The Function of Will Contests*

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I. INTRODUCTION

To anyone steeped in the doctrines of the common law there is something anomalous about the will contest. First, the will is duly admitted to probate in a proceeding which is almost universally conceded to be judicial. Then at a subsequent time a so-called contest is brought by the heir, in which the precise proposition determined on the probate is retried. In most jurisdictions the heir is not bound to make any sort of a showing to entitle him to contest. He need not allege newly discovered evidence. He need not submit any evidence of fraud or mistake. Indeed, in some states, he may even have attended the original probate proceeding and sat by without a murmur of dissent while the will was judicially approved. Yet the law says he may now, merely for the asking, wipe out the effect of the decree admitting the will to probate and have the whole matter heard anew. This is not appeal in any true sense of the word, though in many jurisdictions it is called an appeal with trial de novo; nor is it a hearing on certiorari, though such a hearing may sometimes be granted by a still higher court with respect to the contest itself. It is not a new trial for cause; since, in most states, no cause need be shown. It is, in short, a unique sort of hearing which finds its only justification as a part of a legal system in the uniqueness of the matters with which it deals.

It is, of course, obvious that these observations do not apply to a contest which is a part of, and the same as, the original probate proceeding. If a will is presented to the court by a devisee or executor to be probated and an heir puts the pro-

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ponent's allegations in issue, the trial of that issue at that point in the proceeding is quite as much in accord with the spirit of our legal system as the trial of the due execution of a contract when a promisee brings an action for its breach. But no one ever heard of the contest of a contract or of a deed, separate and apart from the original action on that contract or deed. And unless the probate of a will possesses peculiarities all its own, it is difficult to see why probate should be regarded as distinct from contest.

It is the primary purpose of this paper to consider what are the proper functions of will contests. In this connection, statutes and case law dealing with the various aspects of will contests will be considered with a view to determining what is the underlying theory of the will contest in the various jurisdictions and whether various subsidiary rules concerning it are consistent with that theory. By way of conclusion, we shall attempt to determine what should be the rationale of an ideal piece of legislation on will contest. We shall deal chiefly with the so-called contest after probate, since contest before probate is ordinarily nothing more than a determination of the due execution of the will as an issue in the probate proceeding. But it should be noted that in some jurisdictions legislation appears to indicate that a contest before probate is also more or less distinct from probate itself. Certainly that type of legislation should come in for consideration in connection with any adequate treatment of the function of contest.

It is hoped, moreover, that a clear understanding of the nature and function of will contests will tend to reduce litigation and to result in more coherent legislation. Though it may not reduce directly the number of will contests, yet, if the law is clarified, the number of appeals from will contests should be substantially decreased. Moreover, if suitable limitations on will contests are inserted in statutes which deal with them, contests should also be less frequent.
Up to this point the meaning of the term "will contest" has been assumed. But before proceeding, it should be made explicit. The expression "will contest," as used in this paper, means any proceeding or part of a proceeding in which the question whether a given instrument is the duly executed and unrevoked will of a competent testator is put in issue. It is to be distinguished from a mere ex parte probate proceeding in which no allegations of the proponent of a will are controverted. The term is not limited to statutory proceedings designated as contests, but is used to include any proceeding to admit a will to probate in which its execution or revocation is put in issue; it includes an appeal from an order admitting a will to probate in which the issue is tried de novo; a proceeding to revoke the probate of a will; a probate in solemn form; an action at law in the nature of ejectment or trespass in which the issue of will or no will is tried; a chancery proceeding in which the issue is the due execution of a will. In short, practically any proceeding in which the due execution or revocation of a will is put in issue is a contest.

This paper, however, does not deal with the constructive trust as a device to give effect to a will discovered after administration is closed; nor with an action of tort brought by a devisee of an unprobated will against an heir who has wrong-

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1 Although the term "will contest" has come into almost universal use in the United States, it has seldom been used in England. However, an early edition of Jarman on Wills refers to a legatee as "having contested the validity or effect of a will." Jarman, A Treatise on the Construction of Devises (22 Law Library, 1838) p. *296. It has been suggested that the term comes from the "litis contestatio" of Roman law. See In re Cronin's Will, 143 Misc. 559, 257 N. Y. S. 496 at 503 (1932) and Clemens v. Patterson, 38 Ala. 721 at 722 (1863). As to the "litis contestatio" in Roman law, see Buckland, A Textbook of Roman Law (2d ed. 1932) 695. As to its application to procedure in the ecclesiastical courts, see Conset, Practice of the Spiritual Courts (3d ed. 1708) 85; Langdell, Equity Pleading (1877) xv; 3 Burn, Ecclesiastical Law (9th ed. 1842) 189. Conset, op. cit. 371, refers to the will as being "contested."

The term "contest" appears in American statute law as early as 1711. See Va. Laws, Act of Nov. 1711, c. 2, in 4 Statutes at Large of Virginia, edited by Hening (1820) 14.
fully destroyed the will. Yet each of these situations may involve a determination of the due execution of the will. Nor do we consider the contest of foreign wills, or of nuncupative wills, or of lost or destroyed wills, since such minor differences in the law of contest as may be found there add nothing to our understanding of the matter of function.

II. PROBATE AND CONTEST IN ENGLISH LAW

Since American probate procedure is modeled after the English pattern, it is important to consider what constituted will contest in England. Prior to 1857, wills involving personality were probated in the ecclesiastical court. From the time when the first edition of Swinburn on Wills appeared until courts of probate were set up shortly after the middle of the nineteenth century, the procedure seems not to have greatly varied. Probate could be either in common form or in solemn form, the latter being also described as probate in form of law or probate per testes. If in common form, the proceeding was summary; no notice was given to anyone. The will could be admitted to probate on the mere oath of the executor that he believed it to be duly executed, though additional proof was sometimes required. It is commonly stated that at any time within thirty years after the will had been admitted to probate in common form it could be proved anew.


3 Swinburn says there is a presumption of due execution of a will after ten years. Most other writers say that the will cannot be proved in solemn form after thirty years. In 4 Burn, Ecclesiastical Law (9th ed. 1842) 318 it is suggested that the word “ten” in Swinburn is a misprint for “thirty.” It is possible that there may be some connection between this rule and the rule of evidence as to the presumed authenticity of documents after thirty years. See
in solemn form; although it is not entirely clear that there was any time limit. Or the executor or some other interested party could have secured its probate in solemn form in the first instance and before any other probate was sought. When probate was in solemn form, notice was given to interested parties who were permitted to oppose the admission of the will; and the attesting witnesses were produced to testify in support of the will.

Until the latter part of the nineteenth century, a will, insofar as it involved freehold interests in land, was not subject to probate in the sense in which a will of personalty was said to be probated. That is to say the will was regarded as passing the title to land automatically on the death of the testator, just as a deed passes title on its delivery. The validity of the will might be determined incidentally in an action of trespass or ejectment involving the land devised. But the judgment determined the matter only as between the parties as of the time when the action was brought. Just as in the case of title by deed, any number of subsequent actions of trespass or ejectment might be brought with varying results.

It is true, equity would sometimes take steps to have a devise of land proved; but the result added up to no more than what was permissible in the court of law. Thus, a devisee might, under certain circumstances, go into equity 7 Wigmore, Evidence (3d ed. 1940) § 2138. The rule as to wills of personalty, however, is said to involve a period of thirty years after probate in common form; while the evidence rule, when applied to wills of land, has been held to mean thirty years from the execution of the will. See Doe d. Oldham v. Wolley, 8 B. & C. 22 (1828). It has been said that there is no recognized time limit on the probate of wills in solemn form in the ecclesiastical courts. See Fourth Report by the Commissioners Appointed to Inquire Into the Law of England Respecting Real Property (1833) 39; Report by the Commissioners to Inquire Into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales (1832) 37; Richardson v. Claney, 2 Phillimore 228 note (a), at 231 (1802).

and ask to have his title determined. Chancery would direct the devisee and heir to frame an issue of *devisavit vel non* and have it tried in an action at law before a jury. When the court of equity became satisfied, after one or more verdicts at law, that title was in the devisee and that the will was good, interference by the heir might be enjoined. The devisee might also file a bill in equity to perpetuate testimony and the court would compel the attesting witnesses to come in and testify. These two procedures were sometimes denominated proving the will in equity, just as the trespass or ejectment action was sometimes described as proving the will at law. The following succinct statement from *Adams on Equity* indicates the precise extent to which equity established a will of land:

"The validity of a will of real estate, and of the consequent title of the devisee, is triable only by the Courts of common law. If the devisee being out of possession seeks to enforce the will, or if the heir being out of possession seeks to set it aside, their respective modes of doing so are by ejectment at law. If there be outstanding terms or other legal impediment, they may respectively come into equity to have them removed. If either party being in possession fears that his possession may be subsequently disturbed, he may perpetuate the testimony on a proper bill; or if after a satisfactory verdict and judgment, he is harassed by repeated ejectments, he may have an injunction to restrain them on a bill of peace. But neither party can resort to the Court of Chancery as a tribunal for the trial of the will. If, however, there be a trust to perform or assets

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6 Pemberton v. Pemberton, 13 Vesey 290 (1807); Bootle v. Blundell, 19 Vesey 494 (1815); Tatham v. Wright, 2 Russ & My. 1 (1831); Lowe v. Joliffe, 1 Wm. Black. 365 (1762); Mountain v. Bennet, 1 Cox Ch. 353 (1787), 2 Dick. 683 (1787); 3 Woodesson, Lectures on the Law of England (2d ed. 1834) 477-479; 2 Story, Equity Jurisprudence (1st ed. 1836) 671.

7 See Powell, Devises (1st Am. ed. 1807) 714. As to the bill to perpetuate testimony, see 1 Harrison, Chancery (7th ed. 1790) 784; 2 id. 282.

8 Adams, Equity (2d Am. ed. 1852) *249.
to administer, so that the will is drawn within the cognizance of equity, there is an incidental jurisdiction to declare the will is established, after first directing an issue devisavit vel non, to try its validity at law. By the old practice it was necessary to establish a will against the heir, whenever the Court was called upon to execute its trusts, but the rule is now abolished. The issue devisavit vel non, when a declaration of establishment is asked, is demandable as of right by the heir; for he can be disinherited only by the verdict of a jury. But he may waive this right by his conduct."

Such was the system of will contest in England at a time when American jurisdictions were taking over English legal principles. Clearly illogical in sharply differentiating land and personalty, it merely gave another expression to a distinction which runs all through English common law. It may not be possible to state with certainty, and perhaps it would be futile to attempt to do so, why the ecclesiastical courts took over the disposition of a dead man’s personalty but not his realty. Even as to the personalty it was said not to be by common right but only by English custom,⁹—whatever that may mean. But the upshot of the matter seems to have been that the church desired to have a hand in disposing of a dead man’s estate, a part of which he commonly wished to appropriate for the good of his soul.¹⁰ Obviously land was too important in a feudal society to be entrusted to religious tribunals; for in those days, land was government, land was social status, in short, land was the very foundation of the social order.

Conceding that the interplay of compromise must have resulted in giving probate of wills of personalty to the ecclesiastical courts and such probate as there was of wills of

⁹ Godolphin, Orphans Legacy (3d ed. 1685) 59,—“de Consuetudine Angliae & non de Communi Jure.”
¹⁰ See 2 Pollock and Maitland, History of English Law (2d ed. 1911) 332.
realty to the secular courts, this does not explain the wide diversity in the two concepts of probate. Nor is any adequate explanation forthcoming; yet the theory of each was perfectly rational. Probate in the ecclesiastical court was the authentication of a document. This authentication was contemporaneous with the grant of authority to the personal representative; it did not determine the legal effect of the will. But it said to the executor: "The testator made this will; he appointed you his executor. Take his personal estate and administer it according to the terms of the will."

On the other hand, the determination of the validity of a will of land in a court of law was essentially an inter partes determination of the title to a particular piece of land. It decided both the validity and the legal effect of the will in giving title to the devisee. But it decided this only as it decided the validity of a deed when an action of trespass or ejectment put in issue the title to particular land which it purported to convey.

In the case of the will of personal property, the contest was obviously the probate in solemn form. That it could come after probate in common form did not in any way indicate that the law permitted two trials of the same issue. Probate in common form was no trial. Indeed, it has been definitely asserted by an eminent authority on English ecclesiastical law that it was not a judicial proceeding. Essentially, it was a mere formal administrative authentication of the instrument;

11In 2 Phillimore, Ecclesiastical Law (1873) 1210, it is pointed out that the voluntary jurisdiction of the ecclesiastical court, including the granting of probate of wills, is not a judicial proceeding. The learned author therefore concludes that when the bishop selects a subordinate to act in voluntary proceedings, he is delegating the function; but if it were a true judicial function, the subordinate would be acting as judge for himself, since a judicial function cannot be delegated.

12See Fourth Report by the Commissioners Appointed to Inquire Into THE LAW OF ENGLAND RESPECTING REAL PROPERTY (1933) 55; Report by the Commissioners to Inquire Into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales (1832) 37.
and the contest—the probate in solemn form—was the first and only real hearing of the issue of due execution. There were two good reasons for permitting probate in common form without notice before probate in solemn form. First, in the vast majority of cases there would never be any contest or any disagreement of interested parties as to the distribution of the estate. Hence a system which reduced the formalities to a minimum was desirable. Second, even if a later contest might take place, the preservation of the estate demanded that a responsible person take charge of it as soon as possible after the death of the testator; and to delay until notice to interested parties and a hearing on the will was had would in many instances permit a wasting of the estate.  

Contest in the case of real estate recognized even more fully that no litigation about the will is necessary in the ordinary situation. Its underlying theory was this: Contest takes place only when the title to devised land is put in issue. It operates to authenticate the instrument only to the extent that the judgment in that case is an estoppel between the parties.

It thus appears that broadly speaking the theory of contest in the case of wills of personality and of realty was not as widely divergent as might be supposed. In each type of will it is assumed that there is no contest, no adjudication of the due execution of the will, in the ordinary case. Only when some exceptional circumstance gives rise to a dispute is there

13 "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 Devisees, or Legatees, would be found utterly incompatible with that expedition and economy, which are the most essential ingredients in the administration of every-day justice."

any judicial proceeding in the true sense. In the case of personalty, it is true, a formal authentication is always given to the will and title to the personal estate is handed over to the personal representative. In the case of land, the will is accepted at its face value in the ordinary case, and as vesting title in the devisee without even a formal authentication.

The real nature of probate and contest as applied to various kinds of subject matter is nowhere more clearly brought out than in the Fourth Report of the Real Property Commissioners of England, made in 1833. "Probate in common form," they asserted, "is in effect a mere registration of the Will, and we apprehend that there is no necessity for the machinery of a Court to discharge this office of the present Spiritual Courts, and that every advantage of Probate in common form may be obtained by the establishment of a Register. . . ." They then proposed that all wills, whether involving real or personal property, should be registered; but that probate should be abolished. In the ordinary case, the registration was to be sufficient. But if a contest was desired, whether involving real or personal estate, then a bill in equity to establish the will might be filed, and in this suit an issue could be directed to a court of law.

As a matter of fact, many of the recommendations of this Commission were not adopted. In 1857, however, legislation was enacted which took away the jurisdiction of the ecclesiastical courts over probate of wills and vested it in a probate court. This legislation extended probate to wills involving both real and personal estate. By subsequent reorganizations of the judiciary, the Probate Division, which was the successor to the court of probate, became a part of the High Court of

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15 Fourth Report by the Commissioners Appointed to Inquire Into the Law of England Respecting Real Property (1833) 55.
16 20-21 Vict. c. 77, §§ 3, 4, p. 240.
Justice. The Land Transfer Act of 1897 provided for the probate of wills involving land only and vested title to the realty of decedents in the personal representative rather than in the heir or devisee. Although probate in common form is still retained in name, it consists essentially in a registration of the will with the probate registry and an authentication of it. Probate in solemn form may be resorted to as in early English law except that such probate may be had as to wills of real estate as well as of personalty, and the trial of the issue takes place in the Probate Division. It will thus be seen that Parliament did not adopt the idea of the Real Property Commissioners of 1833, who wished to unify the law of will contest by applying the method of contesting wills of land to wills of personalty; instead, the law was unified by applying the method of contesting wills of personalty,—namely, probate in solemn form,—to wills of land.

III. Contest of Devise of Land in Action at Law to Try Title Becomes Obsolete

Perhaps the first sharp veering away from the English model was the recognition in America of the jurisdiction of courts of probate and similar courts to admit to probate wills involving land. Indeed, from the scanty data which has been examined, one wonders whether in most of the colonies it was ever supposed that one could not probate a will involving real estate. Certainly the probate of wills involving land was usual by the early part of the nineteenth century. In Virginia a statute enacted in 1711 expressly provided for

18 60–61 Vict. c. 65, p. 184.
19 15–16 Geo. 5, c. 49, §§ 150–175 (1925); Tristam and Coote, Probate Practice (18th ed. 1940) 389–399.
20 4 Statutes at Large of Virginia (Hening, 1820) 13.
the probate of wills involving land. Such wills were subject to probate in North Carolina by legislation enacted in 1784.\(^{21}\) A Connecticut decision\(^{22}\) holds that the probate in 1797 of a will involving land was conclusive. A Pennsylvania case\(^{23}\) decided in 1791 discusses the effect of the probate of a will involving land; and a Maryland case\(^{24}\) decided in 1816 indicates that the probate of wills involving land had long been recognized in that state. One cannot say that the English view, to the effect that a decree admitting a will to probate was without effect as to realty, was never followed in this country; for one early New Jersey case\(^{25}\) so holds. But it is reasonably certain that today in every jurisdiction in the United States a duly executed testamentary disposition involving land may be admitted to probate.\(^{26}\)

Conceding, however, that in all states today a will involving land may be admitted to probate, does that exclude the introduction of an unprobated will in an action in the nature of ejectment or trespass to try title to land? In nearly all jurisdictions today the answer is clearly in the affirmative. There was, however, a period in which there must have been much uncertainty about the matter. The Supreme Judicial Court of Massachusetts, it is true, in a case decided in 1822,\(^{27}\) held


\(^{22}\) Judson v. Lake, 3 Day (Conn.) 318 (1809).

\(^{23}\) Fenn, Lessee of Walmesley v. Read, 1 Yeates (Pa.) 87 (1791).

\(^{24}\) Massey v. Massey's Lessee, 4 Harr. & Johnson (Md.) 141 (1816).


\(^{26}\) Statutes expressly require probate of a will of land in Arkansas, Florida, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Vermont and Wisconsin. These statutes are collected in the appendix note to the Model Probate Code for §§ 81 and 85, p. 304, supra. There is clear authority to the same effect in some other states. In the rest the rule is not questioned, but the statutory expression of it is not clear. Such authority as exists is as follows: Inge v. Johnston, 110 Ala. 650, 20 So. 757 (1895); Ariz. Code (1939) § 38-202; Cal. Prob. Code Ann. (Deering, 1944) § 323; Castro v. Richardson, 18 Cal. 478 (1861); Colo. Stat. (1935) c. 176, §§ 47, 50; Johnes v. Jackson, 67 Conn. 81, 34 A. 709 (1895); Del. Rev. Code (1935) § 3799; D. C. Code (1940) § 11-503; Rogers v. Rogers, 78 Ga. 688, 3 S. E. 451.
that the jurisdiction of the probate court to admit to probate a will devising land is exclusive, and unless the will has been so admitted it cannot be proved in an action to try title. In a note to that decision, moreover, the reporter refers to another case in which substantially the same thing had been held some thirty years earlier. But in other jurisdictions it was held that the decree admitting a will to probate was merely evidence in an action to try title but was not conclusive; and that, if the will had not been admitted to probate at all, it could nevertheless be proved in an action to try title to the land.

Doubtless one potent influence in the direction of eliminating proof of an unprobated will in an action of trespass or ejectment was the decision of Justice Story in *Tompkins v. Tompkins* in 1841 to the effect that the statutes of Rhode Island gave the probate court exclusive jurisdiction to determine the validity of a will involving land and that its determination could not be attacked collaterally in an action to try title. Another significant influence in the same direction was the enactment of the following statute as a part of the Massachusetts Revised Statutes of 1836:


*Shumway v. Holbrook, 1 Pick. (18 Mass.) 114 (1822). And see Laughton v. Atkins, 1 Pick. (18 Mass.) 535 at 548 (1823).*

*Jackson ex dem. Le Grange v. Le Grange, 19 Johns. (N. Y.) 386 (1822); Smith's Lessee v. Steele, 1 Harr. & McH. (Md.) 419 (1771); Smith v. Bonsall, 5 Rawle (Pa.) 80 (1835); Executors of Crosland v. Murdock, 4 McCord (S. C.) 217 (1827). And see cases cited in 2 GREENLEAF, EVIDENCE (1st ed. 1846) § 672.*
"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; and the probate of a will devising real estate shall be conclusive as to the due execution of the will, in like manner as it is of a will of personal estate."

That this was already the common law of Massachusetts is pointed out in the Revisers' notes as follows: 31

"This is in accordance with the established law in this state; but as it differs from the law in other places, and is a provision of very extensive and important influence, it may be useful to insert it in the text of our statutes."

Today the state of the law is about as follows. 32 In twelve states statutes similar to the Massachusetts legislation just quoted are in force, which make it clear that a will involving land must be probated in order to be admitted to prove a title. In seven other states legislation in a different form undoubtedly has the same effect. Then there is authority to the effect that, since the probate court has been given jurisdiction to admit to probate wills involving land, that jurisdiction is impliedly exclusive and therefore an unprobated will cannot be used to prove a title in an action in the nature of trespass or ejectment. 33 As the Connecticut court said: 34 "Our statutes commit the probate of all wills to the Courts of Probate; and it has been held in this State that that court is the only tribunal competent to decide the question of the due execution of a will—including the testamentary capacity of the testator. . . . Hence a party who desires to show title by a will, to

32 See Model Probate Code, Appendix A, note to §§ 81 and 85, p. 304, supra.
33 See Swazey's Heirs v. Blackman, 8 Ohio 5 (1837); Jones v. Dove, 6 Ore. 188 (1876); Cummins v. Cummins, 1 Marvel (15 Del.) 423 at 440, 31 A. 816 (1895). In general, see cases cited in note in Ann. Cas. 1916 A 887.
34 Johnes v. Jackson, 67 Conn. 81 at 90, 34 A. 709 (1895). The same view is well expressed in Castro v. Richardson, 18 Cal. 478 (1861).
personal property or real estate, can have it received as evidence of such title, only after it has been established in the proper Court of Probate; because that is the only way in which he can show that the will under which he claims, is genuine."

In New York it appears that, if the will involving real estate is admitted to probate, the decree to that effect is conclusive as against collateral attack. But if it is not offered for probate, then apparently the unprobated will may be proved in an action to try title to the land involved. The same also appears to be the rule in Virginia. In Tennessee there is a line of authority indicating that a will involving land cannot be proved until it is admitted to probate; there are, however, indications in the statutes and cases that under some circumstances, at least, an unprobated will may be proved in an action to try title and that a decree admitting a will to probate may be attacked collaterally in such an action. It should be pointed out that in New York and Virginia, and perhaps elsewhere, an unprobated will involving land is not entitled to be recorded. Therefore, the contest of a will in those jurisdictions in an action in the nature of ejectment would seem to have small practical value, and is probably a little used device.

It thus appears that the contest of a will, in an action to try title to land, is, for most practical purposes, obsolete in the United States. The remainder of the discussion proceeds upon this assumption.

36 Corley v. McElmeel, 149 N. Y. 228, 43 N. E. 628 (1896).
37 Bagwell v. Elliott, 2 Rand. (23 Va.) 190 (1824).
IV. Types of Will Contests Developed in the United States

So far the evolution of Anglo-American law of will contest is all to the credit of the American states. There was no good reason why a will of land should not be probated once and for all just as a will of personalty. If it was desirable to have the matter settled finally as to the personal property, it was even more desirable to have a final determination as to real estate. Thus, our legislatures and courts determined that a will involving land must be probated; and they reached this rational conclusion decades before the same reform took place in England.42

But here our favorable balance in the ledger of history ends. As will appear more fully in the survey of legislation which follows, in a large number of states the rational basis of the will contest was entirely overlooked; and the modification of the English system which took place left us with a totally anomalous legal device.

Before embarking upon a survey of American statutes, however, it may be pointed out that the first step in classifying the various jurisdictions is to divide them on the basis of the presence or absence of notice for the initial probate. If notice is not required and is not given for the initial probate, there will necessarily be a basis for contest after probate and we shall always find it. On the other hand, if notice is required for the initial probate, either there is no reason for contest after probate or the reason must be entirely different from that which justifies the contest after probate in the other group of states. But whether the initial probate proceeding is begun with or without notice, contest after probate, if it exists at all, follows one of three patterns: (1) the hearing is

42 Wills of land were not subject to probate in England until legislation enacted in 1857 so provided. See note 16, supra.
like probate in solemn form in that it is before the same tribunal which admitted the will to probate; (2) the hearing is in a higher tribunal, usually chancery or the trial court of general jurisdiction, and bears a superficial resemblance to a trial of the issue \textit{devisavit vel non} as directed by English chancery; \footnote{But the proceeding in this country, unlike the English prototype, is in \textit{rem} and does not concern any particular land or other estate. This will be apparent from the discussion of the law of particular jurisdictions which follows.} and (3) though the statutes in terms provide only for contest before probate, an appeal with trial de novo to the trial court of general jurisdiction has the effect of a will contest. As we shall see, the provisions for will contests in the respective states \footnote{In this survey, the law of Louisiana is excluded, since it is of civil law origin.} involve almost every conceivable combination of the various patterns and bases for classification which have been suggested.

Taking up first the jurisdictions in which probate may be initiated without notice, we find two groups of states: (1) those which follow the pattern of the English probate in common and in solemn form; and (2) those which provide for a contest in a higher tribunal than that in which the will was probated. This classification is further complicated by the fact that an appeal with trial de novo is permitted in some of them but not in others, and that, in at least one of them, no contest before probate is permitted.

Second, we shall consider those jurisdictions in which notice is required for the initial probate. We shall see that a very few of them permit contest only before probate; others provide expressly for contest both before and after probate in the same court; still others provide for contest after probate in a higher tribunal than that in which the will was probated; and a very considerable number, while professing to permit contest only before probate, in fact permit a contest after probate in the guise of an appeal with trial de novo in the trial court of...
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general jurisdiction. The picture is further complicated by the fact that, in a few states in which probate is always preceded by notice, a will contest can take place only after probate.

A. JURISDICTIONS PERMITTING PROBATE WITHOUT NOTICE

I. Common and solemn form probate in same court

In the following states, the English system of common and solemn form probate is rather closely followed: Delaware, Florida, Georgia, Indiana, Maryland, Mississippi, New Hampshire, North Carolina, and South Carolina.

In general, this means that the original probate may be without notice, or, if something in the nature of a caveat is filed, it is with notice. If the original probate is without notice,

45 Del. Rev. Code (1935) §§ 3799 to 3802. The statutes are contained in a chapter on "Settlement of Personal Estates" but would seem to apply to wills involving land since § 3799 provides that the record of the probated will "shall be sufficient evidence in respect to both real and personal estate." Proof may be taken without notice, or notice to interested parties may be given on request; § 3800 provides for a caveat at any time before probate; § 3801 gives a right of review to "any person interested who shall not voluntarily appear at the time of taking the proof of a will, or be served with citation or notice as provided in Section [3799]."

46 Fla. Stat. Ann. (1941) §§ 732.23 to 732.31. Probate is in the county judge's court. This may be without notice, § 732.23, or apparently may be initiated with notice, § 732.30. After probate "any interested party" may have notice given, § 732.28. An heir or distributee may file a caveat, whereupon he is given notice, § 732.29. Any heir or distributee, "except those who have been served with citation before probate or who are barred under 732.29" may petition for revocation of probate, § 732.30.

47 Ind. Stat. (Burns, 1933 and Supp. 1943) §§ 7-501 to 7-508, 7-511, 7-513. Contest may be in the circuit court, either before or after probate.

48 Md. Code (1939) art. 93, §§ 353, 357 to 363, for probate and contest in the orphans' courts. But see § 370 as to an issue "deviseavit vel non sent from a court of equity."

49 Miss. Code (1942) §§ 503 to 508. Probate and contest are in equity, § 495. But the general plan is that of probate in common or solemn form.


52 S. C. Code (1942) §§ 8932 to 8934.
then there may be a contest thereafter on notice to interested parties. To this group of states we may add, also, Oregon and Washington, although it is not entirely clear in those states whether the original probate can be contested, or whether there must first be a probate without notice, followed by a contest with notice. This, on the whole, would seem to be a perfectly rational scheme; but it should be noted that legislation in at least three of these jurisdictions, namely Georgia, New Hampshire, and Oregon, permits a trial de novo on an appeal to the trial court of general jurisdiction.

The following quotation is made from the Georgia legislation, by way of illustrating the kind of statute here considered:

"113–601. Probate of a will may be either in common or solemn form. In the former case, upon the testimony of a single subscribing witness, and without notice to anyone, the will may be proved and admitted to record. Such probate and record is not conclusive upon anyone interested in the estate adversely to the will.

"113–602. Probate by the witnesses, or probate in solemn form, is the proving of the will, after due notice to all the heirs at law, by all the witnesses in life and within the jurisdiction of the court, or by proof of their signatures and that of the testator, if the witnesses are dead or inaccessible; and the ordering to record of the will so proved. Such probate is conclusive upon all the parties notified, and all the legatees under the will who are represented in the executor."

56 The statutes and cases do not make the point entirely clear, but see 1 BANCROFT'S PROBATE PRACTICE (1928) § 109 and note 3.
58 See note 47, supra.
The function of will contests.

"113–605. Probate in common form shall become conclusive upon all parties at interest after the expiration of seven years from the time of such probate, except minor heirs at law who require proof in solemn form and interpose a caveat within four years after arrival at age. . . ."

While there is much variation in the respective statutes referred to, they all appear to prescribe this same general type of contest.

It would seem also that Arkansas now should belong to this group of states, since both probate and contest are in chancery. However, its legislation has developed from a type of will contest similar to that described in the next subdivision.

2. Contest in a higher court after probate

Much greater variation is found in the legislation involved in the seven states which may fairly be classed in this group than in the group just discussed. Hence, the states will be considered one by one. In the case of Virginia, the history of will contests in that state will be outlined, partly because

69 The compilation of Arkansas statutes of 1937 includes provisions for probate and contest resembling the English probate in solemn and in common form. Ark. Dig. Stat. (1937) §§ 14540 to 14544. The court of probate was empowered to grant probate in solemn form without notice. Or probate could take place on previous notice. An appeal to the circuit court with trial de novo was recognized. Ark. Dig. Stat. (1937) §§ 14530, 14543. Ark. Dig. Stat. (1937) § 14545 provided that certain persons might "within three years after such final decision in the circuit court, by a bill in chancery, impeach the decision and have a retrial of the question of probate. . . ." In 1939 a constitutional provision and certain legislation vested probate jurisdiction in the court of chancery. Ark. Const., Amend. 24; Ark. Acts 1939, Act 3, p. 6. It has been said, however, that this change did not completely consolidate the two courts, but provided for "probate courts in chancery." Lewis v. Smith, 198 Ark. 244 at 248, 129 S. W. (2d) 229 (1939). The appeal to the circuit court with trial de novo appears to have been taken away. Ark. Acts 1939, Act 214, p. 526. By Ark. Acts 1941, Act 401, p. 1169, it was provided:

"That in any case where a will has been admitted to probate without notice having previously been given to the heirs of the deceased testator, a contest of the probate or legality of such will may be heard by the court probating the same. Any heir of the deceased testator may, within six months after the probate of such will, but not thereafter, file a complaint in said court setting out the grounds upon which the legality of such will is contested. . . ."
it is typical of the sort of evolution which has taken place in other states, and partly because the Virginia legislation furnished the model for other jurisdictions.

(a) **Virginia.** Although a brief statute enacted in 1645 gave the county courts jurisdiction to probate wills of residents,⁰⁰ the first legislation in Virginia dealing with will contests was enacted in 1711.⁰¹ It provided for the probate of wills of land as well as of personalty. If a will involved land, the heir was to be summoned to appear at the proving of the will “to show forth anything that shall or may be lawfully alleged against such proof. . . .” There was also a saving clause allowing to persons under disability ten years after their disabilities were removed in which they might contest the probate of the will.

In 1744 additional legislation was enacted ⁰² for the reason that, as stated in its preamble, “the proof of wills in the general court, or county courts of this colony, where lands are devised away from the heir or heirs at law of the decedent, is attended with inconveniences to the executors, and losses in the personal estate.” This enactment provided as follows:

> “That from and after the passing of this act, when any wills are exhibited to be proved in the general court, or any county court of this dominion, it shall and may be lawful to and for the said courts, to proceed immediately to receive the proof of such wills; and to appoint appraisers to value the slaves and personal estate of such testator.

> “Provided always, That where the lands of such testator, or any part thereof, shall, by such wills, be devised away from the heir or heirs at law, such proof as to him, her, or them, shall not be binding; but such heir or heirs shall be summoned, in the manner directed by law, and shall and may be at liberty to contest the validity of such will, in the same manner as if this act had never been made.”

⁰⁰ 1 Virginia Statutes at Large (Hening, 1809) 302.
⁰¹ 4 Virginia Statutes at Large (Hening, 1820) 12.
⁰² 5 Virginia Statutes at Large (Hening, 1819) 231.
In 1748 this legislation was amended by adding a provision extending the time to contest in case of disabilities. The amendment also made it reasonably clear that the notice to the heirs in the case of a will involving land might take place after probate. After the clause to the effect that the will shall not be binding as to the heir, the amendment continued "but the court shall cause such heir or heirs to be summoned, to appear at the next court, and to contest the validity of such will, . . . and if no heir be known . . . then proclamation of such will, being exhibited and proved, shall be made by the sheriff . . . and he shall also publish notice thereof, in writing, and all persons concerned in interest, who at the time of proving any will, shall be under the age of one and twenty years, feme covert, non compos mentis, imprisoned, or out of this colony, shall have liberty to contest the proof thereof, within ten years after their several disabilities and incapacities removed, and not afterwards."

Thus, it would seem that notice before probate, which was required as to wills of land in the legislation of 1711, had not proved satisfactory, and that apparently later amendments permitted a return to the old system of probate without notice.

However, the legislation which was to be the basis of all subsequent will contest statutes in Virginia was enacted in 1785. The important provisions of it are as follows:

"XI. When any will shall be exhibited to be proved, the court having jurisdiction as aforesaid, may proceed immediately to receive the proof thereof, and grant a certificate of such probate: If however, any person interested, shall within seven years afterwards appear, and by his bill in chancery contest the validity of the will, an issue shall be made up, whether the writing produced be the will of the testator or

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63 Virginia Statutes at Large (Hening, 1819) 454.  
64 Virginia Statutes at Large (Hening, 1823) 142.
not, which shall be tried by a jury, whose verdict shall be final between the parties; saving to the court a power of granting a new trial for good cause, as in other trials; but no such party appearing within that time, the probate shall be forever binding.

"XII. In all such trials by jury, the certificate of the oath of the witnesses, at the time of the first probate, shall be admitted as evidence, to have such weight as the jury shall think it deserves."

The significance of this legislation is aptly expressed by the court in Coalter's Ex'r v. Bryan, as follows:

"The obvious purpose of these provisions is, 1. To recognize the ex parte probate of wills, both of realty and personality; 2. To extend the privilege of requiring a reprobat, so as to embrace both; 3. To prescribe a period of limitation for such reprobat; 4. To change the citation for reprobat, so as to require it to be of those interested in sustaining the will, instead of those interested in opposing it; 5. To shift the final probate from the court of original probate to the court of chancery, to be there exercised by the instrumentality of a jury; 6. To provide against the loss of testimony in support of the will, which might result from the delay of the final probate, by authorizing, for the consideration of the jury, documentary evidence of the proof at the first probate."

Without attempting to list all the statutory modifications made from time to time in this legislation, the following important changes may be noted. In 1838 a provision was inserted by which the proponent of a will could institute the proceeding for probate with notice to interested parties if he so desired. But the provisions for probate without notice and a trying of the issue of will or no will in chancery were retained, and all are embodied in the Code of 1849. The 1849 Code permits a devisee to contest a finding adverse to the

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65 1 Gratt. (42 Va.) 18 at 79 (1844).
will, just as an heir could contest a finding in favor of the will.

The present legislation in Virginia on will contests may be summarized as follows:

Probate jurisdiction is vested in circuit and corporation courts and in various clerks of court and their deputies. The probate of a will may be instituted either with or without notice. If the will is admitted by a clerk, any person interested may have an appeal as of right within six months in the same court. The appeal is to be heard by the court "as though it had been presented to the said court in the first instance." Where the original probate is by the court there is no trial de novo on appeal. The court or any person interested in the probate of the will, may cause interested persons to be summoned; and notice of the hearing as to probate may be given by publication. In such a proceeding the final order "shall be a bar to a bill in equity to impeach or establish such will, unless on such ground as would give to a court of equity jurisdiction over other judgments at law." It is also provided that any court having jurisdiction to probate wills may proceed to establish a will ex parte and without notice. In such a proceeding, or on an appeal with trial de novo from a decision of a clerk, a person not a party to the original proceeding may proceed by bill in equity to impeach or establish the will. On this bill, a trial by jury is to be ordered to ascertain "whether any, and if any, how much of what was so offered for probate, be the will of the decedent." Only one year in which to contest by bill in equity is allowed, subject to exceptions as to persons under disability and others similarly situated.

It will thus be seen that Virginia has worked out a perfectly rational system of will contest. If the original probate is be-

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68 Formerly the law was otherwise but the 1849 Code corrected this discrepancy. See REPORT OF REVISORS OF VIRGINIA CODE (1849) 632.
69 Va. Code (1942) §§ 5247, 5249, 5253 to 5261.
before the court, no one can contest after probate unless he was not a party to the original proceeding. Contest after probate is ordinarily by bill in equity and thus resembles slightly the practice of English equity of framing the issue of will or no will. Only in the case of the probate before the clerk can the same parties have the issue tried de novo, and this is obviously because of the inferior judicial qualifications of the clerk.

(b) **West Virginia.** When West Virginia separated from Virginia during the war between the states, it took over pretty largely the Virginia legal system. Since that time, however, modifications have been made in the provisions for will contest, but the resemblance to the parent statutes is very substantial.

The present legislation\(^7\) provides for either an ex parte probate or a probate in solemn form in the county court. A contest before probate may be had in connection with the probate in solemn form if interested parties take the proper steps. The judgment of the county court may be appealed to the circuit court and the issue is then tried de novo. The Code also provides for a contest in chancery in the circuit court. A person who is regarded as a party to a probate in solemn form not appealed from or to an appeal with trial de novo in the circuit court cannot contest in chancery. Indeed, it would seem that the contest in chancery is only possible if the prior probate has been ex parte or if the contestant was omitted as a party to a probate in solemn form or to an appeal in the circuit court.

From this brief summary it is apparent that West Virginia, by making a much greater use of the appeal with trial de novo than does Virginia, permits in the ordinary case two trials of the issue will or no will, after due notice to interested parties.

\(^7\) W. Va. Code (1943) §§ 4061-4072.
THE FUNCTION OF WILL CONTESTS

(c) Kentucky. Kentucky legislation on will contest,\(^1\) which appears to stem from the Virginia legislation of 1785,\(^2\) presents substantially the same set-up as that of West Virginia. Wills may be probated in the county court, with or without notice to interested parties. There may be a contest before probate in the county court. The judgment of the county court may be appealed to the circuit court with a trial de novo. It is further provided that "Any person interested who, at the time of the final decision in the circuit court, resided out of this state and was proceeded against by warning order only, without actual appearance or being personally served with process, and any other person interested who was not a party to the proceeding by actual appearance or being personally served with process, may . . . by petition in equity, impeach the decision and have a retrial of the question of probate."\(^3\)

(d) Pennsylvania. An ex parte probate may be had before the register.\(^4\) A caveat may be filed prior to probate, upon which the register may "issue a precept to either the court of common pleas or the orphans' court" directing a trial of the issue of will or no will.\(^5\) An appeal with trial de novo may be taken, from the register to the orphans' court, or on the filing of a caveat prior to probate, the register may certify the record to the orphans' court.\(^6\)

(e) Tennessee. Probate is in the county court if there is no contest.\(^7\) If the will is contested before probate, the case

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\(^{2}\) See Case of Wells' Will, 5 Littell (16 Ky.) 273 (1824); Dibble v. Winter, 247 Ill. 243 at 257, 93 N. E. 145 (1910).
\(^{6}\) Tenn. Code (Michie, 1938) §§ 8099, 8102.
is transferred to the circuit court and there tried. Presumably an appeal from the decision of the county court with trial de novo in the circuit court would be possible.

(f) New Jersey. The complicated probate court organization has been described in another monograph. It is sufficient to state here the important provisions as to contest. Either the surrogate or the prerogative court has original jurisdiction to probate wills. If a caveat is filed when the will is before the surrogate, the proceeding is removed to the orphans' court. An appeal may also be taken to the orphans' court from the proceeding before a surrogate respecting the probate of a will. In either case, the issue is tried de novo, the orphans' court, however, having the power to certify the question of fact to the circuit court for a trial of the issue.

(g) Missouri. Probate must be in the probate court. There can be no contest until after probate; then the contest takes place in the circuit court.

B. Jurisdictions Requiring Notice Before Probate

For some reason which is not entirely clear at the present time a large number of jurisdictions at an early period abandoned the English plan of an ex parte probate in common form without notice. It may have been because the probate of wills disposing of land was included in the court's jurisdiction, and traditionally the validity of a devise of land had been tested by an action at law which began with notice to the defendant. Or it may have been merely that the American conception of procedure involved the tacit assumption that

78 Tenn. Code (Michie, 1938) §§ 8103-8112.
79 Tenn. Code (Michie, 1938) §§ 9028, 9033.
80 Simes and Basye, "The Organization of the Probate Court in America," 42 Mich. L. Rev. 965 at 982 (1944) and p. 405, supra.
no valid proceeding could be instituted without prior notice to interested parties. At any rate it has come about that slightly over half the states require some sort of notice before a will can be probated. It is believed that in many instances this change has taken place without a full realization of its relation to legislation permitting contest after probate. In the discussion which follows, the statutes will be summarized with this in mind. We shall begin with New York and shall include a little of the history of its legislation, since the statutes of no other state, unless it be California, have had so much influence in shaping present day will contest legislation.

I. Contest only before probate

In two jurisdictions, New York and Massachusetts, the only contest of a will, in the sense herein described, takes place before probate. That is to say, will contest is like any other issue in any trial court; the issue must be made up before trial; thereafter, the remedy is by appeal or, in very extraordinary situations, by some special proceeding to reopen the judgment or decree. As will be pointed out later, the same can be said of a will contest in the more populous areas of Wisconsin; but, since the rule is otherwise in other courts of that state, its provisions for will contest will be considered in another connection.

(a) New York. While probate and contest had a long prior history in New York, the significant elements of the narrative begin with the Revised Statutes of 1828. Prior to that legislation the English system of probate in common and in solemn form was in force. By the Revised Statutes of 1828 separate provisions were made for the probate of wills

See 43 Mich. L. Rev. 1153 (1945) and p. 269, supra.

See Matter of Brick's Estate, 15 Abb. Pr. (N. Y.) 12 (1862); Redfield, Law and Practice of Surrogates' Courts (2d ed. 1881) 1-18.

Redfield, Law and Practice of Surrogates' Courts (2d ed. 1881) 256.
of real and of personal property. In the probate of each kind of will, however, notice prior to the hearing was required. In the case of the will involving real property, the heirs were to be notified; 87 in the case of personalty, the widow and next of kin. 88

The article on probate of wills of personal property also contained this provision: 89

"Notwithstanding a will of personal property may have been admitted to probate, any of the next of kin of the testator, may, at any time within one year after such probate, contest the same, or the validity of such will, in the manner herein provided."

The Code then continued with several sections outlining the procedure for will contest. There was no analogous provision for the contest of the probate of a will involving real property. Presumably this was because such probate was not conclusive as to the due execution of the will. The Revisers' notes give the following explanation for the provision concerning will contest: 90

"The preceding sections, from section 32 inclusive, are new; they are prepared in order to provide for a case which may often occur, and for which it is at least questionable whether there is any provision by the existing law. The notice previous to proving a will is necessarily short, and must often be inadequate to apprise all of the parties interested, and yet it would seem that when once admitted to proof, the probate is perfectly conclusive; vide Phillip's Evidence, vol. p. 245. In England, a practice prevails in the ecclesiastical courts, of permitting a second and more solemn proof, by the citation of the parties at the instance of a relative. Vide 2 Phillimore, 224. But there it has the effect of suspending

all the proceedings of the executors; a result much to be de­
preciated. We have adopted that practice, with many modifi­
cations, fitted to our situation, and we propose to limit the
time for re-examination, so as not to interfere with the pay­
ment of legacies, which cannot be required until one year
after probate. In the case of a will of real estate, the proof is
not so conclusive as of personal property, but the heir may
contest it in a suit at law. The reason would seem equally to
apply to a will of personal estate, so far as to provide some
summary mode, by which he may contest it.”

It is thus apparent that the New York legislation, by requir­
ing notice prior to a hearing on probate of the will, and per­
mitting a contest after probate, had in effect provided for two
probates in solemn form.

In Collier v. Idley’s Ex’rs,91 Surrogate Bradford explains
this anomaly by saying that the original plan was to permit
only next of kin who were out of the jurisdiction, and there­
fore not personally served, to contest after probate; but that
the legislature broadened the contest provision so as to make
it available to all interested parties. His language is as fol­
lows:

“Though the practice of proving wills in common form has
prevailed in other portions of the United States; and though
it was customary in the State of New York, previous to the
revision of the statutes, to prove wills of personalty in that
manner, still, it was not usual to require a new proof of the will
in solemn form, on the demand of the next of kin. And yet
the probate was conclusive. To remedy this difficulty, the
first step was to provide for notice to the next of kin on the
original proof of the will. (2 R. S., p. 60, § 24.) . . .
Still, personal service of the citation was requisite, only on
those who could be served in the county of the Surrogate, and
next of kin not personally served, might be cut off by construc­
tive notice by advertisement. To meet this case, the Revisers
reported to the Legislature a series of provisions, designed to

91 Bradf. Surr. 94 (1849).
allow proof of the will in solemn form at the call of any of the next of kin, upon whom a citation to attend the probate had not been personally served. (See Original Section, § 36.) . . . It is evident that the statute, as reported to the Legislature, was an adoption of the system of proof in Solemn Form, in the case of such of the next of kin as had not been cited. . . . But the Legislature determined to make the statute much broader, and while they retained all the features of the English practice, as reported by the Revisers, they extended the benefit of the statute to all the next kin, whether they had been regularly cited on the original probate or not, the clause limiting the right to file allegations to those who had not been personally cited, being stricken out, and the section enacted as it now stands."

While there were some amendments, this general type of will contest was retained until after the turn of the century. In 1900 the New York Commissioners of Statutory Revision, in their report of that year on "General Procedure," recommended, not an elimination of the requirement of notice for the initiation of a probate proceeding, but the repeal of the provisions permitting contest after probate. Their reasons are expressed in the following words:

"The commissioners think that the unreversed decree of the surrogate admitting a will to probate should be conclusive everywhere until modified, or reversed on appeal. We think the general rule should apply here as in other cases, namely, to furnish a tribunal in which one trial of the issues involved in a probate proceeding may be had, and that the suitors or

92 In 1837 the separate provisions for notice of probate of a will of real and of personal property were repealed, and a group of sections covering notice for both types of wills was substituted. See N. Y. Laws 1837, c. 460. In general as to will contest in 1881, see REDFIELD, LAW AND PRACTICE OF SURROGATES' COURTS (2d ed. 1881) c. 8. In 1892 a provision for contest in the Supreme Court after probate of a will of real or personal property was enacted. N. Y. Laws 1892, c. 591. See this section, as amended in N. Y. Code of Civ. Proc. (Parker, 3d ed. 1903) § 2653a. Provisions for a contest after probate in the Surrogates' Court were repealed by N. Y. Laws 1910, c. 578.

93 2 ANNUAL REPORT OF THE COMMISSIONERS OF STATUTORY REVISION OF NEW YORK (1900) 216.
persons interested should not be given two tribunals with alternative or cumulative jurisdiction; that is, suitors should not be permitted to use one court, and if dissatisfied or if they neglect their rights in that tribunal, go into another tribunal and try the same issues which were or might have been tried in the first. . . . Under the plan proposed any contestant may if he wishes submit the issues to the surrogate, or if he prefers, he may have the issues tried by a jury; and we think that when the issues are so tried and finally determined and settled, the adjudication should be final and conclusive; and there should not be any other opportunity to try the same issues, unless a new trial is ordered. . . . The will once admitted to probate under the plan suggested ought to be conclusive, and the estate ought not to be subjected to the uncertainty of a possible application for revocation. Ample provision is made for obtaining a new trial."

In spite of this forceful argument against the double trial of the issue of will or no will, it was not until the legislative session of 1914 that all provisions for contest after probate were repealed.94 While an appeal from the decree was allowed, and the introduction of new evidence was permissible, it was in the nature of an equity appeal and not a trial of the issues de novo.95

Under the present New York legislation,96 the will can be contested at or before the close of testimony taken on behalf of the proponent, but apparently not later than that time. The original proceeding is always initiated with notice. A decree does not affect the right or interest of a person not notified as provided in the code.

It thus appears that New York eventually arrived at quite as rational a system of will contest as Virginia, whose history we have previously examined on this point, but of a very dif-

94 N. Y. Laws 1914, c. 443. See particularly § 2617 thereof.
different sort. Briefly stated, it is this: the requirement of notice before probate is imposed; but there can be no contest after probate. Therefore, the trial of the issue of will or no will can only occur once.

(b) Massachusetts. The story of the development of the Massachusetts probate system has been so well presented by Professor Atkinson\(^9\) that little need be added here. Although the statutes are not explicit, it appears that the practice in Massachusetts is to give notice of the proceeding to probate a will when the petition is filed.\(^8\) It has, doubtless, long been the rule that contest takes place before probate.\(^9\) But prior to 1920, there was an appeal from the decision of the probate court which constituted a trial de novo before a single justice of the Supreme Judicial Court.\(^1\) At the present time, however, appeals from the decision of the probate court probating or rejecting a will are heard as equity appeals before the Supreme Judicial Court.\(^2\) It is true, the probate court may have the issue of will or no will tried before a jury in the superior court, but this appears to be merely because it is inconvenient for the probate court to call a jury and not because the case is being transferred to a higher court.\(^3\)

2. **Contest before and after probate in same court**

In a very considerable number of states, the legislatures appear to have modified the old procedure for probate in common and solemn form by requiring notice to interested parties before any probate at all. Thus, the principal reason

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8 See Newhall, Settlement of Estates (3d ed. 1937) § 28; Mottla, Massachusetts Practice (1942) § 31.
for contest after probate under the English system,—namely that interested parties had no notice of the first probate,—is gone. And it is not easy to find a satisfactory reason for the retention of the contest after probate.

(a) *The California group.* The states whose legislation on will contest presents the greatest amount of similarity are those which follow the pattern found in California. Without doubt this was influenced by some stage of development of the New York legislation already described, yet it presents a form and content all its own. The legislation of eleven states may fairly be classed in this group, namely: Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming. As legislation in three of these, North and South Dakota and Oklahoma, presents certain common characteristics, their statutes will be discussed together after the others are considered.

(b) *California.* In 1850, the year in which California became a state, its legislature passed “An Act to regulate the Settlement of the Estates of Deceased Persons.” 103 This legislation constitutes the beginning of the present California law of will contest. Prior to that time the Mexican law of wills and administration was in force. 104 This Act consisted of fourteen chapters, the second of which was entitled “Of the Proof of Wills.” Important features of this chapter, for our purpose, are as follows: no distinction is made between wills of real and of personal property; notice by publication, and by citation, prior to the hearing on the probate of a will, was provided for; 105 the will could be contested before probate by filing written grounds of opposition. 106 Without doubt the legislation was influenced by that in force in New York.

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103 Cal. Stat. 1850, c. 129.
104 Castro v. Castro, 6 Cal. 158 (1856); Coppinger v. Rice, 33 Cal. 408 (1867).
This is particularly indicated by the section dealing with contest after probate, which is as follows: 107 "When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same, or the validity of the will. For that purpose he shall file in the Court before which the will was proved, a petition in writing, containing his allegations against the validity of the will, or against the sufficiency of the proof, and praying that the probate may be revoked."

A revised "Act to Regulate the Settlement of the Estates of Deceased Persons" was passed in 1851, 108 but, so far as the law of will contest is concerned, its changes were not significant. An amendment in 1855 109 provided for a jury trial of will contests.

The California Code of Civil Procedure of 1872, still following, in general, the scheme of the enactment of 1850 as to will contests, presents elaborate provisions for contest before probate in a separate article. 110 The contestant is specifically declared to be the plaintiff and the petitioner the defendant. 111 The petitioner may demur or answer and issues of fact which may be raised are stated. Another article of seven sections 112 entitled "Contesting Will After Probate" is chiefly a rearrangement of materials contained in the Act of 1851.

In 1929, 113 the provision permitting any interested person to contest after probate was changed so that such a contest could be instituted only by "any interested person, other than a party to a contest filed before probate pursuant to section 1312 of this code and other than a person who had actual notice of contest thereunder in time to have joined therein."

109 Cal. Stat. 1855, c. 110.
113 Cal. Stat. 1929, c. 495.
The period for contest after probate was, by the same act, reduced from one year to six months.

In 1931 the provisions for will contest appear as a part of a Probate Code in a chapter entitled "Contests of Wills," consisting of two articles, one on "Contests before Probate" and one on "Contests after Probate." This chapter has remained practically unchanged since that time.

At the present time, as in prior legislation, two will contests are possible, although the first as well as the second is instituted with notice. But this anomaly is mitigated to a large extent by the provision enacted in 1929 denying a second contest to those who were parties to the first contest or who had actual notice in time to participate. The most significant sections of the present legislation on will contest, for the purposes of this discussion, are as follows:

"Sec. 370. Any person interested may contest the will by filing written grounds of opposition to the probate thereof at any time before the hearing of the petition for probate, and thereupon a citation shall be issued directed to the heirs of the decedent and to all persons interested in the will, including minors and incompetents, wherever residing, directing them to plead to the contest within thirty days after service of the citation, which shall be made personally or by publication in the manner provided by law for the service of summonses in civil actions. Any person so served may demur to the contest upon any of the grounds of demurrer available in civil actions. If the demurrer is sustained, the court may allow the contestant a reasonable time, not exceeding ten days, within which to amend his contest. If the demurrer is overruled, the petitioner and others interested, within ten days after the receipt of written notice thereof, may jointly or separately answer the contest."

"Sec. 371. On the trial, the contestant is plaintiff and the petitioner is defendant. Any issue of fact involving the com-

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petency of the decedent to make a last will and testament, the freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence, the due execution and attestation of the will, or any other question substantially affecting the validity of the will, must be tried by a jury, unless a jury is waived as provided by the Code of Civil Procedure. If no jury is demanded, the court must try and determine the issues joined."

"Sec. 380. When a will has been admitted to probate, any 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, may, at any time within six months after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate be revoked."

(c) Arizona. The Arizona statutes on contest follow closely the language of the California statutes of 1872 and are obviously copied from them. The separate provisions for contest before and after probate are set out as in the California statutes. The time for contest after probate is one year with additional time for persons under disabilities. Arizona did not adopt the California amendment of 1929 restricting the parties who can contest after probate. According to one section of the Arizona Code, any interested person may contest after probate. Indeed, in Estate of Biehn the proponent of the will was permitted to contest

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119 This is now Cal. Prob. Code Ann. (Deering, 1944) § 380, and provides that "any 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" may contest after probate.
120 Ariz. Code (1939) § 38-216.
121 41 Ariz. 403, 18 P. (2d) 1112 (1933).
after probate. But according to another section,\textsuperscript{122} it may be inferred that, if a person sui juris contested before probate, in person or by an attorney of his own selection, he would be estopped to contest after probate.

(d) \textit{Idaho}. Idaho provisions on contest\textsuperscript{123} are almost the same as those contained in the California Code of Civil Procedure of 1872, except that the time for contest after probate is shorter.\textsuperscript{124} Like Arizona, they do not include the California amendment of 1929, which limits the persons who can contest after probate where there has been a contest before probate. Under the Idaho code, an appeal from the probate court to the district court is de novo unless it is an appeal on a question of law alone and the error appears on the face of the record.\textsuperscript{125} Thus it appears that it is possible to have three trials of the issue of will or no will, although notice to interested parties precedes each of them.

(e) \textit{Utah}. The Utah provisions\textsuperscript{126} follow closely the California Code of Civil Procedure of 1872, although some of the provisions of the latter on will contest are omitted. Contest after probate is limited to "any person who has not contested a will, or who has contested by attorney appointed by the court without his knowledge." The time limit for con-

\textsuperscript{122} Ariz. Code (1939) § 38-208: "Any person interested may appear and contest the will by himself or by his guardian or attorney, appointed by himself or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest after probate by the party so represented, if commenced within the time provided for the contest of wills after probate. . . ." And see Estate of Cunningham, 54 Cal. 556 (1880), interpreting a provision in the California Code similar to this.


\textsuperscript{124} According to Idaho Laws Ann. (1943) § 15-223, the time is four months after probate. But compare Idaho Laws Ann. (1943) § 15-229, which seems to refer to a period of eight months after probate with a saving clause as to persons under disability.

\textsuperscript{125} Idaho Laws Ann. (1943) § 11-406. See, also, Lemp v. Lemp, 32 Idaho 393, 184 P. 222 (1919).

\textsuperscript{126} Utah Code (1943 and Supp. 1945) §§ 102-3-7 to 102-3-13.
test after probate was reduced from one year after probate to six months in 1943. 127

(f) Montana and Wyoming. The provisions for will contest in Montana 128 and Wyoming 129 follow very closely the California Code of Civil Procedure of 1872. In Wyoming, however, the period for contest after probate is six months after probate, and there is no extension of time for persons under disabilities.

(g) New Mexico. While the New Mexico legislation on will contests 130 shows the influence of the California Code of Civil Procedure of 1872, it also shows marked variations. Probate is with notice in the probate court. 131 A contest before probate may take place in that court. 132 But if that court finds against the will, the case is then removed to the district court and tried de novo, "the same as on appeal." 133 A finding favorable to the will in the probate court may be contested in that court at any time within six months, by "any person interested." 134 Appeal to the district court from a decision of the probate court approving or disapproving a will is permitted to "any party aggrieved." 135 This appeal is with a trial de novo. 136 It is evident that, under this legislation, it is possible to have three trials of the issue of will or no will.

(h) Nevada. The recently enacted Nevada legislation on will contests 137 follows closely the language of the California probate code of 1931. However, there are important vari-
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ations. It is expressly provided that the attorney general, and also a devisee or legatee under a former will, may contest before probate.\(^{138}\) The time limit for contest after probate is three months after the will was admitted to probate,\(^{139}\) and there is no saving clause for persons under disabilities as in the corresponding California legislation.\(^{140}\) Like the California probate code, this legislation permits a contest after probate only by "any 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."\(^{141}\)

(i) The Dakota sub-group. Three states, North Dakota, South Dakota and Oklahoma, have statutes on will contest which follow closely the language of the California Code of Civil Procedure of 1872, but which also have some important variations in common. The Dakota Revised Codes of 1877\(^ {142}\) follow the familiar pattern of the California Code of 1872, with a group of sections entitled "Contesting probate of wills" followed by a group on "Probate of foreign wills," after which is found the subdivision on "Contesting will after probate." Two important departures from the California pattern, which are still retained by the three states referred to, are as follows. Contest, both before and after probate, is tried by the court and not by a jury.\(^ {143}\) Contest after probate is permitted only on a showing of "evidence discovered since the probate of the will."\(^ {144}\) The present Oklahoma statutes\(^ {145}\) follow somewhat more closely than do those of the

\(^{138}\) Nev. Comp. Laws (Supp. 1941) § 9882.18.
\(^{141}\) Nev. Comp. Laws (Supp. 1941) § 9882.22. This clause is the same as that contained in Cal. Prob. Code (Deering, 1931) § 380.
\(^{142}\) Dakota Probate Code (1877) §§ 19, 22-27, 31-37.
\(^{143}\) Dakota Probate Code (1877) §§ 22, 34.
\(^{144}\) Dakota Probate Code (1877) § 31.
\(^{145}\) Okla. Stat. (1941) t. 58, §§ 29, 41-46, 61-67. Trial by the court is provided for by §§ 41, 64. The requirement that the contest after probate be based on newly discovered evidence is contained in § 61.
two Dakotas the language of the Dakota Revised Codes of 1877.

The present North Dakota and South Dakota legislation \(^{146}\) on will contests shows some rearrangement and rewording, but on the whole differs but slightly from that found in the Revised Codes of 1877.

It should be noted that, in North Dakota, South Dakota and Oklahoma the order admitting or denying probate of a will can be appealed to the trial court of general jurisdiction and the case can there be tried de novo.\(^{147}\) Thus, although the statutes on will contest might lead one to suppose that a second trial of the issue is permitted only if there is newly discovered evidence, in fact a second trial is permitted by the device of an appeal with trial de novo.

(j) *Other states in this class.* In three other jurisdictions, namely Colorado,\(^ {148}\) the District of Columbia \(^ {149}\) and Iowa,\(^ {150}\) the general plan of permitting a will contest both before and after probate in the same court is followed, although probate is always preceded by notice to interested parties. The Colorado and District of Columbia statutes expressly provide for the caveat and look a little like the system of probate in common and in solemn form with the addition of notice in all cases to precede probate. In Colorado, in addition to contest before and after probate in the county court, an appeal with trial de novo to the trial court of general jurisdiction is

\(^{146}\) N. D. Rev. Code (1943) §§ 30-0601 to 30-0613; S. D. Code (1939) §§ 35.0301 to 35.0312.


\(^{148}\) Colo. Stat. (1935) c. 176, §§ 50, 51, 54 to 56, 63 to 65. The right to contest after probate is limited to persons who were not summoned by actual service of process and who did not appear at the probate. As to appeal with trial de novo, see Colo. Stat. (1935) c. 176, § 243.

\(^{149}\) D. C. Code (1940) §§ 19-308 to 19-312.

\(^{150}\) Iowa Code (1939) §§ 11863-11867, 11882, and see § 11007. The contest after probate is apparently a suit to set aside the will. See 1 McCARTY, IOWA PROBATE (1942) § 318.
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permitted. Texas legislation may also be classified here. There is an express provision for contest before probate. There is also a provision to the effect that, when a will has been probated, a proceeding may be instituted to annul its provisions. Another statute limits the period within which a contest can be instituted to four years after the will is admitted to probate. It is further provided that a suit to cancel a will for forgery or fraud may be instituted within four years after the discovery of the forgery or fraud. It would seem that the proceeding to annul a will is broader than an ordinary proceeding to contest. Texas, however, also recognizes the appeal from the county court to the district court with trial de novo. If we regard this appeal as the will contest, we should classify Texas legislation at a later point.

3. Contest in a higher court after probate

Three states come under this general classification, although they present substantial differences among themselves. They are Alabama, Illinois and Ohio.


Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3433 provides that "When a will has been probated, its provisions and directions shall be specifically executed, unless annulled or suspended by order of the court probating the same in a proceeding instituted for that purpose by some person interested in the estate."

Tex. Civ. Stat. Ann. (Vernon, 1939) art. 5534 provides that "Any person interested in any will which shall have been probated under the laws of this State may institute suit in the proper court to contest the validity thereof, within four years after such will shall have been admitted to probate, and not afterward."

Tex. Civ. Stat. Ann. (Vernon, 1939) art. 5536 provides that an interested person "may institute suit in the proper court to cancel a will for forgery or other fraud within four years after the discovery of such forgery or fraud."

To the effect that there is a trial de novo on an appeal from the county court to the district court, see Tex. Rules Civ. Proc. (Supp. 1944) Rule 334.

(a) Alabama. The scheme for will contest in Alabama resembles somewhat the Virginia provisions already described.\footnote{See Johnston v. Glasscock, 2 Ala. 218 at 237 (1841).} However, unlike Virginia, the Alabama legislation provides for notice prior to probate of the will in all cases.\footnote{Ala. Code (1940) tit. 61, §§ 48-50.} Contest before probate\footnote{Ala. Code (1940) tit. 61, § 52. And see § 63, which provides for a transfer of the contest to the circuit court.} may take place if written objections to the probate of the will are filed in the probate court. On the filing of such objections "an issue must be made up, under the direction of the court, between the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury." Any interested party who has not contested the will may, at any time within six months after the will has been admitted to probate, contest it by bill in equity in the circuit court.\footnote{Ala. Code (1940) tit. 61, § 64. An extension of time is given to persons under disabilities, tit. 61, § 66.} It is further provided that\footnote{Ala. Code (1940) tit. 61, § 67.} "The circuit court may, in such case, direct an issue to be tried by a jury, and on the trial before the jury, or hearing before the circuit judge, the testimony of the witnesses reduced to writing by the judge of probate, according to section 42 of this title is evidence to be considered by the judge or jury."

It is noticeable that Alabama still retains the two trials of the issue of will or no will, in spite of the fact that notice of the first hearing as well as the second is always given. It is true, a person cannot contest after probate, if he has done so before probate, but the mere fact that he was a party to the first proceeding, or a witness, does not preclude him from contesting after probate.\footnote{Breeding v. Grantland, 135 Ala. 497, 33 So. 545 (1902); Knox v. Paull, 95 Ala. 505, 11 So. 156 (1891).} In \textit{Knox v. Paull}\footnote{95 Ala. 505 at 509, 11 So. 156 (1891).} the court
sought to defend the anomaly of two trials of the same issue of fact in these words: "Good reasons may be suggested for affording this additional opportunity to contest the validity of a will which has been regularly admitted to probate after due notice to all parties in interest. The application to prove the will usually follows close upon the death of the testator. The application comes on for hearing as soon as the short prescribed terms of notice have expired. It must frequently happen that persons interested in the proceeding are wholly unable, while it is pending, to inform themselves as to the instruments offered for probate, or of the circumstances attending its execution. Facts affecting its validity may be developed afterwards, and the failure to discover them, or to obtain the evidence to prove them, may have been without the fault or any lack of diligence on the part of those interested in making a contest."

(b) Illinois. Illinois, like Kentucky, took over the Virginia plan of contest in chancery.\(^{159}\) It, however, added not only a provision for an appeal to the trial court of general jurisdiction with trial de novo, but also a requirement of notice for the initiation of the first probate.\(^{160}\) Under an earlier form of the Illinois statute it was held that a contestant could carry on one contest by appeal from the probate court decision and another at the same time by bill in chancery. And he might also move to have the probate in the county court set aside.\(^{161}\) Apparently much the same thing is possible

\(^{159}\) Luther v. Luther, 122 Ill. 558, 11 N. E. 166 (1887); Dibble v. Winter, 247 Ill. 243, 93 N. E. 145 (1910).

\(^{160}\) The provision for notice seems to have appeared in 1897. See Ill. Laws 1897, p. 304. As to the present provision, see Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 216.

\(^{161}\) See Wright v. Simpson, 200 Ill. 56, 65 N. E. 628 (1902); Buergner v. Buergner, 317 Ill. 401, 148 N. E. 274 (1925); Horner, Probate Practice and Estates (4th ed. 1940) § 89.
under the probate code of 1939, although the contest is not called a contest in chancery. At the present time there may be a contest in the county or probate court before probate solely on the ground of "fraud, forgery, compulsion, or other improper conduct which in the opinion of the probate court is deemed sufficient to invalidate or destroy the will." Otherwise there is a statutory contest after probate in the circuit court. An appeal from the decision of the probate court with trial de novo is still possible.

(c) Ohio. In Ohio there can be no contest until after probate. The will is probated in the probate court after notice. Then the statute provides for a contest within six months in the common pleas court. This proceeding is with trial de novo. There can be no appeal, however, from the order of the probate court admitting the will to probate, since that is not regarded as a final order.

4. Contest before probate; appeal with trial de novo in a higher court

One of the most numerous groups of states is that in which the proceeding to probate is initiated with notice and, in terms, contest is permitted only before probate; but in fact by permitting an appeal with trial de novo in the trial court of general jurisdiction a contest after probate in a higher court is

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162 Handley v. Conlan, 342 Ill. 562, 174 N. E. 855 (1931); 1 Horner, Probate Practice and Estates (4th ed. 1940) § 89.
169 In re Estate of Frey, 139 Ohio St. 354, 40 N. E. (2d) 145 (1942). But there is an appeal to the common pleas court with trial de novo from an order of the probate court denying probate, if there was no record taken at the hearing in probate. See Ohio Gen. Code (Page, Supp. 1945) § 10501–56.
recognized. Besides the states already mentioned in other groups which superimpose the device of an appeal with trial de novo, the following jurisdictions may fairly be classified here; Connecticut, Kansas, Maine, Michigan, Minnesota, Nebraska, Rhode Island, Vermont and Wisconsin. In Michigan, the probate may not only be appealed to the trial court of general jurisdiction, but the case may be transferred to that court as soon as the heirs file a contest and before the will has been probated. As has been said, Wisconsin only in part comes within this classification. In its more populous areas, the appeal is direct to the supreme court and is on the record. If we do not regard the Texas proceeding to annul a will as a contest after probate, Texas might well be classified here.

V. The Rationale of the Will Contest

From the foregoing survey of will contest legislation, in which a few glimpses of historical development are interspersed, the legislative trends should be apparent. Many of our legislatures appear to have approached the problem on the assumption that the contest after probate in the manner of the

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172 Me. Rev. Stat. (1944) c. 141, §§5 to 8; trial de novo, c. 140, §37.
174 Minn. Stat. (1941) §§525.23 to 525.241; trial de novo, §525.72.
178 Wis. Stat. (1943) §§310.04 to 310.06; trial de novo, §324.03 (on appeal to circuit court from county court in counties of less than 15,000 population).
170 Wis. Stat. (1943) §324.01. In these more populous counties, the contest may be removed from the county court to the circuit court for trial when a jury is demanded. Wis. Stat. (1943) §324.17, subd. 8.
171 See note 151, supra.
probate in solemn form is an accepted legal device, without realizing why that is true. They thereupon took that device and amended it, by adding a requirement of notice for the original probate or by permitting an appeal with trial de novo, so that the resulting product allowed, not one trial after notice, but two, and in some instances even three, trials of the issue of will or no will. In a few isolated instances,—notably in the case of New York and Virginia,—we find an eventual return to the norm of one trial of the issue. In still other states the pattern apparently is based on the assumption that the issue of will or no will is like any other issue; that notice must be given to interested parties prior to probate and then any contest must take place before probate. But to this perfectly rational conception of the will contest is commonly added the appeal with trial de novo in the trial court of general jurisdiction.

Taking up in order the types of will contest legislation in accordance with the preceding survey, it is clear that a rational basis exists for those which follow the pattern of the English probate without notice, first, because estates commonly need the supervision of the executor immediately on the death of the testator; and, second, because in the vast majority of cases there is not the remotest possibility of a contest and the probate of the will can be reduced to an administrative formality. But since the heir then has no opportunity to contest before probate, he must be given that opportunity afterward.

Moreover, the same reasons would justify a contest in chancery after probate where no notice is given for the initial probate. The fact that it is in chancery may be explained on the ground that a more competent tribunal is needed for a contested than for an uncontested probate; and that if the heir wishes to have a contest after probate in such a tribunal, he may do so. Parenthetically, it should be pointed out, however, that the resemblance of this device to the framing of
the issue of \textit{devisavit vel non} in English chancery in the case of litigation over the title to devised land is largely superficial. Unlike the English historical counterpart, the American contest in chancery is commonly in rem and is a part of the original probate proceeding.\textsuperscript{182}

Where the proceeding is initiated with notice, we must seek a different rationalization. It is true, the Alabama court \textsuperscript{183} suggested that, even with notice before probate, the time prior to the hearing would be so short that little opportunity would be afforded to the heirs to ascertain facts on which a contest could be based. However, it is difficult to see why that should be so. The facts existing at the time of the execution of the will or at the testator's death are just as readily ascertainable as the facts involving a suit relative to the execution of a contract or deed. And the action with respect to the contract or deed may be tried just as speedily after notice as the suit for the probate of a will. Thus it would seem that in those jurisdictions, such as the California group, where there may be contest both before and after probate, there is no satisfactory basis for contest after probate. It is largely an historical survival of probate in solemn form, the reason for which disappeared when probate with notice to interested parties was required.

It is true, in several states of the California group, the same person cannot initiate a contest both before and after probate. Thus, in California, in order to contest after probate, it must appear that the contestant was not a party to the first contest and did not have actual notice of it in time to participate.\textsuperscript{184} There is nothing in this statute, however, which bars an heir from contesting after probate where he had notice before probate but there was no contest. In the Dakota

\textsuperscript{182} See Simes, "The Administration of a Decedent's Estate as a Proceeding in Rem," \textit{43 MICH. L. REV.} 675 at 679 and 688 to 691 (1945), and pp. 494 and 506 to 509, supra.

\textsuperscript{183} See note 158, supra.

\textsuperscript{184} See p. 716, supra.
group the opportunity to contest after probate is further limited by the requirement of showing of "evidence discovered since the probate of the will." It would look as if the contest after probate in this group of states could be justified on the ground that its operation is about as restricted as the motion for a new trial in a civil action. However, in all three states of the Dakota group, legislation permits an appeal with trial de novo as well as a contest after probate. This appeal is objectionable on the grounds hereafter to be pointed out.

Is there any justification for the contest after probate, in jurisdictions which require notice before probate, if that contest is in a higher tribunal? And is there any justification in such jurisdictions, for an appeal with trial de novo in a higher tribunal? It would seem that the answer to these questions is the same. Doubtless the reason for the appeal with trial de novo in the trial court of general jurisdiction is the same as that for the typical provision for appeal from the judgment of a justice court. The legislature has very little confidence in the competency of the judge; he might be a layman, and rules of law might be disregarded; if anybody objects, his case can be tried before a judge who is learned in the law. The same explanation could be given for the jurisdictions which permit a proceeding called a contest in a higher tribunal. In either type of contest, it would seem that the retrial of the issue in the higher court is unjustified, if it can also be tried in the probate court. That is to say, if the probate judge is not competent to preside over a contested probate, he ought not to be allowed to do so at all. If he is competent, then the case does not need to be tried anew in another court.

It should be pointed out that the Ohio provisions for contest are distinguishable and are perfectly rational. There the will is admitted to probate in the probate court on notice, and

\[185\] See p. 721, supra.
the contest can take place only after probate and only in the common pleas court. A lay judge may be competent to handle an uncontested probate though he could not properly preside over a will contest case. Hence, the Ohio legislation provides for an uncontested probate in the probate court, and a contest in the common pleas court. But one criticism of this plan may be suggested: in theory it gives an advantage to the proponent of the will as against the contestant for the contestant must always oppose an already probated will. But it is believed that this advantage is more theoretical than actual.

What types of will contest legislation, then, will stand the test of rational analysis? From the foregoing discussion, we may conclude that there are essentially three. First, in jurisdictions which permit probate without notice, contest can take place after probate, either in the same or in another tribunal, if initiated by persons who had no notice of the first probate. But the addition to this pattern of an appeal with trial de novo is without justification. Second, in jurisdictions which require notice to interested parties before probate and which permit contest before probate, there is no reason for contest after probate either by that name or in the guise of an appeal with trial de novo. Such a jurisdiction should regard the issue of will or no will just like any issue raised in a civil action; it must be raised before trial and determined by the judgment or decree. Third, the Ohio pattern of an uncontested probate in the probate court and a contest in the common pleas court only after probate is perfectly rational in that it recognizes that the common pleas court is competent to try a contest but that the probate court is not.

VI. The Function of Contest After Probate in Relation to Certain Specific Problems

A considerable body of litigation has arisen involving this question: What is the relation of contest after probate to the
prior proceeding for probate of the will? Is it like an appeal? Is it like a proceeding to vacate a judgment? Is it a proceeding in rem like the original proceeding to probate? Is it in fact a part of the proceeding to probate and not an independent proceeding? Of course, in jurisdictions where the contest is an appeal with trial de novo, the character of the proceeding is in part determined by its name: it is an appeal and for most purposes, therefore, is a part of the original proceeding to probate. Indeed, as to most types of contest, it is commonly held that the contest is in rem and is for most purposes a part of the original proceeding to probate.\textsuperscript{186}

However, the function and character of the contest after probate cannot be determined in a vacuum. It must be considered in the light of its application to concrete problems which have faced the courts. We shall, therefore, examine some of these problems in order to ascertain whether they throw light on our analysis of the function of contest after probate.

1. \textit{Federal jurisdiction arising from diversity in citizenship}

The Federal Code provides\textsuperscript{187} that the district courts shall have original jurisdiction “of all suits of a civil nature, at common law or in equity, . . . between citizens of different states” where the matter in controversy is within the jurisdictional amount. It likewise provides\textsuperscript{188} for the removal to the federal district courts, by a non-resident defendant, of “any suit of a civil nature, at law or in equity” of which the federal district courts have original jurisdiction. It is uniformly held that a proceeding to probate a will, or to administer the estate of a decedent, is not a suit of a civil nature at common law or in equity within the meaning of these stat-

\textsuperscript{186} See note 1\textsuperscript{82}, supra.
\textsuperscript{187} Fed. Code Ann., t. 28, § 41.
\textsuperscript{188} Fed. Code Ann., t. 28, § 71.
The reason doubtless is that Congress contemplated the various English tribunals in which suits were once tried,—chancery, common law courts, ecclesiastical courts, and admiralty courts,—and that, in this historical classification, the ordinary function of the ecclesiastical tribunal in probating wills was regarded as outside the purview of suits at common law or in equity. While the meaning of these terms is not wholly tied down to the historical English division of jurisdiction, it is clear that history determined once and for all that a proceeding in the nature of a hearing in an English ecclesiastical court to determine whether a will should be admitted to probate is not within the jurisdiction of the federal district courts.

Hence, our question is this: Is the proceeding to contest a will to such an extent ancillary to, a part of, or the same as, the proceeding to probate the will that the federal courts will likewise refuse to take jurisdiction? The answer, of course, depends upon the nature of will contests in the particular state. In general, the federal decisions indicate that the will contest cannot be tried in the federal courts unless it is a proceeding independent of the proceeding to probate the will and unless it is inter partes. The precise meaning of this test will be clarified by consideration of four leading decisions of the Supreme Court of the United States relative thereto.

Gaines v. Fuentes involved the removal, on grounds of diverse citizenship, of a suit brought in the courts of Louisiana to annul a will as a muniment of title to real estate. Mr. Justice Field, speaking for the majority of the court, expressed the view that the jurisdiction of federal courts in removal cases was more extensive than their original jurisdiction where diverse citizenship was involved, and concluded that this case could be removed solely on the ground of diversity of citizen-

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190 92 U. S. 10 (1875).
ship and without regard to the character of the controversy. He, however, went on to indicate that the federal courts would have had original jurisdiction. He observed: "The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief,—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony." He conceded that the federal courts have no original probate jurisdiction to establish wills. "The reason lies," he said, "in the nature of the proceeding to probate a will as one in rem, which does not necessarily involve any controversy between parties: indeed, in the majority of instances, no such controversy exists." Three justices dissented on the ground that the proceeding was essentially to revoke the probate of the will, and that the jurisdiction of the federal courts in removal cases was limited by their original jurisdiction in cases between citizens of different states. It is to be noted that, whatever the scope of the removal statute may have been at that time, it was modified in 1887 so that its scope was thereafter limited, in most situations, in the same way as the court's original jurisdiction.191

In *Ellis v. Davis*,192 a bill in equity was instituted in the federal court of Louisiana to recover possession of real estate and to set aside a will which had been admitted to probate by

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191 The earlier statute permitted removal of "any suit of a civil nature at law or in equity . . . where the matter in dispute exceeds . . . and arising under the Constitution or laws of the United States . . . or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states," but limited original jurisdiction to "suits of a civil nature at common law or in equity" involving federal questions. 18 Stat. L. 470, §§ 1, 2 (1875). In 1887 the removal statute expressly limited removal to cases over which the federal courts are given original jurisdiction. 24 Stat. L. 553, § 2 (1887). See the discussion of these statutes in *In re Cilley* (C. C. N. H. 1893), 58 F. 977.

192 109 U. S. 485, 3 S. Ct. 327 (1883).
the state courts of Louisiana. On a demurrer, the bill was dismissed. This decision was affirmed by the Supreme Court of the United States. The basis of the decision was merely that, under Louisiana law, there is no jurisdiction in equity to revoke a probate and that the proper proceeding is by an action of revendication, which could be brought in the federal court. The Court pointed out that, under the English practice, the validity of wills involving real estate could be determined as to a particular piece of land by an action of ejectment; and that in jurisdictions where this action is still permissible to determine the validity of a will, it could doubtless be instituted in the federal court, provided diversity of citizenship exists. The court further observed, however, that in many states the probate of wills involving land had been given conclusive force until set aside and that “In states where it is held to have a conclusive force, formal modes are prescribed of contesting the validity of the instrument as a will, and of the regularity and legality of the probate, by suits regularly instituted solely for that purpose, and inter partes; but such proceedings are generally regarded as the exercise of probate jurisdiction, even if administered in courts other than that of original probate, but the judgment, as in other cases inter partes, binds only parties and privies.”

In *Farrell v. O’Brien*, a bill in equity was filed in the federal court to enjoin distribution under a will probated in the state of Washington on the ground that the will was not validly executed. The court determined that the suit, if considered as a Washington proceeding to contest the will, could not be brought in the federal court. The test laid down was as follows: “That where a state law, statutory or customary, gives to citizens of the State, in an action or suit *inter partes*, the right to question at law the probate of a will or to assail probate in a suit in equity the courts of the United States

in administering the rights of citizens of other States or aliens will enforce such remedies.” The court then inquired what was meant by the expression “action or suit inter partes,” and concluded that “the words referred to must relate only to independent controversies inter partes, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding, that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect.” The court then pointed out that if the requirement of an independent suit were not imposed, all inter partes proceedings to contest a will could be removed to the federal court. It should be observed that in the state of Washington, probate and contest are in the trial court of general jurisdiction. Yet the court stated that, under the Washington law, the contest was “special in character” and the decree revoking a will already admitted to probate would “inure not only to the benefit of the particular contestant,” but was “operative as to the whole world.”

In *Sutton v. English*, the federal court was held to be without jurisdiction of a bill in equity to set aside a will probated in Texas, where the requisite diversity of citizenship existed. The court stated the rule thus: “By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents *in rem*, matters of this character are not within the ordinary equity jurisdiction of the federal courts; . . . that where a State, by statute or custom, gives to parties interested the right to bring an action or suit

194 246 U. S. 199, 38 S. Ct. 254 (1918).
inter partes, either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, but that this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate. . . .” The court then determined that the Texas proceeding in the district court to contest a will was essentially a proceeding to review by appeal or certiorari and was supplemental to the original probate proceeding.

What these decisions appear to mean is this: A proceeding to determine whether a will should be admitted to probate is not a civil suit at law or in equity. Any proceeding after probate, which is ancillary to the original probate proceeding is so much a proceeding to probate that it likewise cannot be within the federal jurisdiction based on diversity of citizenship. But if it is an independent proceeding, and if it is inter partes, and if it is in the court of law or of equity, then it may be within the federal jurisdiction. The court seems to have wavered with respect to its meaning of the term “inter partes.” Does it mean that the proceeding is not in rem? Or does it mean that there are parties who are contesting and that the suit is not ex parte? It would seem that the latter is meant. If it is, then every will contest, whether before or after probate, is inter partes, since there are parties who are opposing each other, even though its judgment operates in rem. Thus the court is compelled to limit the jurisdiction to those suits inter partes which are independent proceedings.

Parenthetically it should be observed that the court apparently assumes that, even though the proceeding operates in rem, the diversity of citizenship requirement can be met. Of course, a formal argument could be made to the effect that, since all persons in the world are parties, it can never be true that all the plaintiffs will be citizens of different states from all the defendants. But it is believed that, if the point were
raised, the court would have to conclude that "parties" for this purpose does not mean all persons bound by the judgment, but merely those actively participating in the litigation or named and served as parties.  

It should further be pointed out that the requirement of an independent proceeding is not a generalization as to all federal jurisdiction based upon diversity of citizenship. Doubtless there are situations outside the probate field where the reverse might be held. Apparently what is meant is that, unless we lay down the requirement of an independent proceeding, we bring all will contest cases within the federal jurisdiction, and since it is clear that this was not the legislative purpose, we must lay down this special restriction as to will cases.

Our final question is: How may we classify the various types of contest after probate? Are they excluded from the federal jurisdiction by the rule which the Supreme Court of the United States has laid down? As to the contest on an appeal with trial de novo, the decision in the case of Sutton v. English, supra, in which that type of contest was discussed, makes it clear that it is not removable. Moreover, a contest which is in the nature of probate in solemn form, or of a statutory proceeding to contest in the same court as that in which the original probate was had, would seem, under the decision in Farrell v. O'Brien, supra, with respect to the Washington procedure, to be outside the federal jurisdiction. Decisions of lower federal courts denying jurisdiction as to one or the other of these varieties of contests are found with respect to

195 See Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 S. Ct. 251 (1905), in which a statutory proceeding to take land by eminent domain was held removable; New Orleans v. Gaines' Adm'r, 138 U. S. 595, 11 S. Ct. 428 (1891), involving a representative suit in which the court said that "representatives may stand upon their own citizenship in the federal courts irrespective of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers, etc."

196 See Boom Co. v. Patterson, 98 U. S. 403 (1879).
THE FUNCTION OF WILL CONTROVERSIES

Contest proceedings in Arkansas, Indiana, Pennsylvania, New Hampshire, Maine and Mississippi. In the federal court for Georgia, the jurisdiction of the federal court was recognized in a removal of an appeal with trial de novo on probate in solemn form in the superior court. But a later decision as to a Georgia contest denied removal where there had been no probate but only a caveat in the court of ordinary for the purpose of securing probate in solemn form. Moreover, decisions of the federal courts with respect to Iowa and Oregon contest procedure recognize federal jurisdiction; but they, like the earlier Georgia case, were decided before the decision of the Supreme Court in the case of Farrell v. O'Brien emphasized the requirement that the contest must be an independent proceeding. Where the contest consists of a statutory proceeding either at law or in equity in a higher court which is a court of general jurisdiction, the lower federal decisions show a still greater conflict. It is held that a contest under Virginia or Ohio procedure is not removable; but that a contest under Illinois or New York procedure is removable. Decisions as to the Missouri procedure are in conflict; but the most recent is in favor of permitting removal to the federal court. However, all these

197 Wahl v. Franz (C. C. A. 8th, 1900), 100 F. 680.
198 Copeland v. Bruning (C. C. Ind. 1896), 72 F. 5.
199 In re Aspinwall's Estate (C. C. Pa. 1897), 83 F. 851.
200 In re Cilley (C. C. N. H. 1893), 58 F. 977.
205 War v. Wart (C. C. Iowa 1902), 117 F. 766. The court termed the Iowa contest proceeding an "original proceeding."
206 Richardson v. Green (C. C. A. 9th, 1894), 61 F. 423.
208 Reed v. Reed (C. C. Ohio 1887), 31 F. 49.
211 Not permitting removal: Oakley v. Taylor (C. C. Mo. 1894), 64 F. 245; permitting removal: Sawyer v. White (C. C. A. 8th, 1903), 122 F. 223.
decisions, except that concerning the New York procedure, were rendered prior to *Farrell v. O'Brien*, supra. The New York decision, rendered just after *Farrell v. O'Brien* was decided, is concerned with a procedure not now existing in New York.\(^ \text{212} \)

In conclusion, it is reasonably clear, on the one hand, that contest by appeal with trial de novo, or by probate in solemn form, is regarded as a part of the original probate for purposes of federal jurisdiction based on diversity of citizenship. It would seem, also, that the usual statutory contest proceeding whether it be brought in the same court in which the probate proceeding was initiated, or in a higher court, is sufficiently a part of the original probate that the federal courts would not take jurisdiction.\(^ \text{213} \) Certainly, the fact that a statutory contest is brought in the trial court of general jurisdiction or in chancery does not make the case removable on the ground of diversity of citizenship.\(^ \text{214} \) On the other hand, the practically obsolete contest of a will by means of an action at law in the nature of ejectment, which is purely inter partes and has no operation in rem, could doubtless be tried in the federal courts in a proper case. And the peculiar Louisiana proceeding to annul probate, which seems to resemble that procedure, is likewise within the federal jurisdiction.\(^ \text{215} \) Doubtless, a case such as *Creek v. Laski*,\(^ \text{216} \) in which a legatee sued an heir in a tort action for wrongfully destroying an unprobated will, could be tried in the federal court on grounds of diversity of citizenship, though the due execution of the will is in issue. While, as has been seen, the federal decisions indicate that

\(^ {212} \) Since 1914, contest after probate has not existed in New York. See p. 713, supra.

\(^ {213} \) This seems to be the import of the observation of the court, already quoted, in *Ellis v. Davis*, 109 U. S. 485 at 496, 3 S. Ct. 327 (1883).


\(^ {215} \) *Fakouri v. Cadais* (C. C. A. 5th, 1945), 147 F. (2d) 667.

there is still some uncertainty about the statutory contest proceeding brought in a higher court than that in which the probate was initiated, it is believed to be a reasonable deduction from the decisions of the Supreme Court of the United States on this subject to say this: In most states in which a proceeding to contest after probate exists, the action cannot be tried in the federal court on grounds of diversity of citizenship, because it is a part of the original proceeding to probate the will.

2. *Who has the affirmative of the issue?*

One question which we shall raise, only to discard, as an aid in determining the character of contest after probate, is this: Who is plaintiff in such a contest? Who has the affirmative of the issue will or no will? The answer to this question should aid us in determining who has the right to open and close; who has the burden of proof; and what is the relation between the original probate and contest after probate. Frequently the matter comes up in connection with instructions or rulings on burden of proof. Of course, general questions, such as whether or not mental incapacity or undue influence are affirmative defenses, are not relevant here. The only question which is related to the nature of the contest after probate is this: Is there a different rule as to the burden of proof in a contest after probate as compared with a contest before probate? Concededly, the proponent, in the absence of a statute to the contrary, would have the affirmative of all issues which are not matters of affirmative defense, and the true burden of proving whatever is necessary to make out a case in a contest before probate. But does he still have that burden in a contest after probate? Is he still the plaintiff, or is the contestant the plaintiff? The answer in the cases is confusing and unsatisfactory. Often, we are not told whether burden of proof means burden of going forward with the evidence, or
the true burden of proof which Professor Wigmore has referred to as the risk of non-persuasion. Moreover, discussions of burden of proof commonly make no distinction between the situations before and after probate. Furthermore, statutes in a number of states produce a result which is difficult to rationalize.

Conceivably, courts might analyze the contest after probate in either one of two ways. They might say: this is like probate in solemn form; the idea is that the first proof was inadequate and was without notice; hence we should have, as completely as possible, a retrial of the issue and should make it correspond to the original probate as to parties and as to burden of proof. Thus, the proponent would still be the plaintiff and would have the burden of showing the due execution of the will. Or the courts might approach the matter somewhat as follows: the will has already been admitted to probate; any attack on the decree admitting it can be regarded as in the nature of a proceeding to set aside a judgment; hence the contestant is plaintiff and has the burden of proving that the will should be set aside. In so far as it is possible to determine from the decisions, each of these two methods of approach has been followed in a number of jurisdictions.

218 Estate of Hayes, 55 Colo. 340, 135 P. 449 (1913) (contestant has burden of proof on issues raised by him); Wheeler v. Rockett, 91 Conn. 388, 100 A. 13 (1917) (proponent has burden of proof); Mobley v. Lyon, 134 Ga. 125, 67 S. E. 668 (1909) (proponent has burden of proof); Miller v. Blumenshine, 343 Ill. 531, 175 N. E. 814 (1931) (burden of proof does not shift from proponents to contestants); Pepper v. Martin, 175 Ind. 580, 92 N. E. 777 (1910) (contestants have burden of proof); Convey v. Murphy, 146 Iowa 154, 124 N. E. 1073 (1910) (contestant has burden of proof, the contest is an independent action); Taff v. Hosmer, 14 Mich. 309 (1866) (proponent has burden of proof); but see In re Reed's Estate, 273 Mich. 334, 263 N. W. 76 (1935); Isom v. Canedy, 128 Miss. 64, 88 So. 485 (1921) (proponent has burden of proof); Rock v. Keller, 312 Mo. 458, 278 S. W. 759 (1926) (proponent has burden of proof); In re Estate of Bayer, 119 Neb. 191, 227 N. W. 928 (1929) (on appeal with trial de novo, burden of proof is on proponent); Patten v. Cilley, 67 N. H. 520, 42 A. 47 (1893) (proponent has burden of proof); In re Sturtevant's Estate, 92 Ore. 269, 178 P. 192 (1919) (proponent must reprobate the will by original proof); Renn v. Samos, 33 Tex. 760 (1871) (contestant has burden
There seems to be also a third approach found in statements of the courts to the effect that the proponent must make a prima facie case by proving formal execution of the will, after which the contestant has the burden of proving all his grounds of contest. The latter approach is inconsistent with the proposition that the true burden of proof never shifts; and it is not clear that, in the absence of statute, these statements are meant to deny that proposition.

A few illustrations will demonstrate how little relation exists between the decisions on such questions as burden of proof and right to open and close and the question of the true function of contest after probate.

In the contest after probate in Missouri, the contestant is referred to as plaintiff and the proponent as defendant. Yet it is held that the proponent has the true burden of proof and the right to open and close. On the other hand in Ohio the cases indicate that the contestant has the burden of proof and that "in order to set aside a will the evidence adduced in the case against the will must outweigh both the evidence adduced in favor of the will and the presumption arising from
the order of the probate court admitting the will to probate as the valid last will and testament of the testator." 223 Yet the Ohio statutes on will contest include the following provision: 224 "The party sustaining the will shall be entitled to open and close the evidence and argument. He must offer the will and probate, and rest. The opposite party then shall offer his evidence; the party sustaining the will then must offer his other evidence. Rebutting evidence may be offered as in other cases." While this statute is primarily concerned with the burden of going forward with the evidence, it would seem also to indicate a view as to the party who has the affirmative of the issue, which is hard to reconcile with some of the judicial pronouncements.

One would suppose that, where contest after probate consists in probate in solemn form, the proponent would always have the affirmative of the issue. In South Carolina the proponent is the petitioner and presumably would have the burden of proof, 225 but the Maryland court has indicated that the caveator is plaintiff. 226 In Virginia the court has held that the burden is on the proponent in a proceeding on the issue devisavit vel non, it being suggested that the analogous English proceeding to determine title to land in an action of ejectment would place the burden on the devisee.

The most extraordinary situation is found in California and other states which have enacted similar provisions as to will contests. A provision found in the codes of these states is to the effect that "the contestant is plaintiff and the petitioner is defendant." 228 It should be observed that this provision ap-

223 Van Demark v. Tompkins, 121 Ohio St. 129 at 133, 167 N. E. 370 (1929).
226 Townshend v. Townshend, 7 Gill. (32 Md.) 10 (1848).
228 Cal. Prob. Code Ann. (Deering, 1944) § 371. This section appears in the chapter on contest before probate, but see also Cal. Prob. Code Ann. (Deering, 1944) § 382, providing that proceedings on a contest after probate are to be had "as in the case of a contest before probate."
plies equally to contest before probate and to contest after probate. Hence, if taken literally one might reach the absurd conclusion that, if no evidence at all were introduced at the contest before probate, the will would in all cases be admitted to probate. In order to avoid such a conclusion, the California courts have held that there are two separate proceedings in the hearing on the will before probate; there is an ex parte proceeding in which the proponent has the burden of proof and there is at the same time the contest in which the contestant has the burden of proof. In *Estate of Relph*, the court stated this doctrine in these words: "When a will is contested before probate there are two separate and distinct proceedings pending before the court. One is the petition for the probate of the will; the other is the contest of the probate of the will. . . . The petitioner or proponent appears therein as plaintiff and tenders to all of the world all of the issues of fact relevant to the ultimate question of the validity of the will. While all persons interested in the estate are in a sense parties defendant thereto, there are no defendants in the sense of active parties litigant in this proceeding. It is in a sense an ex parte proceeding, in which the burden rests upon the petitioner to prove all the material allegations of his petition. . . . The contest of a will, on the other hand, while a proceeding *in rem*, is at the same time an adversary proceeding. . . . The only issues of fact involved therein are those which are framed by the allegations of the contest and the denials of the answer. . . . As to those issues the burden of proof rests upon the contestants. . . ." Like conclusions are reached by the courts of other states which follow the California type of statute just quoted. It is not easy, however,
to give a rational explanation of such legislation. As the California court observed in its opinion in *Estate of Latour,* \(^{231}\) "We are unable to see any good reason for our somewhat peculiar statutory provisions so far as a contest before probate is concerned, but we must take the law as we find it."

3. Effect of prior decree admitting will to probate

Whether the prior decree admitting the will to probate is to be regarded as competent evidence in a contest after probate is believed to be of some significance in determining the character of that contest. If the contest is to be regarded as essentially a retrial of the issue of will or no will, then the decree on the former hearing would not be admissible. On the other hand, if the contest after probate is essentially a proceeding to set aside a perfectly valid decree, then we may admit that decree as evidence of the due execution of the will. Of course, as pointed out by the North Carolina court, \(^{232}\) the fact that a statute declares that the decree in the first probate is "conclusive in evidence of the validity of the will" can have application only to a collateral attack on the will and not to the contest after probate, which is a direct attack.

In the absence of statute, courts have generally held that the decree admitting the will to probate is not admissible. \(^{233}\) The argument against admitting the decree is particularly strong where the hearing on the original probate was ex parte or was without notice to interested parties. As was observed by the North Carolina court, \(^{234}\) "The proceedings in common

\(^{231}\) 140 Cal. 414 at 421, 73 P. 1070, 74 P. 441 (1903).
\(^{232}\) Wells v. Odum, 205 N. C. 110 at 111, 170 S. E. 145 (1933).
\(^{234}\) In re Will of Chisman, 175 N. C. 420 at 421, 95 S. E. 769 (1918).
form before the clerk are *ex parte*, and not binding on the caveators, who were not parties.” In a few states statutes expressly provide that the decree admitting the will to probate is evidence to prove the due execution of the will in the contest after probate. Perhaps, also, the California statute making the contestant the plaintiff, may have that effect.

The precise question here considered should be distinguished from the question whether the testimony of the subscribing witnesses as given in the original hearing can be introduced in the contest after probate. A number of statutes do allow the admission of such evidence, although most of them restrict it to cases where the witnesses are not available in the proceeding before probate. It is interesting to note that, in at least two states, it has been held that a statute permitting the introduction of the testimony of subscribing witnesses as given on the original probate should not be construed to permit the introduction of the decree admitting the will to probate.

The reason apparently was that the contest was a retrial of the issue as far as possible, and that to inform the jury of the decree in the former hearing would be unduly prejudicial to the contestants.

236 In re Estate of Holloway, 195 Cal. 711, 235 P. 1012 (1925).
4. *Jury trial in contest after probate*

While it is generally held that the constitutional right to jury trial does not include a jury in a will contest,\(^\text{239}\) the statutes of a majority of the states do give the right to a jury trial in such a proceeding.\(^\text{240}\) Sometimes it is provided that a jury trial may be had either in contest before probate or in contest after probate, but not in both contests.\(^\text{241}\) Sometimes, though the provision for contest after probate calls for trial before a court, a jury trial may be had on an appeal with trial de novo.\(^\text{242}\) In a few states a jury trial cannot be had as a matter of right;\(^\text{243}\) and it is interesting to note that among these are


\(^{242}\) S. D. Code (1939) § 35.2111.

two states which have recently revised completely their probate codes, namely Minnesota and Kansas.

One may well inquire why the jury trial in will contest cases is so universal in the United States in view of the fact that no such procedure was followed by the English ecclesiastical courts, on which to some extent our probate procedure is modeled. The answer would seem to be that, when wills involving land came to be probated in this country just as wills of personalty, it was felt that the jury trial, which was always assured in an action of ejectment in England to try title to devised land, should be incorporated into our probate procedure. It will be recalled that, though English chancery sometimes compelled heirs and devisees to conduct a contest in a common law court to determine the validity of a devise of land, the chancellor did not undertake to override the institution of jury trial in the common law court. If the jury in the action of ejectment on feigned issues did not reach a result pleasing to the chancellor, he did not undertake to decide the facts himself, but sent the case back to the common law court for another trial by another jury.244

In this country a variety of answers can be made to the question, what kind of jury trial is provided for in a contest. Sometimes the conclusion of the courts is that a common law jury trial has been provided;245 sometimes that a trial before an equity jury is called for and that therefore the verdict is purely advisory.246 It has also been said that the statutory provisions

244 Pemberton v. Pemberton, 13 Vesey 290 (1807). After three juries had found in favor of the will, the court refused to direct a fourth trial, saying that if a fourth trial should result in a verdict against the will he would have to direct a fifth trial.

245 Lambert v. Foley, 237 Ala. 131, 186 So. 138 (1939) ; Estate of Green, 25 Cal. (2d) 535, 154 P. (2d) 692 (1944) ; Smith v. Henline, 174 Ill. 184, 51 N. E. 227 (1898) ; Beatty v. Caldwell, 210 Ky. 559, 276 S. W. 547 (1925) ; Struth v. Decker, 102 Md. 496 at 500, 62 A. 709 (1906) ; Dowling v. Luisetti, 351 Mo. 514, 173 S. W. (2d) 381 (1943) ; Barnes v. Bess, 171 Va. 1, 197 S. E. 403 (1938) (devisavit vel non).

for jury trial preserve the historical situation just described in which a court of equity sends the issue of *devisavit vel non* to the law court to be tried.\(^{247}\) If that be true, the court may or may not accept the finding of the jury; but if it does not, then the case must be tried before another jury. Essentially, however, it is regarded as a common law jury trial.

One may well conclude that the retention of jury trial as a matter of right in will contests is largely due to historical reasons. But the issues of fact would seem to be of a sort which could better be dealt with by a court than by a jury.

5. *Time limitations on contest after probate*

Statutory provisions limiting the time within which a contest can be initiated are practically universal.\(^{248}\) The time


\(^{248}\) In the following list the period given is that for contest after probate unless otherwise stated; in states having both contest after probate and appeal with trial de novo, only the former period is given unless otherwise indicated. Ala. Code (1940) t. 61, §§ 64, 66 (six months; and if no contest has been had, infants and persons of unsound mind have 12 months after a guardian is appointed or disabilities removed, but in no case over twenty years); Ariz. Code (1939) §§ 38-216, 38-221 (one year; infants and persons of unsound mind have one year after removal of disability); Ark. Laws 1941, Act 401 (appears in Ark. Dig. Stat. (Supp. 1944) at p. 553) (six months after a probate without notice); Ark. Dig. Stat. (1937) § 14545 (persons not personally served may contest in chancery within three years, and infant not a party to such a suit is not bound until twelve months after attaining majority); Cal. Prob. Code Ann. (Deering, 1944) §§ 380, 384 (six months; infants and persons of unsound mind who were not parties to the proceeding have six months after removal of disability); Colo. Stat. (1935) c. 176, § 65 (a person not summoned on the probate has one year to contest; infants and persons non compos mentis have one year after removal of disability); Conn. Gen. Stat. (1930) §§ 4991, 4992 (amended Supp. 1939, § 1306e) (appeal with trial de novo: one month, or twelve months for persons who had no notice; minors have twelve months after attaining majority); Del. Rev. Code (1935) § 3801 (one year); D. C. Code (1940) § 19-309 (three months for a will of personalty; one year for a will of realty as to persons actually served or per-
limitation for contest after probate designated as such runs from a period under twelve months in most of the states in the California group to seven years in some of the southern states. As might be expected, the period in which a contest personally appearing, and two years as to other persons; minors have one year after attaining majority); Fla. Stat. Ann. (1941) § 732.30 (any time before final discharge of the personal representative); Ga. Code (1936) § 113-605 (seven years; minors have four years after attaining majority, but a contest by a minor after the general period of limitation does not affect any rights other than the minor's); Idaho Laws Ann. (1943) §§ 15-223, 15-229 (the first section states a limitation of four months; the second allows eight months, and infants and persons of unsound mind have eight months after removal of disability); Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 242 (nine months); Ind. Stat. (Burns, Supp. 1943) § 7-504 (one year after the will is offered for probate; infants, persons of unsound mind and persons absent from the state have three years after the will is offered for probate); Iowa Code (1939) § 11007, subd. 1 (two years from the time the will is filed in the clerk's office and notice thereof is given; but if after probate the executor causes personal notice of the probate to be served, the limitation is one year after such service); Kan. Gen. Stat. (Supp. 1943) §§ 59-2404 (amended Laws 1945, c. 237) (appeal with trial de novo: nine months); Ky. Rev. Stat. (1944) §§ 394.240, 394.280 (appeal with trial de novo: five years; a person residing out of the state and proceeded against by warning order only, and a person not having personal service and not appearing, may petition in equity within three years after the decision on appeal; infants have twelve months after attaining majority to bring a similar action; these equity actions operate no further than necessary to protect the rights of the plaintiff); Me. Rev. Stat. (1944) c. 140, § 32 (appeal with trial de novo: twenty days; a person beyond the sea or out of the United States, with no attorney in the state has twenty days after his return or appointment of an attorney); Md. Code (1939) art. 93, § 357 (one year); Mich. Stat. Ann. (1943) §§ 27.3178(36), 27.3178(45) (appeal with trial de novo: twenty days, and court may extend for an additional forty days; a person out of the United States at the time of the decree has three months after his return, if within two years after the decree and administration has not been completed); Minn. Stat. (1941) § 525.712 (appeal with trial de novo: thirty days after service of notice of filing the order appealed from, or six months in the absence of such notice); Miss. Code (1942) § 505 (two years; infants and persons of unsound mind have two years after removal of disability); Mo. Rev. Stat. Ann. (1942 and Supp. 1945) §§ 538, 540 (one year; infants and persons of unsound mind have one year after removal of disabilities); Mont. Rev. Code (1935) §§ 10042, 10048 (one year; infants and persons of unsound mind have one year after removal of disabilities); Neb. Rev. Stat. (1943) § 30-1602 (appeal with trial de novo: thirty days); Nev. Comp. Laws (Supp. 1941) § 9882.22 (three months); N. H. Rev. Laws (1942) c. 351, §§ 7, 9 (one year, if no appeal has been prosecuted; infants, insane persons or those out of the United States have one year after removal of disability); N. J. Rev. Stat. (1937) § 32-52 (appeal, which may be de novo: three months, or six months if the appellant resided out of the state at the time of death of the testator); N. M. Stat. (1941 and Supp. 1945) §§ 32-212, 32-215, 32-220 (six months for contest in the probate court; three months for appeal to the district court with trial de novo); N. C. Gen. Stat. (1943) § 31-32 (seven years; minors, insane and imprisoned
may be had in the form of an appeal with trial de novo is usually very short. While it may not at first be entirely apparent why it is true, it would seem that the length of the period in which the contest may be brought has a direct relation to the function of contest after probate. If the period is short, we may expect to have the contest before final distribution in practically all cases. And if, also, the final order of distribution is the significant decree in determining the successors in interest to the title of the decedent, then we can have no questions about the rights of persons claiming under the first probate. The contest would be regarded as a com-
persons have three years after removal of disability); N. D. Rev. Code (1943) § 30-0508 (one year); Ohio Gen. Code (Page, 1937 and Supp. 1945) §§ 10504-32, 12087 (six months; persons under disability have six months after removal of disability, but bona fide purchasers not affected); Okla. Stat. (1941) t. 58, §§ 61, 67 (one year; infants and persons of unsound mind have one year after removal of disability); Ore. Comp. Laws (1940) § 19-208 (amended Laws 1945, c. 185) (six months after entry of court order in court journal; persons under disability have six months after removal of disability); Pa. Stat. Ann. (Purdon, 1930) t. 20, § 2005 (appeal with trial de novo: two years, but the court may cite anyone to show cause why he should not appeal within six months from the date of such citation); R. I. Gen. Laws (1938) c. 573, § 1 (appeal with trial de novo: forty days); S. C. Code (1942) § 8922, subd. 3 (one year; infants have one year after removal of disability); S. D. Code (1939) §§ 35-0306, 35.0312 (one year; infants and persons of unsound mind have one year after removal of disability); Tenn. Code (Michie, 1938) §§ 8112, 8574 (seven years; infants and persons of unsound mind have three years from removal of disability); Tex. Civ. Stat. Ann. (Vernon, 1941) art. 5534 (contest: four years); Tex. Rules Civ. Proc., Rule 332 (appeal with trial de novo: fifteen days); Utah Code (Supp. 1945) § 102-3-12 (six months); Vt. Pub. Laws (1933) § 3005 (appeal with trial de novo: twenty days); Va. Code (1942) §§ 5259, 5260 (one year; infants and persons of unsound mind have one year after removal of disability; persons residing out of the state or notified only by publication have two years after the order appealed from); Wash. Rev. Stat. (1932) § 1385 (six months); W. Va. Code (1943) §§ 4071, 4072 (two years; infants, convicts and insane persons have one year after removal of disability; persons residing out of the state or proceeded against by publication have two years after the order appealed from); Wis. Stat. (1943) § 324.01 (appeal with trial de novo in counties under 15,000 population: sixty days); Wyo. Rev. Stat. (1931) §§ 88-701, 88-707 (amended Laws 1945, c. 3 and 52) (six months).

Since it is generally the law that the personal representative has title to personalty of the estate, a distribution of personalty by him under a decree admitting a will to probate or ordering distribution of the estate would clearly pass title. If, however, the subject matter in question is land, the heir or devisee would have title. If the order admitting the will to probate is the significant order, a difficult question arises as to whether a bona fide purchaser from the dev-
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plete retrial of the issue, and would supersede the decree in
the first probate. But no real hardship would result because
no decree of distribution would be made prior to the contest.
If the period is long, we may still look upon the contest as a
retrial of the issue as did the English lawyers with respect to
the probate in solemn form in the ecclesiastical courts; but,
on the other hand, modern demands for a speedy, final distribu-
tion are likely to result in having the contest treated as a
kind of proceeding to set aside a valid judgment. Thus a
bona fide purchaser from a distributee under the original pro-
bate may well be protected even though the property in-
volved is land.

One of the most readily discernible trends in will contest
legislation is the tendency to shorten the period of limitation.
Thus the California type of legislation, which originally pro-
vided for a time limitation of one year, has been changed to
provide for a limitation of six months in California and Utah,
and three months in Nevada. Virginia, which at one time
imposed a limitation period of seven years, now provides
for a period of one year in most cases.

In most of the statutes, the period of limitation is extended
for the benefit of persons under a disability, though in a few
no such exception exists. Such provisions have been a source
of litigation. Some courts have concluded that the revocation
of probate on the petition of a contestant who was under a
disability after the general limitation period had elapsed
would apply only to the person who had been under a dis-

isee is protected, when, on a contest, probate is thereafter revoked. See 36
MICH. L. REV. 120 (1937). If, however, the significant decree which confirms
the title of the devisee is the order of distribution, and if contest takes place before
the order of distribution, this problem does not arise.

250 In the ecclesiastical courts the period for instituting probate in solemn form
was probably thirty years after probate in common form. See note 3, supra.
251 See 36 MICH. L. REV. 120 (1937) and note 249, supra.
252 See note 107, supra.
253 See note 64, supra.
ability. Thus we would have the surprising conclusion that, though in general the contest proceeding is in rem, the will is held valid as to some persons and void as to others. Other courts have reached the more rational conclusion that, if the will is set aside after the general limitation period has expired, it is nevertheless set aside as to all interested persons.

In discussing time limitations, it should not be overlooked that in many states an after discovered will can be produced after the statutory period of limitation has expired, since the probate of the after discovered will is not regarded as a contest within the meaning of the statute. Indeed, in some states the production of an after discovered will is expressly excepted from the operation of the limitation statute.

Without going into this problem to any extent, it may be observed that the production of an after discovered will should be considered a contest. Since a probate should determine that the instrument is the last will of the testator, the probate of a later will is a contest of the first probate. Moreover, no good reason is perceived why the production of an after discovered will should be treated differently from any other after discovered evidence. It is true, wills are frequently concealed and cannot be found at the time of the first hearing, but so is other evidence. In some jurisdictions the contest statute expressly applies to the production of an after discovered will, and the time limitation, therefore, is also applicable.

256 McCann v. Ellis, 172 Ala. 60, 55 So. 303 (1911).
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VII. CONCLUSION: IMPROVING AMERICAN TYPES OF CONTESTS; RECOMMENDED LEGISLATION

We have seen that in a considerable number of states the will contest after probate constitutes a procedural anomaly: legislators do not appear to have realized whence it came nor whither it is going. Adapting the English probate in solemn form, they have added provisions for notice before probate and sometimes also provisions for an appeal with trial de novo after probate. Thus they have permitted two, or even three, contests although notice to interested parties is given prior to the first contest. In so doing, they appear to have lost sight of the only reason justifying a contest after probate, the absence of notice and the summary character of the first probate.

Whether we should provide for contest after probate in any case will depend, then, upon whether we desire to permit probate without notice. Without going into that issue exhaustively, it is possible to observe that strong arguments do exist for the initiation of probate without notice. It is a procedure which permits an immediate supervision of the estate without the appointment of a special administrator; it saves expense in the vast majority of cases where there is no desire on the part of anyone to contest the will; it is in accord with the present English practice which has been followed in that country for centuries.

By way of summary, it may be suggested that legislation on will contests should accord with the following propositions:

1. If original probate is without notice, then notice to interested parties should immediately follow; and a short period for contest should be permitted.

2. This period should not be extended beyond the time of the final order of distribution.

3. No extension of time should be permitted in the case of persons under disability. After all, they can act through guardians; and it seems unreasonable to hold up the ultimate
determination of title to the estate until after their disabilities are removed.

4. A jury trial should be permitted only in the sound discretion of the court; it should not be a matter of right.

5. The contest after probate should be regarded as a retrial of the issue of will or no will which was presented at the original probate; not a proceeding to set aside a judgment. Thus it will be a part of a single proceeding to probate the will and administer the estate; proponents will have the same burden of proof which they had on the initial probate; evidence introduced at the original probate will only be admitted in exceptional cases where the witnesses cannot be produced to testify anew, or where the proposition to be proved is not controverted by the contestants.

6. The production of an after discovered will should be barred at the time of the decree of distribution just as other grounds of contest.

If these principles are embodied in contest legislation, it will cease to be an amended edition of a procedural institution which is forgotten; and will become merely a device necessitated by the fact that probate is commonly administrative and without notice, and that a trial of the issue of will or no will is the exception and not the rule.