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TEN PROBATE CODES

Lewis M. Simes
University of Michigan Law School

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*Lewis M. Simes**

PROBATE law is on the march. In no area of property law has there been more legislative activity in the past two decades than in the law of decedents' estates. The changes which have taken place in recent years in this field of law have been so numerous that it would be impossible even to catalog them in the short space of a law review article. Not only has there been constant revision and supplementation at particular points, but whole codes have been the subject of legislative enactment. Indeed, since 1930 ten codes of probate law have been enacted in as many states. These states are Arkansas, California, Florida, Illinois, Kansas, Michigan, Minnesota, Nevada, Ohio, and Pennsylvania.

It is the purpose of this article to summarize some of the most important aspects of these codes for the purpose of indicating legislative trends. For the most part, they will be discussed in the chronological order of their enactment. While some of them deal with many other matters besides the law of decedents' estates, such as guardianships and testamentary trusts, this discussion will be limited to the substantive and procedural law of decedents' estates, exclusive of matters of ancillary administration.

California

Of the ten codes herein considered, that of California was the first to become operative. The effective date was August 14, 1931.[1] It was the work of the California Code Commission, created in 1929 by legislative enactment.[2] The actual draftsman was Mr. Perry Evans, of the San Francisco bar, a member of the Code Commission.

Prior to this time, California had had no separate probate code. Probate provisions were found in the Code of Civil Procedure, in the Civil Code, and elsewhere. The primary purpose of the Commission was to gather together this body of legislative material and to organize it. The Code is essentially a restatement of existing law. Mr. Perry Evans, the draftsman, in referring to the function performed by the Commission, says: "Some attorneys have expressed disappointment

* Floyd Russell Mechem University Professor of Law, University of Michigan.—Ed.

1 Enacted as Cal. Stats. (1931) p. 587.

2 For the report of the Code Commission, see REPORT OF THE CALIFORNIA CODE COMMISSION FOR THE YEAR 1930, p. 23, Appendix E.

that greater changes, more radically simplifying the entire probate procedure, have not been made. The Code Commissioners did not believe that it came within the purview of their duties to propose any great departure from the established practice."[3] Indeed, where the Commission favored changes which were regarded as controversial, these were not presented as a part of the proposed Code, but were submitted through members of the legislature as amendments to the Code.[4]

Thus the entire judicial framework, of probate law, as well as the rules of procedure and of the substantive law of testate and intestate succession, remained substantially unchanged. Provisions for the probate court organization were not even incorporated in the probate code, since in California the Superior Court sits as a trial court of general jurisdiction as well as a probate court.[5]

The new code consisted of four parts entitled as follows: I. Wills; II. Succession; III. Administration of Estates of Decedents; IV. Guardian and Ward. About eighty actual changes in the law were made.[6] Among these were a simplified procedure for determination of heirship;[7] a new procedure for partition during administration;[8] an amendment of the provision for dispensing with administration;[9] and an extension of the jurisdiction of the court, while acting in probate matters, over testamentary trusts.[10]

Some thirty California decisions relating to probate matters were embodied in this legislation.[11]

[3] Evans, "Changes in the Law Effected by the Probate Code," 6 CAL. S.B.J. 170 (1931).

[4] Evans, "An Analysis of the Proposed Probate Code," 6 CAL. S.B.J. 70 at 74 (1931) "Only such changes in the substance of the law have been incorporated in the Probate Code as were considered to be so plainly meritorious as to be practically non-controversial." Evans, "Comments on the Probate Code of California," 19 CALIF. L. REV. 602 at 603 (1931).

[5] In general, as to the California probate court organization, see Simes and Basye, "The Organization of the Probate Court in America," in PROBLEMS IN PROBATE LAW WITH MODEL PROBATE CODE 385 at 423 (1946).

[6] These are listed in Evans, "Changes in the Law Effected by the Probate Code," 6 CAL. S.B.J. 170 (1931). See, also, Evans, "Comments on the Probate Code of California," 19 CALIF. L. REV. 602 (1931).

[7] Cal. Probate Code (Deering, 1931) §§1080 to 1082.

[8] Id., §§1100 to 1106.

[9] Id., §630. This was, however, merely an amendment of a former statute of the same character.

[10] Cal. Probate Code (Deering, 1931) §1120 (jurisdiction of court administering will continues as to testamentary trust in certain particulars); §1124 (jurisdiction continues to fill vacancy in trusteeship).

[11] These are listed, and the sections in which the rule is enacted is stated, in Evans, "Changes in the Law Effected by the Probate Code," 6 CAL. S.B.J. 170 at 176 (1931) and Evans, "Comments on the Probate Code of California," 19 CALIF. L. REV. 602 at 605 (1931). Among them are the codification of the rule declared in Estate of Moore, 180 Cal. 570, 182 P. 285 (1919), to the effect that a later will can be admitted to probate after

On the whole one can hardly say that this Code constitutes a landmark in the reform of substantive or procedural law. It does, however, amount to a distinct advance in the form and organization of probate legislation.

Ohio

The Ohio probate code was enacted in 1931 and took effect on January 1, 1932.[12] It was prepared by a committee of the state bar association under the chairmanship of Mr. Howard L. Barkdull, now president of the American Bar Association.[13] No attempt was made to change the fundamental character of the court organization. Prior to its enactment the probate court was a separate tribunal, from which appeals with trial de novo to the common pleas court were taken.[14] This was substantially unchanged in the 1931 code.[15] It may be said that the outstanding achievements of the new code were that it gathered together in an organic whole numerous substantive and procedural provisions which theretofore had been scattered through the Ohio Code, and that it made some very significant changes in substantive law.

Dower was abolished in all real estate owned by the husband at the time of his death.[16] It was retained only with respect to land which the husband had conveyed away in his lifetime without the wife joining in the conveyance. Instead of dower, an enlarged distributive share in the estate owned by the husband at the time of his death was given to the wife; and, of course, the wife could elect to take this share against the terms of her husband's will.

Prior to the new Code, the Ohio statutes contained entirely separate provisions for the descent of ancestral and of non-ancestral real

the time to contest has elapsed, Cal. Probate Code (Deering, 1931) §385; and Estate of Emart, 175 Cal. 238, 165 P. 707 (1917), as to the requirement that both witnesses to a will must be present at the same time, Cal. Probate Code (Deering, 1931) §50. Estate of Iburg, 196 Cal. 333, 238 P. 74 (1925), influenced the modification of Cal. Probate Code (Deering, 1931) §72. See REPORT OF THE CALIFORNIA CODE COMMISSION FOR THE YEAR 1930, p. 30.

[12] The Code was enacted as 114 Ohio Laws (1931) 320.

[13] For the report of the Ohio bar committee on probate law, in which the preparation of the Probate Code is described, see 3 OHIO BAR 11 (1931). Thirteen short articles on the Code are found in volume 4 of the OHIO BAR ASSOCIATION REPORT, the first of which is at page 85 (May 12, 1931) and the last at page 492 (December 29, 1931). See also the address by Mr. Howard L. Barkdull before the Kentucky Bar Association in which the Ohio Probate Code is described. PROCEEDINGS KENTUCKY STATE BAR ASSOCIATION 77 (1940).

[14] Ohio Code (Throckmorton, 1930) §§10496, 11206.

[15] 114 Ohio Laws (1931) 336, §10501-56. But see note 33 infra.

[16] Id., §§10502-1 to 10502-10.

estate.[17] The Code abolished these distinctions and enacted a single provision for the course of intestate succession which was equally applicable to real and to personal property.[18]

Other changes in substantive law were: the substitution of the common law rule against perpetuities for the unique and unworkable Ohio statute on that subject;[19] a provision making contingent remainders indestructible;[20] a provision preventing a murderer from taking property by descent or devise from the person he had murdered,[21] a codification of the common law rule of incorporation in wills by reference, with a provision for preservation of evidence of the incorporated document;[22] and a statute concerning the devolution of the property of two or more persons who die at or near the same time.[23] It is the opinion of the writer that this last provision is, in one respect, superior to the uniform simultaneous death act.[24]

Procedural changes include provisions permitting the probate court to make declaratory judgments, which are modeled after the uniform declaratory judgments act,[25] and a provision dispensing with the administration of estates under $500 in value.[26] The statement of the jurisdiction of the probate court seems to give somewhat broader powers than did preceding legislation.[27] A slight tendency to extend the jurisdiction of the probate court over land seems to be indicated in that the personal representative is required to include real estate in the inventory,[28] and the probate court is authorized to make a determination of heirship.[29]

[17] Ohio Code (Throckmorton, 1930) §§8573 and 8574.

[18] 114 Ohio Laws (1931) 339, §§10503-1 to 10503-16.

[19] The old statute was Ohio Code (Throckmorton, 1930) §8622. The new section is 114 Ohio Laws (1931) 470, §10512-8.

[20] 114 Ohio Laws (1931) 470, §10512-6.

[21] Id., §10503-17.

[22] Id., §10504-4.

[23] Id., §10503-18.

[24] This statute takes care of certain cases where the spouse of the decedent survives him only a short period of time, but there is no doubt about the fact of survival. Here, as well as in the case where the fact of survival is in doubt, it would seem that a special rule as to the devolution of the property is desirable.

[25] 114 Ohio Laws (1931) 362, §§10505-1 to 10505-10. Subsequently Ohio adopted the Uniform Declaratory Judgments Act, making it applicable to other courts as well as to the probate court. Hence, these provisions were repealed as a part of the Probate Code. See 115 Ohio Laws (1933) 495, enacted as Ohio General Code §§12102-1 to 12102-16.

[26] 114 Ohio Laws (1931) 402, §10509-5.

[27] Id., §10501-53. The former section on this subject was Ohio Code (Throckmorton, 1930) §§10492, 10493.

[28] 114 Ohio Laws (1931) 411, §10509-41. The former law gave the probate court a discretion as to whether land was to be included in the inventory. Ohio Code (Throckmorton, 1930) §§10638, 10641.

[29] 114 Ohio Laws (1931) 422, §§10509-95 to 10509-101.

A definite trend, noticeable throughout the procedural provisions of the code, is the tendency to shorten the time limit for taking various steps in administration. Thus, the time for will contest was shortened from one year to six months.[30] An interesting feature of the code is a subdivision entitled "Time Schedule" in which the time limits for various steps in administration were summarized.[31]

It should be pointed out that, while no attempt is made to discuss amendments to the Ohio Probate Code since 1931, many have been made. Thus, the Probate judge must now be a member of the bar and holds office for six rather than four years;[32] if there is a record in the probate court, appeals are taken to the Court of Appeals and not to the Common Pleas court.[33]

Florida

The Florida Probate Code was prepared by a committee of the Florida State Bar Association, appointed in 1931. The Committee consisted of seven persons, the chairman being Mr. William H. Rogers.[34] The Code was enacted by the legislature in 1933 as chapter 16103 of the Florida General Laws of that date.[35] It consists of 197 sections exclusive of repealing provisions, the titles of the respective articles being as follows: General Provisions; Wills; Descent and Distribution; Dower; and Probate and Administration.

Not only did the makers of this Code organize and edit existing statutes on probate law, but they also made a number of definite advances.

It is true, the general pattern of probate jurisdiction is left much as it was. The probate court is the county judge's court. Appeals are to the circuit court.[36] The English practice of probate in common form without notice is retained.[37] But definite provisions are made for notice immediately after probate.[38]

[30] Id., §10504-32. The old provision was Ohio Code (Throckmorton, 1930) §10531.

[31] 114 Ohio Laws (1931) 398, §§10508 to 10508-14. This was repealed by 119 Ohio Laws (1941) 394. But apparently, since it was only a summary of other statutory provisions, the repeal had little effect on the substance of the law.

[32] Ohio General Code (Page, 1951 Supp.) §10501-1.

[33] Id., §10501-56.

[34] For the history of the enactment of the Code, see 7 FLA. S.B.A. L.J. 7, 207 (1933, 1934).

[35] The Code was later incorporated into the Florida Statutes. See Fla. Stat. Ann. §§731.01 to 736.05; REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA, 2d ed., 22 (1946).

[36] Fla. Laws (1933) c. 16103, §§52, 53, 55. Appeals are on the record of the county judge's court.

[37] Id., §60.

[38] Id., §65.

The jurisdiction of the county judge's court over decedents' estates and the probate of wills is broadly stated.[39] The court is specifically given jurisdiction over the establishment and probate of lost and destroyed wills,[40] and over the construction of wills.[41]

Whereas the probate of a will had formerly been only prima facie evidence of its validity as to land, it was made conclusive.[42] The personal representative was given possession of the decedent's realty as well as personalty,[43] and was authorized to bring actions concerning the real estate.[44]

A new section entitled "Determination of Beneficiaries," authorizes the court to make a judicial determination of the distributees, either by will or by intestacy.[45] This procedure is available whether there is a proceeding pending to administer the estate or not.

One of the most important features of the Code is the shortening of the time limitations for various steps in probate procedure.[46] Thus, the time for appeal from probate decrees is shortened to thirty days;[47] publication of notice to creditors is reduced from eight to four weeks;[48] the time for the filing of claims is reduced from twelve to eight months.[49] The statute limiting claims against an unadministered estate was shortened from ten years to three years.[50]

The dower interest in land was made a one third interest in fee simple instead of for life.[51] Apparently there was some desire on the part of the Bar Association Committee to abolish inchoate dower, but this met with so much opposition that it did not find its way into the Code as enacted.[52] The sections on dower have been the subject of frequent amendment since 1933, but inchoate dower is still retained.[53]

While it is impossible to list all the miscellaneous innovations of the Code, the following may be noted: A provision against revival of a

[39] Id., §38.
[40] Id., §§38 and 64.
[41] Id., §77. But courts of equity have concurrent jurisdiction to construe. See §78.
[42] Id., §63. As to former law, see Fla. Comp. Gen. Laws (1927) §5474.
[43] Fla. Laws (1933) c. 16103, §105.
[44] Id., §106.
[45] Id., §182.
[46] These are summarized in the report of the Committee on Probate Law, 6 FLA. S.B.A. L.J. 187 (1932).
[47] Fla. Laws (1933) c. 16103, §53.
[48] Id., §119.
[49] Id., §120.
[50] Id., §186.
[51] Id., §35.
[52] See 7 FLA. S.B.A. L.J. 7 (1933); 7 FLA. S.B.A. L.J. 207 (1934).
[53] The present form of the statute is Fla. Laws (1951) c. 26582. For earlier amendments, see notes to Fla. Stat. Ann. §731.34.

will by the revocation of a revoking instrument;[54] a provision as to the presumption of the order of deaths of two or more persons;[55] a provision preventing a murderer from taking either by intestacy or by will;[56] a provision as to the discovery of a will after an estate is settled.[57]

Minnesota

The Minnesota Probate Code which took effect in 1935 consisted of 200 sections.[58] It furnishes another illustration of an excellent piece of legislation conceived within the existing framework of court organization and judicial procedure. Like other codes already considered, it was prepared by a committee of the State Bar Association. As stated by Judge Pearson in an authoritative article on its history, the purpose of the Code was "primarily to clarify, re-arrange, consolidate, and revise the probate laws, in other words, to restate the laws more clearly, simply and conveniently."[59] Yet in spite of the implied restrictions imposed upon the committee, the resulting Code elicited the comment from a disinterested expert, shortly after its enactment, that it "is perhaps the best probate code to be found in this country today."[60]

An illustration of the effective consolidation of provisions by the committee is section 158, which brings together eleven sections found in prior legislation.[61] The sort of effective interstitial revision which runs through the Code is illustrated by section 186[62] which is a simple provision for a petition in probate proceedings. But the new section adds these words: "No defect of form or in the statement of facts in any petition shall invalidate any proceedings."

[54] Fla. Laws (1933) c. 16103, §16.

[55] Id., §27. Compare Fla. Stat. Ann. §736.05 the Uniform Simultaneous Death Act, which was enacted in 1941.

[56] Fla. Laws (1933) c. 16103, §32.

[57] Id., §70.

[58] The Probate Code was enacted as Minnesota Laws (1935) c. 72. The present form of the Code is found in Minn. Stat. Ann. §§525.01 to 525.90. The following are discussions of the Code: Eagleton, "The New Minnesota Probate Code," 20 MINN. L. REV. 1 (1935); Pearson, "Summary Probate Proceedings,"19 MINN. L. REV. 833 (1935); Howard, "Summary Probate Proceedings—the Homestead," 20 MINN. L. REV. 104 (1935); Pearson, "Conveyances Under the Probate Code," 20 MINN. L. REV. 106 (1935); Pearson, "Minnesota Probate Practice," 20 MINN. L. REV. 707 (1936); Pearson, "History of Minnesota Probate Law," 31 Minn. Stat. Ann. (1947) 307.

[59] Pearson, "History of Minnesota Probate Law," 31 Minn. Stat. Ann. (1947) 307 at 314.

[60] Eagleton, "The New Minnesota Probate Code," 20 MINN. L. REV. 1 at 18 (1935).

[61] Minn. Laws (1935) c. 72, §158. See Pearson, "Conveyances Under the Probate Code," 20 MINN. L. REV. 106 at 111 (1935).

[62] Minn. Laws (1935) c. 72, §186.

The Minnesota judicial scheme of a probate court, from the orders and decrees of which appeal was taken to the district court with trial de novo, was retained,[63] since, as has already been indicated, the revision committee was not authorized to propose radical changes in the general scheme of court organization.

However, some changes in substance were made. Judge Pearson lists twenty-one of these,[64] of which the following may be noted: The doctrine of exoneration was abolished.[65] The procedure for probate of a lost or destroyed will was simplified.[66] The notice to creditors is included as a part of the notice of the hearing on the original petition for probate of the will or for administration, and the time for the filing of claims is cut from six months to four months.[67] One of the most important provisions was that stating a procedure for summary administration.[68] While legislation on this subject had existed prior to this Code, it was completely revised and its scope enlarged.[69] Another very important section is one which provides that no sale, mortgage, lease or conveyance by a personal representative "shall be subject to collateral attack on account of any irregularity in the proceedings if the court which ordered the same had jurisdiction of the estate."[70]

Kansas

The Kansas Probate Code, consisting of 281 sections, was enacted and took effect in 1939.[71] It was the work of the Kansas Judicial Council, acting under the chairmanship of Justice W. W. Harvey of the Supreme Court of Kansas.[72] Mr. Samuel Bartlett was selected by the Council as the draftsman or reporter. He conducted the necessary research and prepared the preliminary drafts.

A comparison of the Kansas Code with the Minnesota Code indicates that the latter must have definitely influenced the character of the

[63] Minn. Laws (1935) c. 72, §§164-172.

[64] Pearson, "History of Minnesota Probate Law," 31 Minn. Stat. Ann. (1947) 307 at 314-316.

[65] "Every devise of real estate shall convey all the estate of the testator therein subject to liens and encumbrances thereon unless a different intention appears from the will." Minn. Laws (1935) c. 72, §45.

[66] Id., §61.

[67] Id., §100.

[68] Id., §125.

[69] See articles on summary procedure cited in note 1 supra.

[70] Minn. Laws (1935) §162.

[71] The Code was enacted as Kansas Laws (1939) c. 180.

[72] For a description of the manner in which it was prepared, see Bartlett, "The Kansas Probate Code," 9 KAN. CITY L. REV. 139 (1941); BARTLETT, KANSAS PROBATE LAW AND PRACTICE (1939), Foreword, p. iii, by Hon. W. W. Harvey.

Kansas legislation. However, the Kansas Code evidences more freedom on the part of its makers to depart from the substance of existing legal rules.[73]

In writing on the Code shortly after its enactment, Mr. Bartlett lists ten changes which it initiated.[74] From the standpoint of the general student of probate law, the following changes may be regarded as significant. In form, substantive as well as procedural law were included in the Code. A general form of probate procedure is outlined for all sorts of proceedings.[75] Mr. Bartlett, in referring to the provisions for a uniform probate procedure, says that "Kansas is believed to have gone farther than any other state in this respect."[76] Not only does the Kansas Code include a uniform procedure, but it also includes a subdivision declaring certain rules of substantive law applicable to fiduciaries in general.[77] Other innovations in the Code are a provision permitting descent to collaterals only if they are within the sixth degree of kinship,[78] a provision giving the personal representative the right to possession of real estate of the decedent,[79] and a simple section permitting the personal representative to continue the decedent's business.[80] A new provision for the determination of heirship[81] can be effectively used to streamline the administration process. It is available with respect to real estate of the decedent when there has been no administration for a period of one year. Other sections in the Code bar the probate of a will not offered for probate within one year and also bar unsecured claims where a personal representative was not appointed within one year.[82] Hence, if no will is offered for probate and no creditor asserts a claim for one year, the simple proceeding for the determination of heirship is all that is needed for the heirs to establish their record title to the real estate.

[73] In general, as to the Kansas Probate Code, see the following: 12 KANSAS JUDICIAL COUNCIL BUL. 285 (1938); 13 KAN. JUD. COUNCIL BUL. 5 (1939); 15 KAN. JUD. COUNCIL BUL. 30 (1941); Bartlett, "The Kansas Probate Code," 9 KAN. CITY L. REV. 139 (1941); Donnelly, "Effect of Kansas Probate Code Upon Jurisdiction of District Courts," 9 KAN. CITY L. REV. 148 (1941); Morris, "Land Titles Under the New Probate Code," 8 Kan. S.B.A.J. 72 (1939); Letton, "Equitable Jurisprudence of the Probate Court Under the New Code," 8 KAN. S.B.A.J. 78 (1939); Vance, "Probate Procedure Under the New Code," 8 KAN. S.B.A.J. 87 (1939); BARTLETT, KANSAS PROBATE LAW AND PRACTICE (1939).

[74] Bartlett, "The Kansas Probate Code," 9 KAN. CITY L. REV. 139 at 142 (1941).

[75] Kan. Laws (1939) c. 180, §§177 to 194.

[76] Bartlett, "The Kansas Probate Code," 9 KAN. CITY L. REV. 139 at 146 (1941).

[77] Kan. Laws (1939) c. 180, art. 17, entitled "Provisions Applicable to All Estates."

[78] Kan. Laws (1939) c. 180, §31.

[79] Id., §99.

[80] Id., §100.

[81] Id., §§225 to 227.

[82] Id., §§53 and 215.

While the general framework of the judicial scheme was not modified,[83] the powers of the probate court were enlarged, and it was expressly given general equitable powers, and jurisdiction over testamentary trusts.[84]

The Illinois, Michigan, and Nevada Codes

Briefer reference may be made to the Illinois, Michigan, and Nevada probate codes. These involve numerous amendments and a reorganization of existing probate statutes. They represent a definite advance of a somewhat conservative character in probate legislation. But the innovations which would be of interest to any but the local lawyer are not numerous. The Michigan Code, consisting of 459 sections, was enacted in 1939 and became effective on September 29 of that year.[85] The Illinois Code was also enacted in 1939 and became effective on January 1, 1940.[86] It contained 346 sections. The Nevada Code, consisting of 326 sections, was enacted in 1941 and became effective on July 1 of that year.[87]

The Michigan Code abolished the commission on claims and substituted hearings on claims by a referee or by the court.[88] The time limits for the filing of claims and for barring claims were shortened.[89] Revised provisions were enacted dealing with contingent claims.[90] Determination of heirship was made conclusive when such determination is made as a part of a proceeding to administer a decedent's estate

[83] Appeal from the probate court is to the district court with trial de novo. Kan. Laws (1939) c. 180, §§269 to 277.

[84] Id., §17.

[85] Mich. Pub. Act (1939) No. 228. For a discussion of the important changes made by the Code and the manner in which it was prepared, see Searl, "The New Probate Code," 18 Mich. S.B.J. 355 (1939). In general, on the Michigan Probate Code, see McAVINCHEY, MICHIGAN PROBATE PRACTICE (1943) and MOORE, MICHIGAN PROBATE LAW AND PRACTICE (1946).

[86] Illinois Laws (1939) pp. 4-81. For discussions of the Code, see Fins, "Analysis of the Illinois Probate Code," 34 ILL. L. REV. 405 (1939); Illinois Probate Act Symposium (articles by various authors), 29 ILL. B.J. 21 (1940). See also ILLINOIS PROBATE ACT ANNOTATED (1940), by William M. James, editor-in-chief and several associate editors.

[87] Nevada Stats. (1941) c. 107. For a report of the Committee on Probate Practice of the State Bar, in which the probate code is presented, see 4 NEV. S.B.J. 31 (1939). See, also, 6 Nev. S.B.J. 153 (1941), in which the sections of the new code are listed, together with a classification as "new," "unchanged" or "changed."

[88] Mich. Pub. Acts (1939) No. 288, c. VIII, on Claims.

[89] A non-claim period of not more than four months from first publication of notice to creditors and not less than two months is provided for. Mich. Pub. Acts (1939) No. 288, c. VIII, §2. Debts are barred after six years from the date of decedent's death. Id., §20.

[90] Mich. Pub. Acts (1939) No. 288, c. VIII, §§25 to 37.

or when a period of fifteen years has elapsed.[91] A chapter on "General Provisions Concerning Fiduciaries" was inserted.[92]

The Illinois Code reduced the time limit for various steps in probate proceedings.[93] A section was enacted preventing a murderer from taking by testate or intestate succession from the murdered person.[94] The order of priority of claims was revised.[95] A new provision requires the filing with the recorder of deeds or registrar of titles notice of an intent to claim dower.[96] Provisions for appeals were simplified.[97] While there is no subdivision which expressly deals with fiduciaries in general, there is a tendency to throw together provisions for guardianships and for decedents' estates.[98]

The Nevada Code gives but three months after a will is probated for contest.[99] After that time probate is conclusive if the decree is unappealed from.[100] Priorities as between real and personal estate are eliminated in the matter of sales to pay debts and legacies and abatement.[101] There is no attempt to insert provisions for fiduciaries in general.

All these codes include both substantive and procedural law of decedents' estates. In none of them is there any attempt to change the fundamental character of the judicial organization. Thus, in Michigan, appeal continued to be to the circuit court with trial de novo.[102] In Nevada, where the trial court of general jurisdiction had long exercised the probate jurisdiction, this plan was continued.[103] In Illinois, where appeals from the probate court were under some circumstances to the circuit court and sometimes to the appellate court, this contin-

[91] Id., c. II, §79.

[92] Id., c. IV.

[93] For a list of these, see Fins, "Analysis of the Illinois Probate Code," 34 ILL. L. REV. 405 at 408 (1939).

[94] Sections 15a and 49a of the Probate Code, Ill. Laws (1939) p. 4.

[95] Section 202 of the Probate Code.

[96] Section 19 of the Probate Code.

[97] These are discussed in Fins, "Analysis of the Illinois Probate Code," 34 ILL. L. REV. 405 at 416 (1939).

[98] This is done in the provisions of the Code as to bonds (Art. XII), inventory and appraisement (Art. XIV), claims (Art. XVII) and administration of real and personal estate (Arts. XVIII and XIX).

[99] Nev. Laws (1941) c. 107, §22. But failure to contest does not prevent the probate of a later will. Code, §27.

[100] Nev. Laws (1941) c. 107, §26.

[101] Id., §§136 and 139.

[102] Mich. Pub. Acts (1939) No. 288, c. I, §§36 and 42.

[103] The provision concerning probate jurisdiction of the district court is not in the probate code but is found in Nev. Comp. Laws (1929) §8382.

ued to be the case; but, as has been said, the provisions were much simplified.[104]

Arkansas Code

The movement for a new probate code in Arkansas began as early as 1939. In that year a committee of the state bar association was appointed to prepare a revision and recodification of the Arkansas law of probate and chancery practice and procedure.[105] The need for such legislation was emphasized by reason of the adoption in 1938 of amendment number 24 to the constitution of Arkansas. This amendment provided that judges of courts of chancery should sit as judges of probate, and that appeals from the probate court should be taken to the supreme court just as in the case of chancery appeals. Prior to this amendment, the judges of the county court sat as probate judges, and appeals from their decisions were taken to the circuit courts.[106] Apparently due to the second world war, the activities of the committee were not as extensive as had been hoped. But in 1946 a new committee of the bar association, under the chairmanship of Mr. Adrian Williamson, was appointed to accomplish the same task. It was about this time that the Model Probate Code, prepared by a committee of the Property, Probate and Trust Law Section of the American Bar Association, was published.[107] Both from the published report of the Arkansas probate committee,[108] and from the actual text of the Arkansas probate code, it is evident that the committee drew largely from the Model Probate Code. Indeed, it may definitely be said that the Model Probate Code is the chief basis for the Arkansas Code and that the great majority of the sections are either substantially identical with, or show definite influence of, the Model Code. The Arkansas Code was enacted in 1949,[109] and constitutes perhaps the most radical departure from former probate law of all the probate codifications herein discussed.

[104] See note 97 supra.

[105] For a summary of the work of the bar association committees chosen to prepare a probate code, see PROCEEDINGS OF THE ARKANSAS BAR ASSOCIATION, Part I, p. 30 (1947).

[106] See Arkansas Constitution of 1874, Art. 7, §§34 and 35, in the form in force prior to 1938.

[107] The Model Probate Code was presented to the Section of Real Property, Probate and Trust Law of the American Bar Association, by its committee which prepared it under the chairmanship of R. G. Patton, and the report of the committee was approved, at the annual meeting at Atlantic City, New Jersey, October, 1946. The Code is found in the volume entitled PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE, published by the University of Michigan Press, 1946.

[108] See note 105 supra.

[109] Arkansas Acts (1949) No. 140; now Ark. Stat. c. 20. For a discussion of the Code, see Meriwether, "Act No. 140, the Probate Code," 3 ARK. L. REV. 375 (1949).

This is not the place to discuss the Model Probate Code, since that has been done by the writer and other persons in various publications in the past.[110] In appraising the Arkansas Code, however, it is desirable to consider how far it followed the Model Probate Code and wherein it departed from that model.

The Arkansas Probate Code consists of 235 sections, while the Model Probate Code contains 260 sections. The general arrangement is similar but not identical. The five parts of the Model Probate Code are entitled respectively: General Provisions, Intestate Succession and Wills, Administration of Decedents' Estates, Guardianship, and Ancillary Administration. The five parts of the Arkansas Code are entitled as follows: General Provisions, Wills, Taking Against the Will, Administration of Decedents' Estates, and Guardianship. Intestate succession and dower are covered in another part of the Arkansas Statutes[111] and are not included in the probate code. Ancillary Administration is included in the part of the probate code on Administration of Decedents' Estates.

First of all, it is believed that practically all the most important reforms in probate procedure embodied in the Model Probate Code have been included in the Arkansas Code. Like the Model Code, the Arkansas Code makes the judge of a court of general jurisdiction the judge of probate.[112] As has been seen, however, pursuant to a prior constitutional amendment, the judge who is given probate jurisdiction is the judge of the court of chancery; since the Arkansas judicial system established separate courts of law and courts of equity.[113] Appeals are to the Supreme Court.[114]

The jurisdiction of the probate court is quite broadly stated,[115] though not so broadly as under the Model Probate Code.[116] Thus, the probate judge is not given jurisdiction over testamentary trusts, and his jurisdiction over lost wills is concurrent with chancery. The probate court has jurisdiction over land as well as chattels of the decedent, and

[110] Mechem, "A Modern Wills Act—Why Not?" 33 IOWA L. REV. 501 (1948); Patton, "Preparation of a Model Probate Code," 42 MICH. L. REV. 961 (1944); Niles, "Model Probate Code and Monographs on Probate Law," 45 MICH. L. REV. 321 (1947); Rheinstein, "The Model Probate Code; a Critique," 48 COL. L. REV. 534 (1948); Twyeffort, "The Model Probate Code," 22 N.Y. UNIV. L.Q. REV. 63 (1947); Simes, "The Model Probate Code—an Achievement in Cooperative Research," 29 J. AM. JUD. SOC. 71 (1945).

[111] See Ark. Stats. (1947), title 61.

[112] Ark. Acts (1949) No. 140, §4a.

[113] Ark. Stat. (1947) §§22-401 and 22-402.

[114] Ark. Acts (1949) No. 140, §16a.

[115] Id., §4b.

[116] See Model Probate Code, §6.

the decree of distribution includes all the estate.[117] But the personal representative does not normally take possession of land as is provided in the Model Code.[118] The probate proceeding is declared to be one proceeding in rem, just as in the Model Code.[119] The proceeding may be initiated without notice.[120] If so initiated, the later notice of appointment of a personal representative is combined with the notice to creditors, as was provided in the Model Probate Code.[121] The decree of distribution is made conclusive in determining who are the successors in interest to the property of the decedent.[122] Just as in the Model Probate Code, there is only one contest of the will.[123] Time limits for the various steps in the administration of an estate are generally short, though the precise periods set in the Model Probate Code were not always followed.[124] A five year statute of limitations on the probate of a will is included as in the Model Code.[125] The Model Probate Code is followed in that an appeal from an order of the probate court may review prior orders.[126] Many of the provisions of the Model Code with reference to claims formed the basis of analogous sections in the Arkansas Code. Thus, with minor exceptions, all claims are to be filed, whether due or not due, vested or contingent,[127] and detailed provisions are set out with respect to contingent claims.[128] The Model Code included three devices for dispensing with or shortening administration.[129] Two of these were made the basis of analogous sections in the Arkansas Code.[130] One important feature of the Model Probate Code which was followed in the Arkansas Code is that concerned with

[117] This is not expressly stated in the section on jurisdiction, as it is in the corresponding section of the Model Probate Code. But as to distribution, see Ark. Acts (1949) No. 140, §§160, 161; as to inventory, see §91; as to possession of assets, see §94. The latter section concludes with this sentence: "Unless sold by the personal representative pursuant to other provisions of this Code the real property shall not be distributable by the personal representative."

[118] Compare Ark. Acts (1949) No. 140, §94 with Model Probate Code, §125.

[119] Ark. Acts (1949) No. 140, §40; Model Probate Code, §62.

[120] Ark. Acts (1949) No. 140, §48; Model Probate Code, §68.

[121] Ark. Acts (1949) No. 140, §50; Model Probate Code, §70. But compare Ark. Acts (1949) No. 140, §49 with Model Probate Code, §69.

[122] Ark. Acts (1949) No. 140, §161d; Model Probate Code, §183d.

[123] Ark. Acts (1949) No. 140, §§52 to 55; Model Probate Code, §§72 to 75.

[124] As to the Model Probate Code, see Appendix B, the time schedule; as to the Arkansas Code, see Ark. Acts (1949) §§12, 64, 91, 110. But compare Ark. Code, §148 with Model Probate Code, §173.

[125] Ark. Acts (1949) No. 140, §64; Model Probate Code, §83.

[126] Ark. Acts (1949) No. 140, §16d; Model Probate Code, §20d.

[127] Ark. Acts (1949) No. 140, §110; Model Probate Code, §135.

[128] Ark. Acts (1949) No. 140, §§119, 120; Model Probate Code, §§140, 141.

[129] Sections 86 to 92.

[130] Ark. Acts (1949) No. 140, §§66 to 69.

estates of absentees and disappeared persons.[131] If there is some uncertainty as to whether the person whose estate is being administered is in fact dead, then that fact may be put in issue; and reasonable means may be taken to give notice to such person if he be alive. The probate court is expressly given jurisdiction to determine the fact of death, and its decrees are not, therefore, subject to collateral attack. But if the person whose estate has been administered is alive, he may become a party to the proceeding, make a direct attack on the decrees of the court, and recover so much of his property as has not come into the hands of bona fide purchasers. Without going into an exhaustive summary, the following particulars in which the Arkansas Code followed the ideas of the Model Probate Code may be noted: (a) in sales to pay debts or legacies, there is no priority as between real and personal property;[132] (b) provisions for abatement of legacies and devises to pay debts and legacies are similar;[133] (c) distribution of real or personal property may be in kind, but a direction to buy an annuity for a legatee cannot be evaded by permitting him to take the sum set aside to purchase the annuity;[134] (d) the right of retainer as against a debtor-devisee is recognized, but is subject to any defenses which would be available in a direct action against the devisee on the claim.[135]

There are other features of the Arkansas Code, which do not follow the pattern of the Model Code. Thus, the Arkansas statute includes the requirement that the will be signed at the end,[136] a requirement which has been a fruitful source of litigation and which was not included in the Model Code.[137] The Arkansas Code does not recognize the oral will. However, the principal reason why the draftsmen of the Model Probate Code included provisions for oral wills was that there were such provisions in the Model Execution of Wills Act promulgated by the Conference of Commissioners on Uniform State Laws, and it was thought desirable to follow that model.[138] The pretermitted heir statute[139] omits the provision of the Model Probate Code making it inapplicable to the situation in which, "when the will was executed the testator had one or more children known to him to be living and devised

[131] Ark. Acts (1949) No. 140, §§49 to 51, and 61; Model Probate Code, §§69 to 71, and 81.
[132] Ark. Acts (1949) No. 140, §124; Model Probate Code, §150.
[133] Ark. Acts (1949) No. 140, §162; Model Probate Code, §184.
[134] Ark. Acts (1949) No. 140, §168; Model Probate Code, §190.
[135] Ark. Acts (1949) No. 140, §165; Model Probate Code, §187.
[136] Ark. Acts (1949) No. 140, §19.
[137] Model Probate Code, §47.
[138] Model Probate Code, §49.
[139] Ark. Acts (1949) No. 140, §39.

substantially all his estate to his surviving spouse."[140] The provision for an adjudicated compromise in which unborn and unascertained persons are represented by guardians ad litem,[141] is not included in the Arkansas Code. With some exceptions, the old rule as to the amount of the personal representative's bond, to the effect that it is to be double the value of the personal estate, is followed,[142] rather than the rule of the Model Probate Code, giving the court a complete discretion.[143] The Arkansas Code does, however, follow the Model Code in permitting a summary proceeding in the probate court to collect on the bond.[144] The very common type of statute, included in the Model Code, permitting an executor to renounce the compensation named in the will and have his compensation fixed by the court, without renouncing the office,[145] is not included in the Arkansas Code. The provisions for discovery in case of a dispute as to the title to property claimed to be in the estate are much less effective than the Model Code in that the latter expressly empowers the court to determine ownership as against any person whomsoever.[146] The Model Code rejects the whole idea of public administratorship on the ground that such offices are likely to encourage official administration where none is necessary.[147] But the Arkansas Code provides that the sheriff is a public administrator.[148]

On the whole it is fair to conclude that the makers of the Arkansas Code have done precisely what the draftsmen of the Model Probate Code intended; they have used it as a source and adapted it to their local conditions; they have not slavishly copied it.[149] As a result, it is believed that they have come out with a code which is both up-to-date and workable.

Pennsylvania Intestate Act of 1947, Wills Act of 1947, and Fiduciaries Act of 1949

While, strictly speaking, Pennsylvania did not enact a probate code as such, several separate statutes of considerable length have been en-

[140] Model Practice Code, §41.
[141] Model Probate Code, §§93 to 95.
[142] Ark. Acts (1949) No. 140, §80.
[143] Model Probate Code, §106.
[144] Ark. Acts (1949) No. 140, §90; Model Probate Code, §118.
[145] Model Probate Code, §103. Compare Ark. Acts (1949) No. 140, §77.
[146] Ark. Acts (1949) No. 140, §102. Compare Model Probate Code, §130.
[147] See SIMES AND BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE (1946), Introduction, p. 20.
[148] Ark. Acts (1949) No. 140, §§174 to 178.
[149] SIMES AND BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE (1946), Introduction, p. 10.

acted which cover much of the subject matter of decedents' estates. Those here considered are the Intestate Act of 1947,[150] the Wills Act of 1947,[151] the effective date of both of which was January 1, 1948, and the Fiduciaries Act of 1949,[152] the effective date of which was January 1, 1950. These acts were prepared by the Joint State Government Commission of the General Assembly.

Court organization was entirely outside the purview of these acts, and, indeed, no substantial change was made at that time in the judicial framework for the administration of decedents' estates. Pennsylvania, however, already had an excellent court organization for this purpose. Decedents' estates were handled by the registrar of wills and the orphans' court, and appeals from the decision of the orphans' court were to the superior or the supreme court as in the case of appeals from the common pleas court.[153]

These statutes show little influence of the Model Probate Code. However, at one or two points in the Intestate Act the Model Code may have furnished the basis for an idea. Thus, the advancement statute,[154] while quite different from that of the Model Code,[155] resembles it in that it applies to collaterals. Moreover, the Pennsylvania section uses the term "advancee," a word which the writer had never seen in any statute until he inserted it in the Model Code.

The Pennsylvania statute of descent and distribution, like the Model Probate Code, makes no distinction between real and personal property.[156] Moreover, unlike the law of most states, the same Pennsylvania statute provides for escheat before the entire list of remote collaterals is exhausted. The same is true of the Model Probate Code.

The Intestate Act includes what would appear to be a very useful provision whereby a surviving spouse claiming the entire estate may, after the expiration of one year, establish his title.[157]

[150] Pa. Laws (1947) No. 37.

[151] Pa. Laws (1947) No. 38.

[152] Pa. Laws (1949) No. 121. Other legislation somewhat related to decedents' estates, but not included in this discussion, are the Estates Act, Pa. Laws (1947), No. 39, and the Fiduciaries Investment Act, Pa. Laws (1949), No. 544. The latter act includes testamentary trustees but not personal representatives. For discussions of the Fiduciaries Act of 1949, see Eckert, "The Pennsylvania Fiduciaries Act of 1949," 11 UNIV. PITT. L. REV. 194 (1950); Hutton, "The Fiduciaries Act of 1949," 54 DICK. L. REV. 26 (1949); comment: "The Pennsylvania Fiduciaries Act of 1949," 99 UNIV. PA. L. REV. 1164 (1951).

[153] See SIMES AND BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE 431 (1946).

[154] Pa. Laws (1947) No. 37, §9.

[155] Model Probate Code, §29.

[156] See Pa. Laws (1947), No. 37 §§1 to 4; Model Probate Code, §§22 to 24.

[157] Pa. Laws, (1947) No. 37, §11.

The Wills Act contains provisions commonly found as to the execution of written wills. A requirement that the will must be signed at the end is included, but the further provision is added to the effect that "the presence of any writing after the signature to a will, whether written before or after its execution, shall not invalidate that which precedes the signature."[158] Both in the Intestate Act and in the Wills Act, clauses are included to prevent a murderer from benefiting by his wrongful act.[159]

Perhaps the outstanding changes wrought by the Fiduciaries Act are the provisions treating real and personal property alike. The personal representative may take possession of both real and personal property under most circumstances.[160] No distinction is made between real and personal property as to abatement to pay debts and legacies.[161] Both are included in the inventory.[162] So far as this writer knows, the Pennsylvania abatement statute is the only one which attempts to make distinctions within the usual classes of legacies or devises. Thus the order of priority is (1) property specifically devised or bequeathed to the surviving spouse; (2) property specifically devised or bequeathed to or for the benefit of the decedent's issue; (3) property specifically devised or bequeathed to or for the benefit of other distributees. Then follow four other classes.

The Fiduciaries Act shows a tendency to clear titles[163] and to establish short periods for the various steps in administration.[164] The absentee administration sections[165] do not bring absentees within the usual decedents' estate provisions as is done by the Model Probate Code and the Arkansas Code. Sections dispensing with or streamlining administration are included.[166] Provisions for claims not due and for contingent claims are found in the subdivision on claims.[167]

Many other interesting provisions are found in the Fiduciaries Act which one does not usually find in other probate codes. Thus in

158 Pa. Laws (1947) No. 38, §2.
159 Pa. Laws (1947) No. 37, §6, No. 38, §§7 and 9.
160 Pa. Laws (1949) No. 121, §501.
161 Id., §751.
162 Id., §401.
163 See Id., §547 (as to the purchaser from a personal representative), §§615 and 756 (as to titles of purchasers from heirs or devisees.)
164 Id., §§612, 615, 701.
165 Id., §§1201 to 1205.
166 Id., §§201, 202, and 731.
167 Id., §§617 and 618.

the petition for letters, the hour of the decedent's death is to be stated.[168] Letters testamentary may be granted even though the appointee has declined a trust under the will.[169] The register has a discretion as to the appointment of a nonresident administrator.[170] The amount of the bond of a natural person named as a personal representative is in the discretion of the register.[171] The personal representative may be authorized to incorporate the business of the decedent.[172] He may have corporate stock of the estate registered in the name of a nominee if there is a corporate representative.[173] The decision of the majority of the personal representatives controls.[174] The personal representative is not personally liable on a contract properly made by him on behalf of the estate.[175]

Finally, it should be pointed out that, though the title of the Fiduciaries Act indicates that provisions for decedents' estates, trust estates and estates of incompetents are combined, there are comparatively few provisions of that sort. Most of the chapters in this act deal with but one or another of these three kinds of estates.

* * *

In conclusion, from this mass of legislative detail more or less arbitrarily selected from thousands of probate statutes, some trends are apparent. First, codes tend to include both procedural and substantive law, because in this area it is well nigh impossible to separate them. Second, though procedural provisions are included, court organization may be dealt with elsewhere. Third, in some of the codes a tendency to consolidate legislation with respect to the administration of decedents' estates, trust estates, and estates of incompetents is discernible. However, this tendency is not so pronounced in most states as a superficial examination might indicate. Fourth, though the basic court organization is rarely modified, the jurisdiction of the probate court tends to be increased and tends to be extended to land. Fifth, there is a pronounced trend in the direction of treating real and personal property in the same way. Sixth, time schedules are shortened, and the policy in favor of clearing titles is apparent. Seventh, there is a growing mass

[168] Id., §303.
[169] Id., §305.
[170] Id., §307.
[171] Id., §321.
[172] Id., §505.
[173] Id., §511.
[174] Id., §519.
[175] Id., §522.

of legislation dealing with small estates and streamlining their administration. Finally, any number of minor problems which have arisen in litigation in recent years are being solved by specific provisions in the codes. Furthermore, we should find, if we were to examine session laws subsequent to many of the codes, that the process of their revision still goes on. Probate law in America is stable, but it never stands still.