuit courts in Virginia, who exercise a small part of probate jurisdiction, are elected locally. Probate judges in Rhode Island are elected by the town councils. In Connecticut, Florida and Maine probate judges are elected, whereas general trial judges are appointed by the governor. Elsewhere the office of probate judge is elective.

It would be beyond the scope of this study to discuss the relative merits of the various methods of selecting judges. The appointive method is largely confined to a few eastern states and a portion of New England. The experience of that system over a period of several generations has been found to secure the very best in judicial talent. Where general trial judges are appointed, there would seem to be no reason for employing a different method in the selection of probate judges.

351 Del. Const., art. 4, § 3; N. J. Const., art. 7, § 2 (2); N. J. Rev. Stat. (1937) § 2:6–2; Mass. Const., c. 2, § 1; N. H. Const., arts. 46, 73. Such appointments must be confirmed by the senate in Delaware and New Jersey. The United States district judges in the District of Columbia, who also sit in probate, are appointed by the President of the United States.
352 Va. Const., art. 6, § 96.
355 Conn. Const., art. 5, § 3 and amend. 21; Conn. Gen. Stat. (1930) § 4764 (superior court judges are appointed by the legislature upon nomination by the governor); Fla. Const., art. 5, §§ 8, 16; Me. Const., art. 6, §§ 4, 7; Me. Rev. Stat. (1930) c. 75, § 3. Confirmation of circuit judges by the senate is required in Florida.
356 See references under note 357, infra.
(c) Tenure. The question of tenure, like that of qualifications for office, has received much discussion. Frequent approval of judicial officers by means of frequent elections is said to represent a democratic ideal. Longer tenure designed to secure an efficient, fearless and courageous administration of office is a contrary objective. A tenure of such duration as to attract competent, public-spirited men from a more lucrative business is of primary importance. In each state the term of office is likely to emphasize only one of these ideals or objectives.

Terms of office range all the way from one year to life tenure. Two and four-year terms are most common, though six years is not uncommon. The term of judges of the orphans' courts in Pennsylvania is ten years and in Delaware twelve years. The surrogates in New York City are elected for terms of fourteen years, whereas surrogates in other counties of New York hold office for only six years. In the District of Columbia, Massachusetts, and New Hampshire probate judges are appointed for life.

These terms of office in themselves are significant only as they reflect one or more of the objectives enumerated above. The importance attributed to probate courts is to be observed by comparing the term of office of probate judges with that


358 New York County Law, § 230.

359 U. S. Const., art. 3, § 1 (the United States district judges for the District of Columbia serve as probate judges there; D. C. Code (1940) § 11-501); Mass. Const., c. 3, art. 1; N. H. Const., arts. 73, 78 (not beyond age 70).
of judges of courts of general jurisdiction. If the term is less, the office is less likely to attract the same calibre of talent than the latter office. In about one-third of the states the terms of both offices are the same. In Colorado, Florida, Illinois, Kentucky, Michigan, Minnesota, Missouri and Ohio

The following table will indicate the tenure of each office:

<table>
<thead>
<tr>
<th></th>
<th>Probate Judge</th>
<th>Trial Judge</th>
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<tbody>
<tr>
<td>Alabama</td>
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<td>6</td>
</tr>
<tr>
<td>Arkansas</td>
<td>6 (chancery judge)</td>
<td>4</td>
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<tr>
<td>Colorado</td>
<td>4</td>
<td>6</td>
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<tr>
<td>Connecticut</td>
<td>2</td>
<td>8</td>
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<tr>
<td>Delaware</td>
<td>4 (register)</td>
<td>12</td>
</tr>
<tr>
<td>Florida</td>
<td>4</td>
<td>6</td>
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<tr>
<td>Idaho</td>
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<tr>
<td>Illinois</td>
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<tr>
<td>Kansas</td>
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<tr>
<td>Kentucky</td>
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<tr>
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<tr>
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<td>4</td>
<td>15</td>
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<tr>
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<td>Life</td>
<td>Life</td>
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<tr>
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<tr>
<td>Minnesota</td>
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<td>6</td>
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<tr>
<td>Mississippi</td>
<td>4 (chancery judge)</td>
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<td>6</td>
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<tr>
<td>New York</td>
<td>6 (14 in New York City)</td>
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<tr>
<td>North Carolina</td>
<td>4 (clerk)</td>
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<tr>
<td>North Dakota</td>
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<td>Oregon</td>
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<td>Pennsylvania</td>
<td>4 (register of wills)</td>
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<td>Rhode Island</td>
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<td>Life</td>
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<tr>
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<tr>
<td>Virginia</td>
<td>8 (clerk)</td>
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<tr>
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<tr>
<td>Wisconsin</td>
<td>6</td>
<td>6</td>
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</tbody>
</table>

In Arizona, California, Indiana, Iowa, Louisiana, Montana, Nevada, Utah and Wyoming, there is identity of judges of the two courts and hence of their terms of office. Where life tenure is indicated, good behavior is implied and retirement at age seventy is sometimes provided.
the four-year term for probate judges and a six-year term for circuit or district judges is provided. In Idaho, Kansas, Oklahoma, South Dakota and Texas two and four-year terms respectively are provided; in New Mexico and North Dakota two and six years; in Maine four and seven years; in Tennessee one and eight years; in North Carolina four and eight years; in West Virginia six and eight years.

(d) **Salary.** The variations in salaries of probate judges reflect both a variation in monetary values in different localities and the importance attached to the office locally. The question of salary, like the question of tenure, is in large measure determinative of the kind of person who will seek the office.

Much variation is to be found in the prevailing practices for compensating probate judges. Some are expected to be content with fees. Some must turn over to the county or state all fees in excess of a designated amount. In either case the net amount of compensation received by a probate judge will depend on the amount of business in his jurisdiction, which in turn depends on the population and wealth. Some states have a fixed salary for probate judges throughout the state; others have adopted a variable scale depending upon the county (presumably based upon population) or upon the population of the county directly. In a few instances the amount of salaries is left to local boards; or the amount of salary provided by statute may be supplemented locally where warranted by the volume of business and the population.

In certain places additional compensation is paid for additional services, such as acting as juvenile judge, or in connection with inheritance tax appraisements.

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As in the case of tenure of office, the amount of compensation in each case is to be compared with that received by the judges of the courts of general jurisdiction.\footnote{365} In most cases

\footnote{365 The following table will serve as a basis for comparison:}

<table>
<thead>
<tr>
<th>State</th>
<th>Probat Judge Fees*</th>
<th>Trial Judge $5000-8000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>$3600</td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td>1200-7000</td>
<td></td>
</tr>
<tr>
<td>Michigan</td>
<td>1500-4000 (register)</td>
<td>10000-10500</td>
</tr>
<tr>
<td>Florida</td>
<td>Fees</td>
<td>5000*</td>
</tr>
<tr>
<td>Georgia</td>
<td>Fees</td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>800-2000</td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>5000</td>
<td>8000</td>
</tr>
<tr>
<td>Kansas</td>
<td>600-4000</td>
<td>4000</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Fees or reasonable salary</td>
<td>3000</td>
</tr>
<tr>
<td>Maine</td>
<td>600-4000</td>
<td>7500</td>
</tr>
<tr>
<td>Maryland</td>
<td>4-15 per day</td>
<td>8500-11500</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>3000-11000</td>
<td>12000-13000</td>
</tr>
<tr>
<td>Michigan</td>
<td>1000-8400</td>
<td>7000</td>
</tr>
<tr>
<td>Minnesota</td>
<td>750-7500</td>
<td>6000</td>
</tr>
<tr>
<td>Missouri</td>
<td>Fees</td>
<td>2000-5500*</td>
</tr>
<tr>
<td>Nebraska</td>
<td>800-4500</td>
<td>5000</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>1500-2500</td>
<td>7000</td>
</tr>
<tr>
<td>New Jersey</td>
<td>4000-8000 (surrogate)</td>
<td>2700-15000</td>
</tr>
<tr>
<td>New Mexico</td>
<td>300-800</td>
<td>4500</td>
</tr>
<tr>
<td>New York</td>
<td>1800-15000</td>
<td>15000</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Fees or salary</td>
<td>6500</td>
</tr>
<tr>
<td>North Dakota</td>
<td>1500-2700</td>
<td>4000</td>
</tr>
<tr>
<td>Ohio</td>
<td>1100-10000</td>
<td>3000*</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>1500-5000</td>
<td>4000-7200</td>
</tr>
<tr>
<td>Oregon</td>
<td>500-3000</td>
<td>5000-6500</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>9000-14000</td>
<td>9000-14000</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Fees or salary</td>
<td>9500-10000</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Fees or salary</td>
<td>6750</td>
</tr>
<tr>
<td>South Dakota</td>
<td>700-3800</td>
<td>2500</td>
</tr>
<tr>
<td>Tennessee</td>
<td>5 per day*</td>
<td>5000</td>
</tr>
<tr>
<td>Texas</td>
<td>Fees or salary</td>
<td>5000-7500*</td>
</tr>
<tr>
<td>Vermont</td>
<td>600-2100</td>
<td>5000</td>
</tr>
<tr>
<td>Virginia</td>
<td></td>
<td>5400</td>
</tr>
<tr>
<td>West Virginia</td>
<td>2 per day</td>
<td>5000-7500*</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Fixed by county board</td>
<td>8000*</td>
</tr>
</tbody>
</table>

* Indicates that the compensation indicated may be supplemented locally.

The authors are advised that in Missouri the statutes providing for salaries of
the two salaries are subject to noticeable differences, the amount paid to probate judges being the lesser of the two. In the states where the unified court system prevails, there is identity of judges and consequently of salaries. This applies also to the judges of the orphans’ courts of Delaware, New Jersey and certain counties of Pennsylvania in which the common pleas judges also preside over the orphans’ courts. Only in Pennsylvania do the judges of the orphans’ courts (where separate from the common pleas courts) receive the same compensation as do common pleas judges. Here the salary scale varies between $9,000 and $14,000, depending upon the county.\textsuperscript{366} In New York City and Chicago the salary of probate judges has been made to correspond to that of trial judges.\textsuperscript{367}

B. OTHER PERSONNEL

As in courts of general jurisdiction, a clerk is a part of every probate court organization. Invariably the duties of the clerk are “clerical,” i.e., to keep the records of the court proceedings and to receive and file petitions and other papers that are deposited in the court. In a few states clerks are empowered to issue orders for hearings before the court, appoint appraisers to make inventories, approve bonds, etc. Even these are hardly more than ministerial duties. It is but another step to empower the clerk to probate wills and grant letters in cases where there is no dispute as to the validity of the will

\textsuperscript{366} Pa. Stat. Ann. (Purdon, 1930) t. 17, §§ 834, 836. It is not to be implied from this statement that all receive the same salary, but only that, county for county, orphans’ court judges receive the same as do common pleas judges in that county.

or any contest as to who is entitled to letters. In most instances these are regarded as routine functions which any efficient and trustworthy clerk can perform. They are the substantial equivalent of those performed by the registrars in the English ecclesiastical courts. Where statutes have invested clerks of probate with powers of this kind, the judge is free to handle the more important matters of probate administration.

A study of the various statutes reveals that clerks have been given powers varying all the way from those of a clerical nature to complete judicial powers corresponding to those possessed by the judge. Under the recent Florida code the clerk may perform "all non-judicial functions which the judge may perform." The Kansas code makes the probate judge the clerk of the probate court and authorizes the appointment of assistants as deputy clerks. Statutes of every state either provide for or contemplate the performance of clerical duties in keeping the court records and files. Some authorize the clerk to issue notices or citations for hearings before the court. Others provide for the approval or fixing the amount and approval of bonds of personal representatives.

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369 Kan. Gen. Stat. (Supp. 1943) § 59-202. Such a statute fixes upon the probate judge the primary responsibility for keeping the records of the probate court, but permits assistants to accomplish this objective. It also makes it possible in a sparsely settled county for the judge to be his own clerk where the amount of business does not warrant the employment of a deputy clerk.
appointing appraisers for the inventory,\textsuperscript{372} supervising the inventory,\textsuperscript{373} or making orders as to personal property.\textsuperscript{374} Of a slightly higher order are powers to hear and pass upon claims against the estate,\textsuperscript{375} to make decrees barring creditors,\textsuperscript{376} to audit accounts,\textsuperscript{377} and to grant discharges to personal representatives.\textsuperscript{378}

Under the English system, as we have seen, there was a division of function between the ecclesiastical courts and chancery in the administration of decedents' estates. The power to probate wills and grant letters, exercised by the ecclesiastical courts,\textsuperscript{379} was essentially judicial in character even though no question was raised or contest involved. Vestiges of this dual organization exist in this country today in Delaware, the District of Columbia and Pennsylvania where separate offices of registers of wills are maintained, leaving the major task of administering estates to the orphans' or probate court.\textsuperscript{380} Essentially this same system prevails in Mississippi\textsuperscript{381} and


\textsuperscript{375} D. C. Code (1940) § 19-403; Md. Code (1939) art. 93, § 282; Miss. Code (1942) § 1248; Mont. Rev. Code (1935) § 10376 (in absence of judge and when not contested, subject to setting aside or modification by judge within thirty days).


\textsuperscript{378} See discussion under I-A, supra.


\textsuperscript{380} Miss. Code (1942) §§ 1248, 1249.
Virginia where such functions are performed by the clerk of the court instead of by a register presiding over the separate register's court. In effect the register of wills or clerk has supplanted the ecclesiastical courts in performing this function. This practice of having a judicial function performed by a ministerial officer is thus justified by history as well as by modern convenience. In the states above mentioned this power is lodged in the register or clerk, whether or not there is a contest or dispute as to the matter. Other states have been willing to entrust this function to the surrogate or clerk provided that no contest or dispute is involved. This practice prevails in New Jersey, Alabama, Iowa and North Carolina, and the clerk of the superior court in North Carolina is himself a court. In Delaware the deputy register of wills may exercise this power in such circumstances, whereas the register may do so irrespective of a contest.

In Maryland the register of wills exercises these prerogatives during vacation of the orphans' court. In Arkansas, Indiana, Missouri and West Virginia the clerk proceeds similarly during vacation, but subject to a subsequent confirmation or rejection by the court. In Montana, during any absence of the judge, whether during term time or not, the clerk possesses this power when there is no contest.

In Mississippi and Utah the clerk may appoint special

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384 Ala. Code (1940) t. 13, § 300.
385 Iowa Code (1939) § 11832.
389 Md. Code (1939) art. 93 § 283.
391 Ind. Stat. (Burns, 1933) § 6-102.
395 Miss. Code (1942) § 1248.
396 Utah Code (1943) § 102-2-1.
or temporary administrators, and in North Carolina\textsuperscript{397} may revoke letters already granted. The register of wills in Pennsylvania\textsuperscript{398} at any time, and the clerk in Mississippi\textsuperscript{399} during vacation subject to the subsequent approval of the court, may do likewise.

This vesting in the clerk of judicial powers in probate does not stop here. In Missouri the clerk may exercise almost complete judicial power during vacation, subject to a subsequent confirmation or rejection by the court.\textsuperscript{400} In Alabama\textsuperscript{401} and North Carolina\textsuperscript{402} the clerk has such power at all times in the absence of contest. This means that all matters in these two states which are noncontentious in fact may be supervised by the clerk. In Delaware the register of wills regularly supervises the administration of decedents' estates except for the sale of real estate.\textsuperscript{403} And in certain counties of South Carolina the judge may confer complete judicial power upon the clerk.\textsuperscript{404}

One further aspect of this lodgment of power in the clerk should be mentioned. Where there is a vacancy in the office of judge provision is made in New Mexico\textsuperscript{405} and South Carolina\textsuperscript{406} for the clerk to act as judge pro terne during such vacancy. In one respect this practice offends every principle previously advocated on the question of judicial qualifications. As an emergency measure, it may be justified on the basis that the clerk is the one person who is likely to be familiar with the affairs of the court and would likely be capable of functioning temporarily until a successor is selected and qualified.

\textsuperscript{397} N. C. Gen. Stat. (1943) § 2-16.
\textsuperscript{398} Pa. Stat. Ann. (Purdon, 1930) t. 20, § 1863 (when granted to wrong person or on probate of after-discovered will).
\textsuperscript{399} Miss. Code (1942) §§ 1249, 1251.
\textsuperscript{401} Ala. Code (1940) t. 13, § 300.
\textsuperscript{402} N. C. Gen. Stat. (1943) § 2-16.
\textsuperscript{403} Del. Rev. Code (1940) cc. 98, 99.
\textsuperscript{404} S. C. Code (1942) § 206.
\textsuperscript{405} N. M. Stat. (1941) § 16-415.
\textsuperscript{406} S. C. Code (1942) § 3642.
Thus we witness all gradations of power lodged in some inferior officer under a wide variety of circumstances. Each represents an attempt to facilitate the administration of the work of the probate court. Some may seem to vest too much power in such officer. A critical analysis should be accompanied by an examination as to how the system works in a particular locality. The qualifications and abilities of the clerk will be relevant in any individual case. Professor Atkinson points out that even routine matters may be so seriously mishandled as to cause serious consequences. The right of appeal or possibility of correction by the judge is no more than a partial justification. A more fundamental solution in connection with every grant or substitution of power would be a requirement of higher qualifications on the part of the officer who is invested with the power and who will act in the first instance. Whether there is a separate judge for each county, or but one judge for several counties, the judge should assume the primary responsibility for every judicial act. If the clerk is empowered to act, either in contentious or noncontentious matters, it seems desirable that his acts should be subject to the subsequent approval or disapproval of the judge.

VIII. Standards for an Ideal Probate Court

By way of conclusion, we shall propose an answer to the question: What are the standards for an ideal probate court? It is readily conceded that, in any legal study covering so vast an area, the conclusions of the authors cannot be wholly objective. Necessarily, they are based, not only on the legal and factual data heretofore presented, but also on the individual background and experience of the respective writers. Nevertheless, it is believed that each conclusion hereinafter

presented finds ample support in the materials discussed in the preceding pages.

The standards for an ideal probate court will be considered from three standpoints: first, the place of the court in the judicial organization; second, the subject matter of the jurisdiction of the court; and third, the personnel of the court.

First, the probate court should be given a place in the judicial organization fully coordinate with the trial court of general jurisdiction. Historically, that has been the course of development in England; and that is the trend in the United States. The nature of the business of the probate court, the fact that it handles estates unlimited in value and character, and that its jurisdiction may well include the specific administration and distribution of both the real and the personal property of the estate, all point to a conclusion that a superior court is needed. If such a court is set up, then appeals with trial de novo in the court of general jurisdiction would necessarily be eliminated. The only appeals would be to the appellate courts to which appeals are made in actions at law and suits in equity.

Second, the probate court should be the same court as the court of general jurisdiction or should be a division of it. This does not mean merely a unification of judges, such, for example, as is the plan in certain counties in Ohio and Pennsylvania. It means a unification of courts. Indeed, this unification should be so complete that, if, after a proceeding is begun, it is found to come under the equity or common-law jurisdiction of the court, it can be transferred to another docket of the court or to another division, without beginning the proceeding anew. Only in this way can be completely avoided the hardships incident to determining where the shadowy, marginal line of probate jurisdiction is to be drawn. The question of whether a given matter should be in equity or in probate will cease to be one in which a slight misstep on the part
of the attorney may prejudice an innocent litigant. Such a judicial organization is advocated by Dean Roscoe Pound in his recent book on *Organization of Courts*. In presenting the principles and outline for a modern court organization he suggests that there be three chief branches, a court of appeal, a superior court and a county court branch. Discussing the second of these, he says: 408

"The second branch, the Superior Court, should be given complete jurisdiction of first instance, civil and criminal, the civil jurisdiction, for reasons set forth in preceding chapters, to include law, equity, and probate. Certainly there should be no mandatory setting off of these types of cases to separate divisions. But the organization of this branch should be so flexible that if experience showed good reason for setting off some or all of them in that way, it could be done by rule of court, or more simply by assigning cases to judges in such a way as to effect a practical segregation, which, however, could be changed or revoked later if experience or changed conditions made such action advisable."

This type of judicial organization can be adapted to operate both in metropolitan areas and in rural districts. Without doubt, in large cities there will be a number of judges selected for the trial courts of general jurisdiction. Statutory provisions should set up some sort of judicial council, or other administrative machinery, whereby these judges can be assigned to particular specialized matters. Just as some may be assigned solely to criminal matters or to domestic relations cases, so others should be assigned to the probate work of the court. This is in fact done in certain metropolitan areas in California. 409 But the writers would advocate going even a step farther than does the California system. In that state,

408 POUND, ORGANIZATION OF COURTS (1940) 281.
409 Cal. Code Civ. Proc. (Deering, 1941) §§ 67, 67a; Rules of Superior Court of California (as amended to July 1, 1943), rules 24 and 25, LARMAC, CONSOLIDATED INDEX TO CONSTITUTION AND LAWS OF CALIFORNIA (1943) 1788-1791.
the superior court, when it hears a probate matter, is the "superior court sitting in probate." While it is not another court, still its jurisdiction is so different that a proceeding cannot ordinarily be transferred from its probate to its civil jurisdiction, but would have to be started anew. The probate jurisdiction of the trial courts in the state of Washington is to be preferred in this particular. In that state, as has been seen, there is not a court "sitting in probate." It is all a part of the same jurisdiction whether the subject matter be civil or probate.

In rural areas of sparse population objection may well be raised to a separate judge of probate if he is to have the same qualifications and salary as the judge of the trial court of general jurisdiction. It may be felt that the small amount of probate business does not justify such an expensive court. But when the probate jurisdiction is added to that of the civil and criminal jurisdiction of the trial court, not only is this objection eliminated, but the advantages of a unified court are also obtained.

If the objection is made that in many states the unit for the trial court is a district which may include several counties and that the emergency character of some kinds of probate business may well require a judge in each county, the answer is that the trial judge may be assigned to a circuit which includes a number of counties; but clerks may be elected or appointed in each county to take care of routine business under the supervision of the judge, and, of course, the court can sit in each county. This is, in fact, the system adopted in Montana and in some other states.

410 It may be added that, not only should there be a clerk in each county, but the court should be open for business at all reasonable times. The tendency of modern legislation is to dispense with terms of court for probate business. See Kan. Gen. Stat. (Supp. 1943) § 59-211: "There shall be no terms of the probate court. It shall be open for the transaction of business at the county seat at all reasonable hours. Hearings may be had at such other places in the county as the court may deem advisable."
What should be included in the subject matter of the jurisdiction of the ideal probate court? Certainly if we have the unified court, then this question becomes less important. If it is the same judge or a division of the same court, it becomes much less important whether he is sitting in equity or in probate as to the particular question before him. Nevertheless, in the interests of efficiency and simplicity of administration, it would seem that all matters directly connected with the administration of the decedent’s estate should be within the probate division of the court. Such has been the definite trend of legislation in the United States even where probate courts are entirely separate from the trial courts of general jurisdiction. And it is believed that that trend is sound. In that particular the English judicial system might profit by imitating some American models.

As to matters other than decedents’ estates, it is clear that the probate jurisdiction should include guardianships and matters closely related, such as adoptions. But this jurisdiction should not be weighted down with all sorts of irrelevant administrative matters, such as are sometimes assigned to county courts which sit in probate matters.

Third, what can be said as to the personnel of the court? Obviously, if the judge is a judicial officer of the trial court of general jurisdiction, he should have, and will have, the same qualifications as that judge, with a corresponding tenure and salary. But even if that were not the case, the nature of probate jurisdiction calls for such qualifications. He should be a member of the bar, preferably with experience in practice or on the bench.

As to other officers of the court, such as clerks or registers, there should be an adequate number of well qualified persons. Should they have judicial powers? Considering the various patterns in the statutes heretofore analyzed, we find three possible answers. First, in some states such officers do have
judicial powers; in other words, for some purposes, they function as courts. Second, in other states, they have no judicial powers whatever, but can perform only ministerial acts. In still a third group of states, the clerk or register acts in certain matters either subject to the subsequent approval of the judge or subject to the lack of disapproval of the judge within a specified period.

It would seem that, if, as is herein advocated, a noncontentious, summary procedure is permitted, efficiency would require that some judicial powers be given to the clerk or register in these matters. However, the judge should be held to strict accountability for these acts. The jurisdiction described in the third group of states is believed to be preferable. But it should be limited to noncontentious matters. If the judge disapproves of the act of the clerk, or if the matter is contentious, then it should come before the judge in person.

That these conclusions follow as a matter of course from the legal and factual data herein presented can scarcely be denied. That they have seldom been reached by legislative bodies in America is believed to be due, not to the uncertainty of the conclusions, but to the fact that, until very recently, the realm of probate law has been one outside the sphere of scholarly investigation or legislative reform. And this legal structure for more than a century has been added to or amended, bit by bit, to accomplish the specific, narrow objectives of particular

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411 A recent example of a scientific and comprehensive legislative approach to probate reform is found in New Jersey. At its 1944 session the New Jersey legislature agreed upon a revised constitution for that state which is to be submitted to the people at the general election this year. The proposed constitution provides for a superior court having complete general original jurisdiction in all cases, and divided into two sections: (1) a law section to exercise civil and criminal jurisdiction at law, and matrimonial jurisdiction in certain cases; and (2) an equity and probate section to exercise all other jurisdiction. Further provision is made that either section shall exercise the jurisdiction of the other when the ends of justice so require. Proposed N. J. Rev. Const. (1944) art. 5, § 3, pars. 2–3. [Since the publication of this monograph the proposed New Jersey constitution was defeated in a popular referendum.]
legislators or of a few of their constituency, without any considera
tion of the historical development or of the proper
functions of probate courts and probate legislation as a whole.
If these pages have contributed something toward a broad and comprehensive view of the problems of probate court organization they will not have been written in vain.