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DETERMINATION OF HEIRSHIP

Paul E. Basye*

Nearly a hundred years have elapsed since the Supreme Court emphatically voiced its conviction as to the necessity of having some method for making a final determination concerning the devolution of the ownership of property upon the death of its owner. In the Case of Broderick's Will Justice Bradley said:

"The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claim, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual."

The method or procedure by which we determine the persons who are entitled to succeed to a decedent's real property varies quite widely in this country and the trend of its development is noteworthy. In some states the determination is quite informal and may even be contained as a recital in a self-serving affidavit or deed. Elsewhere it is the solemn pronouncement of a probate court in a decree of distribution of real property as the final step in a formal administration proceeding which has subjected real as well as personal property to its judicial supervision. Various intermediate procedures have been developed by specific legislation to effect a declaration or determination of heirship or of devisees under varying circumstances. Such a determination which will satisfy the most meticulous demand for a marketable title may even

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1 21 Wall. (88 U.S.) 503 at 509 (1874).
be made in the absence of administration or as ancillary to a formal administration. In this study we shall analyze and appraise the procedures which exist for determining the persons who are entitled to succeed to the real property of a decedent upon his death.

In order to understand more fully the effectiveness of these various procedures, it will be helpful to consider first the jurisdiction which probate courts exercise over real property. According to tradition, title to the personal property of a decedent passed to his personal representative and thence to his next of kin or legatees. The executor or administrator collected all of the personal property belonging to the decedent and all debts owing to him. In time he became charged also with payment of the decedent's debts and of any legacies provided for in a will. After discharging these tasks he distributed the remaining personalty to the next of kin or legatees. As probate procedure developed, this distribution was made by the personal representative pursuant to a decree of the court having jurisdiction over his activities. This decree was important for two purposes: (1) it commanded the personal representative to make the distribution; and (2) it determined the persons to whom he should make it. The significant aspect of this procedure for our present consideration is that the court exercising testamentary jurisdiction assumed and exercised the prerogative of determining the identity of next of kin or legatees. This determination was basic in tracing one's title to personal property.

In contrast to the course of devolution of the ownership of personal property, title to land belonging to a decedent did not follow this same path of going to the personal representative and thence to the heir or devisee. Ecclesiastical courts under early English law did not exercise jurisdiction over land. Accordingly it became the established pattern that upon the death of a decedent the ownership of land devolved directly upon the heir or devisee.
The reasoning behind this difference was historical. Land was not liable for a decedent's debts under early law. The heir himself was liable in some instances. The executor or administrator was truly a personal representative, that is, he had control over personalty only, not over realty. It was not until the end of the nineteenth century that a legislative change was wrought in this matter under English law. Only since then has the executor or administrator been given any of the rights, powers and duties over land corresponding to those of an owner.

In the early statutes of several of the New England states, there was some indication that personal representatives might be given title to land as well as to personalty. Likewise a California statute taken from the New York Field Code was included in the Civil Code of 1872 to provide:

"The property, both real and personal, of any one who dies without disposing of it by will, passes, in the first instance, to the personal representative of such person as Trustee: 1. To make the provision for the surviving husband, or wife, or child, which is directed by title XI of part III, of the Code of of Civil Procedure; 2. To apply the property to the payment of the debts of the decedent . . . ; and, 3. To distribute any remaining property among those entitled to succeed to the property of the decedent, according to the provisions of this Title."

But two years later this provision was replaced by one which declared that both realty and personalty passed to the heirs, subject to the control of the probate court and to the possession of the ad-
ministrator for the purposes of administration. Besides linking together the court's control and the personal representative's right to possession, this statute restored the common law idea of succession to real property and in its amended form was copied by several western states which saw fit to follow California's lead in codification.

This revised statutory statement correctly expresses the principle applying throughout the United States today as to title, and its plan for conferring possession and control of land upon the personal representative has had a strong influence in molding the law which we find today in slightly more than half the states. An increasing number of recent statutes have purported to give the personal representative the right to possession of real estate until the time has passed during which creditors can present their claims or until ordered released or distributed by decree of final distribution to the heirs or devisees. The Model Probate Code expressly adopted this statement of the California code concerning title to real property and the jurisdiction of the court over it during administration, and also the provision that the personal representative should "have a right to, and shall take, possession of all the real and personal property of the decedent except the homestead and exempt property of the surviving spouse and minor children." This last provision has since been embodied in the legislation of Indiana in 1953 and of Texas in 1955, which states have adopted many of the basic provisions of the Model Probate Code. All of this legislation indicates a trend toward subjecting real estate to some measure of control or possession by the personal representative during the period of administration, which would logically

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15 Cal. Amend. to Code (1873-74) p. 236, now Cal. Prob. Code Ann. (1956) §300. A code examiner's note to the 1873 amendment states that it was made to avoid "grave embarrassment due to doubt as to where the title remains after the death of the intestate and before appointment of administrator, also upon the death or resignation of an administrator or an executor." For other California statutes on this same subject see Cal. Prob. Code Ann. (1956) §§571, 581, 582, 1222.


17 See note 78 infra.

18 Model Probate Code §84, in SIMES AND BASYE, PROBLEMS IN PROBATE LAW 41 (1946).

19 Model Probate Code §124.

suggest the propriety of having a formal decree ultimately distributing it to heirs or devisees at the conclusion of the administration in much the same way that personal property is distributed.

Even though title to land is generally considered in all jurisdictions to pass directly to the heirs or devisees and not to the personal representative, how are their interests in it determined and by what means do they obtain a marketable title? We shall find several different methods as we examine local practices concerning the jurisdiction of probate courts over real property.

First, as already noted, approximately one-half the states do not confer upon their probate courts any general control over a decedent's land in connection with the usual administration. In these states some method is essential to determine heirship which will constitute evidence of a marketable title of record in the heirs or devisees as to real property. Here informality best describes the methods by which a record of heirship is provided, although a formal declaration is provided in a few states.

Second, in states which have expressly given to their probate courts jurisdiction over a decedent's land, it is contemplated that a decree of distribution shall be made at the conclusion of the administration by the court having jurisdiction over the probate proceeding. This decree in terms determines the persons who, as heirs or devisees, are entitled to the land belonging to the decedent, both as to their identity and as to the shares or portions which they are entitled to take. When recorded, it becomes a muniment of title. It is a judicial determination of heirship made in connection with and as a part of the administration proceeding itself, to which the land has been subject, and therefore constitutes the highest form of evidence as to the devolution of title.

Even if legislation exists for such a judicial determination of rights of succession in real property, this procedure may not be availed of in every instance. Occasionally a decree of distribution fails to include a parcel of real property, because of oversight, or for other reasons. In this event, if the estate is not reopened, some supplementary method is necessary to determine the identity of the persons entitled to succeed to the real property. A few statutes specify a procedure in such cases. This type of procedure furnishes a third method for determining heirship.

Fourth, it may be requisite or highly desirable that a determination of heirship or of devisees be made in connection with a pending administration proceeding prior to or as a basis for a
decree of final distribution. A statute of descent or distribution may need to be construed or applied. A will may need to be interpreted. The members of a class may require ascertainment. The identity of a person may be in doubt. Uncertainty as to any of these may also affect the amount and apportionment of inheritance taxes which must be ascertained and paid before a final accounting and distribution can be effected. Other reasons also suggest the early resolution of disputed matters with respect to ultimate rights of distribution.

Fifth, when no administration whatever is had upon the estate of a decedent, some means is essential to ascertain and declare the identity of the heirs or devisees entitled to succeed to the decedent's land and the shares to which they are entitled. A substantial amount of legislation has been adopted to be used in these cases, both in states where probate courts customarily exercise jurisdiction over decedents' land and in states where they do not.

THE PROBLEM OF JURISDICTION

As we survey these five general categories we shall be vitally concerned with the court's jurisdiction under varying circumstances to determine, and provide a suitable memorial of, the devolution of ownership of real property. Rights of ownership to any property may be tried and determined as between individuals in an action in personam. Rights of succession to a decedent's property may also be tried and determined as between individuals, but judgments or decrees in such cases are of limited value in determining rights of succession which third parties will recognize as sufficient for the purpose of accepting title to property. It is not the function of decrees of heirship or of distribution to determine the rights of every person in the world in specific property. At most they determine rights of succession as to the dece-

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21 Such a proceeding is contemplated by the Uniform Declaratory Judgment Act, §4. However, this procedure is purely inter partes and therefore does not provide a vehicle sufficient to determine rights of succession conclusively as against all persons. 3 AM. LAW OF PROPERTY §14.42 at note 26 (1952). See also Borchard, DECLARATORY JUDGMENTS, 2d ed., 236, 247, 699 (1941); Cryan's Estate, 301 Pa. 386, 152 A. 675 (1930).

That there may be occasions other than in probate proceedings when courts of general jurisdiction may make determinations of heirship in actions in personam is recognized in several statutes. See, for example, Kan. Gen. Stat. Ann. (1949) §59-2250, wherein it is provided: "Nothing in this act shall be construed to divest district courts of power to determine descent in any proper proceeding." See also Okla. Stat. Ann. (1937) tit. 84, §256. The situations in which courts of general jurisdiction may need to determine heirship is discussed in Jardon v. Price, 163 Kan. 294, 181 P. (2d) 469 (1947), and Bryson v. Phillips, 164 Kan. 529, 190 P. (2d) 876 (1948).
dent's interest in it. The quantum and quality of the decedent's interest must be appraised independently. If, however, rights of succession in that interest can be determined so as to command universal respect and reliance, a tremendous step will have been taken.

The extent to which this objective can be accomplished depends primarily on the employment of a proceeding for this purpose which qualifies fully as a proceeding in rem. Three factors are involved here. First, the property must be located within the geographical confines of the court's territorial jurisdiction. Ordinarily there is no problem here in the case of land. Second, if a court is to exercise this function, its vestment with power to exercise it is a clear requirement for this purpose. Probate courts in many states do not possess this power inherently. It must be given to them by constitutional or legislative enactment. Third, granted that they have been given such power, reasonable notice must be given to the persons whose interests will be affected, and opportunity must then be afforded them to be heard. In the absence of any of these elements a decree of heirship will be but a questionable marker for proof of succession.

The matter of notice in these proceedings to determine heirship requires further scrutiny in appraising their effectiveness to withstand collateral attack. Concerning proceedings in rem generally the notice necessary to give jurisdiction to a court need not correspond to that for actions in personam. Its purpose is merely to notify those interested in the property to appear and assert or defend their interests in it. Reasonable methods and forms of notice will suffice. For probate proceedings mailing, publishing or even posting notice have all been held to be sufficient methods of notification. Furthermore, if sufficient notice is given at the

22 Judgments Restatement §32 (1942); Fraser, "Actions in Rem," 34 Corn. L.Q. 29 (1948).
23 Judgments Restatement §7 (1942). See also Dunham v. Stitzberg, 53 N.M. 81, 201 P. (2d) 1000 (1949), for a thorough discussion of this matter.
24 Judgments Restatement §32, comments f, g (1942); Fraser, "Actions in Rem," 34 Corn. L.Q. 29 at 43 (1948).
25 Judgments Restatement §32, comment f (1942). It is here said that for actions in rem notice by publication or posting may be adequate insofar as unknown claimants are concerned, but that a different form of notice to known claimants better calculated to reach them may be necessary. See Case of Broderick's Will, 21 Wall. (88 U.S.) 503 (1874); Goodrich v. Ferris, 214 U.S. 71, 29 S.Ct. 580 (1909); Christianson v. King County, 239 U.S. 356, 36 S.Ct. 114 (1915); Fuller v. Sylvia, 213 Mass. 156, 137 N.E. 173 (1922). For an excellent and detailed analysis of notice requirements in probate and other proceedings see comment, 50 Mich. L. Rev. 124 (1951).

It should also be noted that local statutes often require the giving of a particular
commencement of a probate proceeding, no further or additional notice would be necessary as to any step in that proceeding unless required by local statute, because for most purposes an administration proceeding from the filing of a petition for the appointment of a personal representative to the decree of final distribution and discharge of the personal representative is a single judicial proceeding. In other words, in the absence of statute requiring it, a decree of final distribution in a probate proceeding may be made without notice to any of the heirs or devisees other than that provided at its commencement. Thus, rights of succession may be determined during an administration proceeding without additional notice, provided the proceeding adopted for that purpose is a part of that administration proceeding. Of course, most states require a special kind of notice for various steps in the proceeding and this must be complied with if the court's jurisdiction is made to depend upon it.

The question then presents itself as to whether a proceeding to determine heirship of real property is to be treated as a part of an administration proceeding. On the basis of historical precedent it was not, for probate courts had no jurisdiction whatever over land in the ordinary administration proceeding and consequently made no judicial determination of rights of succession in it. As already mentioned, it was not until comparatively recently that real property began to be made subject to the jurisdiction and control of probate courts. If this consolidation of real property with personal property in some states is considered as complete for the purpose of administration, it would seem to follow that a determination of rights of succession to it as part of the decree of

kind of notice before probate or the granting of administration or before various steps during administration and may make the giving of such notice a prerequisite to the acquisition of jurisdiction by the court to make a decree. While the Mullane case, 339 U.S. 306, 70 S.Ct. 652 (1950) (see note 29 infra), did not involve probate proceedings, its requirement of mailing notice to known heirs or beneficiaries corresponds with a modern trend of the same character in probate proceedings. Although the methods of giving notice for the commencement of probate proceedings are not within the scope of this study, discussion of that subject will be found in Fraser, "Jurisdiction by Necessity—An Analysis of the Mullane Case," 100 UNIV. PA. L. REV. 305 (1951); Perry, "The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements," in CURRENT TRENDS IN STATE LEGISLATION 82 (1952); 1952 ANNUAL SURVEY OF AMERICAN LAW 612; note, 39 IOWA L. REV. 665 (1954).


distribution would be natural and proper and that no separate or different notice would be required other than that ordinarily given for the distribution of personal property. On the other hand, if this jurisdiction and control over real property be thought of as merely creating a separate function in the probate court which, for the purpose of convenience, has been consolidated with its jurisdiction over personal property, then it is possible that it is not truly a part of the administration proceeding and that a separate and distinct notice would be necessary to satisfy due process requirements. In view of the treatment accorded to both kinds of property in states where this dual jurisdiction prevails, it is quite clear that real property is the subject matter of an administration proceeding quite as much as is personal property and that the notice given at the commencement of the administration proceeding is sufficient to satisfy due process requirements.

Where probate courts still possess no jurisdiction or control over real property in the ordinary administration proceeding, a few states have purported to authorize them to make a determination of heirship as part of, or in connection with, the final accounting or decree of distribution of personal property. What is the basis for their jurisdiction to make such a determination? If this is permissible one of two things must be true: either (1) the probate court acquires jurisdiction over the real property by the initiation of the probate proceeding; or (2) the probate court by giving notice of the hearing acquires jurisdiction to make a determination of heirship on final accounting or in connection with the decree of distribution. The first theory seems contrary to both historical and prevailing notions on the subject unless the mere possession of power by the probate court to make a determination of succession be regarded in and of itself as bringing real property within its jurisdiction. The latter theory, on the other hand, accords with most existing legislation on the subject which requires the giving of a separate notice and tacitly assumes that it is this notice which furnishes the basis for the court to make such a determination. Moreover, if this theory is accepted, it becomes unnecessary to determine whether the determination of rights of succession is a genuine part of the administration proceeding or is merely an added function vested in the probate court as a convenient tribunal and the one most suited to perform it. In the light of precedent and the tenor of existing legislation it is submitted that only this latter theory constitutes a sound basis for
affording recognition to decrees made in this group of states determining rights of succession to real property.

When a determination of heirship or of devisees is made in connection with a pending administration which embraces real property as well as personal property in order to provide a basis for a decree of distribution, there is seldom any question of the court's jurisdiction, for the probate court has already acquired jurisdiction of the real property at the commencement of the administration proceeding. Aside from the requirements of local statutes on the subject the court's jurisdiction seems beyond question.

The method of acquisition of jurisdiction to make a determination of heirship in the absence of any administration upon a decedent's estate involves an area of some speculation. In states where probate courts would normally have jurisdiction over real property in an ordinary administration proceeding, it is possible to think of a determination of heirship in these circumstances as a kind of "short form" administration to accomplish the single function of determining rights of succession without any other. If this view is adopted, the same kind of notice by which an administration is commenced should suffice insofar as due process is concerned. Local statutes may require special or further notice. In other words, notice requirements for jurisdictional purposes may exceed those demanded by due process. If, however, a proceeding for the determination of heirship is thought of as something other than part of a true probate proceeding, then notice requirements may be more exacting. Under this view a different method of notice may be essential.

If a separate notice is requisite, the next question concerns the method of giving notice for making a determination of heirship in the absence of formal administration. Traditional methods of giving notice would doubtless satisfy due process requirements insofar as such a proceeding partakes of the nature of pure probate proceedings. But if a proceeding for the determination of heirship in real property is regarded as something essentially separate and distinct from a probate proceeding, then it is possible that

28 If sufficient time has elapsed since the decedent's death and no administration commenced so that creditors have become barred by local law and inheritance taxes have likewise become barred or have been paid, a judicial determination of heirship will ordinarily suffice to provide a marketable title in real property owned by him. See Basye, CLEARING LAND TITLES §§153, 154 (1953). For this reason it has sometimes been characterized as a "short form administration." See, for example, Wright v. Rogers, 167 Kan. 297, 205 P. (2d) 1010 (1949); Heirship of Robinson, 119 Neb. 285, 228 N.W. 852 (1930).
more notice than this would be called for under the principle expressed by the Supreme Court in *Mullane v. Central Hanover Bank & Trust Company.*\(^{29}\) There is some concern by lawyers about this possibility, particularly in states where probate courts do not traditionally exercise jurisdiction or control over real property during ordinary probate proceedings. In addition to notice by publication to heirs who are unknown, or whose addresses are unknown, several of the recent statutes have expressly provided for notice by ordinary or registered mail to all heirs whose addresses are known\(^{30}\)—a requirement which may be indicative of an attempt to comply with the minimum notice suggested by the Court’s opinion in that case.

Returning now to a consideration of the several procedures which are employed for determining the persons who become entitled to succeed to a decedent’s real property on his death, it will aid our understanding of them if we will keep this underlying problem of jurisdiction in mind. We will see, for example, that some statutes limit the effect of decrees determining heirship by declaring that they shall constitute prima facie evidence only of the rights which they declare. If the procedure does not provide the ingredients of jurisdiction by the court making the decree, this limitation upon its legal effect is only proper. But if a court truly acquires jurisdiction over the property before making a decree, there is no cogent reason why it should not be given a conclusive

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\(^{29}\) 339 U.S. 306, 70 S.Ct. 652 (1950). In this case a New York statute required that notice by publication be given for the hearing of original accountings of a common trust fund managed by corporate trustees. After refusing to classify the accounting procedure by such trustees as one in rem or in personam the Court declared (at 317) that publication alone was not a reasonable method of notice. Admitting that publication was sufficient for those beneficiaries whose addresses were unknown or whose interests were “either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee,” the Court held that present beneficiaries whose addresses were known must be notified by ordinary mail at least.

The administration of common trust funds are relatively new. Judicial proceedings for the determination of heirship are also relatively new. The settlement of accountings by trustees is very similar to the settlement of accountings by executors and administrators. Determining rights of succession in real property is not radically different from determining them in personal property. The function of settling accountings by trustees administering common trust funds in New York, as elsewhere, is vested in surrogate or probate courts. Similarly the function of determining rights of heirship or of succession is most commonly vested in probate courts. Despite all these elements of similarity the Supreme Court refused to classify the former as a proceeding in rem or to say that the same kind of notice as would be appropriate in probate proceedings would suffice as to beneficiaries whose identity and addresses were known.

\(^{30}\) See particularly the statutes of Arkansas, Iowa, Mississippi, Missouri and Texas, discussed under part 5 infra.
rather than a presumptive effect, subject only to the right of appeal or of vacation for some equitable reason. From the standpoint of promoting marketability of titles the consequences are too important and too far-reaching to justify limitations upon decrees rendered by courts having jurisdiction over the property and preceded by adequate notice.

1. Where Administration Is Had in Probate Courts Having No Jurisdiction Over Land

In states where courts of probate generally exercise no jurisdiction over land there is no occasion for a decree to make formal distribution of real property along with personal property. There is but a single administration proceeding and ordinarily it is concerned only with personalty. It is assumed that the heirs or devisees have already succeeded to the real property and that the administration proceeding, if properly conducted, will discharge all claims and have the effect of barring creditors. If the decedent leaves a will, it will be proven and admitted to probate and thereby become a clear muniment of title as to the devolution of any real property. In most instances the will designates the devisees by name. But if the decedent dies intestate, or if the will does not include a devise of realty, or if the will devises real property to a class whose members are not specifically named, there will be no corresponding clear muniment of title and no official determination as to the identity of the persons entitled to succeed to the real property. A decree adjudicating as to personalty is not determinative or conclusive of rights to succeed to land also owned by the decedent. In all such cases proof of title is likely to rest upon some less formal and perhaps less conclusive evidence.

Title examiners in these states commonly rely upon recitals of heirship in the various petitions, applications, orders and decrees in the administration proceedings. More often they accept state-

31 Simes and Basye, "Organization of the Probate Court in America," 42 MICH. L. REV. 965, 43 MICH. L. REV. 119 at 121 et seq. (1944), reprinted in SIMES AND BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE § 385 at 448 et seq. (1946).
32 If land is devised to an executor or if land is needed to pay debts or legacies, the probate court may then acquire certain incidents of jurisdiction or control over it.
33 JUDGMENTS RESTATEMENT § 71 (d) (1942); 3 AM. LAW OF PROPERTY § 14:29 (1952).
34 See also Mosier v. Osborn, 284 Ill. 141, 119 N.E. 924 (1918); First Colored Baptist Church v. Caldwell, 138 Kan. 581, 27 P. (2d) 237 (1933), rehearing den. 139 Kan. 45, 30 P. (2d) 144 (1934); McVeigh v. First Trust Co. of Wichita, 140 Kan. 79, 34 P. (2d) 571 (1933); Dunham v. Stitzberg, 53 N.M. 81, 201 P. (2d) 1000 (1949); State v. O’Day, 41 Ore. 495, 69 P. 542 (1902) (dictum).
35 BASYE, CLEARING LAND TITLES § 34 (1953); PATTON, LAND TITLES §§ 21, 22, 288 (1938).
ments as to heirship contained in affidavits or recitals in subsequent deeds executed by the heirs themselves. There are a few states in which the executor or administrator is required to file a list of heirs or devisees as part of his official duties, but ordinarily no judgment, decree or official pronouncement of any kind is made to declare those persons to be the ones officially entitled to succeed to the real property. Indeed, such a decree, if made, would have no binding effect because probate courts in these states ordinarily have no jurisdiction over land.

This informal method of determining heirs or the identity of devisees who are not individually named in a will still prevails in approximately half of the American states. Prospective purchasers and mortgagees universally rely upon ex parte affidavits and recitals in deeds to ascertain the persons from whom they can accept conveyances. Only the inherent honesty of people and general neighborhood knowledge keeps such a system from breaking down. But it seems to have functioned sufficiently well to date to prevent its wholesale abandonment.

In an effort to make recitals in affidavits or deeds more acceptable to purchasers and mortgagees, legislation in several states has authorized affidavits of heirship to be recorded and has declared recitals in them and also in other instruments to be prima facie evidence of the facts which they recite. Numerous decisions have recognized this form of evidence as to heirship. Notwith-

35 Basye, Clearing Land Titles §§33, 34 (1958); Patton, Land Titles §288 (1958). Real Estate Title Standards in several states have expressly sanctioned this procedure as a means of furnishing the basis for a marketable title. See Colo. Title Standard No. 51; Conn. Title Standard No. 54; Idaho Title Standard No. 8; III. Title Standards Nos. 10, 12, 15; Ind. (Indianapolis) Title Standard No. 7; Iowa Title Standards Nos. 9.13, 9.18; Minn. Title Standard No. 22; Mo. Title Standards Nos. 7, 8, 10, 20; N.M. Title Standard No. 20; Ohio Title Standard No. 5.3; Washington Title Standard No. 19. References to real estate title standards are collected in Basye, Clearing Land Titles §7, n. 8 (1953).


37 See note 33 supra.

standing its shortcomings this device at least affords a means of proving heirship by competent evidence in a judicial proceeding, whether the affiant is available or not. In states where probate courts are restricted in their jurisdiction and control to a decedent's personal property, some such system is essential for perpetuating record evidence of succession to real property.

This informal way of providing information as to the identity of heirs or devisees is subject to certain risks because it lacks judicial character for rendering it binding upon all persons. Any statement or list of heirs, whether filed by the executor or administrator or prepared by one who purports to know the facts, may be erroneous or mistaken, notwithstanding the honesty of the person making it. The identity of collateral heirs may actually be unknown. Heirs may have been absent or unheard of. For example, in Croxley v. Calhoon 40 a son who had not been heard from during more than twenty years was not included in the list of heirs filed by the administrator of his father's estate in Iowa, although his long absence from home was mentioned. After the estate had been distributed, it was learned that the missing son had migrated to California shortly after the discovery of gold there and that just two years before his father's death in 1872 had personally confessed judgment in favor of a creditor there who later proceeded to attach the son's interest in his father's estate in Iowa by garnishment of the other heirs. Notwithstanding that the estate had been closed for three years and that the list of heirs had been filed in the usual manner, the son's interest was recognized as an existing one and not as having been foreclosed or determined to be nonexistent by the administration proceeding or by the list of heirs filed therein. An order approving the personal representative's final report containing such a list, but without determining that the list constituted the heirs who were entitled to the ancestor's estate, was not an adjudication of their identity or rights in the estate property.41 On the basis of this decision a bona fide pur-

40 45 Iowa 557 (1877).

41 Croxley v. Calhoon, 45 Iowa 557 at 559-560 (1877); McGarry v. Mathis, 226 Iowa 37, 282 N.W. 786 (1938); In re Anders' Estate, 238 Iowa 944, 26 N.W. (2d) 67 (1947).
chaser from the listed heirs would take no better title than he would if the existence or identity of one heir should not be disclosed by the administration proceeding.

About all that can be said for this method is that on the basis of experience such verified lists of heirs contained in probate proceedings or solemnly recited in separate affidavits are likely to be correct, but such probability is not likely to satisfy a prospective purchaser who desires to invest in land, a home or a piece of business property.

The lack of an effective method to determine rights of succession to real property in this group of states constitutes a serious defect in our system. In an attempt to remedy this shortcoming, seven states in this group have adopted legislation to provide a means for declaring the identity of persons entitled to succeed to real property in connection with an administration proceeding otherwise concerned only with personal property. The method specified in these states for acquiring jurisdiction to make such a determination and the legal effect attributed to decrees show considerable variation. Consequently, a thorough analysis of their provisions is in order at this point.

In New York, surrogate courts do not customarily make a decree distributing real estate at the conclusion of an administration proceeding. Nevertheless they have been empowered to determine the rights of inheritance and to direct the disposition of real property of a decedent who has died intestate or has not devised his real property. Any heir or transferee of an heir may file a petition in the surrogate’s court which has acquired jurisdiction of the estate, describing the property, setting forth the facts upon which the jurisdiction of the court depends, and naming all the heirs together with the shares to which they are entitled. Upon the return of a citation directed to each of the heirs named, the

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43 Although surrogates’ courts in New York have not been given jurisdiction over real property in the same sense that they have in approximately one-half of the states, the personal representative has been given statutory power to take possession of all real property of a decedent unless his will prohibits it or provides that real estate shall not be sold, mortgaged or leased or specifically devises it to persons not under disability. N.Y. Dec. Estate Law (1949) §§13, 123.


45 The “estate” as that term is employed in the statute refers only to personal property. If the personal representative takes possession of real property pursuant to the provisions of N.Y. Dec. Estate Law (1949) §§13, 123, he will become accountable for the income received by him. See note 43 supra.

surrogate is authorized to make a decree declaring the rights of inheritance to the real property which is specifically described. A certified copy of the decree may then be recorded and is declared to be "conclusive evidence of the facts so declared to be established thereby against all parties to such proceeding." 47

According to the New York statutes, citation is directed to each of the heirs named in the petition for determination of heirship and the decree is declared to be conclusive only as against "parties" to the proceeding. Obviously the "parties" to such proceeding are those named in the petition and citation. If a given heir was not known or was not named, presumably he would not be bound. This difficulty can be and usually is obviated by naming unknown heirs as parties. Since citation is given by publication, the decree should be binding upon unknown as well as known heirs. Nevertheless in Matter of Clarke 48 where an adopted daughter of a decedent brought a proceeding for probate of heirship alleging that if her mother left heirs other than herself they were unknown to her, and a decree was entered in due time after publication of citation to unknown heirs declaring the adopted daughter to be the sole heir of her mother, it was held that the decree was not binding upon the husband of the decedent because he was not a "party" to the proceeding and, therefore, that the adopted daughter did not have a marketable title to land left by her mother. Apparently the court felt that the identity and address of the surviving husband could have been ascertained with reasonable diligence and that the statement of facts contained in the affidavit furnished in support of an order of publication against unknown heirs was not immune to collateral inquiry. Because of the inconclusive character of the decree under these circumstances, considerable care has been recommended in alleging the efforts used to learn the names and addresses of all heirs of a decedent so that the decree ultimately rendered may not be assailed as was the one in this case.

The above statutes are of limited value in that they apply only to cases of intestacy and to property of which the decedent died seized. This may partially explain why they are seldom used. Another statute provides that where it is not necessary or advantageous to mortgage, lease or sell the real property of the decedent, the parties may upon any judicial settlement request the court to

47 Id., §313.
establish who are the owners of any property devised by will or who are the distributees entitled to succeed to the real property of the estate.\textsuperscript{49} By following this procedure, rights to property devised by will and rights to property owned by the estate at the time of distribution as well as rights to intestate property may be judicially determined. While this method is followed more often in New York than that provided for probate of heirship, it is used in only a very small number of cases. In addition to establishing the rights and interests of parties to property the decree may direct a conveyance to them by the executor or administrator according to their respective interests in confirmation of their title. Notice by citation to all heirs is required here in much the same way as in proceedings to determine heirship but in addition to that given to persons taking personal property only.

Statutes of similar scope but with more limited effect in determining heirship are to be found in Illinois\textsuperscript{50} and Ohio\textsuperscript{51} where the decrees are declared to be only “prima facie evidence” of the facts found. The Ohio statute provides for notice by personal service or by publication as in civil action.\textsuperscript{52} The Illinois statute leaves the manner of giving notice and the persons to whom it shall be given entirely up to the court.\textsuperscript{53} Indeed it is not entirely clear that any notice whatever is required. It is hardly to be wondered that decrees rendered by probate courts in Illinois have been characterized as having no binding effect upon persons who were not named or did not personally participate in the proceeding.\textsuperscript{54} The net effect of proceedings authorized in either of these states would appear to be essentially that of proceedings in personam.

The statutes of Ohio and Illinois just described are to be compared with an Arkansas statute\textsuperscript{55} adopted in 1949 as part of its new probate code revision. Under the Arkansas statute any person claiming an interest in a decedent’s property either as heir or through an heir, or the personal representative of the decedent, may file a petition in the probate court for a determination of heir-

\textsuperscript{51} Ohio Rev. Code Ann. (Page, 1955) §§2123.01 to 2123.07.
\textsuperscript{52} Id., §§2123.03, 2123.04.
\textsuperscript{54} Prescott v. Ayers, 276 Ill. 242, 114 N.E. 557 (1916); Worsley v. Welch, 317 Ill. 90, 147 N.E. 593 (1925); Saunders v. Saunders, 323 Ill. 43, 153 N.E. 593 (1926).
\textsuperscript{55} Ark. Stat. Ann. (Supp. 1953) §62-2914. It is not entirely clear whether this proceeding may be had as part of the probate proceeding itself or whether it is an independent proceeding under the jurisdiction of the probate court. Probably it may be done either way.
ship as to any property of the decedent, either real or personal. Notice must be given by publication to all persons who claim an interest in the property as an heir or through an heir and, in addition, personal notice or notice by registered mail must be given to every such person whose address is known to the petitioner. The court is then empowered to make an order determining the heirs of the decedent and their respective interests in the property, which is declared to be conclusive upon all parties to the proceeding having or claiming an interest in the property.

Similar legislation applying to real property as to which a decedent has died intestate was adopted in 1955 by Iowa where provision is made for directing notice to all known heirs, legatees or devisees and to all persons unknown claiming any interest in the estate of the decedent and also to unknown claimants. Notice must then be published for three consecutive weeks, but power is given to the judge to prescribe a different notice. No provision is made for notifying known heirs personally or by mail. Hearing is to be had as in equity and the decree entered is declared to be final and binding upon all persons, subject only to the right of appeal or to correction, vacation or modification within one year for fraud or mistake, but the title of any bona fide purchaser is immune to any proceeding to correct, vacate or modify the decree. This kind of statute would appear to be highly useful in Iowa where the district courts, sitting in probate, have heretofore possessed no power to determine heirship. Iowa lawyers, however, have questioned the effectiveness of the legislation because of a feeling that a proceeding of this kind may not be considered an integral part of a probate proceeding in which the court is considered to have jurisdiction over real property and that the notice prescribed does not comply with the demands of the Mullane case in failing to require at least notice by mail to those heirs whose addresses are known. There is also a fear that giving the judge a power to prescribe a "different notice" from that specified in the statute might authorize him to prescribe a notice less than that which would satisfy due process.

Missouri has also adopted a statute in its 1955 probate code revision authorizing its probate courts to determine heirship in real property as part of their decrees of final distribution. According to the statute the decree is declared to be "a conclusive

determination of the persons who are the successors in interest to
the estate of the decedent and of the extent and character of their
interests therein, subject only to the right of appeal and the right
to reopen the decree.” Under this new code, as previously, pro­
bate courts in Missouri have no jurisdiction or control over real
estate in ordinary probate proceedings. The personal representa­
tive may not take possession of real property unless the court
orders him to do so for the payment of claims or for its preserva­
tion. Since the court’s jurisdiction over real property in the
ordinary sense of possession and control by the personal represent­
ative is no different from that which it has possessed heretofore,
some form of new and additional notice to interested parties would
seem to be necessary. The new code makes express provision for
this by requiring that general notice of the hearing of final settle­
ment and of petition for distribution shall be given by publication
to all persons interested in the estate and, in addition, that notice
shall be mailed to each heir and devisee interested in the estate
whose name is disclosed by the court records and who has· not
waived such notice in writing. The notice by publication and
mailing would seem to comply fully with both due process and
jurisdictional requirements. This legislation, permitting a pro­
bate court to determine heirship and distribute real property by
decree of distribution without general control over it during the
administration, is an innovation in American probate law. It
seems fully justified, however, and should prove to be extremely
useful in providing a judicial muniment of title for proof of heir­
ship in place of affidavits and recitals in deeds and probate pro­
ceedings as heretofore.

In all six of these states power to make determinations of heir­
ship as to real property has been clearly vested in local courts ex­
ercising probate functions notwithstanding that they do not
normally exercise jurisdiction over real property as part of an ad­
ministration proceeding. By way of contrast a New Mexico statute
authorized the probate or district court having jurisdiction of the
administration of a decedent’s personal estate to determine the
interest of any person who claimed to be an heir or devisee of such

58 Id., §473.263.
59 Id., §473.587.
60 Of the states in this category there may be a determination of heirship or of suc­
cession as to real property in connection with final settlement or distribution of estates
in Arkansas, Illinois, Iowa, New Mexico, New York and Ohio, but only in Missouri is
there a “distribution” of it.
decedent but who was not named in the petition for appointment of an administrator or for probate of the will. Acting under this statute a probate court having supervisory jurisdiction over personal property only, proceeded to make a finding of heirship as to certain real estate owned by a decedent in connection with the final decree. Two persons who were in fact pretermitted heirs were omitted from the will and also from the decree. Thereafter the question of the validity of that determination arose in an action for breach of a covenant of warranty brought in the district court involving the same real estate. The Supreme Court of New Mexico in a decision rendered in 1949 declared that such determination by the probate court was not binding because it had been given no constitutional authority to determine title to real property and that its jurisdiction to determine heirship was confined to the personal property over which it had jurisdiction. In other words the ineffectiveness of the decree was attributable to the failure to vest in probate courts the necessary power to determine heirship as to real property. In 1951 the New Mexico legislature, apprehensive as to the adverse effects upon titles to real property, purported to validate all such previous decrees issued by probate courts. Whether the statute is effective for this purpose may well be doubted. Later that same year, however, the New Mexico Constitution was amended so as to confer upon probate courts jurisdiction to determine heirship in real property. Notice of hearing for this purpose must be given by publication to all heirs of the decedent, both known and unknown, and also served on known heirs in the same manner as summons in civil actions.

62 Dunham v. Stitzberg, 53 N.M. 81, 201 P. (2d) 1000 (1949). After the New Mexico Constitution was amended following this decision the Supreme Court of New Mexico in In re Conley's Will, 58 N.M. 771, 276 P. (2d) 906 (1954), purported to overrule its holding in the earlier case, although its statement to that effect was not necessary to or actually involved in the later case.
65 N.M. Const., art. VI, §23.
66 N.M. Stat. Ann. (1953) §31-12-7. In Harlan v. Sparks, (10th Cir. 1942) 125 F. (2d) 502 at 505, notice of hearing was addressed to "all unknown persons claiming any lien upon or right, title and interest in and to said estate." Because the petitioner knew of the existence of certain relatives of the decedent and in the exercise of due diligence could have ascertained their names and addresses, a decree of heirship rendered under this statute was held not binding upon them in a subsequent action to quiet title to the decedent's real estate.
The general objective of legislation for determining heirship in these states in which probate courts do not normally exercise jurisdiction over real property is to furnish a means for ascertaining and declaring the identity of persons entitled to succeed to real property in connection with an administration proceeding otherwise limited to personal property. Certainly the time is propitious and the information for making such a determination is then ordinarily most readily available. With the passage of time proof of relevant facts becomes increasingly difficult. Furthermore, it is entirely fitting that this function should be exercised by tribunals which are already charged with administering decedents' estates provided they are presided over by judges sufficiently qualified to pass on questions of heirship or construing wills. But it is most important that the essentials of a valid proceeding should be dictated by legislation which clearly vests power in that court to perform this task and also specifies adequate standards of notice. The existence of these conditions and compliance with the procedure prescribed, particularly with that of notice, are necessary prerequisites in order that the final product may bear a seal of worthiness upon which everyone may rely with complete confidence.

It is a common provision of most of the statutes considered in this category that the decrees rendered shall be recorded and thereby constitute muniments of title. Even though not recorded they constitute competent evidence simply by virtue of the fact that they were judicial records. Their legal effect and value is made to vary all the way from prima facie to conclusive evidence. Where they are properly made conclusive, their value is clear from the be-

67 The only real objection to a system which authorizes a determination of heirship in connection with an administration proceeding is the lack of proper qualifications possessed by probate judges in many states. This probably explains the failure of some states to confer upon them the power to declare rights in real property under any circumstances. This matter was pointedly discussed in Dunham v. Stitzberg, 53 N.M. 81, 201 P. (2d) 1000 (1949), in which the court said (at 103): "It is a matter of common knowledge that probate proceedings are usually ex parte; that probate judges in this state are, with few exceptions, not lawyers, and many are ignorant and not fitted for the office. Often they sign prepared orders and decrees without reading; or if read, then without understanding the import. If in fact these courts had the jurisdiction asserted, it would be exercised in most cases without any real trial to determine the fact of heirship. Because of these conditions a statute was enacted authorizing the removal of all proceedings to the district court for administration, where the estate exceeds $2,000 in value, precluding any action on the part of probate courts in such proceedings. "The legislature can and should enact a statute authorizing the district court to determine heirship in all cases wherein real estate is left by decedents, after due notice to all claimants, known and unknown, and a trial in which the question will be settled by a court learned in the law, with jurisdiction to determine it."
ginnin. Where they are made prima facie evidence only, their value as evidence, though less initially, nevertheless increases with the lapse of time.

It is unfortunate that most of this legislation applies to cases of intestacy. Its utility would be increased substantially by extending its application to cases of testacy, particularly where devisees are not specifically named.

2. Where Administration Is Had in Probate Courts Having Jurisdiction Over Land

As previously noted, according to English law the courts exercising testamentary functions possessed no jurisdiction over land until the close of the nineteenth century. Since the organization of probate courts in America preceded this development by more than a century, we inherited the earlier system which then prevailed in England. Thus it became generally accepted in this country that upon the death of a decedent title to his real property passed to his heirs or devisees, and his executor or administrator had nothing to do with it.

Notwithstanding this direct passage of title from a decedent to his heirs or devisees, real property often does become involved in the administration proceeding, for limited purposes, at least. For example, it is almost a universal requirement that land be included in the inventory of a decedent's estate which is customarily filed by his personal representative. 68 Although this requirement serves the purposes of determining solvency of the estate, assessing inheritance taxes and identifying the land as having belonged to the decedent, this procedure alone would hardly justify a conclusion that the court thereby obtains jurisdiction over the land. 69 Also a proceeding to sell real property to pay debts and legacies may require the court to direct a disposition of it or assume a control over it which it did not previously have. 70 Where the personal


70 ATKINSON, WILLS, 2d ed., §123 (1952); 3 AM. LAW OF PROPERTY §14.27 (1952); Simes and Basye, "Organization of the Probate Court in America," 42 Mich. L. Rev. 965, 43 Mich. L. Rev. 113 at 127 (1944), reprinted in SIMES AND BASYE, PROBLEMS IN PROBATE LAW 385 at 455 (1946).
representative would ordinarily have no control over real property, the court acquires jurisdiction over it by giving some form of notice to the heirs or devisees.\textsuperscript{71} Statutes in most states also vest probate courts with jurisdiction to carry out contracts for the conveyance of land entered into by the decedent during his lifetime,\textsuperscript{72} or to make partition of land for the purpose of distributing it to the heirs or devisees.\textsuperscript{73} Likewise, considerable legislation authorizes the personal representative to bring actions to recover possession of or otherwise to seek recognition of the decedent's interest in real property.\textsuperscript{74} All of these attest the court's power or potential power over land.\textsuperscript{75}

Although title is said to be in the heirs or distributees, there has been an increasing amount of legislation to give the personal representative genuine control over real property as well as over personal property. In a few states statutes have given the executor or administrator the right to possession of land. The present California statute, first adopted in 1874, provides:

"When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate . . . ; but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition . . . , and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family . . . ."\textsuperscript{76}

Under a statute of this kind the personal representative would be expected to take charge of real estate, recover possession of it,


if necessary, and collect the rents and profits therefrom. The rights, powers and duties of the executor or administrator over real property are so extensive that for all practical purposes they are almost the equivalent of title for the limited period of administration. Several other states have adopted statutes modeled upon the California one.\textsuperscript{77} A full half of all states have statutes expressly providing for possession of real property by the personal representative, either as a right or as a duty.\textsuperscript{78} Since the personal representative is subject to the direction and control of the court, this alone would suffice as a basis for the probate court's jurisdiction over land. Such a conclusion is emphasized by the specific provision of the statute above quoted that the property shall be subject "\textit{to the control of the superior court for the purposes of administration . . . .}" (Italics added.) Another statute makes the point even more obvious. Thus the California Probate Code has long provided: "Immediately upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, . . . the court must proceed to distribute the residue of the estate among the persons entitled thereto."\textsuperscript{79}

If the court is to distribute real estate, it must effect a transfer of title from the decedent to the heir or devisee. Moreover, it makes this distribution at the conclusion of the administration proceeding, thereby recognizing that both the court and the executor or administrator have had power and control over the land during the period of administration. It is no mere coincidence that legislation directing distribution of real property exists in the same states which authorize the personal representative to take posses-


sion of real property. Decrees of distribution in these states truly determine rights of succession in the same sense and to the same extent that such a decree would do with respect to personal property. This method prevails today in approximately one-half of the states\textsuperscript{80} and is finding increasing acceptance in the more recent probate codes.

After the death of an owner of real estate the title to his property is likely to be unmarketable at least until the expiration of the nonclaim period following the initiation of administration proceedings and perhaps even until it is clear that all debts and claims have been paid and all inheritance and estate taxes have been satisfied. It is in the interest of certainty of titles that the identity of heirs be ascertained and declared as promptly as possible. The same may be said as to the determination of devisees under a will. Although their identity is ascertainable in most cases of intestacy or under most wills this is not always true. The very existence of certain heirs is not always known. The identity of a class of devisees often needs further specification. A formal decree of distribution rendered for this purpose by the probate court as an important part of its larger function of exercising complete jurisdiction over the decedent's real property in the administration proceeding is the ideal means of accomplishing this end. It can then be recorded and made a muniment of title upon which others can rely with absolute assurance. Such is the procedure authorized by the more modern probate codes\textsuperscript{81} and likewise recommended by the Model Probate Code.\textsuperscript{82}


In Louisiana a judgment of possession serves substantially the same function as a decree of distribution in other states. It is not specifically referred to in the Louisiana Code, but is required by the Louisiana Inheritance Tax Act.

\textsuperscript{81}See note 80 supra.

\textsuperscript{82}Model Probate Code §183.
3. Where Administration Is Had in Probate Court Having Jurisdiction Over Land but Decree of Distribution Fails To Include Real Property

Where a determination of heirship or of devisees is thus made an integral part of a decree of distribution, it normally determines the persons entitled to succeed to real property either by the laws of intestacy or by the terms of a will and then proceeds to distribute it to them. Abnormally such a decree may fail to include within its terms some particular piece of real property. This omission may be due to lack of knowledge of its existence as an asset of the estate, to an oversight and consequent failure to include it in the decree of distribution, or to a misdescription of it in the decree. It may or may not have been omitted from the inventory.\(^{83}\) In any case there is a need for some device to correct the error or to supplement the omission. The orderly solution would be to reopen the estate and amend the decree of distribution to make the necessary determination. The usual procedure then becomes available, as previously shown, of determining succession to the land in order to effect its proper distribution, though belatedly, to the persons entitled to it. Some legislation embodies this very procedure.\(^{84}\) It is the method advocated by the Model Probate Code.\(^{85}\)

Notwithstanding the obvious expediency of this procedure several statutes provide for a separate or independent proceeding to determine heirship or rights of succession under these circumstances.\(^{86}\) This type of legislation merely assumes that a determination of heirship or of distributees by a supplementary proceeding following normal administration can be just as efficacious as reopening administration. If this method is followed, it is important

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\(^{83}\) An omission or misdescription of land in an inventory should not affect marketability so long as it clearly appears that the decedent owned it at the time of his death. The inventory is not a true muniment of title. Several title standards have expressly declared that such an omission or misdescription shall not affect marketability. Mo. Title Standard No. 25; Neb. Title Standard No. 3; N.H. Title Standard No. D-14; Ohio Title Standard No. 5.1. See also Neb. Rev. Stat. Ann. (1943) §§76-606; Okla. Stat. Ann. (Supp. 1955) tit. 58, §622.1. In general, see BASYE, CLEARING LAND TITLES §§273, 332 (1953).


\(^{85}\) Model Probate Code §194. See also comment to §195.

to follow faithfully the prescribed procedure to insure that the court acquires jurisdiction over the property and persons in order to make the decree concerning the devolution of ownership. Such legislation generally recognizes this by requiring that notice by citation or otherwise be given to heirs, devisees and others interested in the estate. In addition, notice by publication is required by some statutes. The decree rendered pursuant to these requirements furnishes a suitable muniment of title exhibiting the devolution in ownership of real property.

4. Where Determination of Heirship Is Made Ancillary to Administration Proceeding

Even though administration is had on a decedent’s real and personal estate and even though a decree of distribution would determine heirship or distributees in due course, there may be occasions when a separate determination may be desirable, or even necessary, before a decree can be framed in the administration proceeding itself. There may be an ambiguous will, there may be a gift to a class of persons whose identity is uncertain, there may be rival claimants, either as heirs or devisees, to the same interest in the estate, or there may be pretermitted heirs. An identification of all living heirs may be necessary in order to notify them of a proposed sale of real property by the personal representative. In each of these instances it may be highly desirable to resolve such conflicts in the early stages of a pending administration. In addition, the amount and apportionment of inheritance taxes are necessary items to be ascertained, often long before the final decree can even be thought of. Even if only the resolution of conflict as to the identity of heirs or devisees is involved, it may be an economical use of the time to have a determination made before the expiration of the time for closing the estate rather than to wait until that time and then attempt the determination. It may make a difference to the individuals involved so that they can govern their activities in accordance with a sure knowledge of their interest in the estate. An adversarial resolution of such conflicts concurrent with routine administration can facilitate the closing of an estate which might otherwise be delayed for months or even years.

87 Publication of notice is provided for in Colorado, Florida, Kansas, Michigan, Minnesota, Nebraska and Texas. In some instances publication is required only as to non-resident heirs or unknown heirs.
The California statute, one of the oldest in this group, provides that "when the time to file or present claims against the estate has expired, and a petition for final distribution has not been filed, the executor or administrator, or any person claiming to be an heir of the decedent or entitled to distribution of the estate or any part thereof may file a petition setting forth his claim or reason and praying that the court determine who are entitled to distribution of the estate." In addition to the usual notice by posting, the petitioner must cause notice of the hearing to be mailed to the executor or administrator and to all legatees and devisees and to all known heirs of the decedent and all persons who have requested notice. Any person may then appear and file a written statement setting forth his interest in the estate. Upon a hearing the court determines those who are the heirs of the decedent or are entitled to distribution of the estate and then specifies their interests. When the decree thus rendered becomes final, it is conclusive as to related matters determined during the remainder of the administration of the estate and also upon any subsequent proceeding for distribution.

Analogous statutes have also been adopted in many other states where probate courts normally exercise jurisdiction over real property. In Utah it has been held that the probate court has inherent power to determine heirship at any time during an administration proceeding without statutory sanction. The utility of this procedure is attested by the numerous cases in which it has been invoked in order to determine rights in estates in advance of final distribution. A simple application of the laws of succession only may be involved; or an interpretation of a complex will may be required. Thus power is given to a probate court to construe a will during an administration proceeding in order to pave the way for an orderly decree of distribution.

90 Child v. District Court of Second Judicial District, 80 Utah 243, 14 P. (2d) 1110 (1932).
91 In re Hesse's Estate, 62 Ariz. 273, 157 P. (2d) 347 (1945); Burton's Estate, 93 Cal. 459, 29 P. 36 (1892); Bacon v. Bacon, 150 Cal. 477, 89 P. 517 (1907).
be pretermitted heirs frequently invoke these statutes to assert their rights to a distributive share of an estate. Since their function is strictly probate in character, a jury trial is not essential on constitutional grounds. Nevertheless a jury trial has been made optional in some states.

Ordinarily there is no problem of jurisdiction here. In states where probate courts have jurisdiction over real property as part of their general supervisory control over the estate as a whole, a determination of heirship is but one step in the administration of the estate which is clearly in rem. Even in these states some additional notice to interested parties is customary and is usually required by statute.

Proceedings of this kind to determine heirship prior to decree of final distribution have been declared to provide a “simple and expeditious method for determining who are the rightful heirs of an estate and entitled to the distribution thereof.” Undoubtedly they serve to obviate useless and unnecessary repetitive hearings and provide a timely means of determining rights of succession so that a final report and account can be prepared with certainty, thereby paving the way for a decree of final distribution to follow without needless controversy over conflicting interests in the estate. Thus they exist principally as an adjunct to implement the entire administration proceeding in the orderly accomplishment of its purposes.

5. When No Administration Is Had

It has already been shown that, according to traditional theory, title to a decedent's real property passes directly to his heirs or devisees immediately upon his death. This theory as to its devolu-

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94 A jury trial is now expressly provided for in California and New York.
95 Estate of Wise, 34 Cal. (2d) 576, 210 P. (2d) 497 (1949); In re Baxter's Estate, 98 Mont. 291, 39 P. (2d) 186 (1934). In the latter case one heir was not named or notified. In holding that he was nevertheless bound because the proceeding was part of an administration proceeding which was in rem and of which the world had notice, the court cited and relied on Goodrich v. Ferris, 214 U.S. 71, 29 S.Ct. 580 (1909), cited note 25 supra. See also Blythe's Estate, 110 Cal. 231, 42 P. 643 (1895).
96 Statutes in substantially all of these states require that notice of hearing be published. In addition, all but two or three require personal service of citation upon resident parties, at least. Mailing is directed in Arkansas and Colorado.
97 Estate of Wise, 34 Cal. (2d) 376 at 384, 210 P. (2d) 497 at 501 (1949).
tion correctly describes the matter in a general way, both in states where probate courts have no jurisdiction over real property in an administration proceeding and also where they do have such jurisdiction. But the estate of every decedent is not subjected to formal administration.

When a decedent dies intestate, ownership of his real property devolves upon individuals answering the statutory description of heirs. But statutes cannot identify them as individuals—an identification which is essential to enable them to exercise their full rights of ownership. When a decedent dies testate, his will when admitted to probate operates to transfer ownership and usually names or designates the persons to whom his real property passes and therefore constitutes a muniment of title for that purpose. Even here there are certain instances in which the identity of devisees cannot be ascertained from the language of the will. There may be a gift to a class or to individuals not specified by name, so that there is a lack in the elements necessary to constitute a clear muniment of title. Additional evidence may be necessary.

In cases where administration is not had, methods for ascertaining the identity of those persons who are entitled to succeed to real property have been made available to a considerable extent. The power to make such a determination has usually been vested in courts exercising probate jurisdiction, both in states where they normally have no power or control over real property in an administration proceeding and also where they do have such power. It is important to observe at the outset that conferring this power upon probate courts normally having no jurisdiction over real property constitutes a genuine addition to their previous functional powers. On the other hand, giving this power to courts usually exercising probate jurisdiction over real property constitutes no grant of additional power.

As already noted, an administration proceeding is considered to be a proceeding in rem in the sense that it concludes all persons with respect to property constituting the estate subject to administration. In order to accomplish its function, however, the court having supervision of the estate must acquire jurisdiction over it in the first instance. This it does usually by giving reasonable notice and opportunity to be heard in the initial steps of the proceeding. Subsequent steps in the proceeding are simply in-

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99 Id. at 687-696, as to the necessity and kind of notice for the court to acquire jurisdiction. Comment, 50 Mich. L. Rev. 124 (1951).
dividual steps of a single large proceeding which possesses this in rem characteristic. A determination of distributees made at the conclusion of an administration proceeding as to property of the estate which is subject to the jurisdiction of the court, whether it is personal property only or both real and personal property, would be binding upon all persons.

When power is vested in a probate court to make a determination of succession in the absence of any administration proceeding, it must first acquire jurisdiction over the property with respect to which its determination will apply. In discussing the statutes which have thus far been adopted to provide for such a determination of succession, it is convenient to classify them according to whether the court would ordinarily have jurisdiction of personal property only or of both real and personal property. Special attention will be given to the character of notice required in order for the court to exercise its authority to determine heirship under these conditions.

(a) In States Where Probate Courts Would Normally Exercise No Jurisdiction Over Real Property. An Illinois statute, first passed in 1909, purports to authorize courts having probate jurisdiction to ascertain and declare the heirship of a decedent if there is no grant of administration whatever. The persons to be notified and the manner of giving notice are left entirely to the discretion of the court. Upon hearing, the court is allowed to make its ascertainment of heirship from “an affidavit of any party” or from evidence in narrative form or by questions and answers, which information is then filed with the clerk and becomes a part of the files. Since the court has no control or jurisdiction over the decedent’s real property in a full administration proceeding, it would seem an anomaly that it would be authorized to make a binding decree in this summary fashion without first getting jurisdiction over the real property or requiring that all persons who have interests in the real property, and who would be affected by the decree, be made parties to the proceeding. The legislature doubtless recognized the shortcomings of this proceeding, which is little more than ex parte, for in another section it provides that an order so made by the court shall be only prima facie evidence of heirship and that any other legal method of proving heirship may be resorted to by any party interested in any place or court where the question may arise. The Supreme Court of Illinois has

101 Id., §210.
also stated on several occasions that such orders declaring heirship are prima facie only and are not intended to be binding upon persons who were not notified or did not participate in the proceedings.102 In other words, the court's determination has little, if any, value as evidence other than that which an affidavit of heirship would have, because it is not based upon any semblance of jurisdiction over the property or over all possible parties whose interests are affected.103 The Illinois court is fully aware of this for on one occasion it described this procedure as being merely in the nature of a proceeding for the perpetuation of testimony.104

Legislation in New York and West Virginia has purported to authorize their surrogate and circuit courts, respectively, to determine heirship in land of decedents who have died intestate.105 In these states a petition may be presented by an heir setting forth the names of the persons believed to constitute the heirs of the decedent. A citation or order is then issued and served upon all parties who appear from the petition thus filed to have any interest in the property. In addition, notice is given by publication to non-resident or unknown heirs. The determination of heirship when made is recorded and is then declared to be conclusive against "all parties to such proceeding."106 The effectiveness of decrees rendered under these statutes depends on the extent to which affidavits for service upon nonresident or unknown heirs are immune to collateral inquiry.107

In Mississippi, jurisdiction has been conferred upon chancery to determine the persons who are entitled to succeed to the ownership of property belonging to a person who has died intestate. A petition for this purpose may be filed by any heir or other person interested in any of the property.108 Jurisdiction is obtained by the issuance and service of a citation directed to all heirs of the decedent and also by publication of summons directed to them which is published as other publications to absent or unknown defend-

102 Prescott v. Ayers, 276 Ill. 242, 114 N.E. 557 (1916); Worsley v. Welch, 317 Ill. 90, 147 N.E. 579 (1925); Saunders v. Saunders, 323 Ill. 43, 153 N.E. 593 (1926).
103 Of course, if the determination were made in probate proceedings and interested parties appear and contest the matter, the decree would be binding upon those parties in a subsequent proceeding, such as a partition suit. See Healea v. Verne, 343 Ill. 325, 175 N.E. 562 (1931).
A decree entered upon the conclusion of publication is declared not to be assailable collaterally except for fraud, to be binding upon all persons cited to appear from the date of its rendition and upon all persons whomsoever after the expiration of two years.

An Arkansas statute, adopted in 1949 as part of a new probate code, authorizes any person claiming as or through an heir of a decedent to initiate proceedings for the determination of heirship in the probate court of proper venue for the administration of such decedent’s estate. The petition must contain all relevant data concerning the decedent and his domicile, his heirs or their assigns, a description of the property, the net value of the entire estate, a statement as to whether the decedent died testate or intestate, and if testate, a copy of the will and a certificate of probate thereof. Notice is given to all persons known or believed to claim an interest in the property as or through an heir of the decedent, to all persons shown by the public records to claim an interest through the heirs of the decedent, and to any unknown heirs of the decedent. Notice is made by publication and, in addition, by registered mail to every such person whose address is known to the petitioner. After proof of service the court is empowered to determine the heirs of the decedent and their respective interests as heirs in the property, which is declared to be conclusive upon all parties to the proceeding having or claiming an interest in the property. This statute also permits a determination of heirship when an administration proceeding on personal property is pending or has been completed.

In Iowa, where courts handling probate matters ordinarily have no jurisdiction over real property, there had long been felt a need for a proceeding that would effectively determine heirship or devisees in the absence of administration. Such a statute was finally adopted in 1955 by which, if no letters are issued within five years after a decedent’s death, any person may initiate proceed-

109 Id., §1271.
110 Id., §1272.
113 The order is subject only to the right of appeal or to be set aside upon such grounds and under such circumstances and in the manner provided by law for setting aside a final judgment or decree of a court of general jurisdiction. The court is authorized, however, upon the petition of any person not personally served with notice having or claiming any interest in the property involved, filed within three years after the date of the rendition of the order or within three years after the removal of the disability of any person subject thereto, for good cause, to vacate or modify the order insofar as it affects the interests of such person.
ings to determine heirship independent of administration.\textsuperscript{114} Notice is directed to all known heirs, legatees or devisees and all persons unknown claiming any interest in the estate and is published for three consecutive weeks, but there is no requirement that notice be given personally or sent by mail to any party. Provision is made, however, that the judge may prescribe a different notice. Hearing is had as in equity and the decree entered is declared to be final, subject only to the right of appeal and to be binding upon all persons. Since an in rem determination of heirship as to real property by itself has not previously been considered a probate function in the strict sense and since the proceeding as employed here is unassociated with a probate proceeding embracing either real or personal property, there is some uncertainty among Iowa lawyers as to whether the notice required by the statute is sufficient to confer jurisdiction upon the court.\textsuperscript{115}

Legislation similar in character to that of Iowa was embodied in the new Missouri Probate Code also adopted in 1955.\textsuperscript{116} A petition to determine heirship may be filed in the probate court whenever no administration has been commenced on the estate of a decedent and no will offered for probate within five years after his death.\textsuperscript{117} Provision is included for giving notice by personal service or registered mail and also by publication to all persons known or believed to claim an interest in the property as or through an heir of the decedent, to all persons shown by the public records to claim an interest through the heirs, and to all unknown heirs. Such notice would appear not to be subject to the same objection of the Iowa statute described above but to be clearly ample for the court to acquire jurisdiction to determine heirship and thereby furnish a muniment of title upon which prospective purchasers may rely with confidence.\textsuperscript{118}

In New Mexico two sets of statutes now authorize both district courts and probate courts to determine heirship of decedents who have been dead for more than six years and left real property in the state.\textsuperscript{119} Upon filing a petition for the purpose, notice of

\textsuperscript{114} Iowa Code Ann. (Supp. 1955) §§636.56-636.60, as enacted by Iowa Acts 1955, c. 267.

\textsuperscript{115} See discussion at note 56 supra.


\textsuperscript{117} A will may not be admitted to probate nor letters of administration granted after five years. Mo. Ann. Stat. (Vernon, Supp. 1955) §473.070.

\textsuperscript{118} The statute provides that the decree shall be recorded and shall be conclusive evidence of the facts determined thereby.

\textsuperscript{119} N.M. Stat. Ann. (1953) §§31-12-16 to 31-12-21 (in district courts); N.M. Stat. Ann. (1953) §§31-12-22 to 31-12-27 (in probate courts). See discussion at notes 61-66 as to the power of probate courts in New Mexico to determine heirship as to real property.
hearing, which shall include a description of the property described in the petition, is published and also given to all known heirs in the same manner as is provided for the notice of hearing of the final report in the administration of estates. The court is directed to have the property appraised and to determine the amount of succession tax which must be paid before any order determining heirship shall become final. Since probate courts as well as district courts in New Mexico now have power to determine heirship, there seems to be no question as to the validity of decrees rendered for this purpose provided all heirs are made parties and properly notified.

(b) In States Where Probate Courts Would Normally Exercise Jurisdiction Over Real Property. A substantial quantity of legislation for the purpose of determining heirship in the absence of administration has also been adopted in states where probate courts would normally exercise jurisdiction over real property. A Colorado statute is an excellent model. It provides that when any person shall die intestate leaving real property in that state or shall die a resident of the state leaving intestate personal property, any person claiming to be an heir of the decedent, or a grantee of an heir, or any person claiming an interest in such property may, after one year from the death of such decedent, if no administration shall have been granted, apply to the district court or, if the value of the property does not exceed $2,000, to the county court, stating to the best of his knowledge the names, addresses and relationship to the decedent of all heirs entitled to any interest in such property, and the name and address of the present owner thereof. The court or clerk shall then issue a notice of the filing of the petition which shall include the name of the decedent, a description of the property set forth in the petition and the names of the alleged heirs and present owner, which notice is then published at least once a week for four successive weeks, served personally upon all persons residing in the state whose names and addresses are shown in the petition and also mailed to all persons whose names and addresses are shown in the petition.

120 N.M. Stat. Ann. (1953) §§31-12-19 and 31-12-25. Notice of hearing of a final account and report is given in the same manner as summons is served in a civil action and also published. Id., §§31-12-7.

121 Id., §§31-12-18 and 31-12-24.

122 For a New Mexico case allowing a collateral attack on a decree obtained without naming certain heirs whose identity and address could have been ascertained see Harlan v. Sparks, (10th Cir. 1942) 125 F. (2d) 502, discussed in note 66 supra.


124 Id., §152-4-2.
Upon a hearing the court is authorized to determine the heirs of the decedent and the present owners of the property and to issue a decree to that effect. Here we see a judicial process which is genuinely one in rem, where the court has power over the property within its territorial jurisdiction, asserts and obtains jurisdiction by mailing notice to and personally serving all interested persons within the state, mailing notice to those outside, and publishing notice as to all others. Moreover, any heir or grantee of an heir who has not been personally served with notice of the hearing or appeared thereat may move to reopen the decree at any time within six months. Certainly this would satisfy the most extreme requirement for obtaining jurisdiction over the property and declaring the identity of those who are entitled to succeed to its ownership.

Statutes similar to the Colorado one above described exist also in approximately a dozen other states where probate courts would normally exercise jurisdiction over real property in an administration proceeding. To obtain their benefits an application is filed by an heir or other person in the court which would exercise probate jurisdiction setting forth the fact of the decedent's death, a description of the property left by him and the names of all the heirs so far as known to the petitioner. A time and place for hearing is then set. Service of citation or notice upon all known heirs whose names appear and who can be found within the state is required by most and notice by publication is required by all of them. Since the court in which the proceeding is filed would

125 Id., §§152-4-4, 152-4-5.
126 Id., §152-4-5.
128 Nebraska requires notice by publication only. Neb. Rev. Stat. Ann. (1948) §30-1702. Michigan requires personal service on parties in the county or by publication or by registered mail or by a combination of any two of these methods. Mich. Stat. Ann. (1943) §27.3178 (32). Wisconsin requires personal service in or out of the state or by publication and mailing to all persons whose addresses are known or with reasonable diligence can be ascertained. An order of court authorizing publication shall also direct service by mail to all. If the order does not specifically designate the parties to whom notice is to be mailed, it shall be deemed to refer to those whose names are set forth in the petition. The statute further provides that such an order and record shall be conclusive in all collateral actions and proceedings as to the knowledge and ascertainability with reasonable diligence of the names and addresses of persons interested. Wis. Stat. (1953) §324.18. This eliminates the possibility of collateral inquiry as to the adequacy of notice as occurred in Matter of Clarke, 131 App. Div. 638, 116 N.Y.S. 101, affd. 195 N.Y. 613, 89 N.E. 1098 (1909), discussed at note 48 supra.
have jurisdiction to determine heirship in a full administration proceeding, it may be argued that notice by publication or even by posting would suffice if that would be the only notice required for an administration proceeding.\textsuperscript{129} Notice by personal service or mailing in such a case may be in accordance with additional local requirements for an administration proceeding. On the other hand, if a proceeding to determine heirship to real property in these states is deemed not to be a probate function because it is unassociated with a probate proceeding, then personal notice or notice by mail to all known heirs may be in order on the theory that the principle of the \textit{Mullane} case may be applicable here.\textsuperscript{130} As yet no case has passed upon this point. As previously mentioned, however, it is believed that if the notice required to determine heirship in any of these states corresponds to the requirements to initiate an administration proceeding in the same state, then all possible requirements of notice will have been satisfied.

It is worthy of note that an increasing number of these statutes authorize a determination of persons entitled to succeed to either real or personal property.\textsuperscript{131} Most of them, however, are limited to cases of intestacy.\textsuperscript{132} Notwithstanding that decrees of heirship in these states appear to possess all the elements of valid in rem decrees, they have been limited in two other ways in some states. In Michigan they are declared to be prima facie evidence only unless fifteen years shall have elapsed since the death of the decedent.\textsuperscript{133} And in Wisconsin they are declared to be presumptive evidence only of the facts of heirship found, but conclusive evidence as to heirs to whom notice shall have been given or who shall have appeared.\textsuperscript{134} The Texas Probate Code makes them conclusive as to all parties who were personally served with citation or notice and as to nonresident parties and bona fide purchasers from any of them, but prima facie evidence only as to others.\textsuperscript{135} This would exclude resident parties who were not served or were not known and therefore not made parties by name.

\textsuperscript{129} See discussion at notes 28-30 supra.
\textsuperscript{130} See discussion at note 29 supra.
\textsuperscript{131} Among the states considered in this group the statutes of Florida, Idaho, Minnesota and Texas purport to apply to both real and personal property.
\textsuperscript{132} The statutes of Florida, Minnesota and Texas purport to apply to cases of testacy as well as intestacy. Of course, the will would need to be admitted to probate in order to have legal effect and for the court to determine devisees or legatees under it.
\textsuperscript{133} Mich. Stat. Ann. (1943) §27.3178 (149) (where determination of heirship is not made as part of an administration proceeding). If made in an administration proceeding, it is conclusive. See note 80 supra.
\textsuperscript{134} Wis. Stat. (1953) §315.06.
\textsuperscript{135} Texas Prob. Code (Vernon, 1955) §55.
Also because of the fact that decrees in these cases are frequently founded on service by publication and therefore may affect interests of persons who may not in fact learn of them until after their rendition some statutes contain liberal provisions to permit persons who were not personally served to move to set aside the decree and open up the proceedings for further proof.\textsuperscript{136}

(c) **Effect of Determination in Providing Complete Marketability of Title.** Another significant feature of these statutes, with the aid of supplementary legislation, is their effectiveness in providing a full marketable title to land. It is well known, of course, that two of the basic purposes of administration upon the estate of a decedent are to discharge all indebtedness due from him or his estate and to make distribution of the residual property to the persons entitled to it. In most states statutes of limitations applicable to the debts of a decedent cease to run upon his death. When a personal representative has been appointed and notice given to creditors to present their claims, statutes of nonclaim replace statutes of limitations to bar or extinguish the decedent's debts. Logically it would seem to follow that the failure to initiate administration proceedings upon the estate of a decedent would result in leaving the claims of creditors extant and thereby impair marketability of titles perpetually in such cases. However, a very substantial amount of legislation has been adopted by the states in question to free land from the claims of creditors after the expiration of a period of time during which no one takes steps toward formal administration.\textsuperscript{137}

It will be noted that a large portion of the statutes providing for a determination of heirship in the absence of administration do so only after the expiration of a stated period of time after the decedent's death.\textsuperscript{138} It is more than a coincidence that the periods


\textsuperscript{138} Colorado (1 year); Idaho (2 years); Iowa (5 years); Kansas (1 year); Minnesota (5 years); Missouri (5 years); Nebraska (2 years); New Mexico (6 years); North Dakota (6 months); Oklahoma (3 years); Utah (3 months); Wisconsin (60 days); Wyoming (2 years).

In Idaho and Wyoming creditors may be notified of the hearing for the determination
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provided by these statutes correspond closely to those for freeing land from the claims of creditors when administration has not been had. The net result is to afford a means of providing a full marketable title to property in the heirs to the same extent that it was marketable during the lifetime of the decedent, subject only to the claim of the state for inheritance and succession taxes. Many of these statutes provide for a determination and payment of these taxes as a routine requirement in their use. But legislation has not been uncommon in these same states to bar even the demands of the state for taxes after the expiration of time without assertion.\textsuperscript{139} Where the claims of creditors have thus become barred, the procedure for determining heirship then serves to provide a complete basis for establishing marketable title to real property by succession from a decedent without administration.

**Conclusion**

Proceedings for the determination of heirship have been adopted to function in a wide variety of circumstances. In states where probate courts ordinarily exercise no jurisdiction over real property there is but scant legislation for that purpose. Some of the older statutes have made the proceeding of such a character that the resultant decree has a value little more than that of a self-serving affidavit. The increased value of a decree in such cases arises only when interested persons appear and litigate their competing claims. Even here there is nothing to approach the effect of an in rem decree. The more recent legislation has sought to provide notice to interested parties in order to constitute the pro-

ceeding one truly in rem and make it binding upon all persons insofar as it may determine who is entitled to succeed to the decedent’s interest in property.

Where probate courts do exercise a real jurisdiction over real property, their decrees of final distribution make the desired determination of heirship or of distributees, thereby serving as a protecting guide to the personal representative in making distribution as well as becoming a decree binding upon the whole world and serving as a genuine muniment of title. Also when the decree of final distribution fails to include some particular piece of property, we have noted a substantial amount of legislation providing a summary procedure to correct the oversight.

Proceedings for the determination of heirship probably serve special needs best in two situations: (1) when they are resorted to before the decree of final distribution in connection with an administration proceeding in order to determine the rights of ultimate distributees; and (2) when there has been no administration whatever. When used in connection with a pending administration, they make possible a timely determination of conflicting interests which obviates possible delay in closing the estate and making prompt distribution to interested parties who look forward to receiving their proper shares of the estate. When resorted to in the absence of administration, they can and sometimes do serve as a substitute for a summary administration, provided creditors have become barred according to local law by their failure to take steps to assert their interest.

Several trends may be observed in the enactment of legislation for this purpose. First, there is some tendency to permit determinations of rights of succession in states where probate courts do not normally have anything to do with real property and to do so in a way that will be binding upon all parties. Second, there is increased use of this procedure to resolve conflicts in connection with pending administrations. Third, there is a greater inclination to authorize a procedure for this purpose in the absence of administration and thereby simplify problems for certain classes of persons, particularly those succeeding to small estates. Fourth, there is an increasing number of statutes which extend their application to personal property as well as to real property. Finally, there are marked indications of broadening existing procedure by authorizing a determination of rights under wills as well as under the laws of intestacy. All of these are beneficial as well as logical extensions of their original functions.